THE COURT OF APPEAL

UNAPPROVED
Court of Appeal Record Number 2018/221

Costello J.
Collins J.
Binchy J.

BETWEEN

ALLIED IRISH BANKS PLC, AIB MORTGAGE BANK AND EVERYDAY FINANCE DAC

PLAINTIFFS/ RESPONDENTS

- AND -

TIM SHEAHAN

DEFENDANT/ APPELLANT

JUDGMENT of Ms. Justice Costello delivered on the 29th day of June 2021

1. This is an appeal from the judgment and order of the High Court (O'Regan J.) of 18 April 2018 appointing a receiver by way of equitable execution over all sums due to the appellant by the Minister for Agriculture, Food and the Marine such as would satisfy a judgment debt due by the appellant to the respondents together with an order of costs in favour of the respondents against the appellant and Sheahan Farming Limited.

Background

2. The appellant is the owner of agricultural lands in County Cork comprised in Folios 6388, comprising 116.43 acres, and 12916, comprising 9.98 acres of land (together "the lands"). At various times between 2005 and 2013, the appellant borrowed monies from the

respondents pursuant to commercial loan facilities. In addition, the appellant guaranteed certain facilities advanced by the respondents to a company of which he is a director, Farmco Agri Trading Limited.

3. The appellant charged the lands in favour of the first named respondent by Deeds of Mortgage in Charge dated 13 May 1999 in respect of the lands comprised in Folio 6388, and 24 May 2005 in respect of the lands comprised in Folio 12916. Each mortgage contained a negative pledge on the part of the appellant not to convey, transfer, assign, demise or let or part with possession of the mortgaged property or any part thereof without the prior consent in writing of the bank.

4. On 13 February 2008, Mr. Sean Brennan, Relationship Manager of AIB, wrote to the appellant in relation to Folio 6388 as follows:-

> *"Further to our conversation, we do not envisage any difficulties in leasing the above land and hereby grant permission for you to do so, providing that it is for agricultural use only."*

5. The letter discloses no details of the intended lease referred to and it relates solely to the lands in Folio 6388. There was no evidence concerning the conversation referred to in the letter, nor that any lease of the lands was entered into by the appellant in 2008.

6. On 17 September 2010, the appellant and his brother, Mr. John Sheahan, incorporated a company, Sheahan Farming Limited. Mr. John Sheahan held 49 ordinary shares and the appellant held 51. They were each directors of the company and the appellant was the company secretary. The appellant and his brother entered into a shareholders agreement on 17 September 2010. At Clause 14, they agreed *"[b]oth directors agreed to lease their lands and single farm payments to Sheahan Farming Limited."* On 8 March 2011, the appellant entered into two agreements with Sheahan Farming Limited. It is appropriate to quote them in full:-

"Land Leasing Agreement

8.03.2011

I, Tim Sheahan of … agree to lease lands at Cooldurgha, Annakisha, Mallow, Co. Cork to Sheahan Farming Limited of Annakisha, Mallow, Co. Cork lands totalling 136ac for the sum of €8,000 for the remainder of year 2011. The following years rent are listed below:

2012: €40,800

2013: €40,800

2014: €40,800

2015: €40,800

Single land payments are to be claimed by Sheahan Farming Limited. The lessee, Sheehan Farming Limited, is responsible for all activities on these lands for the purpose of growing crops on these lands.

Period of Lease: 1.03.2011 – 31.08.2031

Rent Review: 1.03.2016

Every five years from lease start date.

Lease can be extended if required by lessee."

7. Thus, the appellant agreed to lease his lands to his company and the EU subsidies payable to certain farmers, referred to in the lease as "Single land payments", were to be claimed by the company, not the appellant.

8. The second agreement related to the single farm payment and provided:-

"Single farm payments agreement:

8.03.2011

1. ***Sheahan Farming Limited will claim all single farm payments in the name of Tim Sheahan***.
2. *Sheahan Farming Limited will rent, lease and provide all lands so payments will be claimed.*
3. *Tim Sheahan agrees to change address of payments from his own address to that of the company registered address.*
4. *Sheahan Farming has the use of Tim Sheahan's crop number D344C518.*
5. *Sheahan Farming undertakes to make sure all single farm payments are used and not lost.*
6. *All payments are to be mandated to Sheahan Farming bank account.*
7. *Sheahan Farming accepts that in excess of 290 ha or 720 ac more than land leased from Tim Sheahan at Cooldurgha, Mount Nagle, Annakisha must be provided to claim these entitlements.*
8. ***Tim Sheahan agrees to having no claim on the EU payments set out above for the duration of the lease***.
9. *Total entitlements: 320"*. (emphasis added)

9. The document is signed by the appellant on his own behalf and John Sheahan on behalf of the company. Consistent with the lease, the company agrees that it will claim all single farm payments *"in the name of"* the appellant.

10. Ultimately, the appellant defaulted on his obligations pursuant to both the facilities and the guarantee, and the respondents instituted proceedings for debt repayment against

the appellant on 17 July 2015. On 11 January 2016, the High Court (Noonan J.) entered judgment by consent in favour of the respondents against the appellant in the sum of €2,606,806.15. There was no order as to costs. By consent, a stay was placed on execution until 1 February 2016.

11. On 1 March 2016, after judgment had been entered by consent, the appellant and the company entered into a land leasing review. The document said that the appellant agreed:-

> *"... to review lease (sic) lands at Cooldurgha, Annakisha, Mallow, Co. Cork to Sheahan Farming Limited ... lands totalling 126 ac for the sum of €18,900 with single farm payments to be claimed by Sheahan Farming Limited. The lessee, Sheahan Farming Limited, is responsible for all activities on these lands for the purpose of growing crops on these lands."*

12. The agreement confirmed that the period of the lease was from 1 March 2011 to 31 August 2031, that payments were due by 31 October of each calendar year and that the next rent review was 1 March 2026. Thus, by this agreement the appellant fixed the rent for ten rather than five years, at an amount of less than 50% of the previous rental. The parties agreed that the company would claim the single farm payments relating to the land.

13. It is worth noting that the land leasing agreement of March 2011 was stamped on 7 July 2017, more than a year after the appellant consented to judgment and in circumstances where that judgment was largely unsatisfied, by reference to the then rent of €18,900 per annum.

14. The respondents appointed Mr. Declan Taite, of Duff & Phelps, as receiver over the lands. However, owing to access issues in respect of part of the lands, Mr. Taite has been inhibited from selling the lands and the lands have not yet been sold. There appear to be serious practical difficulties in realising the security provided for the outstanding debt. In addition to the charges over the lands, the appellant provided the respondents security over

three residential investment properties at Tinley Park, Mallow, County Cork. Mr. Taite was appointed receiver over these properties also and he collected certain rents. On day two of the hearing in the High Court, counsel for the respondents confirmed that the properties had been sold for a sum in excess of €400,000, though the net figure was not then available. It was not disputed that the judgment sum outstanding remained in the region of €2.4 million.

15. The single farm payment paid by the EU to qualifying farmers was replaced in 2015 by a new EU scheme, the Basic Payment Scheme (BPS). As with its predecessor, the scheme was administered by the Department of Agriculture, Food and the Marine. There were certain qualifying criteria, including that the applicant be an active farmer within the meaning of Regulation (EU) 1307/2013. The entitlement to receive the payment is a personal entitlement as an active farmer and the quantum is determined by reference to the number of eligible hectares, as defined, of which he is the owner or occupier under a lease or tenancy which are being used or managed by him as an active farmer. It is an income supplement rather than a payment in the nature of a wage or subsidy, as had been argued previously.

16. The respondents ascertained that in 2016 the appellant applied for and received two BPS payments for the period 16 October 2015 to 15 October 2016 in the sum of €12,439.84 and €160,742.24, making a total of €173,182.08 in relation to the lands. The respondents believed that the due date for payment of the 2017 BPS to the appellant would occur in or about October 2017. Their solicitors wrote to the Department by letter dated 13 September 2017 explaining the position and indicating their intention to apply *ex parte* for the appointment of a receiver by way of equitable execution over the monies. No reply was received to that letter.

17. On 2 October 2017, the respondents applied *ex parte* to the High Court for an order pursuant to O. 45, r. 9 of the Rules of the Superior Courts to appoint Mr. Conal Keane, of Mason Hayes & Curran, to act as receiver by way of equitable execution over such payments as were due to be received by the appellant from the Department of Agriculture, Food and the Marine under the BPS as would satisfy the judgment of the High Court of 11 January 2016. The application was grounded upon an affidavit of Ms. Madeline Murray, manager of both respondents, sworn on 18 September 2017. Having outlined the background as set out above, she averred that the monies were not amenable to the ordinary methods of execution, whether by way of garnishee order, execution of a writ of *fieri facias* or otherwise, as the monies were not then in the appellant's possession and the amount of the monies had not yet been ascertained. She confirmed that the judgment debt was not recoverable by any other means and she explained that in any given year under the BPS a prospective recipient has an entitlement to apply to the Department of Agriculture, Food and the Marine:-

> *"... to seek payments under the Basic Payment Scheme but those payments will only be granted where the application is made within the time period permitted and the terms and conditions specified in the Basic Payment Scheme complied with. In addition, the payment will not be made unless the prospective recipient meets certain qualifying criteria. Consequently, the [appellant] has no legal right to demand payment of specific sums of money under the Basic Payment Scheme and thus has no debt claim against the Department of Agriculture, Food and the Marine which is capable of been attached by an order for garnishee."*

18. The High Court duly made a conditional order appointing Mr. Keane as receiver by way of equitable execution in respect of any BPS payments to be made by the Department to the appellant.

19. The appellant filed an affidavit challenging the appointment of the receiver by way of equitable execution on the basis that the payments to be made by the Department were not due to him. He said that the application for the BPS payment was made by Sheahan Farming Limited and, as such, any payments from the Department are paid to the company. He did not refer to the fact that he had applied for the BPS entitlement in his own name in relation to the lands in both 2016 and 2017.

20. The respondents' solicitors wrote to the Department seeking clarification as to whether the appellant or Sheahan Farming Limited was entitled to the BPS entitlements in this case. On 16 November 2017, Ms. Moira Kane, of the Department of Agriculture, Food and the Marine, replied as follows:-

> *"Dear Sirs,*
>
> *We refer to your letters of 27 and 20 October and we note that Conal Keane has been appointed receiver by way of equitable execution on 2 October 2017 over future payments due to Mr. Tim Sheahan under the Basic Payment Scheme.*
>
> *We confirm that an application under the 2017 Basic Payment Scheme has been submitted by Tim Sheahan* ***in his personal capacity****. Any payments that become due under that application will be paid to the receiver under the terms of the High Court Order dated 2 October 2017."* (emphasis added)

21. There were further exchanges of affidavits between Ms. Murray, on behalf of the respondents, the appellant and Mr. John Sheahan, on behalf of Sheahan Farming Limited. The application to make absolute the appointment of a receiver by equitable execution was heard on 17 and 18 April 2018. The appellant and Sheahan Farming Limited both opposed the application. By the time the application came on for hearing, Mr. Conal Keane had left

the respondents' solicitors firm and the application was to appoint Ms. Judith Riordan as the receiver in his place. Further, by order of 11 December 2017, the High Court had ordered that the judgment sum be charged on the shares of the appellant in Sheahan Farming Limited and Farmco Agri Trading Limited. There was no opposition to confirmation of this order by the court.

The respondents' case

22. The respondent argued that the appellant applied for the BPS payment in his own name in 2016 and again in 2017. It was ultimately a matter for the Department whether he was entitled to the BPS payments he applied for. The Department held that he was, and therefore he had an interest in the BPS payment. That is the end of the matter. A private contract between the appellant and Sheahan Farming Limited does not alter this and is immaterial. Counsel referred to the decision of the Court of Appeal in *ACC Loan Management Limited v. Rickard* [2017] IECA 245, as authority for the proposition that it was possible to appoint a receiver by way of equitable execution over BPS payments such as those to be made to the appellant. It was submitted that the criteria identified in the judgment of Hedigan J. were all met in this case.

23. As to whether it was just or convenient to appoint a receiver, it was submitted that the debt due remained very large, despite a substantial reduction of the total due. There was no other obvious means by which the debt would be repaid. The monies due under the scheme are substantial. The parties whom it was alleged would be prejudiced by the appointment of the receiver are third parties who may derive some of the proceeds of the payment at a later stage based on their contracts with either the appellant or Sheahan Farming Limited. It was unlikely that Sheahan Farming Limited would cease to trade if it did not receive the BPS payments from the appellant as the BPS payments relate to 126 acres only. The evidence showed that the company leased 1,200 acres and received the

BPS entitlements payable in respect of the remaining 1,074 acres. The accounts appeared to show that it had a very high annual turnover which was not based solely on BPS payments. The fact that John Sheahan offered to purchase the shares of the appellant in the company suggests that he does not believe that the loss of the BPS payments at issue in these proceedings would be *"disastrous"* for the future of Sheahan Farming Limited. Therefore, there was no reason why it would not be just or convenient to appoint a receiver by way of equitable execution over the payments as sought by the respondents.

The appellant's defence

24. The appellant argued that the single farm payments are leased along with the lands to Sheahan Farming Limited. He said that the company is in *"receipt of the benefit of the Single Farm Payment"*. He exhibited bank statements from the company which show payments from the Department of Agriculture and Food from the years 2011-2016 which appear to represent both single farm payments and Basic Farm Payments. It is not entirely clear whether these are the single farm payments and Basic Farm Payments relevant to the lands, and this is not clarified in the affidavits. It is notable that in his affidavit of 11 October 2017, the appellant does not say who applied for the single farm payment in respect of the lands for the years 2011-2016 and he does not explain why, in accordance with the lease agreement and the single farm payment agreement, the company did not apply for the payments, if it did not. He says:-

> *"... I am not in receipt of any Single Farm Payment benefit and that Sheahan Farming Limited has been since 2011 and continues to be the beneficiary of the said Single Farm Payments. I say that the payments are paid directly by the Department of Agriculture, Food and the Marine to the account of Sheahan Farming Limited ... I say that I personally have not received any area aid benefit since the year 2010 as I have not had land available to me for drawdown. I beg to refer to confirmation from*

my accountant, Colman Dalton & Co. Ltd., dated 9 October 2017 confirming total Area Aid Payments received for the years 2011, 2014 and 2015 which amount to €628,890 and further confirming that an audit was carried out on Sheahan Farming Limited and the Revenue were satisfied that the Area Aid Payments properly belong to the company and are reflected on (sic) the company turnover/profits. … Sheahan Farming Limited farms in excess of 1,200 acres which are needed to draw down the Area Aid Payment which Sheahan Farming Limited receive. Sheahan Farming Limited also leases other farms with basic payment scheme entitlements attaching thereto. Under the current rules said entitlements must be claimed under the use it or lose it scheme. I beg to refer to a copy of Sheahan Farming Limited Profit & Loss Accounts for all years showing Single Farm Payments/Basic Payment Scheme entitlements forming part of Sheahan Farm Limited taxable income."

25. In an affidavit sworn on 11 April 2018 the appellant averred:-

"I have not farmed in my own right as a sole trader since 2010. All entitlements subsequent to this were for the benefit of Sheahan Farming. Sheahan Farming has paid all related fees and taxes since that date. Your deponent was subject to a detailed Revenue audit from 2013 to 2017 which supports the contention that I have received no direct farming income or BPS payments for my own personal benefit since 2010."

26. He confirmed that the BPS applications are made by the company itself, John Sheahan and the appellant *"all for the benefit of the company"*. He said that:-

"The BPS payments received into your deponent's account are immediately transferred to Sheahan Farming's account following receipt of same. These BPS payments are properly the property of the company. … While I accept that the payments are made in my name, the reality is that they are obtained and utilised for

the benefit of Sheahan Farming. … This arrangement is outlined in the company's Single Farm Payment Agreement dated 8 March 2011…".

27. Mr. John Sheahan swore an affidavit on 1 December 2017 on his own behalf and as a director and 49% shareholder of Sheahan Farming Limited. He averred that:-

"… it was agreed between the parties that the Single Farm Payments in respect of the land were to be claimed by the company, as the company was to be responsible for all activities on the lands for the purpose of growing crops. I say that the company does not have its own tillage number, pursuant to which it could directly claim payments from the Department of the Marine, Agriculture and Food (sic), and therefore it leased the use of the defendant's tillage number, along with the lands."

This appears to be inconsistent with the appellant's statement that he himself, Mr. John Sheahan, and the company each applied for single farm payments in respect of land from the Department.

28. Mr. John Sheahan continued in his affidavit to state that:-

"… the Single Farm Payment and other payments from the Department in the [appellant's] name are paid directly into the bank account of the company by the Department of Agriculture, Food and the Marine and have been since 2011."

He also averred that further payments in his name are paid into the bank account of the appellant by the Department and thereafter immediately transferred to the company bank account by the appellant for the company's use.

29. Mr. John Sheahan said that the company operates a tillage farming business and that it was essential that it was in funds to rent lands during the winter months for winter cereals. He averred that if the respondents were allowed *"to Garnish (sic) the payments sought"*, it would have *"disastrous consequences"* for the company and that the payments are payable to the company and not to the appellant.

30. The appellant offered no explanation as to why payments which are alleged to have been the property of the company and/or John Sheahan were made by the Department to the appellant. Furthermore, no explanation was given as to why the Department's records confirm that an application under the scheme was made by the appellant in his name in 2017. Neither does he explain why he did not refer to this fact in his first affidavit.

31. The appointment of a receiver by way of equitable execution was opposed on four grounds. Firstly, that the appellant had no, or no sufficient, interest in the BPS entitlement as it belonged to Sheahan Farming Limited and not to the appellant; secondly, that EU payments of this nature should not be subject to orders of garnishee and, by analogy, to orders appointing receivers by way of equitable execution, and; thirdly, the appellant denied that there was any breach of the negative pledge clause in the two mortgage deeds by reference to the letter of 13 February 2008, which he said satisfied the condition that there be written consent in writing from the first named respondent prior to the grant of any lease of the secured land. This latter point was not pursued by the respondents at the hearing. Fourthly, it was argued that the court should exercise its discretion to refuse the order sought because of the serious implications of the order to Sheahan Farming Limited, and the knock-on implications for the payment by Sheahan Farming Limited of €400 per fortnight to Mr. John Sheahan and to Farmco Agri Trading Limited.

32. At the hearing in the High Court, counsel on behalf of the appellant accepted that the court can as a matter of principle grant an order in relation to the BPS payment, thereby conceding the second ground upon which the appointment was opposed. In oral submissions, counsel on behalf of the appellant accepted that the appellant had made the application in his personal capacity and that a decision was made by personnel in the Department that the appellant was entitled to the payment. It was argued that the relief sought was an equitable relief and that the court must determine whether any order is just

and convenient. The court should look at the second step, which is whether the payments ultimately end up with the company and they are applied by the company. Counsel submitted that the court should look at the totality of the situation and the reality of the situation.

Decision of the High Court

33. The trial judge emphasised the letter from the Department of Agriculture, Food and the Marine dated 16 November 2017 which stated that the application for the funding for 2017 had been made by the appellant in his personal capacity. She was of the view that the company would have been perfectly capable of applying for the relevant payments had it been entitled to do so and had the funds apparently belonged to it. She emphasised that the appellant gave no adequate explanation as to why this did not occur and she said that the fact that the Department considered these payments to be the appellant's payment *"speaks volumes"*. She held that BPS payments did not enjoy a specially protected position, such as that of a family home, which would prevent her from making the order sought. She noted that in *ACC Loan Management v. Rickard* [2017] IECA 245, the Court of Appeal held that it is possible to appoint a receiver by way of equitable execution over payments effectively emanating from the EU and being distributed by the Department of Agriculture, Food and the Marine. She held that it was open to her to appoint a receiver in the circumstances. She held that the funds would be paid to the beneficiary of the entitlement as required by Article 11 of Regulation (EU) 1306/2013 as there is no difference between the appellant receiving the monies and paying them to the company and the Department paying them to the respondents on behalf of the appellant in part satisfaction of his judgment debt.

34. When considering whether or not to exercise her discretion to make the appointment absolute, she noted that the prejudice identified in the affidavits was in fact that of Mr.

John Sheahan. He was paid €400 a fortnight by the company and, it was alleged, if the company experienced financial difficulties by reason of the non-receipt of the BPS entitlements in respect of the lands, then these payments to Mr. John Sheahan would be in jeopardy. She held that in the absence of any evidence regarding Mr. John Sheahan's assets and liabilities or his qualifications to secure other employment, she could not determine that the deprivation of €400 on a periodical basis was such as to justify the court in exercising its discretion to refuse to confirm the appointment of the receiver by way of equitable execution. She pointed to the fact that Mr. John Sheahan had offered to buy the appellant's shares in the company in response to the order charging the shares in both companies as suggesting that he was *"not without some funding to do so"*.

The appeal

35. The appellant filed his notice of appeal as a litigant in person. He argued that the trial judge erred in refusing to grant a stay on her order and in refusing to recognise and uphold a private contract, *i.e.* the lease agreement entered into between the appellant and Sheahan Farming Limited. He referred to the fact that the respondents had denied that they consented to the lease and referred to the letter of February 2008. He pleaded that the court was obliged to uphold the agreement in circumstances where, according to the appellant, the respondents later admitted that the consent necessary for the appellant to lease the lands to Sheahan Farming Limited had been granted by the respondents. He argued that in those circumstances the court should have been aware that the monies were not those of the appellant but the monies of Sheahan Farming Limited, and the court could not make the order appointing a receiver by way of equitable execution in those circumstances. He argued that, as a result of the order, he has been placed in breach of his lease agreement with Sheahan Farming Limited. He pleaded that the company were *"the*

contractual and beneficial owners of the monies … and the Court did not protect the beneficiary's legal rights in this regard".

36. In his written submissions, he argued that he was not the beneficial owner of the payments because of the agreement he had entered into with Sheahan Farming Limited. The monies formed part of the lease agreement. The monies were paid directly by the Department to Sheahan Farming Limited *"on foot of the provisions of the aforementioned lease agreement"*. His core point was that the *"salient point in contention"* between the parties was simply whether the lease entered into between the appellant and the company was valid or not. If the lease was a valid lease, then the provisions should have been applied by the court. He submitted that the provisions of the lease agreement meant that the monies were not his, but rightfully belonged to Sheahan Farming Limited.

37. In his oral submissions, he elaborated on this argument. He said that he never claimed that he had no interest in the payments and that the monies were his to deal with as he saw fit. He asserted that he was free to lease them to his company and that the court should uphold his contract with Sheahan Farming Limited. In addition, he argued, somewhat inconsistently with his first submission, that he did not qualify for payment under the scheme as he was not an active farmer of the lands within the meaning of the regulation. This, he said, showed that it was the company rather than he who was *"beneficially"* entitled to the BPS payment. He did not explain why, if this was so, he applied for the payments in 2016 and 2017, and the Department accepted the applications in his personal capacity.

Analysis

38. There is a single issue in this appeal (the second issue was not advanced on the appeal); namely, whether, by reason of the alleged lease agreement between the appellant and Sheahan Farming Limited, the monies at issue were the property of the company and

not the property of the appellant. Before considering the substance of this argument it is important to note that, though the validity of the lease and whether it was binding on the respondents was raised in their affidavits, the issue, in fact, was not pursued. Both counsel described it as *"something of a red herring"*. It was submitted by the respondents that the court did not have to decide whether the lease was valid or invalid as the payments were due to the appellant who was the applicant for the BPS. The trial judge observed that while the issue of the lease had been in the case, *"it's no longer in the mix before me"*. In her judgment, she made no determination whether the lease was valid or invalid and accepted that it was not a matter for her to resolve in the proceedings before her. Her decision was not based upon the validity or otherwise of the lease. At the outset of the appeal, counsel for the respondents made it clear that, for the purposes of the appeal, they were not asking the court to find that the lease was invalid.

39. It follows that the primary ground of appeal is not addressed to the validity of the decision of the High Court and, even if this court were to uphold the validity of the lease, this could not lead to a reversal of the decision for this very reason.

40. Furthermore, the appellant seeks to argue a point which was not pursued by the respondent in the High Court, or on appeal, and which his counsel submitted was not relevant in the court below and which did not form the basis of the decision of the trial judge. It is not open to a litigant to pursue on appeal an issue which was expressly agreed by both parties was irrelevant to the resolution of the case and thus which was not pursued. (*Lough Swilly Shellfish Growers Co-op Society Ltd v. Bradley* [2013] IESC 16, [2013] 1 I.R. 227, para. 28). The appellant did not argue that the lease was valid and therefore the company was beneficially entitled to the BPS, as he now asserts. That, too, is sufficient to dispose of the appeal.

41. Nonetheless it may be of some benefit to explain why counsel for both the appellant and the respondents in the High Court, and the trial judge, were correct in their assessment of the relevance of the lease of March 2011.

42. The starting point is that there is an unsatisfied judgment due by the appellant to the respondents. The respondents have endeavoured to execute the judgment, but a sum in the order of €2.4m. remains outstanding more than five years after the appellant consented to judgment in the sum of €2,606,806.15. One means of recovery of a judgment is the appointment of a receiver by way of equitable execution. This is provided for in s. 28(8) of the Supreme Court of Judicature (Ireland) Act 1877 (as applied by s. 8(2) of the Courts (Supplemental Provisions) Act 1961) which provides:-

> *"A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just …".*

43. The provision is repeated in almost identical terms in O. 50, r. 6(1) and (2) of the Rules of the Superior Courts. Order 45, r. 9 deals specifically with the appointment of receivers by way of equitable execution. It provides:-

> *"In every case in which an application is made for the appointment of a receiver by way of equitable execution, the Court in determining whether it is just or convenient that such appointment should be made shall have regard to the amount of the debt claimed by the applicant, to the amount which may probably be obtained by the receiver, and to the probable costs of his appointment, and may, if it shall so think fit, direct any inquiries on these or other matters, before making the appointment. The order shall be made upon such terms as the Court may direct."*

44. In *ACC Loan Management Ltd. v. Rickard* [2017] IECA 245, the Court of Appeal considered whether the court had jurisdiction to appoint a receiver by way of equitable execution over legal, as distinct from equitable, interests in property, and whether a receiver may be appointed to receive further sums to which the appellant may become entitled pursuant to the BPS, which is also at issue in these proceedings. Concurring judgments were given by Finlay Geoghegan and Hedigan JJ.. Finlay Geoghegan J. held that having regard to the breadth of jurisdiction given to the court by s. 28(8) of the Act of 1877, there was no reason in principle why an order for the appointment of a receiver by way of equitable execution should not be made in respect of legal as well as equitable interests in property. The core principle remains that the appointment is not execution as such, but rather appointment of a receiver in aid of execution where, owing to the nature of the property or other hindrance, execution against the property is not available at law by one of the existing methods of execution, such as the execution of the writ of *fieri facias* or by an order of garnishee. Finlay Geoghegan J. held that the payments to be made to the appellant in the *Rickard* case under the BPS were not in the nature of salaries, wages or earnings and thus there was no prohibition on the court, as a matter of policy, appointing a receiver. She held that the BPS payment is an income supplement, the amount of which is determined by the number of eligible hectares declared. She held that a receiver may be appointed to receive a future debt or sum which may become due to the appellant pursuant to his existing legal right in the sense of a legal *chose in action* to receive payments under the BPS. She held there was no reason in principle why the court should not exercise the power to appoint a receiver by way of equitable execution over future receipts from a defined asset.

45. Hedigan J. identified the principles to be distilled from the relevant authorities as follows:-

"37. From this review of the relevant authorities, it seems to me that the following principles should guide the courts in determining upon the appointment of a receiver by way of equitable execution;

(a) The court has jurisdiction to appoint a receiver to receive future debts as well as debts due or accruing.

(b) A receiver may not be appointed over future wages or salary.

(c) The court must consider whether it is just and convenient to do so. In this respect, the court should have regard to the amount of the debt, the amount that may probably be obtained by the receiver and the costs of the appointment of a receiver.

(d) Are there special circumstances in the particular case that make the usual process of execution or attachment unavailable?

(e) Is there some hindrance arising from the nature of the property which prevents the judgment creditor from obtaining execution at law which the appointment of a receiver can overcome?

(f) There should be no way of getting at the fund other than by the appointment of a receiver.

(g) It is not execution that is granted but equitable relief where there is no remedy by execution at law.

(h) The remedy is discretionary."

46. He applied each of the criteria to the facts in *Rickard* and held that all of the conditions required for the appointment of a receiver by way of equitable execution over the BPS payments that may be made to the appellant were met in that case.

47. *ACC Loan Management Limited v. Rickard* was appealed to the Supreme Court and its decision was given on 9 May 2019 ([2019] IESC 29). The court rejected the appeal and upheld the judgments of the Court of Appeal. MacMenamin J. rejected the proposition that

the BPS payment was akin to a salary for work done. He also rejected the argument that a receiver by way of equitable execution could not be appointed over a legal interest or over a future payment. He held that the question comes down to whether the chose in action which the appellant holds is sufficiently clear, or *"choate"*, so as to allow for the appointment of a receiver. He was satisfied in the instant case that the appointment was warranted and justifiable. At para. 84 he held:-

> *"84. The end point of the discussion returns to the starting point: the meaning of two words. I wish to re-emphasise, however, that what will be determined as being 'just or convenient' in any one case remains a matter for a court to determine on the facts of each case. Like the courts in the latter half of the 19th Century, the courts now must be vigilant to ensure that the position of a judgment debtor is not rendered unsustainable by the making of such an order. That is a matter for judgment in each individual case. An onus will, therefore, lie upon a judgment-debtor to place full and candid evidence before the Court as to the effect which the appointment of a receiver will have upon him or her. It is an "evidence based" approach. A court will then be placed in a situation to determine whether or not a receiver should be appointed. "Convenience" cannot be subservient to justice. No evidence has been placed before the Court in this case that, in the sense of the provision and the Rules, the appointment would be "unjust". I would, therefore, uphold the judgments of the Court of Appeal, on the grounds set out in this judgment."*

48. At para. 79 of his judgment, he held that one of the factors to which a court must have *"significant regard"* is whether the appointment would have a prejudicial effect on third parties, or their interests, and these must be *"sufficiently well defined"* by reference to evidence of the prejudice asserted.

49. It is thus clear that, as a matter of law, it is permissible to appoint a receiver by way of equitable execution to a payment to be made to an applicant for a BPS payment, such as is in issue in these proceedings. It was accepted by the applicant that he applied in his own name for the BPS payment in 2017. The Department of Agriculture, Food and the Marine acknowledged that he is the party entitled to the relevant payment in respect of the lands. It follows, applying the decision in *Rickard*, that it was open to the High Court to appoint a receiver in respect of the payments to be made to the appellant.

50. The appellant argued that his agreement to lease the single farm payment, which has now been replaced by the BPS, to Sheahan Farming Limited alters this proposition. He said he has no entitlement to the monies; they belong to the company. But this submission is incorrect and reflects a misunderstanding of the effect of the lease of the lands to Sheahan Farming Limited.

51. The appellant agreed to *lease* the payments to Sheahan Farming Limited. He could only do so if he had an entitlement to receive the payments in the first place. The very fact of purporting to lease the payments to the company acknowledges that he has good title to the payments in the first instance.

52. Secondly, the Department accepted his application in both 2016 and 2017 in his personal capacity. The Department administers the scheme on behalf of the EU in the state and it determined that the appellant was entitled to the BPS payments for those years. Having applied for them in his personal capacity, he cannot now be heard to argue that he in fact has no entitlement in his personal capacity.

53. Thirdly, his obligations to the company under the lease are contractual. There is no basis upon which he can be said to hold the monies in trust for his company. There was no assignment of the BPS payments due to him to the company. The obligation under the lease to pay the company the BPS payments he receives in any given year is a *debt* he

owes to the company. So too is his obligation to the respondents. The mere existence of contractual obligations by a judgment debtor to a third party does not mean that it is not open to a court to appoint a receiver by way of equitable execution in respect of monies due to the judgment debtor which he had *"ear marked"* to pay a different creditor.

54. It follows that the appellant had an interest in the BPS payments to be made by the Department in respect of which the court could appoint a receiver by way of equitable execution and the obligation of the appellant to pay the monies to Sheahan Farming Limited, in accordance with the lease, did not alter this fact. For this reason, the issue of whether or not the lease was granted in breach of the negative pledge clause, and thus not binding on the respondents, is, as counsel agreed, a red herring. The issue was whether the appellant had sufficient interest in the BPS payment to be made by the Department and, for the reasons I have given, this was undoubtedly so.

55. This disposes of the substantive issue in the appeal.

56. The only remaining issue is whether, in the exercise of her discretion, the trial judge ought to have refused to appoint the receiver in the circumstances of the case. While the appellant did not raise this point in his appeal directly, it may be considered to arise indirectly from his submissions to the court.

57. When the court considers whether it is just and convenient to appoint a receiver, the court should have regard to the amount of the debt, the amount that may probably be obtained by the receiver and the costs of the appointment of a receiver. In this case, the debt is in excess of €2m., possibly in the region of €2.4m. Counsel informed the court that the Department paid the bank the sum of €154,000 in April 2018 in accordance with the order of the High Court, but that no further payments had been received, suggesting that someone other than the appellant has since applied for the BPS payments in respect of the lands. There was no evidence as to the costs of the appointment of a receiver, though

clearly these would be modest in comparison to the probable recovery to be made by the receiver.

58. The respondents have already exhausted the processes of execution in respect of other secured properties. Ms. Murray explained the significant practical difficulties in realising the principal security for these borrowings, and this was not contested by the appellant or Sheahan Farming Limited. Further, given the nature of the BPS payment, there are no means of execution against the BPS payments available to the respondents, so the appointment of a receiver by way of equitable execution is appropriate in the circumstances. While the respondents obtained charging orders over the shares of the appellant in Sheahan Farming Limited and Farmco Agri Trading Limited, there was no information before the court as to sums thereby likely to be realised in satisfaction of the respondents' judgment.

59. MacMenamin J. made clear in *Rickard* that the onus lies upon the judgment debtor to place *"full and candid evidence before the Court as to the effect which the appointment of a receiver will have upon him or her."* It is an *"evidence based"* approach. The appellant did not make the case that he personally would suffer undue hardship if the receiver's appointment was made absolute. This is consistent with his position that the monies are ultimately, beneficially owned by Sheahan Farming Limited. His argument was that Sheahan Farming Limited would suffer *"disastrously"*. It was also argued that, by reason of a shortfall of receipts by Sheahan Farming Limited that, by implication, Sheahan Farming Limited would not be able to pay the bi-weekly salary of €400 to Mr. John Sheahan. It was also argued that it would impact upon the fortunes of the related company, Farmco Agri Trading Limited.

60. In the exercise of her discretion, the trial judge found that the extent of the liability was undisputed and that the appellant had provided no evidence to show that the effect of

appointing a receiver by way of equitable execution over the monies would be unjust or disproportionate. Insofar as it is alleged that the order would have disastrous consequences for the company, the lands comprise 126 acres and the payment is by reference to these lands. It is uncontested that the company farms 1,200 acres. It is not explained why depriving the company of these monies could have such disastrous consequences. The company might not be able to pay the rent due to the appellant in respect of the lands which he has leased, but this could hardly be a ground for refusing the respondents the relief they sought. There was a suggestion that the salary payments due to Mr. John Sheahan might be in jeopardy and other rents due to other lessors, but this was not substantiated in evidence and it was not referred to in either written or oral submissions on the appeal as might be expected had it resulted in the hardship that had been apprehended. It is worth adding that no further monies in respect of the intervening years were paid by the Department to the bank which leads to the inference that another party, presumably the company, is in receipt of the relevant payments.

61. Mr. John Sheahan does not aver that the company would not be able to pay him his salary if the order were made, though he does say that the company requires the BPS payment which the appellant applied for in order to discharge the rents due in respect of the lands leased by the company which amounted to €125,600. He does not explain how much, if any, of that sum is due in respect of his or the appellant's lands.

62. The appellant avers in his affidavit of 11 April 2018:-

> *"... The reality is that Sheahan Farming and Farmco are entirely interdependent companies, in that they share facilities, equipment and labour. Sheahan Farming supplies the majority of grain sold as feed by Farmco. In turn, Farmco provides chemicals to Sheahan Farming in order to help produce the company's crop.*

In the event that Sheahan Farming is deprived of the benefit of the substantial BPS payments which are transferred directly from your deponent's account, it will be extremely difficult for the company to continue to trade. This, in turn, will make it extremely difficult for Farmco to continue to trade, having regard to the symbiotic relationship between the two entities. Consequently, both Mr. John Sheahan and I would be deprived of our principal source of income."

63. I am satisfied, based on the evidence in the affidavits filed on behalf of the appellant and Sheahan Farming Limited, that no evidence has been adduced which would lead to the conclusion that the appointment of the receiver by way of equitable execution was neither just nor convenient in the circumstances of this case.

64. While the appellant appealed the refusal of the High Court to stay her order, neither in his written nor his oral submissions to the court addressed this argument. In the circumstances, where he had consented to a very substantial judgment in favour of the respondents, and it was clearly established that there was little prospect of recovering the monies due on foot of that judgment by other means, I am satisfied that it was within the trial judge's discretion to refuse a stay on her order in the circumstances of this case.

Conclusions

65. In 2017, in his personal capacity, the appellant applied to the Department of Agriculture, Food and the Marine for payment under the Basic Payment Scheme in respect of the lands. The Department confirmed that it intended to make the payment to the appellant. It clearly took the view that the appellant was the person entitled to the BPS payments in respect of the lands for 2017. As a matter of principle, it was and is open to the court to appoint a receiver by way of equitable execution over the BPS payments where it is just or convenient so to do. The onus lies on a judgment debtor to establish, by

reference to evidence, that it would not be just or convenient to appoint a receiver. The appellant did not do so.

66. The fact that the appellant had leased his lands and leased the BPS payment to his company, Sheahan Farming Limited, did not mean that he had no interest in the BPS payment, nor that a receiver could not be appointed in respect of the payment. His contractual obligation under the lease was no bar to such an appointment. The court was not required to refrain from appointing a receiver over the monies in order to allow the appellant to fulfil his contractual obligations to Sheahan Farming Limited, or to avoid unsubstantiated prejudice to third parties.

67. For these reasons, I would dismiss this appeal.

68. As this judgment is being delivered electronically, my provisional view is that the costs of the appeal should follow the event and that the appellant should pay the costs of the respondents, to be adjudicated in default of agreement. If any party wishes to contend that a different order as to costs should be made, they may, within fourteen days of the delivery of this judgment, contact the Office of the Court of Appeal and request a short oral hearing at which submissions will be made by each side in relation to the appropriate order for costs. Parties should note that in the event that they are unsuccessful in altering the provisional order for costs which I have indicated, that they may be required to pay the costs of the additional hearing.

69. Collins and Binchy JJ. have read and approved this judgment.