



THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 274

**Finlay Geoghegan J.
Peart J.
Hogan J.**

Appeal No. 2015/165

BETWEEN

INDEPENDENT TRUSTEE COMPANY LIMITED

PLAINTIFF / APPELLANT

AND

REGISTRAR OF COMPANIES

DEFENDANT / RESPONDENT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 13th day of October 2016

1. This appeal primarily concerns the power of the Registrar of Companies, the respondent, to record on the publicly accessible electronic Register maintained by her the status of a company as "receivership" where a notice is received that a receiver has been appointed over property of which the company is the legal owner and which it holds on trust for third parties. It also concerns the proper construction of ss. 99(1), 107(1) and 317(1) of the Companies Act 1963 (now ss. 409, 436(1) and (4), 29(1) of the Companies Act 2014) and their application to property of which a company is the legal owner but holds on trust for third parties.

Background to the facts

2. The parties agreed a statement of facts for the hearing of the case before the High Court, relied upon and recited by the trial judge. In summary, they are as follows.

3. The respondent is the officer appointed pursuant s.368 of the 1963 Act to conduct and oversee the registration of companies under the Companies Acts. As part of the duty the respondent is responsible for maintaining and updating entries in the Register of Companies (The "Register").

4. An electronic Register was created in 1991. In the electronic Register the respondent created entries for each company entitled "status", in one of the following terms, "normal", "strike off listed", "liquidation", "receivership", "ceased following cross-border merger" or "dissolved". The application of these descriptions is a long standing practice, but it is not a requirement of the Companies Acts. The status descriptions are available free of charge to the public and accessible from the Companies Registration Office website (www.cro.ie).

5. The appellant is a pension provider and acts as the trustee to approximately 2,750 unit trust funds. As trustee the appellant holds the legal title to the properties owned by each fund on trust for the beneficiaries of such fund.

6. The fund relevant to this case is the Delta Fund, established by a declaration of trust made on the 2nd January, 2002, and later modified. The Delta Fund is subdivided into a series of sub-funds including Delta Fund 704530 (the "sub-fund") which this case is concerned with.

7. Pursuant to the declaration of trust, the appellant stands possessed of the sub-fund's property on trust for the unit holders of the sub-fund. Clause 9.00 of the declaration of trust prohibits the appellant from dealing in the assets or property of the sub-fund on its own account unless authorised to do so by the unit holders of the sub-fund. The provisions of the declaration entitles the appellant to discharge from the sub-fund disbursements and administration expenses, and to be paid remuneration and fees out of the assets of the sub-fund. The appellant is paid property management fees from the rent received from the sub-fund's property from which disbursements are also discharged.

8. By facility letter dated 20th November, 2007, West Bromwich Commercial Limited (the "lender") advanced a loan facility of £4,088,000.00 to the sub-fund to finance the purchase of Gloucester House, Silbury Boulevard, Milton Keynes, England (the "property"). The lender's recourse for the loan was limited to the assets of the sub-fund together with the security outlined therein.

9. By deed of legal charge dated 16th April 2008 between the appellant as trustee of the sub-fund and the lender a fixed charge was created over the legal and beneficial interest in the property. Under its terms the lender was entitled to appoint a receiver over a secured asset upon an event of default specified in the deed. The respondent was notified of the creation of this charge pursuant to s. 99(1) of the 1963 Act and recorded and registered the charge in respect of the appellant.

10. In June, 2011, the lender asserted that an event of default had occurred when the maximum loan-to-value ratio between the property and the loan had been exceeded. The lender appointed two receivers over the property. The receivers' appointment was limited only to the Property and did not relate to any of the other assets of the sub-fund or the assets of the appellant.

11. In July, 2011, the lender lodged an E8 form notifying the respondent of the appointment of the receivers, in compliance with the obligations set out in s. 107(1) of the 1963 Act. The lender then placed a notice in "The Irish Times" of the receivers' appointment over the property and also referred to the appellant as being "in receivership". The placing of the advertisement caused concern to the appellant's customers and creditors such that it considered it necessary to issue a corrective statement to its creditors and the press.

12. When an E8 form is received by the respondent it is recorded on the Register as a "received" submission against the company to which it relates. On processing the E8 form, a staff member of the Register checks to ensure that the charge under which the receiver is appointed is registered in respect of the company concerned and that the form is fully completed, signed and dated. The

form is then registered, and the respondent's computer system automatically changes the company's status to "Receivership".

13. The E8 in relation to the appointment by the lender of the receivers over the Property was received by the respondent on 7th July, 2011, and recorded as "received" in respect of the appellant. Following contact from the appellant's solicitor on 11th July and correspondence objecting to the registration of the form E8 supported by counsel's opinion the respondent wrote to the Lender's solicitors who presented the form E8 asking if they wished to withdraw this form. They declined to do by letter of 11th October, 2011, stating:

"It is our understanding that the company holds the legal ownership of the asset in question but does not hold the beneficial interest. Section 107(1) in our view is clear in its terms and requires a filing to be made where a receiver is appointed over the property of a company and does not distinguish between legal and beneficial interests. On this basis, it was and remains our view that a filing was required in this case and we do not intend to withdraw the Form E8."

14. The respondent agreed to refrain from making any change to the Register regarding the appellants' "status" pending the trial of the action. In a letter dated 20th June 2012 she stated:

"Whenever the status designation "Receivership" is applied to a company following registration of Form E8 by CRO, the following explanatory note now appears directly beneath the status field:

"Receivership" means that Form E8 (Notice of Appointment of Receiver) per s107 CA 1963 has been filed with the CRO in respect of all or part of the property of the company, which property may or may not be beneficially owned by the company. Please refer to the relevant E8 form(s) for further information."

15. Limited oral evidence was adduced in the High Court from a director of the appellant which expanded upon the above but it is not necessary to refer to it for the purposes of deciding the issues on appeal, save to record that he explained that the registration of the charge was done by reason of a specific requirement of the lender.

16. Whilst the agreed facts refer to the fund and sub-fund in places as if they were a legal person, it was confirmed at the hearing of this appeal that they are not. The facility letter from the Lender is in fact addressed to the appellant as trustee of the fund.

High Court judgment

17. The appellant in the High Court sought injunctions restraining the alteration by the respondent of its status from "normal" and recording on the register that notification had been received from the lender that receivers had been appointed over the property. It also sought declarations that ss. 107(1) and 317(1) of the Act of 1963 did not apply to the appointment of the receivers over the property.

18. The trial judge (Hunt J.) in a judgment delivered on the 16th January, 2015, [2015] IEHC 12 dismissed all the claims. He held that the appellant held an interest in the property susceptible to the provisions of s. 99(1) of the 1963 Act; that s. 107(1) applied to the appointment of the receivers over the property and that s. 370(1) applied notwithstanding that the appellant was only the legal owner of the property and held it on trust for the unit holders of the sub-fund.

19. The trial judge also decided that the respondent was not acting in excess of the powers granted her by the Companies Acts in applying a "status label" to a company. Furthermore, whilst he accepted that the criticisms made by the appellant of the application of a single "receivership" label were well founded, he considered that the refinement introduced by the explanatory note set out at para. 14 above amounted to a sufficient explanation to meet the criticism.

Appeal

20. The primary focus of the appeal was the alleged error of the trial judge in deciding that the respondents practice of recording the "status" of a company is not *ultra vires* her powers and that even if *intra vires* the designation "receivership", even with the explanatory note, does not accurately represent the position in relation to the appellant in this case.

21. The appellant also contended that the trial judge was in error in his construction of ss. 99, 107(1) and 317(1) of the 1963 Act.

22. The parties each made lengthy written submissions and oral submissions. To a considerable extent these were a repeat of the submissions made at trial and recorded by the trial judge in his judgment. Whilst I have taken them into account I do not consider it necessary to set them out in this judgment.

23. The 1963 Act applied at the time of the lodging of the form E8 in issue in the proceedings and at the time of commencement of proceedings and hence I propose continuing to refer to the relevant sections of that Act notwithstanding the commencement of the 2014 Act.

24. While the application of a "status" designation and in particular that of "Receivership" following the filing of a form E8 is the primary focus of the appeal nevertheless it appears to me more logical to consider first the submission that ss. 107(1) and 317(1) do not apply to the receivers appointed over the property and there was no obligation to register the charge created over the property pursuant to s.99 as the appellant holds the Property on trust for the unit holders.

Sections 99, 107 and 317 of the 1963 Act

25. Central to the appellant's submissions on the obligations imposed by these sections is that they only apply where the property in question is beneficially owned by a company and that they do not apply where a company is only the legal owner of the property and holds it on trust for third parties.

26. The trial judge correctly approached the construction of the relevant sections in accordance with the interpretative principles set out by the Supreme Court in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101 (per Blayney J.), *D.B. v. Minister for Health* [2003] 3 I.R. 12 (per Denham J.) and *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27 (per Clarke J.). As stated therein "the cardinal rule" is that statutes be construed according to the intention expressed in the Acts themselves by the words used. If the words of the statute are clear and unambiguous then no more is necessary than to give them their ordinary meaning. It is only where the meaning of a statute is not plain from the words used that a court may move on to apply other rules of construction. For the reasons explained by Clarke J. in *Kadri*, s. 5(1) of the Interpretation Act 2005, does not require any change in such approach.

27. Section 107(1) of the 1963 Act imposes an obligation to deliver to the respondent notice of appointment of a receiver "of the property of a company". This provides:-

"If any person obtains an order for the appointment of a receiver of the property of a company or appoints such a receiver under any powers contained in any instrument, he shall, within 7 days after the date of the order or of the appointment publish in the Companies Registration Office Gazette and in at least one daily newspaper circulating in the district where the registered office of the company is situated, and deliver to the registrar of companies, a notice in the form prescribed."

28. The term "A receiver of the property of a company" includes in accordance with s. 323(a) of the 1963 Act, *inter alia*, a receiver "of part only of that property", unless the contrary intention appears. The 1963 Act did not define what constitutes "property of a company" in relation to land. I am in agreement with the trial judge that in its ordinary meaning it includes any interest in land including as in the case of the appellant the legal ownership of land. Insofar as property law recognises distinctions between legal and equitable interests, the ownership of a legal interest is a real and substantial interest in the land in question.

29. The trial judge in construing s. 107 was entitled to have regard to the nature of the charges to which s. 99(1) applies pursuant to s. 99(2), both being in Part IV of the 1963 Act and part of same legislative scheme. This includes at subpara. (d) "a charge on land, wherever situate, or any interest therein . . .".

30. It follows that even if the appellant in the deed of charge of 16th April, 2008, only charged the legal interest in the property it would have been a charge to which s. 99(1) applied. However, as recorded in the agreed statement of facts, the deed of charge is not so limited. It is agreed that by the deed a fixed charge was created over the legal and beneficial interest in the property. The appellant as the legal owner of the property under clause 1 of the deed charged "with full title guarantee in favour of the lender, with the payment and discharge of the Loan Obligations, by way of first legal mortgage, the property specified in the schedule". No other person was required to join in the deed to create the first legal mortgage over the property described by its address in the schedule.

31. The appellant submitted that s. 107(1), notwithstanding the words used, should be construed as applying only to the appointment of a receiver of property of a company where it owns the beneficial interest in such property relied upon the well established principle that, normally, only property beneficially owned by a company will be available for distribution on insolvency to its creditors. That principle, in my view, does not alter the construction of s. 107 in accordance with the plain meaning of the words used. Further I agree with the trial judge that in relation to a company, such as the appellant which, as part of its pension provider business, is the legal owner of multiple properties and other assets held in trust for many thousands of unit holders of funds or sub-funds, it may be of relevance for persons dealing with it to know that receivers have been appointed to properties owned by them as part of that business albeit as trustee. It must be recalled that the appellant was the person which in accordance with the trust was on its own able to charge the legal and beneficial interest in the property to the lender. In no sense can it be considered that a construction of s.107 in accordance with the words used leads to an absurd result.

32. It follows from the above that the lender was obliged pursuant to s.107 of the 1963 Act to file the disputed form E8 and the respondent is entitled to register same.

33. Section 317(1) provides:-

"Where a receiver of the property of a company has been appointed, every invoice, order for goods or business letter issued by or on behalf of the company or the receiver or the liquidator of the company, being a document on or in which the name of the company appears, shall contain a statement that a receiver has been appointed."

34. Whilst the above section is not directly relevant to any obligations of the respondent in issue in the proceedings it did arise for consideration and for the same reasons I consider it also requires the appellant on the documents referred to in s.317 to include a statement that "a receiver has been appointed" where a receiver has been appointed to property of which it is the legal owner. I would add that whilst I am aware that it is common practice to comply with the obligation imposed by this section by including the phrase "in receivership", I would observe that such an appellation is not necessarily required by the section and for the reasons set out below could well give rise to a misunderstanding in a case such as the present one. The obligation is to include a statement that "a receiver has been appointed". This does not appear to prohibit any statement which, for example, identified the property over which the receiver is appointed or any other statement considered necessary to present the true facts.

Designation of status

35. The respondent has since 1991 in the electronic Register created an entry entitled "status" which records that a company's status is either "normal", "strike off listed", "liquidation", "receivership", "ceased following cross border merger" or "dissolved" as the case may be.

36. There is no express provision in the Companies Act which authorises such a description or classification of companies. The public Register was maintained by the registrar pursuant to ss. 368 and 370 of the 1963 Act. Section 247 of the Companies Act 1990 also provided:-

"(1) Where, under the Companies Acts, any information relating to any person is required to be delivered to the registrar of companies and is so received by him, the registrar may apply such system of classification as he considers appropriate to such information and may assign symbols of identification to persons or classes of persons to whom any such information relates."

37. A person includes a company pursuant to the Interpretation Act 2005.

38. The respondent submits that this empowers her to make information available to the public in a clear, organised and accessible manner and that she is given some administrative discretion in the manner in which that is undertaken. In making this submission she relies upon the judgment of Geoghegan J. in the Supreme Court in *Kincaid v. Aer Lingus Teoranta* [2003] 2 I.R. 314, where at p. 318 he stated (in relation to the construction of O.39,r.46 of the Rules of the Superior Courts) :-

"The fact that there may be no express provision dealing with the point which has arisen in this case does not mean that the rules cannot be interpreted as implicitly covering the problem."

39. She also relies upon the comment on that judgment in Dodd *"Statutory Interpretation in Ireland"* (Dublin, 2008), where he states:-

"Legislation is not expected to cater for every single matter or every single scenario and ascertaining the intention of the legislature is an essential aspect of interpretation."

40. Both the above were cited with approval by Hardiman J. in *McCauley v. Governor of Mountjoy Prison* [2012] IESC 57.

41. It was submitted on behalf of the respondent that she is entitled to use the status description which in her submission simply summarises the fact of statutorily mandated notifications which are, in any case, the subject of other publication.

42. I accept that submission subject to one point. It is necessarily implicit in the powers conferred on the Registrar by s. 247 of the Act of 1990 (and its replacement s. 895(1) of the 2014 Act), that she is authorised to organise the information on the Register in a clear, organised and accessible manner. The express statutory power to classify includes the power to create a summary of statutorily mandated notifications. By the same token, however, it is also necessarily implicit in this statutory scheme that any such summary must be clear and must not be misleading.

43. The use of the term "receivership" under a heading of "Status" appears to me misleading. I do not share the view expressed by the trial judge that the explanatory note applied since 2012 coupled with the invitation to inspect the individual form E8 for applicable details is sufficient to meet what he considered to be the well founded criticism (which I share) of the use of the single "receivership" label as part of the status description of the appellant. My reasons for this disagreement are as follows. The respondent has chosen the generic description "Status" to create this summary or classification. "Status" in relation to a company may be used in different ways. It sometimes means the corporate status and in other instances - as was referred to by the trial judge - it may mean the financial status of the company. When, however, the term is used by the respondent in respect of the Register, it appears to me objectively to connote the corporate status.

44. This is emphasised by the other descriptions used for Status which include "strike off list", "liquidation", "ceased following cross border merger" or "dissolved" as well as "normal". Each of the first four relate to a change or pending change in the normal corporate status of a company. Liquidation is the term applied following a notification of appointment of a liquidator. A liquidator is appointed where either a court order has been made or a resolution passed for the winding up of the company. Following the commencement of a winding up the corporate status changes and there is a pending inevitable dissolution. In *Re Greendale Developments Ltd.* [1997] 3 IR 540, Laffoy J. stated at p.547:-

"Once a winding up order is made, the company is doomed to extinction".

Similarly the other terms used connote the actual or potential extinction of the company.

45. However, I accept as correct the appellant's submission that the appointment of a receiver to property of a company, and in particular to part of the property of a company does not necessarily bring about a change or a pending inevitable change in the corporate status of the company. Furthermore, it is clear that the use of the label "receivership" when applied to the field "Status" on the electronic Register does imply a change or pending inevitable change in the corporate status of a company which, in the circumstances, would be misleading. The explanatory note is not sufficient to correct the inaccurate impression given to the public by the use of the label "receivership" that there has been or will inevitably shortly be a change in the corporate status of the appellant.

46. The reason is that unlike the commencement of a winding up of a company and the appointment of a liquidator, the appointment of a receiver to property of a company may, depending upon the property over which the receiver is appointed, have significantly different consequences for the company. At one end of the scale a company may have charged all of its property, assets and undertakings by way of fixed and floating charges to a lender. Where that lender appoints a receiver (very often as a receiver and manager) such a person will then be in control of the entire undertaking and business of the company and if all are sold may ultimately lead to the demise of the company. However, at the other end of the scale is an appointment such as that which gave rise to these proceedings; a company which is the owner or legal owner of multiple properties and a receiver is appointed only over one isolated property and the remainder of the properties and business of the company remain unaffected. Accordingly, in such circumstances the sale by a receiver of an individual property would not interfere with the continuation of the company as a corporate entity.

47. Section 319 of the 1963 Act provides limited recognition of such potential difference by imposing greater reporting obligations on a receiver appointed over the "whole or substantially the whole" of the property of a company pursuant to debentures secured by a floating charge.

48. In summary, it appears to me that the use by the respondent of the designation "receivership" - even with the explanatory note in a classification identified as the "status" of a company - is *ultra vires* her powers under the Companies Acts. For the reasons already stated, such a designation is unclear and is apt to mislead in that it implies incorrectly that there has been a change in the corporate status of a company by reason of the appointment of a receiver to part of the property of the company when, in fact, no such change in corporate status has taken place or will inevitably take place.

49. It follows from this analysis that I accept that the respondent has the statutory power and duty to organise the information on the electronic Register (and the paper Register if that is applicable) in a clear, organised and accessible manner and is given some administrative discretion in the manner in which that is undertaken. The submission made was that the intention is to summarise the fact of statutorily mandated notifications. This is something the respondent is clearly authorised to do. The respondent is authorised to summarise in a clear way the fact of notifications including that of the appointment of a receiver to all or part of the property of a company (including that of which it is the legal owner and holds on trust) and in the summary to direct a person to the form of notification for the relevant details. It is, however, impermissible to do so in a manner which implies that an appointment of a receiver to property of a company causes a change or a pending inevitable change in the status of the company.

Relief

50. I accordingly consider that the appeal should be allowed in part. The respondent remains entitled to file the E8 received in respect of the receivers appointed over the property of the plaintiff, but is not permitted to change the "status" of the appellant from "normal" to "receivership". I would propose that the Court should hear the parties as to the precise form of relief in accordance with this judgment.