

**THE HIGH COURT
COMMERCIAL**

[2022] IEHC 276
[2019/294/COS]

**IN THE MATTER OF THE COMPANIES ACT 2014 AND IN THE MATTER OF SECTION 438
OF THE COMPANIES ACT 2014
AND IN THE MATTER OF DAN MORRISSEY (IRL) LIMITED**

JUDGMENT OF Mr. Justice Twomey delivered on the 13th day of May, 2022

INTRODUCTION

1. This case raises the novel proposition that a borrower (or in this case a shareholder in a corporate borrower) might be able to compel a receiver to lease secured property to that borrower, where the receiver was appointed to the property which was provided as security for the borrowings.
2. In this case, Philip Morrissey ("Mr. Morrissey") of Milford, County Carlow, who is a shareholder in Dan Morrissey (Irl) Ltd ("DMI Ltd"), seeks to rely on s. 438 of the Companies Act, 2014 to obtain such an order from this Court.
3. The order he seeks would require Mr. Paul McCann and Mr. Stephen Tennant (the "Receivers") who were appointed to the assets and undertaking of DMI Ltd to grant Mr. Morrissey, who is a shareholder in DMI Ltd, an agricultural lease over the secured land in Powerstown, County Carlow.
4. Mr. Morrissey complains that the lands are being mismanaged by the Receivers, with activities such as crop rotation not being properly followed. In these circumstances, he has made what he believes to be a reasonable offer to rent the land from the Receivers for a sum of €200 per acre.
5. He relies on the terms of s. 438 to seek an order from this Court for the Receivers to lease the lands to him on this basis for a period of 10 years. Mr. Morrissey represented himself in these proceedings, which relate to a valuable quarry and agricultural lands which had been owned by his father and then by DMI Ltd, a company in which he has invested very considerable sums. He therefore has very strong personal reasons for seeking to ensure that the lands are not being mis-managed. Mr. Morrissey presented his argument in a cogent and respectful fashion and it is difficult not to have sympathy with him regarding the fact that lands that he and his family have worked for many years are now in the hands of Receivers due to the failure to repay bank borrowings. However, this case, like all cases, must be determined by the law and not by sympathy. In this regard, as noted hereunder, the question for this Court is a net legal question of whether this Court has jurisdiction to grant the order sought by Mr. Morrissey. This case is therefore primarily determined on the basis of an interpretation of s. 438.
6. Mr. Morrissey's motion dated 29th March, 2022 seeks an order directing Allied Irish Bank plc and the Receivers 'to grant an agriculture lease of part of the Agricultural Lands at Powerstown, County Carlow.... comprising circa 110 acres' to him.

7. Upon receipt of this motion, the solicitors for the Receivers claimed that the High Court does not have jurisdiction to grant the order sought. Accordingly, McDonald J. directed that this jurisdictional point be dealt with by this Court as a preliminary issue.

ANALYSIS

8. The key legal argument relied upon by Mr. Morrissey is that s. 438 grants this Court jurisdiction to order the Receivers to grant him the lease he seeks. This section states:

“(1) Where a receiver of the property of a company is appointed under the powers contained in any instrument, any of the following persons may apply to the court for directions in relation to any matter in connection with the performance or otherwise, by the receiver, of his or her functions, that is to say:

- (a) (i) the receiver;
- (ii) an officer of the company;
- (iii) a member of the company;
- (iv) employees of the company comprising at least half in number of the persons employed in a permanent capacity by the company;
- (v) a creditor of the company;

and

- (b) (i) a liquidator;
- (ii) a contributory;

and, on any such application, *the court may give such directions, or make such order declaring the rights of persons before the court or otherwise, as the court thinks just.*

(2) An application to the court under subsection (1), except an application under that subsection by the receiver, shall be supported by such evidence that the applicant is being unfairly prejudiced by any actual or proposed act or omission of the receiver as the court may require.” (Emphasis added)

9. For the purpose only of this preliminary issue, the Receivers did not contest that Mr. Morrissey was either an officer, member, creditor or a contributory of DMI Ltd, such as to entitle him to rely on s. 438. However, irrespective of whether the claims of mismanagement are justified or of how reasonable the lease terms suggested by Mr. Morrissey may be, the Receivers dispute that this section grants the court the power to compel them to grant Mr. Morrissey the agricultural lease he seeks.
10. On a superficial reading of s. 438, the wording of the section might appear to confer on this Court the power to make such an order, since, like a lot of similar statutory provisions, the court is entitled to make such order as it thinks just.
11. However, Clarke J. (as he then was) in *In the matter of HSS (in receivership)* [2011] IEHC 497 considered the predecessor section to s. 438, i.e. s. 316 of the Companies Act, 1963, which is in very similar terms. It is clear from that judgment that, while this section

(like a lot of statutory provisions granting similar powers to courts) does appear to grant the court a wide discretion, this wide discretion is granted to a court in order to deal with the wide variety of circumstances which arise in receiverships (and indeed in other situations where such powers are granted to courts). It is not granted so as to enable a court to ignore the well-established rights of secured lenders and the receivers they appoint and then make any order that appears reasonable to the court. As noted by Clarke J. at para. 4.9:

“[T]he section does not, however, give the Court *carte blanche* to reassess whether the carefully crafted provisions of corporate insolvency law are to apply.”

12. Thus, the context in which the Court is granted the power in question and so the context in which it must exercise that discretion is crucial. The context, for the power granted to courts under s. 438 in this case, is the exercise of the powers of a receiver when dealing with assets under her control and thus the rights of a receiver, lender and borrower in that context.
13. To put the matter another way just because the court is entitled to give directions or make orders as it ‘thinks just’ does not leave the court with a completely free hand regarding the order that it can make. In particular, the court cannot ignore the rights of a receiver to conduct a receivership as set down in legislation and case law, simply so as to achieve what the other party might regard as a just order (in this case, the grant of a lease by the Receivers to that party).
14. It is relevant to note that no authority has been cited by Mr. Morrissey to support the view that a borrower (or connected third party) has a right to be granted a lease of the secured property by a receiver.
15. In all these circumstances, this Court cannot see how it can make an order requiring the Receivers to do so, in this case, in favour of Mr. Morrissey, simply because Mr. Morrissey believes that it would be fair to do so, because of his view that the land is being mismanaged and badly farmed.
16. Even if this Court found that the lands had been mismanaged by permitting potatoes to be grown more than one year in four, as alleged by Mr. Morrissey, this Court does not have the power to choose Mr. Morrissey as the person who should farm the lands and then make an order for the lands to be leased by the Receivers to Mr. Morrissey
17. If this Court were to do so, this Court would in effect be implying that there was a right, on the part of a borrower who has defaulted on his loan (which led to the lender appointing a receiver over the borrower’s secured assets), to seek to dictate how that receiver manages the assets to pay-off the secured debts. The notion that a borrower would be able to dictate, via a court order, how a receiver manages the secured assets would be a novel proposition in Irish law.

18. Accordingly, this Court rejects Mr. Morrissey's claim that s. 438 grants this Court the jurisdiction to make an order obliging the Receivers to grant him an agricultural lease over the lands in question.

19. While Mr. Morrissey relied primarily on s. 438 to support his motion, he also relied on s. 16 of the Supreme Court of Judicature (Ireland) Act 1877 ("the 1877 Act"). Section 16 states:

"If, in any case not expressly provided for by this Act, a liability to any duty, or any authority or power not incident to the administration of justice in any Court whose jurisdiction is transferred by this Act to the High Court of Justice, shall have been imposed or conferred by any statute, law, or custom upon the Judges or any Judge of any of such Courts, every Judge of the said High Court, except where otherwise expressly directed by this Act, shall be capable of performing and exercising, and shall be liable to perform and empowered to exercise every such duty, authorities, and power, in the same manner as if this Act had not passed, and as if he had been duly appointed the successor of a Judge liable to such duty or possessing such authority or power, before the passing of this Act. Any such duty, authority, or power, imposed or conferred by any statute, law or custom, in any such case as aforesaid upon the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, or the Lord Chief Baron, shall continue to be performed and exercised by them respectively, and by their respective successors, in the same manner as if this Act had not passed."

20. However, it will be seen that s. 16 of the 1877 Act simply confers certain duties and powers, which were previously conferred on judges of the Superior Courts at that time, on the High Court. This section does not confer a power upon the High Court to order a receiver to lease lands, to which he has been appointed, to a borrower or a shareholder in a borrower.

21. Mr. Morrissey also relies on s. 27(1) and (2) of the 1870 Act, which states:

"In every civil cause or matter commenced in the High Court of Justice law and equity shall be administered by the High Court of Justice and the Court of Appeal respectively according to the rules following:

- (1) If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to rely upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right which heretofore could only have been given by a Court of Equity, the said Courts respectively, and every Judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose, properly instituted before the passing of this Act.

- (2) If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract or against any right, title, or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said Courts respectively, and every Judge thereof, shall give to every equitable estate, right or ground of relief so claimed and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court for the same or the like purpose before the passing of this Act.”
22. In reliance on this section, Mr. Morrissey claims to own directly and indirectly 1/3 of the shares in DMI Ltd. On this basis he claims to have a beneficial and equitable ownership in the lands owned by DMI Ltd and which are the subject of the receivership. On this basis, he claims that s. 27, by its reference to relief on equitable grounds etc, gives this Court jurisdiction to grant the order sought by him.
23. However, first, it would be a novel proposition if a shareholder in a company was thereby regarded as a beneficial owner of the property owned by that company. No authority has been cited by Mr. Morrissey for this proposition and it flies in the face of the well-established principle of the separate legal personality of a company (*Salomon v. Salomon* [1897] A.C. 22). Under this principle property owned by a company is owned by that separate legal person and is not owned by the shareholders in the company. This principle applies to legal ownership and beneficial ownership and so Mr. Morrissey does not become the legal or beneficial owners of land which is owned by DMI Ltd by becoming a shareholder in DMI Ltd.
24. In any event, even if Mr. Morrissey was the beneficial owner of the lands in question, this section does not assist Mr. Morrissey. This section simply confers on the High Court powers to make orders of an equitable nature which previously had been made only by the Court of Chancery. There is nothing in this section which would entitle this Court to order a receiver to lease lands, to which they have been validly appointed, to the beneficial owner of those lands.
25. Mr. Morrissey also relied upon an extract from *Robinson & Walton, Kerr and Hunt on Receivers and Administrators*, 18th ed. (2005) at para. 7-19 which states:
- “Power to lease. A direction to set and let is not now inserted in an order appointing a receiver over real or leasehold estate, the judge, having power to give any direction in chambers as to the management of the estate, however in special circumstances, the order may include a direction for the granting of a specific lease, or the power to grant a class of tenancies.

A receiver cannot, without the sanction of the court, set or let even for a single year: the Court of Appeal has laid down that no valid lease can be made by a receiver, without the sanction of the court." (Emphasis added)

26. However, this extract does not assist Mr. Morrissey since it is clear that it is concerned with court-appointed receivers. The receivers in this case were not appointed by the court as they were appointed under a deed. In any case, the thrust of this paragraph is that a court-appointed receiver cannot let property to a third party without the sanction of the court. It is not, as Mr. Morrissey would like it to be, authority for the proposition that a court has the jurisdiction to order a receiver, howsoever appointed, to grant a lease to third party.

CONCLUSION

27. For all the foregoing reasons, this Court concludes that it does not have the jurisdiction to make the order sought by Mr. Morrissey in this case and accordingly the motion is dismissed.

28. This Court orders the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time, with the terms of any draft agreed court order to be provided to the Registrar. In case it is necessary for this Court to deal with final orders, this case will be provisionally put in for mention one week from the date of delivery of this judgment, at 10.45 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).