

IRISH COMMERCIAL
(No 2)

1986 3896 p.
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IRISH COMMERCIAL SOCIETY LIMITED
(In Liquidation)

PLAINTIFF

AND

PETER PLUNKETT, MARGARET PLUNKETT, PONDERWOOD SOCIETY LIMITED, SALTILLO LIMITED, STAK TAVERN LIMITED, RICHMOND ROAD INDUSTRIAL ESTATE (1976) LIMITED, WELLINGTON TRADING LIMITED TRADING AS BALLINASINK ENTERPRISES, TARA FINANCE LIMITED, AND IRISH COMMERCIAL SOCIETY TRUST LIMITED

DEFENDANTS

Judgment of Mr. Justice Barron delivered on the 13th day of May 1986.

The Plaintiff Society is an Industrial and Provident Society and was one of a number of Societies and Companies controlled by Peter Plunkett, the first named Defendant. Early in 1985 and for some time before that the Registrar of Friendly Societies ("The Registrar") had been dissatisfied with the manner in which the affairs of the Group were being managed. On the 3rd February 1985 he appointed an Inspector under the provisions of section 13 of the Industrial and Provident Societies (Amendment) Act 1978 to investigate and report to him on the affairs of the Plaintiff Society and of other Societies in the Group.

On the 2nd February 1985 the Society presented a Petition to wind up the Society. A Provisional Liquidator was appointed and on the 27th February 1985 a winding up Order was made and the Provisional Liquidator appointed Official Liquidator. Such appointment was opposed unsuccessfully by the Registrar. At the hearing before the Court, the Court was informed that an Inspector had been appointed under section 13 of the 1978 Act. A direction

was made by the Court that the Registrar was to be put on notice of all future applications to the Court in the winding up proceedings.

On the 15th March 1985 the Liquidator of the Society having obtained the leave of the Court commenced proceedings on behalf of the Plaintiff and other Societies in the Group also in liquidation against Peter Plunkett and others of the Defendants in the present proceedings. The Indorsement of Claim was as follows:

"The Plaintiffs claim is brought pursuant to Order of the Court dated the 15th day of March 1984 for:-

- (1) As against the second, third, fourth, fifth and sixth named Defendants a declaration that at all material times the said Defendants carried on business with the Plaintiffs as one single business entity.
- (2) An Order directing the application of the assets and liabilities of the said second, third, fourth, fifth and sixth named Defendants with those of the Plaintiffs.
- (3) An injunction restraining the said second, third, fourth, fifth and sixth named Defendants from mortgaging, charging, selling, offering for sale, disposing of or otherwise dealing with all or any of their assets or properties howsoever held and in particular with those properties set forth in the schedule hereto.
- (4) An injunction restraining the first named Defendant from mortgaging, charging, selling, offering for sale, disposing of or otherwise dealing with all of the properties set forth in the schedule hereto and any other properties held by the said Defendant in trust for the Plaintiffs or the other Defendants in these proceedings.
- (5) A declaration that the first named Defendant is personally

liable for the excessive loans and deposits received by the fourth named Plaintiff in breach of the provisions of section 15 of the Building Societies Act 1874 as amended.

- (6) Judgment as against the first named Defendant for the amount of such excess.
- (7) Further or other relief.
- (8) Costs."

There was included a schedule setting out a number of properties. The second, third, fourth and fifth named Defendants in those proceedings are also Defendants in the present proceedings. The injunctive relief sought was obtained and is still in force.

On the 30th October 1985 the proceedings were compromised by the parties subject to the approval of the Court. In accordance with the terms of that agreement certain provisions had to be implemented before application was made to the Court for its consent. On the 21st April 1986 the approval of the settlement by the Court was applied for by the Liquidator, notice of such application having been given in advance to the Registrar. The application was not heard on that day but adjourned until the 28th April 1986.

On the same day the 21st April 1986 the Registrar being aware of the terms of the compromise of the proceedings brought by the Liquidator and having received on the 28th November 1985 the report of the Inspector appointed by him instituted the present proceedings. The Indorsement of Claim is as follows:

"The Plaintiff's claim is brought at the behest of the Registrar of Friendly Societies pursuant to section 14 (8) of The Industrial and Provident Societies (Amendment) Act 1978 for:

- (1) Damages for misfeasance and breach of trust;
- (2) Damages for negligence and breach of duty;

- (3) A declaration that the assets or such part thereof as this Honourable Court may determine of the Defendants and each of them constitute property of the Plaintiff which has been misapplied and/or wrongfully retained by the Defendants and each or any of them;
- (4) An Order directing the Defendants and each of them to restore to the Plaintiff such part of the Defendants assets as this Honourable Court may determine which have been misapplied or wrongfully retained as aforesaid;
- (5) Damages for misconduct in connection with the promotion, formation, and carrying on of the business of the Plaintiff;
- (6) A declaration that the properties set forth in the schedule hereto and any other properties held by the Defendants are held in trust for the Plaintiff;
- (7) An injunction restraining the Defendants and each of them from mortgaging, attempting to mortgage, charging, attempting to charge, selling, attempting to sell, offering for sale, disposing of or otherwise dealing with all or any of their assets or properties as howsoever held and in particular with those properties set forth in the schedule hereto;
- (8) Such further or other relief as to this Honourable Court shall seem fit.
- (9) Costs."

The schedule of properties set out two named properties. The injunctive relief sought was obtained by the Registrar on the same date.

On the 28th April 1986 three matters came before the Court.

There were:

- (1) The application by the Liquidator to sanction the settlement of his proceedings in accordance with the terms of the compromise entered into between the parties thereto on the 30th October 1985;
- (2) An application by the Registrar in the present proceedings for interlocutory relief in the nature of the injunctive relief already obtained by him ex-parte on the 21st April 1986;
- (3) An application by the Defendants to dismiss such proceedings.

The third of these applications was heard by me on the 28th April 1986. The Defendants sought a dismiss of the proceedings upon the following grounds:

- "(a) That they are frivolous and/or vexatious.
- (b) That they are an abuse of the Courts process or alternatively that the Plaintiff has no cause of action in law or in equity.
- (c) The same claim relief which is sought or was sought in the Liquidator's proceedings.
- (d) The Plaintiff has no authority or power pursuant to section 231 of the Companies Act 1963 to commence the said proceedings on the basis that the sanction of the Court in accordance with that section has not been sought or obtained or alternatively that the Plaintiff is estopped or precluded by virtue of an agreement dated 30th day of October 1985 from maintaining the action herein."

Having heard the submissions of Counsel for both parties, I held that there was no ground for dismissing the proceedings at

that stage, since the submissions raise substantial matters of law and fact. Nevertheless, having regard to the matters of law raised which could be determined as a preliminary issue, I indicated that I would do so if the parties so agreed. They have done so and have agreed to have the following questions determined as preliminary legal issues. The questions are as follows:

- *(1) Does the Registrar of Friendly Societies have power to issue proceedings under section 14 (8) of The Industrial and Provident Societies (Amendment) Act 1978 notwithstanding that the Society in whose name the proceedings are issued is in the course of being wound up by the Court?
- (2) If the answer to (1) is in the affirmative, does the Registrar of Friendly Societies need the sanction of the Court under section 231 of The Companies Act 1963 or otherwise to issue such proceedings?
- (3) If the answer to (1) is in the affirmative, is the Registrar of Friendly Societies precluded from pursuing the present proceedings under section 14 (8) of the Industrial and Provident Societies (Amendment) Act 1978 by virtue of the terms of the settlement dated the 30th day of October 1985 and made between Irish Commercial Society (In Liquidation) of the first part, Irish Commercial Society Group, (In Liquidation, of the second part Irish Commercial Finance Limited (In Liquidation) of the third part Irish Savings Building Society (In Liquidation) of the fourth part David M Hughes of the fifth part Peter A Plunkett of the sixth part Ponderwood Society Limited of the seventh part Richmond Road Industrial Estate (1976)

Limited of the eighth part Stak Tavern Limited of the ninth part Saltillo Limited of the tenth part and Wellington Trading Limited of the eleventh part a copy of which agreement is annexed hereto and which agreement is subject to the approval of this Honourable Court?"

Meanwhile the other two matters listed for the 28th April 1986 stand adjourned and the injunctive relief granted to the Registrar has been continued until the determination of these issues.

The 1978 Act gives to the Registrar of Friendly Societies certain regulatory powers in relation to both Industrial and Provident Societies and Credit Unions. Although dealt with in separate parts of the Act, such powers are virtually identical. Under section 11 the Registrar has power to appoint an authorised person to inspect the books and records of a Society. Section 12 requires the Society to furnish returns to the Registrar. Section 13 empowers the Registrar to appoint an inspector to investigate and to report to him on the affairs of the Society. Section 14 grants supplemental powers in cases where an inspector has been appointed under section 13 including the publication of the report of the inspector and the institution of proceedings by the Registrar in the name of the Society following upon consideration of such report.

Section 15 gives the Registrar following the exercise of his powers under either section 11 or section 13 power to appoint a person to be a member of the Committee of Management of the Society. Section 16 gives the Registrar certain powers whether or not an investigation has been directed under section 13 to direct the suspension for any period up to two months of the acceptance of deposits, the raising of funds without his authority or the making of payments without his authority or of any one or more of such activities. Section 17 provides that where a direction made under

section 16 is in force, the Society must make reasonable arrangements for using the funds of the Society to meet applications for repayment of monies deposited or otherwise invested by investors in the Society. The section gives to the Registrar an ultimate power in the event of the failure by the Society to so use its funds to apply to the Court for the winding up of the Society.

Section 19 which provides in effect that the Society can only be wound up as if it were a company is as follows:

"19- (1) Subject to this section, a society may be wound up only in accordance with Part VI of the Act of 1963, and, accordingly, that Part of that Act shall, subject to any necessary modifications, apply as if the society were a company.

(2) For the purposes of the application of section 213 of the Act of 1963, a society may be wound up under this section by the Court if -

- (a) the society has by special resolution resolved that the society be wound up by the Court;
- (b) the society is unable to pay its debts;
- (c) the society has, after notice from the Registrar, contravened a provision of the Industrial and Provident Societies Act, 1893 to 1978, or a direction or permission given by the Registrar under those Acts;
- (d) the Court is of opinion that it is just and equitable that the society should be wound up.

(3) (a) Notwithstanding anything in section 215 (as applied by this section) of the Act of 1963, an application under that section for the winding up of a society may be made by the Registrar.

(b) Section 215 (d) of the Act of 1963 shall not apply to the winding up of a society.

(4) The winding up of a society shall not bar the right of the Registrar to apply to have it wound up by the Court.

(5) A society may not be dissolved by an instrument of dissolution."

Consideration of these provisions of the Act suggests that they are given to the Registrar primarily to ensure that the affairs of the Society are carried on in accordance with law with the ultimate sanction as indicated by section 17 (3) and section 19 (2) (c), that where the Society is in breach he may apply to have the Society wound up. Section 14 (8) contains one such power and is similar to the power given to the Minister in the case of companies by section 170 (4) and (5) of the Companies Act 1963.

Counsel for the Defendants submits in effect that since the Society is to be wound up as if it was a company, no proceedings can be brought in the name of the Society once it is in liquidation other than in accordance with the provisions of section 231 of the Companies Act 1963. He submits that if even the Registrar has power to direct the issue of proceedings in the name of the company under the provisions of section 14 (8) of the 1978 Act that nevertheless he cannot do so without the sanction of the Court nor in circumstances where the issues to be determined have already been compromised by the Liquidator on behalf of the Society.

Counsel for the Registrar submits that the power to direct the issue of proceedings is a power granted to the Registrar quite independent of whether the Society is or is not in liquidation. He submitted that section 231 was a restraint only on the Liquidator and that accordingly it did not affect him. Finally, he submitted that the nature of the proceedings brought by him differed from

those brought by the Liquidator and against different parties.

I accept the submissions made on behalf of the Defendants. Once the Society becomes subject to a winding up Order, control of its affairs passes to the Official Liquidator subject to the overall control of the Court. All the property of the Company including things in action to which it is or appears to be entitled passes into the control of the Liquidator: section 229 of the 1963 Act. The power to bring proceedings in the name of a company given to the Registrar by section 14 (8) can only be exercised in respect of a cause of action vested in a Society. Once the Society is in liquidation this cause of action passes into the control of the Liquidator and thereafter he alone with the sanction of the Court has the authority to bring proceedings in the name of a company. Undoubtedly the 1978 Act is a special Act in relation, inter alia, to Industrial and Provident Societies. Nevertheless section 19 is a general section providing that the winding up of such Societies shall be carried out as if they were companies. The legislature has not reserved any rights to the Registrar and accordingly the general provisions of the Companies Act prevail. In the conflict which the submissions of the Registrar raises it is the Liquidator who prevails over the Registrar.

It has been submitted on behalf of the Registrar that the nature of the proceedings authorised by section 14 (8) differs from those which the Liquidator may be permitted to bring in similar circumstances in that the subsection authorises proceedings for misconduct. I do not accept any such construction. The proceedings may be brought inter alia "in respect of any fraud, misfeasance or other misconduct. This does not authorise proceedings for any misconduct, but only for misconduct in the circumstances permitted by the subsection as ejusdem generis with fraud and misfeasance. There is no cause of

action created by the subsection which is not available to the Liquidator in similar circumstances. I do not accept the submission that the Registrar has the power when the Society is in liquidation to institute proceedings in the name of the Society in respect of the type of relief specified in section 14 (8).

To construe section 14 (8) otherwise than as being subordinated to the general provisions of the Companies Act so as to give a power to the Registrar could lead, in a case where the Court has refused its sanction to the commencement of proceedings and the Registrar has decided to the contrary, to a situation where an administrative officer would effectively be reversing the decision of this Court. Such a construction would make the power repugnant to the provisions of the Constitution: see Costello .v. D.P.P. 1984 I.L.R.M. 413, so that where as here there is a construction of the statutory provision which does not lead to this result, it must be accepted.

Since I take the view that the Registrar did not have power to institute these proceedings, the answer to the first question is no. The remaining two questions do not therefore arise. So far as the application to approve the consent is concerned, the Registrar is on notice of that application and may make such submissions to the Court in respect of that application as he considers proper.

Henry Barron
13th May 1986.