

THE HIGH COURT

[2023] IEHC 703

[Record No. 2013/3049S]

BETWEEN

MARK MCGUINNESS

PLAINTIFF

AND

AIDAN MCGUINNESS

DEFENDANT

AND

ADRIAN GREANEY

NOTICE PARTY

JUDGMENT of Ms Justice Bolger delivered on the 8th day of December 2023.

1. The plaintiff has applied to make absolute a conditional garnishee order made by this court on 25 January 2021 in proceedings against the defendant who is the plaintiff's father. By order of 27 July 2023 the notice party was permitted to appear to set out the nature and particulars of his claim against the defendant.

Background

2. There is a difficult and protracted background to these proceedings including separate litigation in which the defendant has made a number of allegations against the notice party and against the solicitor whose firm is named by the plaintiff as the garnishee. Claims have been brought by the defendant against the notice party, one of which was struck out by this court with a costs order against the defendant. The defendant has also brought separate proceedings relating to the commercial transaction which gave rise to the debt which is the subject matter of these garnishee proceedings, in which two cost orders were made against the defendant. The plaintiff in these garnishee proceedings accepts that those costs orders have to be deducted from the monies due to the defendant that he wishes to garnishee. That leaves a balance of approximately €178,000 potentially available for distribution to the defendant.

3. The monies arise from the implementation of terms of settlement of 20 February 2019 pursuant to which a substantial property was to be sold and 25% of the net proceeds paid to the defendant. It was an express term of that settlement that the net proceeds of sale were to be held on trust by a named co-owner of the property who was to distribute them as soon as practicable following the completion of the sale. The solicitor's firm, named as the garnishee in the within proceedings, had carriage of sale of the property but were not a party to the terms of settlement. The monies are currently in their client account.

4. Entirely separate to the sale of the property and litigation in relation to it, the notice party is a former solicitor of the defendant who says he is owed monies arising from work done for the defendant in relation to 2013 proceedings. The defendant disputes any monies are owed because those costs have not yet been adjudicated upon. The notice party says the delay in adjudication is because the defendant issued professional negligence proceedings against him, on the same day as the plaintiff issued his proceedings for the debt of which he now seeks payment by way of the garnishee order. The notice party says the professional negligence proceedings against him are devoid of merit and were issued solely to delay adjudication of his costs. Those adjudication proceedings currently stand adjourned since 6 January 2021.

Ex parte application

5. The plaintiff made an *ex parte* application to this court on 11 January 2021 seeking a conditional garnishee order. The notice of motion seeks an order over the proceeds of sale "*due to the Defendant as held by the solicitors with carriage of sale*". The affidavit grounding the application refers to a letter of 10 December 2020 sent by the principal of that solicitor's firm to the defendant confirming that the sale had concluded. The defendant wrote back to that solicitor by letter dated 15 December 2020 asking her to lodge his net proceeds of sale with a solicitor to be nominated by his son (the plaintiff in these proceedings) and said if she did not provide that undertaking within seven days, that the "*appropriate injunction proceedings will be issued*". The letter also referred to what the defendant claimed were unaccounted monies and to his intention, if necessary, to bring the matter to the attention of the President of the High Court. The defendant wrote again on 20 December 2020 in which he said he was giving an undertaking to lodge his net proceeds of sale with his son. The plaintiff swore in his grounding affidavit that the solicitor's firm "*is indebted to the Defendant in respect of a debt that was incurred with the jurisdiction of this Honourable Court.*"

6. Following on the making of the garnishee order, the principal of the solicitor's firm named as garnishee therein (hereinafter referred to as 'the named garnishee') swore an affidavit in which

she said that the firm was not "*a person indebted*" to the defendant for any amount and confirmed that the monies remained in the firm's client account to the benefit of the estate of one of the co-owners of the property. Her averment that the firm was not a person indebted to the defendant was not denied by the plaintiff when he responded to the replying affidavit, although he did criticise the named garnishee for not making that objection in open correspondence on receipt of the conditional order of garnishee. He condemned the solicitor's objection as "*an attempt to muddy the waters.*" The solicitor swore a further affidavit in which she stated the estate of the co-owner to the property had "*not consented to releasing any monies from any solicitor firm to Mr Mark McGuinness or any other 'partner'*" in circumstances where satisfactory books and accounts had not been provided to show where monies already received were dissipated.

7. The notice party stated on affidavit that those proceedings are an abuse of process to enable the defendant shield his assets from the notice party's reach. The defendant's response in his affidavit of 26 April 2023 was to make allegations of wrongdoing against the notice party and against the solicitor acting in the sale of the property (which allegations were denied on affidavit by both solicitors) but he did not address the notice party's allegations of an abuse of process. The plaintiff also responded by affidavit denying the allegations of abuse of process made against him and said the dispute between the notice party and the defendant were nothing to do with him. There were many other matters raised and discussed in the affidavits which are not necessary to recount here. Suffice to say that there is a history of serious difficulties between the defendant and the principal of the named garnishee firm of solicitors and the defendant and the notice party and a close relationship between the plaintiff and the defendant, which was not disputed at hearing.

8. The defendant, in written submissions to this court, asserted that the notice party's particulars of debt were not proven and that the notice party was not entitled to be joined to the garnishee proceedings. The defendant had previously offered to lodge the sum of €24,000 with the court or to a solicitor nominated by the court, but this had not happened as he said he had been waiting to hear back about it. He did not take any proactive steps to activate his offer made to this court prior to the matter being listed for hearing before me.

Order 45: Proofs

9. There are a number of proofs which a plaintiff must satisfy in order to secure an attachment of a debt pursuant to O. 45. They must establish that they have obtained a judgment or order for the recovery of money and they or their solicitor must state on affidavit, *inter alia*, that any other

person is indebted to the debtor. The court then has a discretion to order that the debts owing or accruing to the third person or to the debtor shall be attached to answer the judgment.

10. The plaintiff has proved the existence of a judgment in his favour. The existence of a debt owing or accruing was challenged by the named garnishee and the notice party because the application was brought before the monies from the sale had been realised. Having regard to the decision of Hanna J. in *Ballinrobe Credit Union Ltd. v. Nicola O'Neill* [2016] IEHC 230, I find that the monies that were expected to accrue from the sale of the property at the time of the *ex parte* application, were an accruing debt similar to the department grant in that decision "*being a debt not actually payable at the time of the garnishee application but a debt representing an existing obligation*" (at para. 19).

11. The remaining challenge is whether the named garnishee is or was a person indebted to the defendant. The plaintiff swore an affidavit asserting that the court make a conditional garnishee order on the basis that they were. However the named garnishee and the notice party said the court was misled at the *ex parte* application (at which time the plaintiff was represented by different solicitor and counsel from those who appeared at the hearing before me).

12. The named garnishee disputed, on affidavit, that they were indebted to the defendant. That was not disputed by the plaintiff although he criticised them for not raising the issue in correspondence. I do not understand the significance of whether the issue was addressed in correspondence or not. Proving that the person the plaintiff asked the court, in an *ex parte* application, to name as garnishee was indebted to the defendant, was and remains an essential proof. The court clearly accepted the plaintiff's sworn averment that the named garnishee was indebted to him. That averment is now denied by the named garnishee. The plaintiff does not challenge that and indeed the plaintiff's counsel confirmed to me that he does not stand over the original averment, although he disputed its central significance to his client's entitlement to an absolute order.

13. The named garnishee also stated on affidavit (of 12 September 2023) that the entity named as garnishee is not a legal entity. That has not been disputed.

14. The named garnishee was never and could never have been indebted to the defendant in respect of the monies which the plaintiff now seeks to attach. In *Kier Regional Limited (t/a Wallis) v. City & General (Holborn) Limited* [2009] B.L.R. 90 at p. 97, Coulson J. stated,

“the fundamental requirement, before any final third party debt order can be made, is that the relationship of creditor and debtor must exist between the judgment debtor and the third party respectively. There must be money due to the judgment debtor from the third party.”

In the within case, the essential relationship of creditor and debtor between the defendant and named garnishee does not and never did exist. In an absence of an express agreement that the named garnishee were to be liable to the defendant, then the general rule as espoused by Wright J. in *Montgomerie v. UK Mutual SS Assn Limited* [1891] 1 Q.B. 370 at p. 371, must apply.

“There is no doubt whatever (sic) as to the general rule as regards an agent, that where a person contracts as agent for a principal, the contract is the contract of the principal, and not that of the agent; and, prima facie, at common law the only person who may sue is the principal, and the only person who can be sued is the principal.”

In the within case, the named garnishee was acting as an agent on behalf of a disclosed principal and cannot be viewed as having ever been liable to the defendant.

15. The plaintiff seeks to rely on the decision of the Court of Appeal in *Philip Keane v. Dermot McGann Groundworks Limited* [2021] IECA 192 as authority for the proposition that a conditional order of garnishee can be named against a number of parties including, as occurred in that case, an insurance broker. I distinguish that decision on its facts as the debt in question arose from a settlement between the defendant and a broker and the underwriter in circumstances where the broker made it clear to the court that they simply wanted to pay the money they had agreed to pay pursuant to the terms of settlement to the defendant solicitors (as set out at para. 11 of Binchy J.’s judgment).

Exercise of discretion

16. The background to the issuing of this application, the nature of the relationship and arrangements between the plaintiff and the defendant particularly in relation to the close proximity of the issuing of the judgment proceedings and these proceedings at a time when the notice party was trying to secure payments of his costs, alongside the defendant’s attempts to adjourn the adjudication process of those costs and the professional negligence proceedings, all combine to establish what I would consider to be the type of special circumstances that Hogan J. said in *Response Engineering Limited v. Caherconlish Treatment Plant Limited* [2011] IEHC 345 would be required for the court to exercise its discretion to decline to make an order: -

“[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."

17. In *Roberts Petroleum Limited v. Kenny Limited* [1982] 1 W.L.R. 301, Lord Brandon (at p. 307) set out a list of principles to be applied by a court in deciding whether to make a conditional garnishee order absolute including, at (5):

"The court should so exercise its discretion as to do equity, so far as possible, to all the various parties involved, that is to say the judgment creditor, the judgment debtor, and all other unsecured creditors."

Lord Brandon's decision was later overruled by the House of Lords [1983] 2 W.L.R. 305 but not in a manner that undid this principle.

18. The notice party says he is a creditor even though his costs have not yet been adjudicated upon. While the defendant disputes any liability for those costs, he had offered to lodge a sum of money into the court to meet them. The notice party is one of the parties involved to whom the court should seek to do equity in exercising its discretion whether to make the conditional garnishee order absolute.

Conclusions

19. The plaintiff has failed to establish an essential proof *i.e.*, that the entity that he chose to name as the garnishee is indebted to the defendant. Neither is it a legal entity. That, combined with the circumstances surrounding the notice party's situation, renders it appropriate for me to exercise my discretion against making the conditional garnishee order absolute.

Indicative view on costs

20. The defendant is a lay litigant and has not incurred legal costs. He and the plaintiff, his son, clearly enjoy a close relationship and in all the circumstances my indicative view is that there should be no order for costs between them.

21. The notice party's involvement in these proceedings was complicated by the attitude adopted by the defendant who took a strong view that all the monies due to him from the net proceeds of sale, belong to his son. Whilst the plaintiff also disputed the notice party's assertion of an entitlement to some of those monies, he did so in a more appropriate manner.

22. The defendant adopted what I consider to have been an inappropriate approach toward the named garnishee, even though he asserted during the hearing that his participation in the proceedings was limited to opposing the notice party's application. He has made inappropriate and at times, bizarre, allegations against the named garnishee including claiming collusion between the principal of the firm, the notice party and counsel (in particular at paras. 21 and 22 of his affidavit of 5 April 2023 which he reiterated at para. 4 of his affidavit of 26 April 2023).

23. Having regard to the defendant's conduct in these proceedings towards the notice party and the named garnishee, my indicative view on costs in accordance with s.169 of the Legal Services Regulatory Act 2015 is that the defendant should pay the full costs of the named garnishee and half the costs of the notice party.

24. I will put the matter in for mention before me on 19 December 2023 at 10:30am to allow the parties make whatever representations they wish to make in relation to costs and final orders to be made.

Counsel for the plaintiff: Hugh O'Flaherty BL

Counsel for the named garnishee: Richard Downey BL

Counsel for the notice party: Ross Gorman BL

The defendant represented himself.