

**The High Court**

**Circuit Appeal**

**Record number 2012/118 CA**

**Between**

**Eugene Lacey Tarmacadam Limited**

**Plaintiff**

**And**

**Four Seasons Homes (Kilkenny) Limited**

**Defendant**

**Judgment of Mr Justice Charleton delivered on the 14th day of November 2012**

The decision of the Court on this matter was given during the Monday list earlier this week. Because a point that is likely to recur was argued, brief written reasons for that decision are now given.

The plaintiff company specialises, as its name implies, in road working. The defendant company is responsible for a housing development in county Laois. The job of constructing the roadways for that housing development was subcontracted by the defendant company to the plaintiff company. The price was in the region of €60,000. Of this, two tranches of €10,000 each have been paid. The balance remains outstanding. It was sought to be recovered by a civil bill dated 12 October 2010. On 11 April 2011, judgement was entered in the Circuit Court in Kilkenny in favour of the plaintiff company against the defendant company in the sum of €38,100. The county sheriff sought execution by way of seizure of goods, but this was unsuccessful and the order was returned marked nulla bona on 12 October 2011. The legal advisers to the plaintiff company were aware that there was some kind of bond entered into between AIB Bank PLC and the local planning authority, Laois County Council. This, it was thought, was some kind of debt that might be made subject to a garnishee order. That course was not pursued. Instead, the application made to the Circuit Court on 15 December 2011 was for the appointment of a receiver by way of equitable execution over the goods of the defendant company pursuant to Order 39 of the Rules of the Circuit Court. As the order makes clear, what was to be targeted was the bond between AIB Bank and Laois County Council. This is the operative part of the order:

That William X White be and the same is hereby appointed a receiver by way of equitable execution without the necessity of giving security and without remuneration over the proceeds of the bonds executed on the 11th day of July 2000 and the 1st day of September 2004 and entered into between the defendant Four Seasons Homes (Kilkenny) Limited, Allied Irish Banks PLC and Laois County Council in the sums of £90,000 and €100,000 respectively, which said bonds were executed in relation to planning permission reference number 98/1126 issued by Laois County Council in respect of a housing development at Rossleigh, Mountmellick Road, Portlaoise, in the County of Laois.

The background to this order is that when planning permission was granted for the housing estate in question to the defendant company as developer, conditions were attached by the planning authority. Sixty five dwellings were to be built and, as is common, a contribution was to be made by the developer to local services. In addition, for fear that the housing estate would be left unfinished, the developer, which was the defendant company, was required to enter into a bond for the due execution of the development. There were two bonds to be entered into; one in 2000 for £80,000 and the other in 2004 for €100,000. Since both of these bonds are in the same form, a brief quote from the latter will suffice:

KNOW ALL MEN BY THESE PRESENTS that WE, FOUR SEASONS HOMES (KILKENNY) LIMITED having our registered office at ... and ALLIED IRISH BANK PLC having its registered office at ... are hereby jointly and separately held and firmly bound unto LAOIS COUNTY COUNCIL ... in the full and just sum of €100,000 ... to be paid to the Council its successors or assigns for the payment of which said sum well and truly to be made and done by the Contractor [Four Seasons Homes] and the Surety [AIB Bank] bind themselves and their successors and assigns jointly and severally by the use presents...

Stripping back the archaic language, what has happened is that in pursuance of a condition in the planning permission, the defendant company as developer paid an insurance bond to AIB Bank whereby in the event that the estate was not finished, Laois County Council would have an entitlement to draw on the bond in order to finish the public areas of the estate itself. The estate was completed, I understand. Even if it was not completed, there were no circumstances under which the defendant company, as developer, would ever under this bond have an entitlement to receive back from AIB Bank either the amount of the bond or the amount of the insurance premium paid to secure sums in favour of Laois County Council. That is why a receiver by way of equitable execution cannot be appointed by court order.

In *Snell's Equity* (32nd edition) the following passage occurs at paragraph 19-028:

A receiver will not be appointed if there is no property which can be reached either in law or equity for equity does nothing in vain. Thus no receiver will be appointed to enforce rights not justiciable in England or to seize a judgement debtor's future earnings, or a patent which is not in worked in this country.

In *Kerr and Hunter on Receivers and Administrators* (18th edition) the learned editors comment to the same effect at paragraph 3-25:

A receiver cannot be appointed to receive the interests of a fund, the disposal of which is in the absolute discretion of trustees or others. It must be clearly shown that there is something payable to the defendant in such a way as to make his interest assignable. But where the judgement debtor is the sole object of a discretionary trust, it is apprehended as a receiver could always have been appointed. A receiver will not be appointed over property of no appreciable value. It has

been held, in Ireland, that a receiver will not be appointed over a gratuity which has been awarded to a public servant, before it is paid over, and the same would be the case with a gratuity which a private employer has expressed an intention to pay. A receiver will not be appointed where the effect of the appointment might be to destroy the property, though the appointment of a receiver, without powers of management, may be obtained by the incumbrancer of a business, and the goodwill thus destroyed.

Without necessarily accepting every proposition of law therein set out, the principle that a receiver should not be appointed where that appointment would be futile is supported both by modern and older authority. In *Bourne v Coldense* [1985] IRLR 339, an employment dispute, Dillon LJ stated at paragraph 23:

The appointment of a receiver by way, as it is traditionally called, of equitable execution is a form of equitable relief to enforce payment of a judgement debt which the court may grant in the special circumstances of a particular case if, as in the present case, the recovery of the judgement debt by the more usual processes of execution or attachment of debts is not practicable. The remedy is, however, discretionary and it is plain that the court would not appoint a receiver if the court was satisfied that the appointment would be fruitless because there was nothing for the receiver to get in.

In *Cohen v Ruddy* [1905] 2 IR 56 a debt was sought to be enforced through the appointment of a receiver by way of equitable execution. The money coming to the defendant, however, was not his and was merely money that he was collecting in respect of a tenancy for a head landlord. On appeal by a plaintiff, who had been refused such an order, FitzGibbon LJ commented:

It is not the practice of the King's Bench to appoint a plaintiff a receiver by way of equitable execution, unless where it is proved that all the money that can come into his hands under the execution will be the money of the defendant. Here, to the extent, at least, of the head landlord's rent, it is not the money of the defendant. The King's Bench considers that it has no machinery to control a receiver appointed by way of equitable execution, or to make them account for money to be disbursed to third parties.

While not ruling out the appointment of a receiver by way of equitable execution where there is an appropriate undertaking to properly disburse any debt that might be due to a third party, it is clear in this case that the defendant company has no entitlement ever to be paid from the bond. The entitlement is solely that of Laois County Council. Therefore the appeal from the order of the Circuit Court must be allowed.