[2020] IEHC 440

THE HIGH COURT

[2020 No. 3 FJ]

IN THE MATTER OF ARTICLE 39 OF COUNCIL REGULATION (EU) NO. 1215/2012 OF 12 DECEMBER 2012
AND IN THE MATTER OF REGULATION 4 OF THE EUROPEAN UNION (CIVIL AND COMMERCIAL JUDGMENTS) REGULATIONS 2015
AND IN THE MATTER OF ORDER 42A, RULE 23 OF THE RULES OF THE SUPERIOR COURTS 1986 (AS AMENDED)

BETWEEN

A-DATA LIMITED

APPLICANT

AND

GEORGE MCMAHON

RESPONDENT

AND

CLAIRE KELLY TRADING AS KILDARE AUDIT AND ACCOUNTANCY SERVICES (GARNISHEE)

NOTICE PARTY

JUDGMENT of Mr. Justice Meenan delivered on the 8th day of June, 2020

Background

1. On 6 December 2019, the applicant, a limited liability company, obtained judgment from the High Court in London against the respondent in the amount of £250,175.46 (the judgment).

2. Around the time at which the judgment was obtained, the applicant learned that the respondent's company had ceased trading and that it was intended that the company be liquidated. The applicant also learned that two commercial properties owned by the respondent in Dublin were on the market for sale. Having made enquiries concerning the sale of these properties and receiving no response, on 13 December 2019 the applicant obtained an interim Mareva injunction. On 17 December 2019, on consent, orders were made that the proceeds of the sale of the properties would not be dissipated, with the exception of permitting the Solicitor with carriage of the sale to transfer the proceeds to the Garnishee in her capacity as the personal insolvency practitioner for the defendant.

3. The protective certificate issued to the respondent under the Personal Insolvency Act, 2012 (the Act of 2012) was extended twice, this being the maximum number of extensions permissible. The protective certificate was due to expire on 11 May 2020. The previous Friday, 8 May 2020, the Garnishee, in her capacity as the personal insolvency practitioner acting on behalf of the respondent, held a meeting with the defendant's creditors where a proposed Personal Insolvency Arrangement was put to them. This proposed Personal Insolvency Arrangement failed to meet the requisite approval of 65% in value of the defendant's debts such that, as of 8 May 2020, it stood rejected.

Order of Garnishee

4. On 13 May 2020, the applicant applied, *ex parte*, for an order nisi attaching the proceeds of the sale of the two properties which had been sold by the respondent. The Court (Eagar J.) granted the order sought. The matter was returnable to 20 May 2020.

5. On 15 May 2020, the Garnishee sent a letter to the High Court Examiner's Office on behalf of the respondent to the effect that he was seeking to make an application for bankruptcy. The bankruptcy hearing has been listed for 15 June 2020.

6. As well as having a liability to the applicant, the respondent has a tax liability to the Revenue in the amount of €216,817.15, of which €173,561 relates to unpaid income tax for the year ended December, 2019. Arising from this tax liability, the Revenue have sought to appear and be heard in the Garnishee proceedings and rely on the provisions of O. 45, r. 5 of the Rules of the Superior Courts (RSC), which provides as follows: -

> "Whenever in proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court may order such third person to appear, and state the nature and particulars of his claim upon such debt."

7. Following a number of adjournments and an exchange of written submissions, the matter came before this Court on 3 June 2020. Counsel for the applicant, Mr. Ruadhán Ó Ciaráin BL, applied to have the order of Garnishee made absolute. This application was opposed by counsel for the Revenue, Mr. Garret Flynn BL.

Submissions of the Revenue

8. Mr. Flynn submitted that in this case, in accordance with O. 45, r. 5 of the RSC, that "*it is suggested by the garnishee that the debt sought to be attached belongs to some third person…*". In support of this, he referred to certain passages from the affidavit of the Garnishee. In the course of her affidavit, Ms. Kelly stated that the respondent had progressed his application for bankruptcy and stated "*that the preferential amount of the liability to the Revenue Commissioners was €173,561…".*

9. The Revenue relied on the discretionary nature of an application to make a Garnishee order absolute. The Court was referred to a number of authorities. In *Allied Irish Banks PLC v. McGuigan* [2018] IEHC 67, Barrett J. stated: -

> "A garnishee order allows a judgment creditor to attach a debt owed by a third party to the judgment debtor. Consequent upon such order, the third party must pay the amount owed to the judgment creditor. A commonly attached debt is the debt owed by the judgment debtor's bank to the judgment debtor under a bank account. Garnishee orders fall to be made under O.45 of the Rules of the Superior Courts… which in turn appears ultimately to derive its adoption from provision made in the Common Law Procedure Amendment Act (Ireland) 1856…"

and: -

> "Among the matters to which a judgment creditor must aver in the affidavit evidence supporting its *ex parte* application for a conditional garnishee order are that the debt to be attached does not belong to a third person and that no third person has an interest in it… The granting of a garnishee order is a discretionary matter. So even where the various necessary averments are made, the judge

before whom application is made nonetheless has the power to refuse the relief. Examples of circumstances in which a garnishee order might be refused include but are not limited to where attachment would not leave a judgment debtor enough to support herself and any dependents…"

10. Mr. Flynn also submitted that the wording of O. 45, r. 5 of the RSC should not be construed literally insofar as the word "*belongs*" must be taken to mean a proprietary interest. He submitted that the Court must have regard to the fact that the respondent is seeking to be adjudicated a bankrupt and should this occur, the Revenue would be a preferential creditor for a very significant part of the debt owed. Finally, the Revenue submitted that in making the *ex parte* application, there was not full disclosure on the part of the applicant.

Submissions of the applicant

11. Mr. Ruadhán Ó Ciaráin BL, on behalf of the applicant, maintained that the Revenue had not brought itself within the terms of O. 45, r. 5 of the RSC, in that it is not sufficient for the Revenue to show that they are another creditor but rather they must show that they have some proprietary interest in the amount of money being held by the Garnishee. Mr. Ó Ciaráin laid particular emphasis on the difference between the provisions of the Bankruptcy Act, 1988 and the Companies Act, 2014. Under s. 589(1) of the Companies Act, the winding up of a company by the court shall be deemed to have commenced at the time of the presentation of the winding-up petition, whereas there is no such similar provision in the Bankruptcy Act. What follows from this is that as the hearing of the bankruptcy application will not take place until 15 June, it follows that, as matters stand, the Revenue do not enjoy a preferential status in respect of part of the monies owed. Thus, the Revenue is a creditor that ranks the same way with other creditors. As for the provisions of the Personal Insolvency Act, 2012 (as amended), they no longer have application where, as in this case, there was a rejection of a proposed Personal Insolvency Arrangement.

12. As for what discretion the court may have in making an order of Garnishee absolute, counsel referred to the following passage from the judgment of Hogan J. in *Response Engineering Limited v. Caherconlish Treatment Plant Limited* [2011] IEHC 345, where he stated: -

> "27. 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."

13. Mr. Ó Ciaráin did accept that the making of the Garnishee order absolute would adversely impact on other creditors. However, this was not a ground for the court to exercise its discretion against the making of the order. Counsel relied on the following passage from

the judgment of Lord Goddard C.J. in *James Bibby Ltd v. Woods and Howard* [1949] 2 KB 449: -

> "Garnishee proceedings are one form of execution and, as I have said more than once in the course of the argument, it not infrequently happens that, where there are several claims, or may be several claims, against money, the person who gets in first gets the fruits of his diligence If the solicitor in the present case had applied for a charging order when he heard as he did on February 28, that the garnishee order nisi had been made, he might have got a charging order. If he had got it, his charge would have been taken precedence over the judgment creditors' claim. But when the application to make the order absolute came before the district registrar, there was no charge in existence. The so-called "lien" had not been perfected because no charging order had been made, and I think therefore that the district registrar was right, and that this appeal must be dismissed."

This passage was referred to by O'Hanlon J. in *Fitzpatrick v. DAF Sales Ltd* [1988] I.R. 464, as follows: -

> "Mr. Finnegan, while bringing this decision to the notice of the court, invited me to decline to follow it as he submitted that it was not in accordance with earlier decisions of the courts in England to which he referred. I find the judgments of the Court of Appeal in *Bibby* quite convincing, however, and see no reason why I should not follow it. It has stood the test of time during the forty odd years which have elapsed since the judgment was given."

14. The Court was also referred to the following passage from the judgment of Flaux J. in *British Arab Commercial Bank PLC and ors v. Algosaibi and Bros Co and ors* [2011] EWHC 2444 (Comm), where he stated as follows: -

> "53. I have reached the conclusion that Cooke J. was right in saying that in non-statutory insolvency regime cases, the general rule is that the principle of 'first past the post' applies…"

Flaux J. then went on to consider the discretion which a court has as to whether or not to make a final order. Though this judgment was considering the effects of s. 1 of the Charging Orders Act, 1979 and the terms of CPR 73.8 and, thus, may be of limited assistance, the Court stated: -

> "55. In my judgment, the prejudice to other creditors, such as the opposing banks in the present case, can only be said to be 'undue' if there is something about the judgment creditor's conduct which would cause undue prejudice if there were a final charging order or if there are some other exceptional circumstances, which mean that other creditors will suffer some prejudice over and above the prejudice they would inevitably suffer, if an order were made in favour of the judgment creditor."

Consideration of submissions

15. I should say, at the outset, that there is no basis to any claim that there was a lack of disclosure on the part of the applicant in making the *ex parte* application for the order of Garnishee. The application was grounded on an affidavit of Mr. Michael Hinkson, Solicitor, instructed by the applicant. This affidavit exhibited the "*Personal Insolvency Arrangement*" which clearly sets out the creditors, including the Revenue. This information was put before the Court, so in making the order of Garnishee nisi, the Court was fully aware that the applicant was not the only creditor.

16. At the time the *ex parte* application was made, the debts of the respondent were not subject to any statutory regime. The process under the Personal Insolvency Act, 2012 had ended given the fact that the proposed Personal Insolvency Arrangement had failed to achieve the requisite approval. Though the respondent had made an application to be adjudicated a bankrupt, this application is not due to be heard until 15 June 2020, and, if granted, will not relate back to the date when the application was made being 18 (or possibly 20) May 2020. This is unlike the position when a company is wound up under the Companies Act, 2014. It follows from this that, as matters stand, the Revenue is not a preferential creditor as it would become were the respondent to be adjudicated a bankrupt. Thus, in this case, the Revenue is to be treated no differently than other creditors.

17. Garnishee proceedings are a form of execution. In proceeding with an application for Garnishee, it is not necessary to put other creditors on notice. However, from the Garnishee's standpoint, it is necessary that there be a procedure to provide for a situation where the debt that is sought to be attached belongs to some other person or is subject to a lien or charge. Hence, the provisions of O. 45, r. 5 of the RSC. I am of the view that the terms "*belongs*", "*lien*" and "*charge*" used in the said rule mean that more is required than simply being another creditor to appear and be heard before a final order is made. The terms used may cover a situation where a particular creditor is a preferential creditor. If this were not the case, then the making of an order of Garnishee absolute would require putting all creditors on notice. I am of the opinion that this interpretation of O. 45, r. 5 of the RSC is the basis for what the authorities have referred to as being the principle of "*first past the post".*

18. Clearly, the attachment and payment of a debt to satisfy one creditor will prejudice others. This prejudice alone is not be sufficient to enable the Court to exercise its discretion not to make a final order. Though the respondent may be adjudicated a bankrupt in the future, which will give the Revenue a preferential status, I believe that I have to deal with this application based on the facts as they are now and not what they might be depending on what a court might decide on the bankruptcy application.

Conclusion

19. As it is the case that the Revenue do not enjoy any preferential rights in respect of the monies owed to them, I am satisfied that they do not come within the terms of O. 45, r. 5 of the RSC. It follows from this that they have not established an entitlement to be heard

on the hearing of the application to have the order of Garnishee to be made absolute. The Court will now hear the applicant’s application in this regard.