

## THE HIGH COURT

[2018 No. 315 COS]

## IN THE MATTER OF THE COMPANIES ACTS 1963 – 2012

## AND IN THE MATTER OF SECTION 106 OF THE COMPANIES ACT 1963

## AND IN THE MATTER OF CST LIMITED

BETWEEN

ACC LOAN MANAGEMENT DESIGNATED ACTIVITY COMPANY

APPLICANT

AND

CST LIMITED

RESPONDENT

**EX TEMPORE JUDGMENT of Mr. Justice Tony O'Connor delivered on the 26th day of February, 2019**

1. This application to extend time for delivering particulars of a charge dated 28th February, 2000, under s. 99 of the Companies Act 1963, as amended ("*the 1963 Act*"), is somewhat extraordinary given the elapse of time. The following chronological summary is uncontroversial.

25/01/2000 ACC Bank Limited, which changed its name to ACC Loan Management Limited in 2014, and, on 23rd August 2016, converted to ACC Loan Management Limited Designated Activity Company, ("*ACC*"), agreed to loan CST Limited, ("*the company*") IR£112,000 to assist in purchasing a commercial property at Rathdowney, Co. Laois, comprised in Folio 562F County Laois, ("*the property*").

27/01/2000 The directors, including Mr. Day who represented himself in Court today as an interested shareholder and creditor, agreed to the terms of the facility letter of 25th January, 2000. This followed a resolution of the board of the company to enter into security documentation required by ACC under the facility letter. On 26th January, 2000, the then solicitors for the company furnished a written undertaking to ACC to, *inter alia*, deliver particulars of the deed of charge to the Registrar of companies for registration within 21 days after the date of creation of the charge.

08/02/2000 Particulars of a debenture in favour of ACC were registered in the Companies Registration Office ("*CRO*"). This related to a debenture in favour of ACC.

11/02/2000 The deed of charge in favour of ACC was dated this date although the cover sheet refers to 28th February, 2000. In any event, the deed was stamped on 14th March, 2000.

05/03/2001 Forms of satisfaction for charges in favour of AIB were registered in the CRO which meant that the only secured creditor, according to the CRO was then ACC.

30/01/2006 The Land Registry registered the charge on Folio 562F.

24/04/2006 The then solicitors for the company furnished a certificate of title, the land certificate for Folio 562F and the original debenture before asking for confirmation that their undertaking "*is cancelled*".

01/06/2006 ACC confirmed the discharge of the said undertaking given by the solicitors to the company.

Sept 2013 Seven years after the last communication with the company's solicitors about its security and title and thirteen years after the creation of the charge, ACC discovered on a security review that particulars of the charge had not been furnished to the CRO in respect of the charge for which this application is made. It should be said that in the interim, particulars of the amounts due by the company to ACC had been given and were well known to the company.

24/08/2018 Five years after the said discovery, ACC issued the notice of motion seeking the extension of time which was heard today.

11/09/2018 The CRO by letter confirmed that the Registrar of companies had no objection to this application.

**The Applicant's Position**

2. Counsel for the applicant explains that:-

(i) this application is brought under s. 106 of the 1963 Act by virtue of s. 419 of the Companies Act 2014, which requires applications for extensions of time to deliver particulars of charges created before the commencement of the 2014 Act, to be brought in this manner. There is, and can be, no controversy about this point;

(ii) the rationale for the register of charges under s. 99 of the 1963 Act, is to afford protection to creditors of a company while providing them with a means of discovering whether a particular company has encumbered its assets in favour of secured creditors;

(iii) the consequences for not furnishing particulars do not avail unsecured creditors until after the appointment of a liquidator. Then, the liquidator is the person with *locus standi* to challenge the charge or the details of the charge;

(iv) although the position of unsecured creditors may be prejudiced where relief is granted under s. 106, (now s. 417 of the Companies Act 2014), an application for late delivery of particulars will not assist them. Counsel cites the passage from *Romer J. in In Re Ehrmann Brothers Limited* [1906] 2 Ch. 697 at 708: "... I think they were intended to be treated

*as valid charges subject only ... to rights acquired which could have been enforced in some way against the property had not the extension of time been granted. ...”;*

(v) section 106 gives a wide discretion to the court and provisos known as the “Joplin provision”, (see para. 19.094 of Courtney’s *The Laws of Companies* (4th Ed.)) and the “Charles” type order, (see para. 19.099 of above) are often included to protect secured creditors who may be surprised by the consequences of an application to extend the time for delivery of particulars.

3. Counsel for the applicant further submits that the unsecured creditor and shareholder, Mr. Day, has always known or ought to have known about the charge. There is no representation for the company before the Court.

#### **The position of Mr Day**

4. Mr. Day made the following principal submissions:-

(i) The application must be statute barred; however, he was unable to point to the statutory provision that actually limits the time for bringing this application. He concentrated on the 21 day period for furnishing particulars of the charge as opposed to the time limit for bringing an application to court to extend the time for delivery of particulars.

(ii) The application cannot fit into the ‘accidental’ or ‘inadvertence’ excuse, or use the ‘just and equitable grounds’ required by s. 106 of the 1963 Act, given the constructive, if not the actual knowledge of ACC. It ought to have acted with diligence in relation to the conduct of its business and affairs. He rightly acknowledged that “*some other sufficient cause*” may be open to ACC but this puts the onus on the applicant to advance that sufficient cause.

(iii) If the order was granted, the receiver will sell the property at an undervalue given a boundary dispute and some water ingress problem which he mentioned in submissions even though they were not described on affidavit. In this way, he, as an unsecured creditor and shareholder, could be or will be prejudiced if the charge is rendered valid and enforceable by virtue of an order of this Court.

(iv) The company cannot be responsible for the failure of its solicitors to comply with their obligations and terms of engagement. He also refers in his oral submissions to his experience of lending institutions taking responsibility for furnishing particulars to the CRO when charges are granted.

#### **Decision**

5. The rationale for s. 99 is as submitted by counsel for the applicant. Section 106 applications are relevant to secured creditors. Issues about selling at an undervalue and the responsibility of the company’s former solicitors are matters for other proceedings if there are grounds to commence a claim. The Court emphasises that it cannot and does not make any determination of those issues at this particular stage: the issue about the boundary dispute and the ingress problems are problems for a receiver.

6. The ‘*other sufficient cause*’ under s. 106 can be relied upon by ACC. It is true that ACC could have been more diligent but that is not a sufficient reason to refuse this application. A mistake was made by the company which failed in its obligation under s. 101 of the 1963 Act. I cannot determine whether its solicitors failed in any duty although I note that their undertaking was noted to have been discharged by ACC in June 2006. ACC, through counsel, acknowledges that it is guilty of delay but that is not sufficient to defeat the application in the presenting circumstances. Oversight and lack of attention to detail has occurred but s. 106 can nevertheless be applied.

7. Mr. Day may feel aggrieved that it has taken ACC so long to close this affair but he is not prejudiced effectively by ACC proceeding to regularise the affair in seeking the late extension for delivering the particulars. Mr. Day did well in describing his perception of prejudice, but there is no reality ultimately in his argument when one considers that the charge was created and was later registered in the Land Registry.

8. He has known at all times that the charge was entered into and given to ACC. Neither the company nor its officers, such as Mr. Day, can rely on their own default and primary responsibility under s. 100 of the 1963 Act to deliver particulars to the CRO. The solicitors were agents of the company. I do not accept Mr Day’s submission that by employing solicitors, the company and its directors can avoid the primary responsibility to furnish particulars. The solicitors are not in court and no cause of action has been commenced by the company against those solicitors. I cannot determine whether the company has a cause of action against its solicitors and I specifically refrain from commenting on their role because they are not represented in this Court.

9. Therefore, I will grant the application subject to the “Joplin” provision and a “Charles” form order to permit any future liquidator of the company to discharge this order which application must be made by 2nd July, 2019. I should say there is no suggestion that a liquidator will be appointed to the company. I just want to ensure that all possibilities are covered when making this order.