

## THE HIGH COURT

[2004 No. 18860 P]

BETWEEN

LINDEN LIMITED

PLAINTIFF

AND  
ANNE MARIE GLENNON

DEFENDANT

**Judgment of Mr. Justice McGovern delivered on the 9th day of February, 2007**

1. The plaintiff is a private limited liability company which, at the time of commencement of the proceedings, had its registered offices at 20 St. Johns Road, Dublin 4.

2. The plaintiff company was incorporated on the 24th day of July, 1973, within the State. The plaintiff has a nominal share capital of IR£5,000 divided into 5,000 shares of IR£1 each. Two of the shares were issued and the memorandum of association shows that the shares were issued to Richard Edgar Devlin and Maurice Wilson Cully. The articles of association state that the first directors of the company were Richard Edgar Devlin and Maurice Wilson Cully. In the course of the hearing evidence was given that the effective controller of the company from the date of its incorporation up until July, 1997, was Maurice Cully. It was he who had arranged for the formation of the company and made most of the executive decisions concerning its operation.

3. Maurice Cully died on 5th November, 1997.

4. Maurice Cully was married to Belinda Cully, but they had been separated for many years prior to his death. There were two children of the marriage, namely Maurice Cully Junior and Louise Cully, (now Louise Heatherly). In or around 1984 Maurice Cully formed a relationship with Ms. Anne Marie Glennon, the defendant in these proceedings. There are two children of that relationship, namely a son named Zane and a daughter named Lara. Mr. Cully and the defendant became estranged sometime around 1994. In an affidavit sworn in proceedings bearing record no. 1996 No. 4225P between Maurice Cully and Anne Marie Glennon, Mr. Cully states that the relationship terminated in 1994 and Ms. Glennon asserts in an affidavit that it ended in April, 1996. The precise date on which they became estranged is not crucial to my findings in this judgment.

5. By the time of his death the plaintiff had entered into a further relationship with one Beatrice Frommann and he recorded in his last will and testament that his will was made in contemplation of his marriage to Beatrice Frommann.

6. In 1990 the Plaintiff company was struck off for failing to make annual returns from 1974 to 1990. Evidence was given by an official from the Companies Registration Office who traced the history of the appointment and resignation of directors in the company and other relevant changes from time to time. Most of the documents on the Companies Registration Office file were reconstructed. Mr. Dermot Coyne gave evidence that he took instructions from the late Mr. Maurice Cully with a view to recreating, as accurately as possible, the records of the company. Louise Heatherly (nee Cully) assisted in that task and signed some annual returns with her father. There are a small number of documents which can be traced back to the period 1974 to 1990 and I will refer to some of these later in the judgment. But most of the returns in that period are based on a reconstruction. In the course of the hearing I heard evidence from a number of witnesses in support of the documentation which has been recreated.

7. In High Court proceedings bearing record number 1991/6582P a petition was brought to have the company restored to the register of companies. By order made on 13th May, 1991, the company was restored to the register.

**The Issues**

8. In or about the month of November, 2001, the auditors of the company received a letter from the defendant's solicitors claiming that the defendant had been appointed as a director of the company some time earlier. The letter asserted, inter alia, that she continued to be a director of the company. The company contends that she was never made a director nor did she ever act as director nor was she treated as a director. In view of the dispute on this issue the company commenced these proceedings. In these proceedings the company seeks a declaration that the sole directors of the plaintiff company are;

(a) Louise Heatherly, nee Cully, and Dermot P. Coyne;

(b) a declaration that the defendant is not a director of the plaintiff company;

(c) an injunction restraining the defendant, her servants or agents, or any person acting in consort with her from purporting to act or hold herself out in any manner whatsoever as a director of the plaintiff company; such further declaratory orders or other relief as may be just or necessary.

9. In the statement of claim it is pleaded that the sole shareholders in the plaintiff company are the late Maurice Cully and Louise Heatherly, nee Cully. It is also pleaded that after Maurice Cully died his shareholding in the plaintiff company was held pro tempore by Dermot P. Coyne, solicitor, in his capacity as executor of the estate of the said Maurice Cully, deceased.

10. The defendant delivered a Defence and Counterclaim. In the defence she denies that Louise Heatherly is a shareholder in the company and that the share of the late Maurice Cully is held "pro tempore" by Dermot Coyne whether in his capacity as executor of the estate of the said Maurice Cully, deceased or otherwise. She also denies that Mr. Coyne is the lawfully appointed executor of the said estate. The latter issue was subsequently litigated in a probate action and by order of the High Court the will of the late Maurice Cully was admitted to probate and Dermot P. Coyne is the executor of the will so admitted. The defendant also denies that the said Louise Heatherly, nee Cully and the said Dermot P. Coyne are directors of the company. The defendant pleads that she invested IR£50,000 in the company and was duly appointed a director of the company on 9th May, 1988 at a salary of £27,000.00 per annum. She contends that at all material times the late Maurice Cully was the full beneficial owner of the issued shares and that he held one share in the plaintiff company in his own right and the second share was held in trust for him by a succession of trustees none of whom had any capital input nor any equitable interest in the said shares. She claims that she agreed to invest £50,000.00 in the plaintiff company in consideration of her appointment as a director of the plaintiff and a 50% beneficial share in the shareholding of the plaintiff. In the course of the hearing the Defendant stated that she was not claiming to be the owner of a share in the Company. She counterclaims that she is the only lawfully appointed director of the plaintiff company having been duly appointed in May 1988 and seeks a declaration that she is the only lawfully appointed director of the plaintiff; a declaration that neither Dermot P. Coyne or Louise Heatherly were lawfully appointed as directors; she also claims other relief including damages for breach of contract and such

accounts or enquiries as may be necessary.

11. At the commencement of the hearing counsel for the company informed the court that in advance of the hearing it had served on the plaintiff an amended statement of claim to cover the defendant's plea that she is entitled to 50% of the beneficial ownership of the shareholding of the plaintiff company. The application to file an amended Statement of Claim was not proceeded with at the commencement of the hearing but in the course of the trial an extensive amount of evidence was given as to the shareholding of the plaintiff company and it is clearly desirable in the interest of deciding the issues in this case and for the saving of costs and expense that this matter should be dealt with as part of these proceedings, having been raised in the defence and counterclaim of the defendant. As this matter had not been resolved on the conclusion of the hearing the matter was put in for mention on the week following the conclusion of the evidence and the parties agreed that the issue of the shareholding should be dealt with. The defendant accepted that she had prior notice of the amended statement of claim and is not prejudiced by it. Accordingly I directed that the amended statement of claim be filed in the Central Office and I will deal with the issue of the shareholding in the plaintiff company in the course of this judgment.

## **The Evidence**

### **Directorships**

12. The reconstructed Companies Office file shows the following appointments and resignations of directorships:-

First directors on incorporation – Richard Edgar Devlin and Maurice Wilson Cully.

18th June, 1984 Richard Devlin resigned and Desmond Stephen Waddick was appointed.

16th February, 1990 Louise Dorothy Cully appointed and Derek Desmond Waddick resigned.

30th July, 1996 Beatrice Frommann appointed and Louise Cully resigned.

28th July, 1997 Dermot Coyne appointed and Maurice Cully resigned.

31st July, 1998 Beatrice Frommann resigned and John Carlin appointed.

31st July, 1998 Louise Cully appointed

8th March, 2000 John P. Carlin resigned.

10th March, 2000 Form B10 reciting John Carlin resigned as director and secretary on 10th March, 2000 Louise Cully appointed secretary.

9th June, 2000 Dermot Coyne appointed.

13. There are a number of inconsistencies in the later documents. For example a B10 form shows that Dermot Coyne was appointed a director from the 28th July, 1997. A later B10 form shows that he consented to act as director and he signed a consent to act as a director on the 9th June, 2000. A B10 form dated 10th March, 2000 shows John Carlin resigned as director on that date and another B10 form reports to show that he resigned as director and secretary on the 8th March, 2000.

14. While some of these forms are clearly in error they do not materially alter the position because they show that Dermot Coyne has been appointed a director and has not resigned and they also show that John Carlin who had been appointed in July, 1998 resigned on either the 8th or 10th March 2000.

15. On the 26th November, 2001, Patricia McNamara & Co. Solicitors, acting on behalf of the defendant informed the defendant informed the auditor of "it is apparent from Company documents recently discovered by us that our client was appointed a director Linden Limited some time back. We are instructed that she never resigned her position nor was she removed... "

16. From that time on the defendant has asserted that she has been appointed a director and remains a director of the company. Her claim took everyone connected with the company by surprise. The only witness who supported the defendant's contention that she had been appointed director was Mr. John Nolan a Companies Registration agent. He gave evidence that he knew Maurice Cully from about 1967 or 1968 and that he acted as his agent. In July, 1973 he formed the company and as no single member was permitted to be director he used a trustee shareholder Mr. Richard Devlin. He said that Maurice Cully took a share in his own right. He said that Richard Devlin was the other director. He agreed that Richard Devlin was replaced by Des Waddick. On the 9th May, 1998 he says that Maurice Cully came to office with Ms. Glennon. She was pregnant with her first child. Maurice Cully informed him that he had been under investigation by the Revenue and that Ms. Glennon had put some money into his businesses. He was not specific as to which business. The late Mr. Cully had a number of businesses and there was no dispute that the defendant was associated with some of them. He said she would not be attending meetings but he wanted to protect her into the future. He instructed Mr. Nolan to lodge a B9 document and it was only to take effect from the 9th May, 1988 which was the date at the bottom of the document. The representative from the Companies Registration Office said that there was a certified copy of this document on file. As it was not properly filled out it was returned and received back in the office on the 13th September, 1989 when it was registered. The defendant relies heavily on this document in support of her assertion that she is a director.

17. There are a number of unusual features about the document. In the first place it purports to show that the defendant was approved as director on the 25th July, 1973. This would have been one day after the incorporation of the company and at a time when Mr. Cully and Mr. Devlin were directors. In July, 1973 the plaintiff was 13 years of age and she did not even know Mr. Cully. In High Court proceedings bearing record number 1996 No. 4225P between the late Maurice Cully and Anne Marie Glennon she swore an affidavit in which stated she formed a relationship with the late Mr. Cully in or about 1983, in the same action Maurice Cully swore an affidavit in which she confirms that fact (although he says it was 1984). There is no evidence to suggest that the parties even knew each other in 1973.

18. The document also purports to show that on her appointment as a director Richard Devlin resigned. The reconstructed file shows that Desmond Waddick replaced Mr. Devlin as a director and he gave evidence to that effect. I accept the evidence given by Mr. Waddick in that matter. Furthermore Mr. Nolan said that he was sure that Mr. Devlin was replaced by Mr. Waddick. In the course of the hearing a number of statements given to An Garda Síochána were produced including a statement by Mr. John Nolan. This arose out of allegations being made by the defendant concerning the company and the way it was being run. In a document appended to

his statement Mr. Nolan stated that at the meeting on the 9th May, 1998 at his office Mr. Cully introduced the defendant as his wife and produced the old form 9 "... that he had been given when he first had Linden Limited registered by Nolan's company in 1973, and specifically instructed that Anne Marie be appointed a director of Linden Limited". When it was pointed out to Mr. Nolan that this could not be so because the form is entitled "Companies Acts 1963 to 1983" he withdrew that statement and accepted it could not be true. Mr. Nolan also gave evidence that as and from the 9th May, 1988 Ms. Glennon knew she was a director. I do not accept that evidence. The first time the defendant made any claim to be a director was through her solicitors on the 26th November, 2001.

19. Mr. Dermot Coyne gave evidence that in early 1991 he joined the firm Bryan Fox & Co. Solicitors and he worked on the restoration of Linden Limited to the Register. He took instructions from Mr. Maurice Cully and tried to reconstruct the annual returns. Mr. Coyne produced a document which the defendant accepts is in her handwriting and is dated the 26th February, 1996. In that document the assets of Maurice Cully were being set out and they included the plaintiff company. Under the heading "Linden Limited" the following appeared in the handwriting of the defendant:

"Owns property/business premises 400,000/450,000

49 South William Street, Dub. 2

Directors M.C. Cully and Louise Cully".

20. Mr. Coyne gave evidence that the defendant was a director of two other companies in which the late Mr. Cully was involved namely Bray Fun Limited and Galliano Limited. He stated that the defendant was not involved in the company. In proceedings bearing record number 1996/4225P between Maurice Cully and the defendant Mr. Cully stated that the defendant was a director and shareholder of Bray Fun Limited and Galliano Limited. He went on to say in paragraph 9 of a replying affidavit sworn on the 24th October, 1996 that apart from her involvement in those companies "... the defendant had no other involvement in any business venture with this deponent...". By letter of the 12th February, 1996 the accountants for the company wrote to the defendant in relation to a number of companies. In the final page of that letter the defendant was informed that as she was not a shareholder or director of Linden Limited the accountants were unable to furnish her any information other than to state that there were no wages charged in either company to her name. The defendant never took issue with that statement or made any assertion that she was a director before November, 2001.

21. Ms. Louise Heatherly gave evidence that she had no knowledge of the B9 form purporting to make the defendant a director although she accepts it may well have been on the Company file. The first she became aware of it was in or around November, 2001 when the plaintiff's solicitor wrote to her and to Dermot Coyne stating that she was a director. A meeting was held on the 12th September, 2002 with a view to rectifying the situation. This resolution purported to acknowledge that she had never been made a director. Once it surfaced both she and Dermot Coyne felt that the situation should be regularised.

22. Mr. Coyne was never aware that the plaintiff was a director nor did he ever hear the late Maurice Cully mention the fact.

23. Mr. Alex Cremin an audit partner in Cremin McCarthy & Company consulted the audit file of Tony McCormack deceased who carried out most of the audit work on the plaintiff company. He gave evidence that no investments had been made by Ms. Glennon in the company although there was evidence of money being paid by her into other companies in which the late Maurice Cully had an interest.

24. Mr. Pat Cremin an accountant with Cremin McCarthy & Company said he had known the late Mr. Cully since 1967 and they were very close friends. The first time they heard anything of the defendant being a director of the plaintiff company was when a letter came from her solicitors in November, 2001. He said that the late Maurice Cully never acknowledged Ms. Glennon as a director.

25. Leaving aside the B9 form on which the defendant relies there is no other evidence to indicate that the defendant was a director or had ever purported to act as director. In fact the evidence is very much to the contrary.

26. The question which arises is whether the B9 form dated 9th May, 1988 has the effect of confirming the defendant as director of a company ?

27. I am satisfied that the B9 form cannot be relied on and is a fiction. Even if I accept Mr. Nolan's evidence that the late Mr. Cully wanted to protect the defendant and brought in this document to his office in order to achieve this purpose, it is clear that the document is totally unreliable and quite plainly wrong and inaccurate in many important respects. It cannot be relied on as evidence for a number of reasons:-

1. It purported to appoint the defendant a director from the 25th July, 1973 which was long before the defendant and Mr. Cully knew each other and at time when the defendant was only 13 years of age.

2. It purported to show that Richard Devlin resigned on the appointment of Anne Marie Glennon when this was not so.

3. Richard Devlin resigned on the 18th January, 1984 when Mr. Desmond Waddick was appointed. Mr. Nolan said that the B9 document only took effect from the 9th May, 1998. Mr. Devlin had resigned 4 years earlier.

28. I am quite satisfied that the defendant never acted as a director of the plaintiff company, that the B9 document dated the 9th May, 1988 cannot be relied on and that there is no evidence that the defendant ever having been properly appointed to the Board.

### **Shareholding Issue**

29. The evidence clearly shows that the late Maurice Cully was a beneficial owner of one share in the company and this share is now held by Dermot Coyne, his executor. Under the terms of his will he holds this share in trust for Zane Cully and Zara Cully, the two children of his relationship with the defendant.

30. A dispute exists concerning the other share.

31. Mr. John Nolan gave evidence that Ms. Louise Heatherly holds the other share in trust. He said he had no doubt about this and that he recalled telling the late Mr. Cully that he should execute a declaration of trust and complete an undated but signed share transfer form. He says this took place at the meeting in his office on the 9th May, 1998.

32. I am satisfied from the evidence of Mr. Desmond Waddick that at the time he became shareholder he held the share in trust for

Louise Heatherly (nee Cully). The share transfer form records the fact that he received the share "in trust for Louise Cully minor". Mr. Waddick was quite clear in his evidence that when the share was transferred by him, he did not transfer the share in trust. He said that Maurice Cully wanted his daughter to have the share in the company as a gift since they had been reconciled after many years of separation. Ms. Louise Heatherly gave evidence that after she was reconciled with her father he told her he wanted to transfer one half of the company to her. Mr. Dermot Coyne told the court that he took instructions from the late Maurice Cully and that the share transfer from Mr. Waddick to Ms. Heatherly (nee Cully) was definitely on Mr. Cully's instruction. Mr Pat Cremin of Cremin McCarthy & Company Accountants said that he believed that Mr. Nolan was incorrect when he stated that Louise Heatherly holds the second share in trust. He said such evidence contradicts the conversation which he had with the late Mr. Cully in his office. His understanding was that Dermot Coyne held one share for Zane and Zara and Louise Heatherly held one for herself. I accept the evidence of Mr. Waddick, Mr. Coyne and Mr. Cremin and prefer their account of the event to that of Mr. Nolan. I find support for that finding in the affidavit sworn by the late Maurice Cully himself on 7th May, 1991 in the petition proceedings to restore the company to the Register (Record No. 1991/6582P) in which he stated at paragraph 5:

"The authorised share capital of the petitioners £5000 divided into 5,000 shares of £1 each. The issued share capital of the petitioner is £2 divided into two shares of £1 each and held as to one share each by your deponent and Louise Doherty Cully of 20 St. John's Road, Dublin 2."

33. In 1998 Louise Heatherly (nee Cully) commenced a s. 205 petition against the company and Beatrice Frommann and Dermot Coyne. (Record No. 1998/155COS). In a replying affidavit Dermot Coyne confirmed that Louise Heatherly owned one of the two issued shares.

34. I am satisfied on the evidence that Louise Heatherly is the owner of one share in the company and that she did not hold it in trust for the late Maurice Cully.

### **Summary**

35. In conclusion my findings are as follows:

1. The defendant is not and never has been a director of the plaintiff company.
2. Louise Heatherly (nee Cully) is the owner of one issued share in the plaintiff company, the other issued share being held by Dermot P. Coyne executor of Maurice Cully deceased for the benefit of his estate.