THE HIGH COURT

[2018 No. 132 SP]

BETWEEN

AN POST

PLAINTIFF

AND

MICHAEL HARRINGTON, ANTHONY HARRINGTON AND

ANNE O'DWYER (IN HER CAPACITY AS RECEIVER)

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 10th day of April, 2019

1. This is an interpleader action and this judgment is given in the application of the third defendant, a receiver appointed by Gulland Property Finance DAC ("Gulland") for a declaration that she is entitled to recover or receive rental payments made by the first and second defendants between 24 February 2017 when she was appointed, and 31 July 2018 when, by deed, she was discharged from her role.

2. The interpleader proceedings were brought against the background of proceedings commenced by Michael and Anthony Harrington ("the Harringtons") bearing record number 2016/2445 P, in which they sued Gulland and Stephen Tennant, the then receiver, arising from the appointment by Gulland of Mr Tennant as receiver and the alleged unlawful calling in by Gulland of loan facilities. Two judgments were delivered by me in the background proceedings, *Harrington v. Gulland Property Finance Ltd. (No. 1)* [2016] IEHC 447 and *Harrington v. Gulland Property Finance Ltd. (No. 2)* [2018] IEHC 445.

3. The interpleader proceedings were commenced by An Post which, at all material times, was a tenant of one of the units owned by the Harringtons whose secured loans with Anglo Irish Bank were sold to Gulland.

4. In the events, an order was made on 10 February 2016 that Gulland was not entitled to appoint a receiver. It transpired that Gulland, which had purchased the Harrington loans, had not acquired by deed the interest in the security at the relevant times.

5. Mr Tennant was removed as receiver on 13 December 2016 after it became evident that the Deed of Transfer of 6 February 2015 from Irish Bank Resolution Corp. ("IBRC"), the successor in title of Anglo Iris Bank, to Gulland on foot of which Gulland had appointed Mr Tennant, did not include in the parcels clause the Harringtons' lands. Gulland ultimately took a new deed of 6 October 2016 and became registered as owner of the charges on the relevant folios on 7 October 2016. Thereafter, Ms O'Dwyer was later appointed receiver by Gulland on 14 February 2017, some months after the former receiver, Mr Tennant, had been discharged from his office, and after the title had been rectified.

6. Ms O'Dwyer was appointed receiver after Gulland had taken the benefit of the charge and no argument was made in the course of the background proceedings nor in these interpleader proceedings that Gulland was not entitled to appoint Ms O'Dwyer as receiver. This judgment is directed to the single question of her entitlement to receive rents during her period of office.

The position of An Post

7. An Post has, for a long number of years, been a tenant to the Harringtons under a commercial lease. It was not prepared to take the risk of paying the rent either to Mr Tennant, the Harringtons or, later, to Ms O'Dwyer. In those circumstances, it commenced these interpleader proceedings and, following an interlocutory hearing, an order was made that the rents be paid in court on 13 February 2018 pending the delivery of judgment in the primary action, which was delivered on 25 July 2018.

8. Thereafter, the issue of the entitlement to the rents was litigated and written and oral submissions made by counsel for Ms O'Dwyer and for the Harringtons.

9. The sole question for determination in this ruling is whether the receiver is entitled to those monies lodged in court *in lieu* of rental payments. The claim by the receiver is in respect of rents paid into court by An Post since the date of her first appointment in February 2017 until she was discharged by Deed of Discharge of 31 July 2018.

Arguments

10. The receiver argues that her discharge from her position as receiver is prospective in effect and that she was entitled to the benefit of any accrued rights until she was formally discharged on 31 July 2018. It is argued that the right to claim rents up to the date of discharge was not lost by the discharge.

11. Counsel for the Harringtons argues that by reason of the discharge from the receivership, Ms O'Dwyer has no vested right to receive unpaid rents and relies on an extract from Picarda, *The Law relating to Receivers Administrators and Managers* (2nd ed., Butterworth, 1990), at p. 149, as authority for the proposition that:

> "an order discharging a receiver puts an end to his right to receive, it does not put an end to his liability to account."

12. This proposition was cited with approval by the Court of Appeal for England and Wales in *Curley v. Curley* (Unreported, Court of Appeal, 17 July 1998).

Deed of Discharge

13. The starting point for the analysis must be the Deed of Discharge of 31 July 2018 by which Gulland discharged the receiver. The operative part of the deed reads as follows:

> "Gulland hereby discharges and releases the Receiver from her receivership and from all her duties and responsibilities as receiver under the Deed of Appointment as and from 3pm on the 31st July 2018".

14. The deed of discharge, in its plain words, has the clear effect of unconditionally removing from Ms O'Dwyer all duties and

responsibilities and all powers as receiver over the Harringtons' lands as and from the time and date specified.

15. Counsel for Ms O'Dwyer relies on the decision of the Court of Appeal for England and Wales in *Glatt v. Sinclair* [2013] EWCA Civ 241, [2013] 1 WLR 3602. The judgment concerned the question of whether a receiver appointed by a court could recover expenses and remuneration incurred in respect of tasks carried out after an order of discharge had been made. The Court of Appeal, *per* Davis L.J., held that the receiver did have an entitlement to recover such expenses and remuneration and at paras 42 and 43, said the following:

> "42. […]. It is, at all events, entirely foreseeable that an amount of expenditure will be likely to be incurred and a number of services will be likely to be required to be performed by a receiver consequent on an order of discharge.
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> 43. There is, in my view, no principled basis for denying a receiver any right even to claim remuneration or expenses for such post-discharge services which are necessarily performed with a view to winding up (if I may use that word) the receivership. The common law neither requires nor imposes such a restriction. Moreover, no such restriction can be spelled out of the wide language of rule 69.7 and supporting practice direction (Practice Direction 69 - Court's power to appoint a receiver) relating to remuneration."

16. That decision concerned the question of whether a receiver might continue to have obligations or functions after an order of discharge was made, and the decision of the Court of Appeal must be seen as reflecting a view that the orderly winding-up of a receivership might involve the receiver in the performance of certain functions, possibly functions of an administrative type. There can be no doubt nonetheless, that the discharge of a receiver, whether by deed or by order of the court, must remove from the receiver all powers which were previously vested in the receiver, and that judgment did not determine otherwise.

17. Counsel for Ms O'Dwyer argues, however, it offers a useful analogy with regard to any powers previously vested in the receiver which ceased to be effective on discharge.

18. Reliance is also placed on the Irish authority *Crawford v. Lord Annaly* (1891) 27 LR Ir 523 considered by Laffoy J. in *In re Ronan* [2013] IEHC 386, at para. 21, in relation to the issue of whether a receiver is entitled to arrears of rent out of the assets over which he is appointed which have accrued prior to his appointment, but which are unpaid. In *Crawford v. Lord Annaly*, at p. 529, Porter M.R. said:

> "[I]t is a principle of this Court […] that a receiver is entitled to collect and receive all arrears, subject of course to the limitation, that they are arrears of rent belonging to the estate over which he is appointed."

19. I accept, in principle, that the mere fact that certain rights and obligations survive the determination of the receivership, as explained by the judgment of the Court of Appeal for England and Wales in *Glatt v. Sinclair*, does not, in itself, mean that the right to accrued rents is established. The authority is, in my view, one for a much more limited proposition, namely that a receiver may be entitled to remuneration and expenses in bringing a receivership to an end. The right to recover expenses and remuneration does not offer a useful analogy with regard to the substantive right of the receiver to collect accrued rents.

20. I also consider it relevant that the decision of the Court of Appeal for England and Wales in *Glatt v. Sinclair* must be seen in the context of the special rules of court which operate in that jurisdiction, and in the light of the fact that there the Court was considering the effect of a court order discharging a receiver, where the receivership would not be fully wound-up merely by the making of the order.

21. In principle, therefore, it seems to me that the right to be paid or to receive remuneration or expenses is of a different nature or quality from the right to collect rents, which is a right vested in a receiver by a deed of appointment, and which may be, and is in the present case, removed from the receiver by deed of discharge.

22. It seems to me, however, that the question may more readily be answered by the words of the Deed of Discharge of 31 July 2018 itself. The receiver is not, by the Deed, expressly divested of any rights that had accrued at the date of her discharge. What is removed expressly are the duties and responsibilities of Ms O'Dwyer as receiver, not any powers that derive from the receivership. There is no assignment by her of any accrued rights, and the deed expressly identifies a time and date from which the powers, duties, and responsibilities cease to have force.

23. To that extent, it seems to me that the authority on which counsel for the Harringtons relies, *Curley v. Curley*, and the extract from Picarda, *The Law relating to Receivers*, does not offer an answer to the question for consideration in the present case. The proposition stated by Picarda is stated in the present tense, that the discharge puts an end to the right of the receiver to receive.

The effect of s. 24(3) of the Conveyancing Act 1881

24. Clause 9.5 of the charge reflects the provisions of s. 24(3) of the Conveyancing Act 1881 by which there was vested in the receiver all rights of the Harringtons to make demand for or bring action for the recovery of rent. Section 24(3) of the Conveyancing Act 1881 reads as follows:

> "The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same."

25. It seems to me that any receiver appointed on foot of the power in the charge or under the statutory power contained in s. 24(3) of the Conveyancing Act 1881 as a matter of right and deriving from the statutory and contractual power is entitled to demand and receive the rents, and in addition, to power to demand and bring action for the recovery of unpaid rents.

26. The receiver therefore by statute and under the charge has a right to receive rents and to sue for unpaid rents. The charge contains a similar right and power. It must be the case on a plain reading of the subsection and the charge that unpaid rents may be demanded as otherwise the receiver could be denied the rents on the mere happenstance that they were not paid by a tenant. The right to receive rents is express and a vested right which in my view is not lost by mere non-payment.

27. In that context, counsel for the Harringtons argues that the monies in court can no longer be described as "rent" or "arrears of rent" and I now turn to consider that proposition.

Is the money in Court to be characterised as "rent"?

28. Counsel for the Harringtons argues that, by virtue of the order made in March 2018 by which the An Post rent was to be paid into court, the money now in court may not properly be characterised as "rent" and, as a separate argument, that if the monies are to be characterised as rent, the rent is no longer in arrears. It is argued, therefore, the money paid into court was thereby earmarked with a trust and had changed its character.

29. The question then becomes the purpose and effect of the payment of money into court by An Post in the interpleader action.

30. It seems to me that, having regard to the purpose for which money was ordered to be paid into court, and indeed the very nature of the interpleader summons, the money paid into court is not to be considered to be a payment in discharge of any agreed liability. It is a payment made to avoid further litigation and to preserve the *status quo*. The primary purpose of the payment into court was to protect An Post from forfeiture or any other action that might derive from its failure to pay rent, but also to preserve the *status quo* and meet its acknowledged obligations where the identity of the person to whom the rent was owed is a matter of controversy in other litigation.

31. The money paid into court was paid and calculated on foot of rental obligations in a lease and it must, therefore, be characterised as rent, albeit the beneficial interest in the rent was not at that point in time ascertained. Once the entitlement to the rent is ascertained and the rent is paid to the person beneficially entitled thereto, the interpleader has achieved its purpose. The *status quo* and the rights and obligations of the interpleader have been preserved pending the resolution of the controversy regarding the beneficial interest in the funds.

32. Furthermore, I accept the argument made by counsel for Ms O'Dwyer that if the money in court is not to be characterised as rent, then it must be repaid to An Post with the necessary conclusion that An Post is de facto in arrears of rent, and the receiver is entitled to demand and if necessary bring action in respect of those arrears.

33. Thus, it seems to me that the receiver is correct to rely on the judgment of Laffoy J. in *In re Ronan.* There, Laffoy J. held that the appointment of a receiver carries with it the entitlement to sue for any rental arrears which might be outstanding at the date of appointment. Thus, following the appointment of Ms O'Dwyer the second Deed of Appointment, made on 8 August 2018, Ms O'Dwyer is entitled to the monies representing the payment of rent by An Post which remained unpaid to her at the date of her second appointment on 8 August 2018.

34. In the circumstances, I conclude that Ms O'Dwyer is entitled to the arrears of rent up to the date of the deed of discharge, including the monies held in court to the credit of this suit.