Neutral Citation Number: [2014] IEHC 59

THE HIGH COURT

[2012 No. 70 C.A.]

BETWEEN

EAMON FLANAGAN AND MARESA PRENDEVILLE

PLAINTIFFS

AND

THOMAS CROSBY, MICHAEL MCNAMARA AND KIERAN O'BRIEN

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on 7th February, 2014

1. Can a receiver be appointed by way of equitable execution in respect of the future salary or other emoluments of an employee to which he is in law entitled? Or is the power to appoint a receiver by way of equitable execution confined to equitable interests in property only? These are essentially the questions which are presented in this appeal from a decision of the Circuit Court. The issue arises in the following way. In November, 2010 the plaintiffs, Mr. and Ms. Flanagan, obtained judgment against the three defendants in the sum of €8,955.53 plus costs in respect of a claim for damages for breach of contract. The figure for costs was taxed at just under €23,000, so that by September 2011 the total sum due was €31,774.40. Save for a few payments, this judgment remains undischarged.

2. The first defendant, Mr. Crosby, is a councillor with Roscommon County Council. On 5th September, 2011, the County Registrar made a conditional order appointing a receiver by way of equitable execution in favour of the plaintiffs over any monies due to Mr. Crosby by Roscommon County Council by way of emoluments in respect of his position qua councillor both then and in the future. That order was made absolute by the County Registrar on 8th December, 2011, and it envisaged that one Bríd Miller, solicitor, be appointed receiver by way of equitable execution over part of the income of Mr Crosby in the sum of €500 per month until this debt was paid. It should be noted, however, that the making of that order was opposed by Mr. Crosby's legal representatives on 3rd October, 2011, when the matter first came back into the Registrar's list.

3. That matter came back before the Circuit Court judge (His Honour Judge McCabe) on 20th March 2012. He made the order appointing a receiver by way of equitable execution absolute, save that the monthly payment to be paid by Roscommon County Council until the debt be discharged was reduced to the sum of €400.

3. The first defendant, Mr. Crosby, has now appealed against this order, contending that the established case-law does not permit the appointment of a receiver by way of equitable execution in a case such as this. It is further contended that such an appointment would not be convenient, as this procedure is essentially one of last resort which is not intended to displace the Enforcement of Court Orders Acts 1926-2009.

4. In considering these questions, it is, perhaps, here unnecessary to determine the wider questions potentially presented by this appeal, whether the circumstances in which the appointment of a receiver by way of equitable execution can be said to be confined solely by reference to those categories of cases which obtained prior to the enactment of the Supreme Court of Judicature (Ireland) Act 1877. Nor is necessary to consider the potentially even wider question as to the extent to which law and equity can be said to be fused following the enactment of the 1877 Act, even though these issues are in view in this appeal.

5. It is, however, sufficient to say that the appointment of a receiver by way of equitable execution is generally regarded as a remedy of last resort to be invoked in those cases where the traditional legal remedies are likely to be ineffective. In considering the case-law, we may start with the well-known decision of the English Court of Appeal in *Holmes v. Millage* [1893] 1 QB 592. Here the plaintiff had obtained judgment against the defendant, who was the foreign correspondent of a British newspaper then living in Paris. The plaintiff sought to garnishee his future weekly earnings, but not to no avail. She then sought to have a receiver appointed by way of equitable execution.

6. In his judgment for the Court Lindley L.J. held ([1893] 1 QB 551 at 554-555) that the order of the Divisional Court which appointed the receiver must be discharged:-

> "The question involved in this appeal is whether the judgement creditor is entitled to receiver of the future earnings of his judgment debtor. Going back to the time before the Judicature Acts it is clear that a judgment creditor had no such right. The common law writs of execution did not extend to future income. The garnishee process did not reach it; nor was the statutory process of charging orders applicable to wages or other remuneration for personal services. The courts of common law had no jurisdiction to appoint a receiver. The court of chancery no doubt had; but the jurisdiction was confined to certain classes of cases within which such a case and the present cannot be brought. In considering the jurisdiction of the courts of chancery to appoint a receiver, we may dismiss from our minds all cases in which the courts interfered to enforce its own decrees against property, the subject of a suit in equity…the only cases of this kind in which the courts of equity had ever interfered were cases in which the judgment debtor had an equitable interest in property which could have been reached at law, if he had the legal interest in it, instead of an equitable interest only…..In a popular sense, almost any mode of making a man pay his debts may be just, and convenient at least to the creditor; and in that sense it may be just and convenient to appoint a receiver in a case like this. But even in popular sense such an order may be anything but just or convenient to the newspaper affected by it. The appointment of a receiver is a serious interference of this business. We cannot judicially hold that the appointment of a receiver in a case which no Court could grant a receiver before the Act to be just or convenient within the true meaning of s. 25(8) of the Judicature Act 1873. We cannot come to the conclusion that this section was intended to alter the law of debtor and creditor, and the relation of employer and employed, to such a very serious extent that the order appeal from, if upheld, would alter them."

7. These principles have generally been applied in the subsequent case-law. In *M'Creery v. Bennett* [1904] 2 I.R. 69 the question was

whether the appointment of a receiver by way of equitable execution over the future salary of a clerk to the Petty Sessions was contrary to public policy. While the judgment of Kenny J. focusses on the contention that this would be contrary to public policy, it might be thought that the judgment of Barton J. ([1904] 2 I.R. 69, 73-74) was more on point when he stated:

> "The principles applicable to the appointment of receivers by way of equitable execution are those which were applicable in the Court of Chancery before the Judicature Act. There was no jurisdiction in the Court of Chancery before the Judicature Act to prospectively impound the future earnings of a judgment debtor and it follows that we have no jurisdiction to prospectively impound them by the appointment of receiver by way of equitable execution…future earnings or salary could not have been reached by a writ of sequestration before the Judicature Act in the Court of Chancery and cannot be reached by the appointment of receiver by way of equitable execution in any division of the High Court under our present practice."

8. Barton J. also added ([1904] 2 I.R. 69, 74):

> "The judgment creditor is not without his remedy. He can apply for an instalment order under the Debtors Act..."

9. This issue was further considered by the Irish Court of Appeal in *Picton v. Cullen* [1900] 2 I.R. 613, where the issue was whether a receiver by way of equitable execution could be appointed over the salary of a national school teacher. While the Court rejected the argument that public officials should on public policy grounds enjoy such an immunity from execution, it seems clear from the judgment of Holmes L.J. ([1904] 2 I.R. 613, 618) that the appointment of a receiver by way of equitable execution was confined to those cases "where the salary is still in the hands of the official paymaster, provided that it has already been earned".

10. In more recent times the authorities have continued to stress that the appointment of a receiver by way of equitable execution is confined to those cases where the debtor has an equitable interest in property (whether moveable or immoveable) which cannot otherwise be reached by the legal process. In the first of the contemporary authorities, *National Irish Bank Limited v. Graham* [1994] 1 I.R. 215, the plaintiff bank had obtained judgment in default of appearance against the defendants, who were farmers, on foot of a summary summons. On the same day they sued out a *fieri facias*. The defendants owned a milking herd, over which the plaintiff bank had no security, although it did have security by way of chattel mortgage over the defendants' non-milking herd. On 8th December, 1993 the plaintiff bank sought the appointment of a receiver by way of equitable execution over all of the defendants' cattle, including the milking herd. Keane J. refused to approve the appointment of a receiver, saying ([1994] 1 I.R. 215, 222):

> "Nor is this a case in which it would be appropriate to appoint a receiver by way of equitable execution over the milking herd. It is clear that the jurisdiction to appoint such a receiver is confined to cases in which a debtor enjoys an equitable interest in property which cannot be reached by legal process. The law was thus stated by Fry L.J. in *In re Shephard* (1889) 43 Ch. D. 131,138:
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> > 'A receiver was appointed by the Court of Chancery in aid of a judgment at law when the plaintiff showed that he had sued out the proper writ of execution, and was met by certain difficulties arising from the nature of the property which prevented his obtaining possession at law, and in these circumstances only did the Court of Chancery interfere in aid of a legal judgment for a debt'.

In *Holmes v. Millage* [1893] 1 Q.B. 551, Lindley L.J. said at p. 555 that:-

> > 'The only cases of this kind in which Courts of Equity ever interfered were cases in which the judgment debtor had an equitable interest in property which could have been reached at law, if he had the legal interest in it, instead of an equitable interest only … It is an old mistake to suppose that, because there is no effectual remedy at law, there must be one in equity.'
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> In the present case, the plaintiffs meet none of the requirements laid down by these decisions. The defendants are the legal owners, and not merely the owners in equity, of the milking herd. There is no impediment to the execution of the writ of *fieri facias* arising from the nature of the defendants' interest in the herd. There is in the result no ground for the appointment of a receiver by way of equitable execution."

11. A similar view was taken by Laffoy J. in her judgment in *Honniball v. Cunningham* [2006] IEHC 326, [2010] 2 I.R. 1. Here the plaintiff judgment creditor sought the appointment of a receiver by way of equitable execution over the proceeds of the sale of a share in a company which the plaintiff believed the judgment debtor was about to sell. Invoking the principle in *Graham*, Laffoy J. observed ([2010] 2 I.R. 1, 16) :

> "The principle, as I understand it, is that the court will not appoint a receiver by way of equitable execution over property of which the judgment debtor is the legal owner and which can be the subject of legal process. The facts in *National Irish Bank Limited v. Graham* illustrate that point very clearly: the defendants were the legal owners of the milking herd and there was nothing to stop the sheriff seizing the milking herd on foot of the *fi. fa*. The principle is that the equitable remedy is only available where the judgment debtor has only an equitable interest in property against which the judgment creditor seeks recourse."

12. She went on to note that the defendant had stated that he did not intend the sale the shareholding:

> "What the plaintiff asked the court to do was to appoint a receiver by way of equitable execution over the proceeds of sale of the single share which the defendant owns in the company, should the defendant have sold that share. I have already quoted para. 21of Mr. Dempsey's affidavit in which he has averred that no distribution on foot of the existing shareholding or sale of the same is contemplated, which I take to mean that the defendant has not sold, and does not intend to sell, his existing share in the company. Therefore, as a matter of fact, the defendant has no equitable interest in the proceeds of a share sale; rather he is the legal owner of a share which, by order of the court, was and remains, charged in favour of the plaintiff. There being no property in which the defendant enjoys merely an equitable interest, the appointment of the receiver cannot stand and is discharged."

13. Three other modern authorities (one of them English) should also be noted at this point. Considerable reliance was placed on the decision of Peart J. in *O'Connell v. An Bord Pleanála* [2007] IEHC 79. In this case one of the notice parties to environmental litigation, Lavine Ltd., had obtained an order for costs against the applicant in the sum of €58,315. That judgment remained unsatisfied, but Lavine nonetheless sought the appointment of a receiver by way of equitable execution in respect of any monies the applicant might recover against a third party in quite separate High Court proceedings for assault. Peart J. concluded that it was just and equitable that a receiver be so appointed:

> "The sum of damages is not to be in any way equated with earnings or wages necessary for the applicant to live. It is a fund entirely removed from such a category. It is in the nature of a debt due for payment in the future in the event of an award of damages being made in her favour.
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> I am satisfied that the ordinary processes of execution normally available to a judgment creditor are not in the circumstances of the present case sufficient to enable the second named notice party enforce payment of its judgment against the applicant. I am satisfied that the reasoning of Colman J. in *Soinco SACL v. Novokuznetsk Aluminium Plant* [1998] 1 QB 406 is equally persuasive in this jurisdiction, and I see no reason why this Court should conclude that the law here should be different. The appointment of a receiver by way of equitable execution is a remedy by which equity assists a judgment creditor to secure enforcement of a judgment against the judgment creditor. To appoint such a receiver over such sum as may be recovered by the applicant in her claim for damages, and limited of course to the amount of the judgment debt, including interest, does not do any injustice to the judgment debtor, especially in circumstances where judgment has already been obtained. It is not therefore unjust. I am satisfied that it is convenient to do so, given the inability of the ordinary methods of execution to effect a discharge of the amount due, and given the fact, which I accept, that the second named notice party can have no control over the applicant's proceedings for damages and no reasonable way of ensuring that it is aware of what is happening in relation to those proceedings even if there are not settled prior to any hearing. The second named notice party would never aware if the case was settled prior to trial, and in a position to make any timely application for an order of garnishee over any settlement monies. Neither would it be aware of the date of any trial so as to hold a watching brief and make an appropriate application at the conclusion of the trial. It is therefore convenient that an order should be made.
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> I should add of course that simply because it would be "convenient" in the broad sense of that word that a judgment creditor would have a receiver appointed, would not justify the Court in appointing a receiver. Any judgment creditor must be expected to exhaust any reasonable method of legal execution before equity could be expected to provide assistance."

14. In Sonico Colman J. argued that the jurisdiction to appoint a receiver should be released from its pre-Judicature Act shackles and that the court should instead assume a general jurisdiction to appoint a receiver irrespective of whether the underlying right of the judgment debtor was legal or equitable in nature and irrespective of what the precise practice of the Courts of Chancery prior to the enactment of the Judicature Acts would have been.

15. It may be observed that cases such as *Graham and Honniball* were not examined in O'Connell. The reasoning has been described as "surprising": see Keane, *Equity and the Law of Trusts in the Republic of Ireland* (Dublin, 2011)(2nd Ed.)(at 385). The author adds that the order in *O'Connell* was made:

> "in favour of a judgment creditor in respect of a claim by the judgment debtor to damages in a personal injuries action still to be heard. Since there was no property of any sort to which the judgment debtor was entitled, either immediately or in the future, it is difficult to understand what equitable interest in property the execution process could attach."

16. In any event, it should be noted that *O'Connell* was concerned with the future payment of as an unliquidated sum which was contingent of uncertain events and Peart J. stressed that regular future payments by way of salary or emolument represented a quite different category of cases.

17. These authorities were even more recently examined by Kearns P. in *Waterside Management Co. Ltd. v. Kelly* [2013] IEHC 143. Here the plaintiffs sought the appointment of a receiver of equitable execution over the rents received from residential tenants in five named apartments to satisfy an unpaid judgment debt for management fees. Kearns P. concluded that the appointment of a receiver would in itself have been so intrusive in respect of the satisfaction of a debt for a relatively small sum that this in itself meant that the appointment of a receiver would not have been just and convenient in this sense. He did not find it necessary, however, to resolve any possible difference of opinion as between cases such as *Graham* and *Honniball* on the one hand and that of *O'Connell* on the other.

18. In the end the question comes down to whether the power to appoint a receiver by way of equitable execution should continue to be confined to same category of cases in which the Court of Chancery might have exercised jurisdiction prior to the enactment of the Judicature Act and, specifically, whether the power should be confined to those cases involving *equitable* (as distinct from purely legal) interests only? Alternatively, can it truly be said that the jurisdiction in such cases should essentially turn on the happenstance of whether the judgment debtor's interest in certain property should be characterised as equitable as distinct from legal in nature?

19. Holmes famously observed ("The Path of the Law" (1897) 10 *Harv. Law Review* 457) that it was "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV", adding:

> "It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

20. It is in that spirit that it may be suggested that the pre-1877 limitations on the scope of the power to appoint receivers by way of equitable execution should no longer be dispositive. After all, s. 28(8) of the 1877 Act gave the court power to grant an injunction or appoint a receiver "in all cases in which it shall appear to the Court to be just and convenient that such order should be made." This finds a direct echo in Order 50, r. 6(1) of the Rules of the Superior Courts which provides as follows:

> "The Court may appoint a receiver by an interlocutory order in all cases in which it appears to the Court to be just or convenient so to do."

21. Injunctions have been granted in aid of legal rights (and not simply equitable rights) since at least the enactment of the Judicature Acts and it is not easy to discern any reason of *principle* as to why the power to appoint a receiver should be confined simply in aid of equitable – as distinct from purely legal - rights only, not least given that the jurisdiction of the Court to grant injunctions and to appoint receivers is dealt with in the same sub-section of the Judicature Acts.

22. This is not at all to suggest that one must accept that law and equity have been fused. For my part, I respectfully adhere to the views which I expressed on that topic in *Meagher v. Dublin City Council* [2013] IEHC 474. In that case one of the issues was whether the doctrine of laches could bar a claim for damages at common law for breach of contract. I concluded that it could not, adding:

> "27. The very fact that such a distinction remains embedded in the legal system should perhaps give us pause to reflect

before any far-reaching claims regarding substantive fusion can properly be accepted. It might also be borne in mind that many equitable principles were originally fashioned to impose particular duties on persons such as trustees and fiduciaries to ensure that they exercised their powers in a manner consistent with the overriding principle of utmost good faith, even if over time these equitable principles were applied more generally and more widely in order to temper the rigour of the common law. Yet these higher duties had been imposed by the Courts of Chancery by reason (in part, at least) of the special obligations which trustees or fiduciaries owe to third parties by virtue of their special relationship with such persons. It would not, however, be necessarily appropriate to impose these higher standards in the ordinary sphere of the law of contract and tort where these underlying principles will generally have little or no application, even though this would (or, at least, might) be a natural consequence of the substantive fusion of law and equity.

28. This may be especially true in the context of limitation periods and delay. The doctrine of laches was originally developed by the Courts of Chancery because "successive statutes of limitation did not apply to equitable claims" :see Brady and Kerr, *The Limitation of Actions* (Dublin, 1994) at 167. Thus, the length of time which it may be appropriate to allow a plaintiff to seek discretionary equitable relief such as an injunction or recission or the setting aside of a transaction as improvident may well depend on the particular circumstances of the case, especially if this would adversely affect the rights of third parties.

29. By contrast, the length of time for actions in both tort and contract have been fixed by the Oireachtas in the Statute of Limitations 1957 (as amended). It is true that s. 5 of the 1957 Act provides that: "Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise." This, however, is clearly directed at the grant of equitable relief (injunctions, specific performance, rectification etc.) which might otherwise operate in the context, for example, of actions to recover land or actions in respect of trust property. It certainly has never previously been suggested that actions in tort and contract which have otherwise been commenced within the appropriate limitation period could be barred by reference to these equitable principles.

30. Here one may accordingly agree with the observations of Hanbury and Martin, *Modern Equity* (19th Ed.)(at p. 29) that while the two systems of law work ever more closely together and draw mutual inspiration from each other, the two systems "are not yet fused." All of this means that the doctrine of laches has, as such, no application to a claim at common law for damages for breach of contract where that claim is not otherwise barred by the Statute of Limitations."

23. As I pointed out in that judgment, there are many reasons, for example, why the equitable doctrine of laches might not be applicable in the context of purely legal rights, such as the right to sue for damages for breach of contract. These differences can stem from the underlying nature of the different types of rights themselves and, indeed, in the context of laches, the fact that the Oireachtas has fixed clear and definite time limits for claims for damages for breach of contract in the Statute of Limitations. In other words, in the context of that particular example, there continue to be clear and justifiable reasons for the different treatment of the different types of legal and equitable rights and this was not a case – to use Holmes' words - of the rule persisting simply "from blind imitation of the past."

24. Returning to the issue in the present case, in the context of an order in aid of execution of a judgment creditor, it is not clear to me why in a modern era there should be such a sharp differentiation between legal and equitable rights so far as the power to appoint a receiver by way of equitable execution is concerned. Indeed, it may be observed that in the United Kingdom this legal/equitable distinction was abolished by statute in the context of the appointment of receivers: see Supreme Court Act 1981, s. 37(4).

25. Irrespective, however, of any statutory change, I consider that it would be open to this court to interpret afresh the relevant statutory words – "just and convenient" – by reference to modern needs and conditions. After all, s. 6 of the Interpretation Act 2005 permits the court – subject to important limitations – to give statutory language a contemporary interpretation:

> "In construing a provision of any Act or statutory instrument, a court may make allowances for any changes in the law, social conditions, technology, the meaning of words used in that Act or statutory instrument and other relevant matters, which have occurred since the date of the passing of that Act or the making of that statutory instrument, but only in so far as its text, purpose and context permit."

26. Section 28(7) of the 1877 Act did not in terms confine the power of the court to grant injunctions or to appoint receivers to those category of cases where this power would have been exercisable prior to 1877 by the Court of Chancery. The Victorian Parliaments were well capable of expressly limiting the exercise of a new statutory power by reference to some pre-existing procedure or practice had they wanted to do so. Thus, for example, while s. 13 of the Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870 enabled the High Court to grant a decree of nullity, this Court is nonetheless required "to give relief on principles and rules on which the ecclesiastical courts of Ireland have heretofore acted and given relief."

27. As we have noted, the 1877 Act contained no such express limitation. It was rather the natural – and understandable – conservatism of the Victorian judiciary which thereafter sought to anchor the parameters of the - then radical - Judicature Acts to the familiar practice and procedure of the Court of Chancery to which they had been accustomed.

28. If, therefore, the matter were to be viewed afresh examined from the standpoint of first principles, then tradition apart, there seems no reason in principle why an order for the appointment of a receiver by way of equitable execution could not be made in respect of *legal* as well as equitable interests. Yet, irrespective, however, of how the matter might be approached if the issue were to be considered as if it were *res integra*, I nevertheless feel that I would not be entitled to depart from the view expressed in contemporary times by both Keane J. in *Graham* and by Laffoy J. in *Honniball*. To that extent, therefore, I consider myself bound by the majority views as expressed by members of this Court and it is clear that, absent special circumstances, I must follow this line of authority: see, *e.g.*, by analogy the comments of Clarke J. in *Kadri v. Governor of Cloverhill Prison* [2012] IESC 27 and my own decision in *AG v. Residential Institutions Redress Board* [2012] IEHC 492.

29. The decisions in *Graham* and *Honnibal* clearly hold that the appointment of a receiver by way of equitable execution is confined to the enforcement of equitable rights only. Here the entitlement of the judgment debtor to receive payment from Roscommon County Council is by way of emoluments for his position as a councillor. These rights are not equitable in nature, since Mr. Crosby has a statutory right (*i.e*,, a right existing at law) to such payments. For this reason alone, I would hold that the judgment creditor is not entitled to an order in aid of execution.

30. There is, in any event, a further reason why I would decline to grant such relief. As Kearns P. observed in *Waterside Management Co*., the appointment of a receiver by way of equitable execution sometimes imposes administrative burdens on innocent third parties. This would be true in the present case where the Council would have to make special arrangements every month to pay over the

monies to a receiver. In these circumstances, it would seem that enforcement by way of an application for an instalment order before the District Court under the terms of the Enforcement of Court Orders Acts 1926-2009 would have been a more straightforward remedy.

Conclusions

31. In these circumstances, therefore, while completely sympathetic to the plight of the innocent judgment creditors whose judgment remains outstanding, I find myself nevertheless obliged by virtue of the established case-law to allow the appeal.