

HIGH COURT
CIRCUIT COURT APPEAL
WESTERN CIRCUIT COUNTY OF MAYO

[2014 No. 467]

BETWEEN

BALLINROBE CREDIT UNION LIMITED

DEFENDANT/APPELLANT

AND

NICOLA O'NEILL

PLAINTIFF/RESPONDENT

JUDGMENT of Mr. Justice Michael Hanna on the day 12th of February, 2016.

1. The present proceedings are an appeal against the Order of a Circuit Court Judge of 6th March, 2015, which affirmed the order of the County Registrar dated the 8th December, 2014 making absolute the garnishee order dated the 8th September 2014

"over all debts owing or accruing to the [appellant] herein from the Department of Agriculture, Food and the Marine, to pay to the [respondent] herein all sums due now or in the future to the [appellant] in respect of farming and/or land use related schemes, including but not limited to REPS, AEOS, the Single Payment Scheme, Disadvantaged Areas Scheme or any other state payment relating to agriculture or land ownership in order to reduce the debt due and owing (sic) to the [respondent] until such time as the sum of €191,488.87 together with interest at 8 per cent per annum is satisfied."

Factual Background

2. By High Court Summary Summons in proceedings entitled *Ballinrobe Credit Union Limited v. Nicola O'Neill* (Record No. 2009/2377S) issued on 15th June, 2009, the respondent claimed the sum of €130,324.11 from the appellant in respect of monies loaned to the appellant together with accrued interest. Evidence was adduced that a loan advanced in 2008 to the appellant by the respondent in the sum of €85,000, in addition to an existing balance of €34,415.60, on the basis that grants from the Department of Agriculture, Food and Marine (hereinafter "the Department") would be used to pay the loan. The appellant formally assigned the Department grants to the respondent on 10th February, 2009 for this purpose. Subsequent to this, the appellant informed the respondent that the assignment had been withdrawn.

3. By order dated 8th December, 2009, the respondent obtained judgment against the appellant in the sum of €130,324.11 and interest thereon at the rate of 8% from 8th December 2009 and costs in the sum of €309.63.

4. On 8th September 2014, the respondent obtained a conditional order of garnishee from the County Registrar of the Circuit Court, County Mayo addressed to the Department to pay to the respondent all sums due now or in the future to the appellant in respect of farming and/or land use related schemes, including but not limited to REPS, AEOS, the Single Payment Scheme, Disadvantaged Areas Scheme or any other state payment relating to agriculture or land ownership.

5. The respondent's application for an absolute order of garnishee came before the County Registrar on 8th December, 2014. It was claimed by the appellant that this application was contested. This is disputed by the respondent. The appellant was legally represented at all material times. The County Registrar made absolute the order of garnishee to the respondent.

6. The appellant appealed the order of the County Registrar to the Circuit Court, wherein the Circuit Court Judge, by order dated 6th March 2015, dismissed the appeal and confirmed the order of the County Registrar of 8th December, 2014.

Submissions of the Appellant

7. The appellant submitted that the Circuit Court had no jurisdiction to hear the respondent's application for a garnishee order where the proceedings on foot of which the respondent obtained judgment against the appellant were High Court proceedings. The appellant relied on s. 22(1)(a) and s. 22(7) of the Courts (Supplemental Provisions) Act 1961 ("the Act of 1961") to ground this argument. Section 22(1)(a) provides:

"the Circuit Court shall, concurrently with the High Court, have all the jurisdiction of the High Court to hear and determine any proceedings of the kind mentioned in column (2) of the Third Schedule to this Act at any reference number."

The appellant contended that the section does not extend to garnishee orders as no reference is made to such in the Third Schedule to the Act of 1961. Section 22(7) of the Act provides:

"(7) [w]ithout prejudice to any jurisdiction conferred by the previous subsections of this section, the Circuit Court shall have powers of attachment, garnishee and interpleader, and shall have all powers (including the power to appoint a receiver) ancillary to any jurisdiction exercisable by it."

The appellant argued that the garnishee order was ancillary to the summary proceedings for the debt in the High Court and, thus, the garnishee action ought to have been brought in the High Court.

8. The appellant contended that the County Registrar had no authority to make an absolute order of garnishee on 8th December,

2014. The appellant asserted that she did not consent to the garnishee application before the County Registrar. Order 18, r. 1 (va) of the Rules of the Circuit Court, as amended by S.I. 312 of 2007, provides that a County Registrar may make "[a] conditional order of garnishee and, if the order is consented to or is uncontested, an order of garnishee."

9. Order 45, r. 1 of the Rules of the Superior Courts ("RSC") provides that the Court may make an order in respect of "all debts owing or accruing" from the garnishee to the judgment debtor. The appellant argued that the terms of the Order are at variance with the law as established in *Webb v. Stanton* (1883) 11 Q.B.D. 518, as followed in *O'Leary v. Buttimer* [1953-1954] Ir. Jur. Rep. 15 and *Robinson v. McDonnell* 3 N.I.J.R. 342 (see also recent Irish authorities *Kanwell Developments Ltd. v. Salthill Properties Ltd.* (In Receivership) [2008] IEHC 3 and *Lynch v. Darlington Properties & Anor.* [2011] IEHC 273. The appellant submitted that there must be money due to the judgment debtor from the third party and the debt needs to be payable at the time of the application for the garnishee order or will become payable in future by reason of a present obligation. The appellant submitted that the entitlement to the Department of Agriculture grants does not arise automatically. A farmer is required to make an application in May of each year and the debt only crystallises once the Department determines the entitlement to the grant.

10. However, I should observe at this juncture that evidence was given by the appellant's husband, Mr. Fergal Morahan, to the effect that an entitlement to the grant arises once there is compliance with the required criteria in advance of the application to the Department. I am satisfied that he dealt with all relevant matters in connection with these grants on his own and the appellant's behalves. This remains the uncontradicted state of the evidence before me.

11. The appellant also submitted that if the High Court has jurisdiction to deal with this matter, the Court should exercise its discretion by refusing to make the Order absolute as (i) the appellant is insolvent and (ii) a scheme of arrangement has established by the main body of creditors and has a reasonable prospect of succeeding.

Submissions of the Respondent

12. The respondent denied that the appellant contested the application before the County Registrar. There was no suggestion made that the debt to the respondent was not due and owing or that there was no debt to attach. The respondent claimed that the submissions were ad misericordiam in nature. Further, the appellant did not raise an issue in respect of the jurisdiction of the County Registrar at either County Registrar's Court level or in the Circuit Court. The respondent asserted, therefore, that the appellant is estopped from relying upon such an issue on appeal. The respondent referred upon the Supreme Court decision in *Clarke v. O'Gorman* [2014] IESC 72 wherein O'Donnell J. stated at para. 41:

"However, it is well established that the entry of an unconditional appearance will confer jurisdiction, or at least deprive the defendant of the ability to challenge it. As set out in *Delaney and McGrath, Civil Procedure in the Superior Courts* (Dublin; Round Hall; 3rd edition; 2012), para. 4-11:

"The concept of an appearance to contest jurisdiction derives from the principle of submission to jurisdiction whereby, regardless of whether a court would otherwise have jurisdiction, it will acquire jurisdiction where a defendant submits to the jurisdiction of the court by entering an unconditional appearance to proceedings before that court."

13. In respect of the appellant's argument that the garnishee proceedings ought to have been brought in the High Court, the respondent relied on s. 22(7) of Act of 1961. The respondent argued that it is apparent from a literal reading of the section that the Circuit Court is conferred with the jurisdiction to grant Garnishee orders simpliciter, with reference to ancillary jurisdiction being disjunctive and conferring a separate jurisdiction to the general unlimited jurisdiction to grant jurisdiction in respect of debts. The appellant acquiesced in and unreservedly submitted to jurisdiction. The application was dealt with by the County Registrar and subsequently in the Circuit Court. The appellant raised no issue as to jurisdiction until the High Court appeal. Thus, the respondent contended that the appellant is now estopped from raising such issue on appeal.

14. In respect to the discretionary jurisdiction of the Court to refuse the order due to the appellant's insolvency, the respondent asserted that the appellant has repeatedly and deliberately misled the respondent in respect of the debt in issue. The respondent contended that the appellant has not come to Court with clean hands and, as such, she is not entitled to invoke a discretionary jurisdiction which would substantially prejudice the applicant. Reliance was placed on *Response Engineering Ltd. v. Caherconlish Treatment Plant Ltd.* [2011] 3 I.R. 406 wherein Hogan J. observed at pp. 415-416:

"While it is true that the making of an order under O. 45 remains in the discretion of the court, it would generally require special circumstances before the court would decline on discretionary grounds to make an order in favour of a judgment creditor who had otherwise satisfied the necessary proofs. It is probably fair to say that the approach of the court in relation to such orders is more direct and somewhat less nuanced than might obtain in the cases, for example, of an application for an injunction or an application for judicial review."

The respondent submitted that the bankruptcy/insolvency proceedings were commenced during the garnishee proceedings, and the respondent's motive in this regard should be subject to strict scrutiny.

15. The respondent submitted, and as given and accepted in evidence by the appellant's husband, that the entitlement to the grant is created as a right by complying with the conditions set out for the grant prior to the application being made. Thus, the situation can be characterised as an existing obligation by the Department of Agriculture to pay the grant once there is compliance with the criteria and, therefore, is a debt owing or accruing from the Department of Agriculture to the appellant for the purposes of an order of garnishee.

Decision

Jurisdiction

16. It would not be inappropriate for me to commence my decision by giving the "fall back" view to which I have come. I find myself persuaded by the respondent's argument that a literal reading of Section 22(7) of the Act of 1961 would confer jurisdiction on the Circuit Court to entertain and determine the respondent's application. The reference to ancillary jurisdiction would appear to be disjunctive. This view can only be obiter in that the appellant is, in effect, estopped from relying upon want of jurisdiction. This Court, sitting as an appellate court of the Circuit Court, pursuant to statute, does not appear, to me, to be the appropriate venue to debate this issue for the first time. One would expect, particularly where a party is legally represented at all stages, that questions of jurisdiction should have bubbled to the surface before the County Registrar and, assuming any complaints were unsuccessful, before the High Court sitting as such on an application for leave to bring judicial review proceedings. Failing that, at the very least, one would have expected the matter to be raised in the Circuit Court and to be debated there and adjudicated upon by the learned Circuit judge. Perhaps, even then, a remedy by way of judicial review could have been contemplated as opposed to an appeal. But here we

are, in the High Court on appeal from the Circuit Court.

17. The appellant did not at any point prior to this appeal in the High Court raise an issue in relation to the jurisdiction of the County Registrar to grant a garnishee order. With regard to the appellant's contention that the application was contested, I am satisfied on the evidence that there was no such contest and that any submissions made on the appellant's behalf were purely *ad misericordiam*. Further, no issue was raised to the effect that the Circuit Court did not have jurisdiction where the original debt proceedings were dealt with in the High Court. The appellant acquiesced in the jurisdiction of the County Registrar and the Circuit Court to deal with the matter, thus resulting in the matter now being before the High Court on appeal. The law on acquiescence to jurisdiction is clear and as elucidated by O'Donnell J. in *Clarke v. O'Gorman* "the entry of an unconditional appearance will confer jurisdiction, or at least deprive the defendant of the ability to challenge it." Thus, this Court has the jurisdiction to determine the matter. As to how this may have been challenged it was stated by Finlay C.J. in *Campbell International Trading House Ltd. v Peter van Art* [1962] IRLM 663 at p. 66:-

"It may not be necessary to do it in any particular form; conceivably it is not necessary to do it exactly contemporaneously with the entry of appearance, but it is certainly necessary to do it by some method, informing the plaintiff of the fact that the purpose of the entry of an appearance is to contest jurisdiction."

No strict form is required other than to signal in clear and unambiguous terms the complaint of want of jurisdiction. Nothing what so ever was done to signal to the respondent or to the County Registrar or the Circuit Court that the appellant was taking this stance. Her failure to do so is fatal to her complaint irrespective of its merits (if any, which I doubt).

Are the Department of Agriculture grants "debts owing or accruing" for the purposes of granting an order of garnishee?

18. Are the relevant Department of Agriculture grants "debts owing or accruing" for the purposes of granting an order of garnishee pursuant to Order 45, r. 1 RSC? The principle, which is not contested by either of the parties, that the debt must be due to the judgment debtor from the third party and the debt needs to be payable at the time of the application for the garnishee order or become payable in future by reason of a present obligation. The nature of this rule was set out in *Webb v. Stenton*, wherein Brett M.R. held at pp. 522-523:

"It seems to me upon the plain reading of rule 2 of Order XLV [of the Judicature Act] that no order can be made unless some person at the time the order is made is indebted to the judgment debtor. If there be a person so indebted, then the order will be that all debts owing or accruing from such person to the judgment debtor shall be attached. If there is a debt due payable in presenti, of course an order may be made to attach that debt. If there is not a debt payable in presenti, but there is a debt in existence, debitum in presenti, but payable in futuro, it seems to me that such an order could be made with regard to that debt, although it be the only debt and there is no debt payable in presenti, because such third person is indebted to the judgment debtor, and that would satisfy the words of the rule."

19. The appellant argued that the debt only crystallised once the decision was made by the Department of Agriculture that the applicant had an entitlement to the grant. This would occur at some stage prior to the payment of the grants, thus being between May, the time at which the application is submitted, and August, prior to the first payment. However, no evidence was provided to the Court supporting this contention. In fact, the evidence which was furnished by the appellant's husband, Mr. Morahan, supported the respondent's position that there is an existing obligation on the Department of Agriculture to pay the grant once there has been compliance with the conditions of the grant. On the evidence before me, I prefer this view. Compliance with the criteria is where the entitlement to a grant arises. Once the application is submitted and valid, in that the necessary criteria are met, the Department approves the payment of a grant. As made clear by Mr. Morahan in his evidence, he would have a serious issue with the Department of Agriculture if it was to deny the application or withhold the grant where there had been full compliance with the necessary requirements. Thus, the Department grants are an accruing debt, being a debt not actually payable at the time of the garnishee application but a debt representing an existing obligation.

Should the Court exercise its discretion in refusing to make the order of garnishee absolute?

20. The third issue is whether the Court should, as requested by the appellant, exercise its discretionary jurisdiction in favour of the appellant. In *Roberts Petroleum v. Kenny* [1982] 1 W.L.R. 301 at p. 307, Lord Brandon set out a list of principles to be applied by a court in deciding whether to make a garnishee order nisi absolute, which includes *inter alia*:

"(4) In exercising its discretion the court has both the right and the duty to take into account all the circumstances of any particular case, whether such circumstances arose before or after the making of the order nisi.

(5) The court should so exercise its discretion as to do equity, so far as possible, to all the various parties involved, that is to say, the judgment creditor, the judgment debtor, and all other unsecured creditors.

(6) The following combination of circumstances, if proved to the satisfaction of the court, will generally satisfy the court in exercising its discretion by refusing to make the order absolute: (i) the fact that the judgment debtor is insolvent; and (ii) the fact that a scheme of arrangement has been set on foot by the main body of creditors and has a reasonable prospect of succeeding."

21. The Court must take into account all the material circumstances in deciding whether or not to make a garnishee order absolute. As outlined by Hogan J. in *Response Engineering Ltd.*, the Court "would generally require special circumstances before the court would decline on discretionary grounds to make an order in favour of a judgment creditor who had otherwise satisfied the necessary proofs." I do not think that such special circumstances have been established in this case.

22. The appellant, with her husband, engages in a fairly substantial farming business. The appellant is, of course, the only party before the Court and the farming enterprise is conducted principally in her name. But no dispute was raised about their general circumstances. I do not wish to dwell at any length on their private financial affairs. It is sufficient to state that, in addition to the farming enterprise in which there is no doubt that the appellant's husband is heavily involved, there is also an almost bewildering array of investment properties in her husband's name. The appellant, in addition, is engaged in post-graduate studies in the social sciences. They present a picture somewhat removed from the more traditional modest farming family unit in a state of indebtedness to a rural Credit Union.

23. In relation to the insolvency of the appellant, a letter dated 13th July, 2015, from Mr. John O'Callaghan, Personal Insolvency Practitioner, was exhibited in the affidavit of Ms. Ruth Byrne, solicitor for the appellant. The letter states *inter alia*:

"We have determined that our clients are evidently insolvent and in all probability candidates for bankruptcy but which we would prefer to avoid....

We further understand that our clients have indicated with some confidence that they expect to be able to resolve their indebtedness to creditors provided they are afforded the opportunity for the consideration of a PIA and time to allow all creditors opt in to this PIA.

It is possible that the creditors will recognise their circumstances and shall not seek that which our clients cannot pay. Fergal and Nicola are not entitled to prefer their Creditors and any resources which they may have, of which there appears to be none, based on the information to hand, would have to be applied equitable to all Creditors.

In regard to progress through a formal Insolvency process, we find ourselves premature in the development of PFS or an arrangement of any kind (PIA, DSA) which we must investigate prior to proposing bankruptcy in accordance with s. 15(2) of the Bankruptcy Act 1988 the nature and value of the assets available to the debtor, the extent of his/her liabilities and whether the debtor's inability to meet his/her engagements could, having regard to those matters and the contents of the statement of affairs of the debtor filed with the Court, be more appropriately dealt with by means of a Debt Settlement Arrangement or a Personal Insolvency Arrangement. We cannot satisfy this section of the bankruptcy act as there are significant contingent and prospective debts the settlement of which, given their size and import will have significant bearing on whether the client will be suitable for an insolvency process or more suited to bankruptcy. Therefore we would recommend that the client be allowed time to find a solution with their creditors so that a PIA can be proposed to include all debt and to find a long term solution with their creditors...."

24. As is evident from this letter, the appellant and her husband are in the early stages of the insolvency process. However, no arrangement, such as a personal insolvency arrangement or debt settlement arrangement, has yet been deemed appropriate for the appellant, let alone developed, agreed with the main body of creditors and considered to have a reasonable chance of succeeding. To exercise the discretion of the Court in such circumstances would be to prejudice the respondent's claim and attempt to recover its debts, particularly in circumstances where the insolvency process, or bankruptcy if such comes to pass, was commenced during these garnishee proceedings.

25. In terms of coming to an arrangement with the respondent in this case, the Court agrees with the argument made by the respondent that the appellant previously deliberately misled the respondent in respect of the repayment of the debt. In this regard, there was evidence from Billy O'Carroll, Manager of Ballinrobe Credit Union, to the effect that the loan was approved in 2008 on the condition that the Department of Agriculture grants would be used to repay the debts and the subsequent formal assignment of the grants for this purpose by the appellant to the respondent in February, 2009. However, the respondent was informed later in the year that despite the formal assignment, the grants were being used to repay another financial institution. This evidence was not contested by the appellant. The proceeds of cattle sales were also promised by the appellant to the respondent but the respondent only received one such payment of €3,600 in June 2008 despite assurances from the appellant. Thus, even if the Court was minded to exercise its discretion on favour of the appellant based on the insolvency grounds, the conduct of the appellant, particularly in reneging from a formal assignment of the grants to the respondent, does not entitle the appellant to discretionary relief.

26. For the foregoing reasons, the appeal is dismissed.