THE HIGH COURT

[2011 No. 735 COS]

IN THE MATTER OF CTO GREENCLEAN ENVIRONMENTAL SOLUTIONS LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2010

AND IN THE MATTER OF AN APPLICATION BY LOUIS J. O'REGAN LIMITED UNDER SECTION 139 OF THE COMPANIES ACT 1990 AND SECTION 98 OF THE COMPANIES ACT 1963

BETWEEN

LOUIS J. O'REGAN LIMITED (AS PETITIONER AND A CREDITOR OF CTO GREENCLEAN ENVIRONMENTAL SOLUTIONS LIMITED (IN LIQUIDATION))

APPLICANT

AND

STEPHEN GRIFFIN AND DAVID RONAN AND ARK LIFE TRUSTEES LIMITED AND ARK LIFE NOMINEES LIMITED AND ARK LIFE ASSURANCE COMPANY LIMITED

RESPONDENTS

Judgment on Application of the Official Liquidator of CTO Greenclean Environmental Solutions Limited (in liquidation)

Judgment of Mr. Justice Robert Haughton delivered on the 26th day of April, 2017

1. By Notice of Motion dated the 14th of September, 2016, Mr. Myles Kirby, official liquidator of CTO Greenclean Environmental Solutions Limited (in liquidation) ("the Official Liquidator" and "the Company" respectively) seeks the following orders:-

> "1. An order pursuant to Order 15, rule 13 of the Rules of the Superior Court or otherwise, joining the Official Liquidator as a co-applicant in the within proceedings;
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> 2. In addition, an order prohibiting the first and second named respondents from taking any steps to dissipate or utilise the monies which are the subject matter of the within proceedings, as referred to in the notice of motion dated 18th December, 2014 and specified in the affidavit of Myles Kirby sworn on 12th September, 2016, pending the determination of the proceedings or further order of this honourable court."

2. The proceedings to which the Official Liquidator seeks to be joined as a co-applicant were brought by Notice of Motion issued on 18th December, 2014 on behalf of Louis J. O'Regan Limited against the respondents and each of them in essence requiring payment by the first and second named respondents ("Mr. Griffin" and "Mr. Ronan" respectively) of sums totalling €2,664,333.00 which it is claimed were unlawfully or improperly paid by the Company to them at a time when they were directors of the Company. It is claimed that between the 11th February, 2008 and 26th May, 2008 sums totalling €2,064,33.00 were paid to Mr. Griffin, and that €600,000.00 was paid to Mr. Ronan on 5th January, 2009.

3. It is claimed that these monies were paid improperly and in breach of s. 139(1)(b) of the Companies Act 1990, and that "the effect of such disposal was to perpetrate a fraud on the company, its creditors or members" and that such monies should be paid to Louis J. O'Regan Limited. A claim under s.139(1) can be brought "… on the application of a liquidator, creditor or contributory of a company which is being wound up …". Alternative claims are made pursuant to s.286 of the Companies Act 1963 asserting that these payments were fraudulent preferences, and pursuant to s.298 of the Companies Act 1963 (as amended) that Mr. Griffin and Mr. Ronan were guilty of misfeasance or breach of duty, and that the monies should be repaid to Louis J. O'Regan Limited or the Company.

First Issue – Application for Joinder of the Official Liquidator

Order 15 rule 13

4. This application is made pursuant to O. 15, r. 13 of the Rules of the Superior Courts 1986, which provides:-

> "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a summons or notice in manner hereinafter mentioned, or in such other manner as the Court may direct, and the proceeding as against such party shall be deemed to have begun only on the making of the order adding such party."

5. In his grounding affidavit sworn on 12th September, 2016 the Official Liquidator records that Louis J. O'Regan Limited, an unsecured creditor of the Company presented a petition to the High Court on 20th December, 2011 seeking to have the Company wound up. By order of the High Court (Laffoy J.) made on 23rd March, 2012 Mr. Joseph Foran was appointed Official Liquidator. He resigned on 23rd May, 2013, and he was replaced by Mr. Alan Fitzpatrick as Official Liquidator by order of the High Court (Finlay Geogheghan J.) made on 17th June, 2013. By Notice of Motion dated 25th November, 2013 Louis J. O'Regan Limited sought the removal of Mr. Fitzpatrick as Official Liquidator, he subsequently agreed to resign and pursuant to an order of the High Court (Mr. Justice White) dated 22nd February, 2016, that resignation was accepted and Mr. Myles Kirby was appointed Official Liquidator.

6. As noted above Louis J. O'Regan Limited initiated the main proceedings herein in December 2014. While it would be more usual for a liquidator to initiate such proceedings it appears that the first two liquidators of the Company decided, for whatever reason, not to initiate such proceedings against Mr. Griffin or Mr. Ronan, but Louis J. O'Regan Limited was entitled as a "creditor" to initiate such proceedings under s.139(1) of the 1990 Act.

7. The Official Liquidator avers that having carried out a detailed investigation into the history of the Company, and based on the books and records available to him, the Company "was barely solvent on a balance sheet basis" and "…was not in a strong financial position" in July 2007 (para. 24). However in August 2007 the Company was awarded a very substantial contract to carry out certain waste clearance works at the former Irish Steel plant at Haulbowline in Co. Cork. The Company was engaged as a subcontractor by a Hammond Lane Metal Company, which had been awarded a contract worth €30 million by the Irish Government. Hammond Lane was a principal contractor and it sub-contracted the work to the Company via Eastwood Ltd. The Company then subsequently sub-contracted certain work to Louis J. O'Regan Ltd. Subsequent to this his turnover increased substantially.

8. It appears that in February 2008 Mr. Griffin, then a director of the Company, notified the Environmental Protection Agency of environmental contamination in the Haulbowline site, and at this time it became apparent that the cost of the clean-up would be a multiple of the original estimate of €30 million as the quantity of contaminated material to be removed had substantially increased. Government concern over this led to the closing down of the site and termination of the main contract on 30th May, 2008. At para. 32 of his affidavit the Official Liquidator sets out details of five payments totalling in excess of €2 million made by the Company to Mr. Griffin between 11th February, 2008 and 26th May, 2008, and the payment of 5th January, 2009 to Mr. Ronan of €600,000.00, all of which were described in the Company books as payments into the respondents' pensions.

9. The last payment to Mr. Griffin of €659,000.00 was made on 26th May, 2008 some three days after a letter was written by the Chief State Solicitor on behalf of the government indicating that the work on the Haulbowline site should cease, and plant and machinery removed, that the site would be locked and secured, and one day before the letter of 30th May, 2008 terminating the main contract.

10. The core case that the Official Liquidator wishes to pursue against the first and second named respondents is that the effect of the payments was to render the Company insolvent and to deprive its creditors of their entitlements. He expresses concern *inter alia* that certain of the payments were made with only one of the respondents as cheque signatory; that a payment of €416,000 made by Mr. Griffin to himself on 10 April 2008 was made at a time when the Company needed cash flow to cover other outgoings; that staff in the Company were being put on protective notice at the time of the payments; that there was no consideration of management accounts or the solvency of the Company when the payments were made; that they were made notwithstanding known substantial VAT and lease payment liabilities and a known substantial potential exposure to withholding tax and finally, that the Company was to bear 20% of the third party costs associated with the removal of the hazardous waste

11. Although Mr. Griffin and Mr. Ronan maintained that the payments made to them by way of remuneration/pension were made by the Company bona fide, and at a time when the Company was solvent, the Official Liquidator in the evidence presented on affidavit questions whether the Company was in fact solvent having regard to all of its debts, liabilities and contingent liabilities, at the time when all or some of the payments were made, and even if it was solvent asserts that such payments were nevertheless "a fraud on the company" within the meaning of section 139.

12. Counsel for the Official Liquidator argued that this is an appropriate case in which to join the Official Liquidator for a number of reasons:-

> (1) The liquidator can pursue the proceedings on behalf of all of the creditors of the Company and is in a better position to do so than a creditor such as Louis J. O'Regan Limited; and
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> (2) The liquidator is in possession of the books and records of the Company and is therefore in a better position to investigate and prosecute such proceedings, including dealing with discovery, and adducing evidence.
>
> (3) If the proceedings are successful the appropriate orders will be for payment to the Official Liquidator on behalf of all of the creditors of the Company.

13. Counsel emphasised that under O. 15, r. 13 a party can be joined "… to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter". In written and oral submissions counsel relied on *Cunningham v. Springside Properties Ltd*. (unreported, High Court Clarke J. February 2007) where, in the context of an application to add a new defendant, Clarke J. suggested that this will ordinarily be granted except where prejudice may occur by reason of the timing of the joinder either to the existing parties or to the proposed defendant. It was argued that the respondents would not suffer any prejudice.

14. Counsel also referred to *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd.* [1998] 2 I.R. 519 for useful statements of principle. There the plaintiff's application to join a parent company as a co-defendant in existing proceedings was dismissed. Laffoy J. stated that the onus on the plaintiff was no greater than to demonstrate that it had a stateable case against the proposed defendant. In addition, she expressed the view that it was not appropriate to attempt to resolve at that stage conflicts of evidence, such as those which arose on the affidavits filed, and that the proper approach was to determine whether there was a stateable case on the basis that the plaintiff's version of the disputed facts was a true one. On appeal, Murphy J. considered that the *locus standi* of the existing defendant to resist the application for the addition of a new defendant. He stated that, in general, a plaintiff may institute proceedings against any defendant without seeking the permission of another. However, it had to be borne in mind that the joinder of a defendant in existing action may well cause delay or add unnecessarily to the cost of proceedings. In his view the court had a discretion as to whether to order the addition of a new defendant and the submissions of an existing defendant might well be of assistance to the court in determining how such discussion should be exercised so the requisite *locus standi* did exist.

15. Thus Counsel argued that the Official Liquidator had shown a stateable case and it was not appropriate for the court to attempt to resolve conflicts of evidence on this procedural application. They argued that the courts discretion should be exercised in favour of the Official Liquidator particularly having regard to the fact that, if the application is refused, the Official Liquidator could simply institute proceedings by way of a fresh application which would ultimately be a mere duplication of existing proceedings, add to costs and lead to potential delay. Counsel also proposed certain case management which would ensure that there was no undue delay or additional cost.

16. In written and oral submissions counsel for Mr. Griffin (whose submissions were adopted by counsel for Mr. Ronan) resisted the application to join the Official Liquidator as a co-applicant on a number of grounds.

17. Firstly, it was observed that the wording of O. 15, r. 13 anticipates that an order will be made by the court either on an application of a party to the proceedings or by the court itself, and does not appear to provide for a bringing of an application by someone in the Official Liquidator's position. This construction was based on the words:-

> "The Court may at any stage of the proceedings, either upon or without the application of either party …"

However, in my view this is an unduly narrow reading of the rule. The main purpose of the rule is evident from the first sentence – it is to ensure that no cause or matter is defeated by reason of misjoinder or non-joinder of parties. Clearly the rule is intended to be facilitative and enabling. Where a non-party applies to be joined, to reject that application upon the basis that they are not an existing party to the proceedings would be contrary to the main purpose of the rule. Once a non-party applies to be joined, if it is appropriate to make such an order it is clear that the court having the power under O.15 r. 13 should do so.

18. Secondly, it was argued that under O. 15, r. 13 the test for joinder is whether the presence of the party is "necessary" in order to enable the court effectively and completely to adjudicate upon the questions involved in the cause or matter. It was argued that joinder of the Official Liquidator is not "necessary" because Louis J. O'Regan Limited as a creditor is empowered to bring an application under s.139 of the Companies Act 1990, and under s.298(2) of the Companies Act 1963 (seeking an order for repayment or restoration of money to a company). Counsel noted that at the outset of the hearing Louis J. O'Regan Limited had appeared by counsel and had indicated that they were not participating in the motion but, in the event that the application to join was granted, they intended bringing an application to withdraw from the substantive proceedings. Counsel for Mr. Griffin described the application for joinder as "backdoor substitution" which was not "necessary".

19. Counsel referred to the Supreme Court decision in *Barlow v. Fanning* [2002] 2 I.R. 593 in which the court cited, with apparent approval, the House of Lords decision in *Vandervell Trustees Ltd. v. White* [1971] AC 912. In the Court of Appeal Lord Denning had suggested that the corresponding words in the English rule should be given a wide interpretation "so as to enable any party to be joined whenever it is just and convenient to do so". The House of Lords disagreed, and Viscount Dilhorne at p. 35 stated:-

> "The rule does not give power to add a party whenever it is just or convenient to do so. It gives power to do so only if he ought to have been joined as a party or if his presence is necessary for the effectual and complete determination and adjudication upon all matters in dispute in the cause or matter. It is not suggested that the revenue ought to have been joined."

Subsequently the rule in England was widened, but no corresponding amendment has been made to the R.S.C. 1986.

Conclusions on O.15 r.13 considerations
20. In my view, the arguments made on behalf of the Official Liquidator on this issue are to be preferred. While O. 15 r. 13 does use the word "necessary" it does not do so in any absolute sense. In fact, it uses the phrase "may be necessary" and this is a further recognition that O.15 r.13 is an enabling procedural provision which is availed of before a court is called upon to make any adjudication or final determination. Where the presence of a party "may be necessary" it is appropriate that they be joined, whether as a defendant or plaintiff/applicant.

21. It is also clear that the fact that a person who is not a party could initiate separate proceedings cannot be an answer to an application to join a co-applicant. If that were so there would be no purpose in having a provision in the Rules permitting joinder of a co-plaintiff or co-applicant – they would be compelled to initiate their own proceedings in every case. The resulting duplication of proceedings and inevitable additional costs cannot have been the intention of the Rules Committee drafting O.15 r.13. Moreover the joinder of the Official Liquidator could not prejudice the respondents in respect of any defence that they may wish to pursue under the Statute of Limitations.

22. If the application in the main proceedings is successful it will involve orders directing payment of monies to the Company. I am satisfied that it is necessary for that purpose alone to have the Official Liquidator joined as a co-applicant.

23. I am also satisfied that it "*may be necessary*" to join the Official Liquidator having regard to the fact that the books and records of the company, including management accounts, and minutes such as those exhibited in his principal affidavit, are in his possession, custody and control. Clearly these books, records and accounts will be core evidence in the application. His joinder will also facilitate the making of discovery that is likely to be required before this matter comes to trial. In a very real way the joinder of the Official Liquidator will enable the court to "effectively and completely" adjudicate upon all questions arising in the application. While it is true that if he was not joined the Official Liquidator could still provide access to the books and records to Louis J. O'Regan Limited for the purposes of the proceedings, but he would have no obligation to do so, or to make non-party discovery, absent an order of the court. The joinder of the liquidator makes him directly amenable to the jurisdiction of the court within the context of the main proceedings.

Statute of Limitations
24. The third ground of opposition to the joinder of the Official Liquidator urged by counsel for the respondents was that the Official Liquidator would be statute barred. In this respect different periods of limitation apply to the different claims made in the main proceedings.

25. The claim under s. 286 of the Companies Act 1963 may conveniently be dealt with first. Under s.286 a payment to a creditor who is a "connected person" is liable to be deemed a fraudulent preference if that payment was effected within two years of a winding up of the company. The commencement of a winding up is deemed to occur in a compulsory liquidation at the time of the presentation of the petition to the High Court (s. 220(2) of the Companies Act 1963). Here this occurred on the 20th December, 2011, although the order appointing the first official liquidator was not made until 23rd March, 2012. As all the payments said to constitute "fraudulent preference" of the respondents as directors, and hence "connected persons", were made more than two years prior to the date of presentation of the petition, any claim under s. 286 would be statute barred.

26. Counsel for the Official Liquidator did not dispute this reasoning. While it is not necessary for this Court to make any final determination of this issue, *prima facie* it would seem that the Official Liquidator, and indeed Louis J. O'Regan Limited, face a difficulty in pursuing any claim under section 286.

27. With regard to the claims under s. 139 of the Companies Act, 1990 and s.298 of the Companies Act, 1963 (as amended), neither of these provisions stipulate a period within which applications must be brought. The respondents therefore relied upon s. 11(1)(e) of the Statute of Limitations 1957 to 2012 which provides that "actions to recover any sum recoverable by virtue of any enactment" must be brought before the expiration of six years from the date in which the cause of action accrued. Counsel argued that the cause of action accrued on the date on which the several impugned payments were made. In respect of Mr. Griffin the last of those was in May 2008, and in respect of Mr. Ronan it was in January 2009, and as over six years has elapsed it was claimed that any such proceedings would be statute barred and accordingly the Official Liquidator should not be joined as a co-applicant.

28. Counsel for the respondents relied upon the decision in *Southern Mineral Oil Ltd. (in liquidation) v. Cooney & Ors* [1999] 1 I.R.

237. That was an application for relief under s. 297 and s. 298 of the Companies Act 1963. Section 297(1) provides:-

> "If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct."

Shanley J. considered that the applicable period of limitation was six years under s. 11(1)(e) of the Statute of Limitations 1957. In relation to the accrual of the cause of action, at p. 241 he stated:-

> "Section 297(1) involves, *inter alia*, an assessment of the conduct of a director by a court in consequence of which the court may, in its discretion, declare the director to be personally liable for all or any of the debts of the company. It is the director's conduct which causes the discretion of the court to be exercised. If as a result of the exercise of that discretion a sum of money becomes payable by the director, the cause of action is not founded upon the declaration, but rather upon the conduct which gives rise to the declaration in the first place."

In the course of his decision Shanley J., in determining the period of limitation applicable, referred with approval to the Court of Appeal in England and Wales decision in *Re: Farmizer (Products) Ltd.* [1997] 1 B.C.L.C. 589. That case concerned s. 214 of the Insolvency Act 1986 which dealt with a form of fraudulent trading and provided, at subs. (1) that:-

> "… If in the course of the winding up of a company it appears that subsection (2) of this section applies in relation to a person who is or has been a director of the company, the court, on the application of the liquidator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper."

Gibson L.J. at p. 660 stated:-

> "The words 'in the course of the winding up of a company' are expressed to govern 'if it appears', which must mean if it appears to the court. They govern the period of jurisdiction of the court to make an order, and are expressed to govern the commencement of proceedings. …
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> Secondly, it is to be noted that the phrase 'if in the course of the winding up of a company it appears' is an introductory phase to be found in each of s. 212, 213 and 214. It was described in the course of argument as a hallowed phrase because, in the case of the provisions of s. 212 it's use goes back to s. 165 of the Companies Act 1862 and, in the case of the provisions of s. 213, it's use goes back to s. 75 of the Companies Act 1928. All three of the consecutive sections are linked, as the heading of that group of sections indicates, by the common thread that they enable directors and officers to be penalised for wrongdoing. But if Mr. Oliver is right, the significance of the use of the phase differs as between s. 212 and s. 213 and s.214. Only in the case of the latter two sections, Mr. Oliver says, does the phase amount to the prescribing of a period of limitation within s. 319. In the case of s. 212 he accepts that it does no such thing and that, for example, more than six years after the commission by a director of a tort against the company the liquidator chose to proceed under s. 212, he could be met by a limitation defence notwithstanding that the proceedings were being prosecuted in the course of the winding up of the company. Mr. Oliver was compelled to concede because of the decision in Re: Lands Allotment & Co. [1894] 1 Ch. 616. In that case proceedings were brought by the liquidator of a company under s. 10 of the Companies (Winding-Up) Act 1890 (the predecessor of s. 212) to make directors restore to the company money improperly vested by them eight years earlier. It was held by this Court that they could avail of themselves of a limitation defence. It was not argued at first instance or in the Court of Appeal that 'in the course of winding up' excluded the Statute of Limitations."

29. Section 298 of the Companies Act 1963 (as amended) also adopts the phase "if in the course of winding up of a company" in subs. (1). Section 139 of the Companies Act 1990 does not use this exact phase but does provide in subs. (1) that an application may be brought in respect "of a company which is being wound up". In reliance on these comparisons to the UK legislation being considered by the court in *Re: Framizer*, counsel for the respondents asserted that the six year period does not run from the date of winding up, but rather from the conduct complained of in 2008/2009. Thus counsel relied by way of analogy on the decision of Shanley J. in *Southern Mineral Oil Ltd*.

30. Shanley J. in refusing to join the liquidator as a party also relied on the decision of the Supreme Court in *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd*. [1998] 2 I.R. 519, where Murphy J. delivered the judgment of the court. One of the matters in issue was an application by the plaintiff to add a party as a defendant. The trial judge had refused to add the party as a defendant and the Supreme Court affirmed the decision. Murphy J. said at p. 533 of his judgment:-

> "It is a well established rule of practice that a court will not permit a person to be made a defendant in an existing action, at a time when he could rely on the Statute of Limitations as barring the plaintiff from bringing a fresh action against him."

Counsel for the respondents denied on behalf of their clients that there was any wrongdoing, but without prejudice to that submission asserted that the conduct alleged to constitute a fraud on the company under s. 139, and the same conduct alleged to constitute misfeasance or breach of duty or trust under s. 298(1), occurred eight or nine years ago and accordingly any claim that the Official Liquidator might bring would be statute barred.

31. In response Counsel on behalf of the Official Liquidator relied on the earlier decision of the Supreme Court in *O'Reilly v. Granville* [1971] I.R. 90, where the court allowed a plaintiff's application to add a defendant even though the limitation period had expired as against that defendant, the court taking the view that the Statute of Limitations was a matter of defence and did not arise until pleaded. Counsel also relied on the decision of Clarke J. in *Hynes v. Western Health Board* [2006] IEHC 55 where, having reviewed the authorities he stated:-

> "3.2 In those circumstances I have come to the view that the general proposition, to the effect that a defendant can be joined in proceedings notwithstanding there being issues as to the applicability of the statute to his case, is subject to an exception that the court retains a discretion not to join a defendant where the statute would clearly apply and where, in the words of Budd J., the joining of such a defendant, would be "futile".
>
> 3.3. …

> 3.4. I am, therefore, satisfied that the court should not, in a clear case, join a defendant where it is manifest that the case as against that defendant is statute barred and where it is also clear that the defendant concerned intends to rely upon the statute."

32. Counsel also referred the court to the more recent decision of Supreme Court in *O'Connell v. Building and Allied Trade Union* [2012] 2 I.R. 371 where MacMenamin J. reviewed the case law and sought to set out the principles which should apply. He summarised these at p. 389-390:-

> "[55] I would summarise my views on the procedural questions just identified as follows:-
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> 1. a court of first instance should not generally enter into an inquiry as to whether a claim may or may not be statute barred on the hearing of a procedural motion seeking to join a defendant;
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> 2. in general, on such an application, the only question which a court will ask itself is whether, on the facts before it, the claim against the intended defendant is clearly or manifestly statute barred, and if there are no circumstances in which an intended defendant would be debarred, either in law or in equity, from relying upon the Statute of Limitations 1957;
>
> 3. if there is doubt upon the question, then the defendant should be joined, and whether or not the claim is in fact statute barred may be dealt with in the ordinary way, if necessary by means of a preliminary issue;
>
> 4. prior to acceding to an application to dismiss such a co-defendant out of proceedings because a claim is statute barred, a court will, naturally, ensure that there is evidence before it so that all the circumstances, and any issue as to the conduct of all the parties prior to such joinder, may be considered;
>
> 5. however a court of first instance must always retain the discretion to dismiss an application to join co-defendants if the application itself is evidently futile, would serve no purpose, is founded on insufficient evidence or if it is vexatious or an abuse of court process."

33. Counsel for the Official Liquidator submitted firstly that the cause of action established by s. 139 of the Companies Act 1990 is a creature of statute established by that section, and that it cannot arise until the company is wound up, and that therefore the cause of action does not accrue until the winding up order is made – which in this case was in March 2012. He argued that the decision in *Southern Mineral Oil Ltd*. concerned a different section and the decision in *Re: Farmizer* cannot be applied by analogy. Further s. 297(1) as it applied at the time of the decision in Southern Mineral Oil Ltd. provided for a remedy where "it appears that any business of the company has been carried on with intent to defraud creditors", and it was submitted that the facts before the court were very different to the facts in the present proceedings. Counsel submitted that there were in fact no authorities directly in point that were supportive of the submission made on behalf of the respondents.

34. Secondly, it was submitted that the Official Liquidator in this case would, in response to any defence based on the Statute of Limitations, be entitled to rely upon s. 71(1) of the Statute of Limitations 1957 for extension of the period of limitation by reason of fraudulent concealment. Section 71 provides:-

> "71. (1) Where, in the case of an action for which a period of limitation is fixed by this Act, either—
>
> (a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or
>
> (b) the right of action is concealed by the fraud of any such person, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it.
>
> (2) Nothing in subsection (1) of this section shall enable an action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed."

Counsel submitted that the claim under s. 139 is that there was disposal of Company property which was the perpetration of a "fraud on the company", and that therefore the period of limitation should not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it. It was asserted that this fraud on the Company was not discovered until the third Official Liquidator carried out his investigation into the affairs of the Company after his appointment on 22nd February, 2016.

35. In making this submission counsel relied upon the following averments in the affidavit of the Official Liquidator:-

> "44. Audited financial statements for the year ended 28th February, 2009 were signed by the directors of the Company on 25th March, 2010. It appears that the said accounts were prepared with a view to preventing the striking off of the Company.
>
> 45. I note from the judgment of Ms. Justice Laffoy dated 12th March, 2012 giving the decision of the High Court on the winding-up petition, that one of the directors of the Company, Mr. Boardman, conceded in cross-examination that the Company ceased trading in or around August or September 2010."

Counsel asserted that there was evidence from which a court could find that the Company was continued in existence in order to conceal the conduct the subject matter of the s. 139 proceedings.

Counsel for Mr. Griffin objected that this was a very serious allegation that would require full and precise particularisation, and that no case had been made out on affidavit for deliberate prolongation of the life of the company and avoidance of liquidation with the intention of avoiding personal liability, noting also that Mr. Griffin retired as a director in 2008.

Decision

36. In approaching this issue there does not appear to be any difference in principle between an application to join a co-plaintiff or co-applicant, or the more usual application to join an additional defendant. I am therefore guided by the test most recently enunciated by MacMenamin J. in *O'Connell*. Accordingly this court should be slow to enter into an inquiry as to whether the claims

which the Official Liquidator seeks to pursue are statute barred.

37. I am of the view that there are weighty issues in relation to the Statute of Limitations which are already raised on affidavit by the respondents in defence of these proceedings. However, I have come to the conclusion that the answers are not so clear-cut that the court should decide them at this procedural stage. In particular the question when time first starts running under s. 139 of the Companies Act 1990, which adopts different wording to that used in s.297A and s.298 of the Companies Act, 1963 (as amended), and which focuses on the effect of transactions rather than personal intent, is a question on which there is no clear authority, and one that would need to be fully argued. The consideration of the decisions in Southern Mineral Oil Company and *Re: Farmizer* in the course of the present application does not give rise to such clear answers as would persuade the court not to join the Official Liquidator as a co-applicant.

38. Further the question of whether and to what extent the Official Liquidator can place reliance upon s. 71(1)(b) of the Statute of Limitations, 1957 in response to the limitation defence is an issue upon which the Official Liquidator has provided some evidence of relevance, although clearly not all circumstances that might be relevant are dealt with in the affidavits. Fuller and more precise pleadings, evidence, and argument would be required before a court could make any determination.

39. I am therefore satisfied on the first issue that an order should be made joining the Official Liquidator as a Co-Applicant in the within proceedings.

40. For the sake of completeness mention should also be made of O. 15, r. 1 of the R.S.C. which was an alternative basis upon which the Official Liquidator sought to join in the proceedings. The rule provides:-

> "(1) All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise; provided that if, upon the application of any defendant, it shall appear that such joinder may embarrass or delay the trial of the proceeding, the court may order separate trials or make such order as may be expedient".

This provision enables more than one person to join as plaintiffs in an action, even though they could have brought actions separately. It therefore enables the initiation of proceedings with more than one plaintiff, but it allows a court on application by a defendant, to order separate trials "or make such order as may be expedient". Although counsel suggested the court could join the Official Liquidator by reference to this last phrase, in my view O.15 r.1 is not the rule applicable because there is another rule that expressly covers the procedure under consideration in the present motion. This is properly cited in the Notice of Motion as O. 15, r. 13 and that is the correct basis for the order joining the Official Liquidator to the proceedings.

The Second Issue – Injunction

41. The Official Liquidator seeks interlocutory injunctions that are akin to *Mareva* injunctions restraining the first and second named respondents from taking any steps to dissipate or utilise monies the subject matter of the claims in the proceedings.

42. The test for granting such injunctions was set out in *Re John Horgan Lifestock Ltd.: O'Mahony v. Horgan* [1995] 2 I.R. 411. That was a case in which a liquidator invoked various provisions of the Companies Act, 1963, including s. 298(2), to make the respondent directors of the company personally liable for certain debts of the company. At first instance Murphy J. granted an injunction against the second named respondent, but this was discharged on appeal by the Supreme Court. Hamilton C.J. at p. 418 having traced the history of *Mareva* injunctions and noted that the Act *ad personame*, stated:-

> "Consequently a *Mareva* injunction will only be granted if there is a combination of two circumstances established by the plaintiff i.e. (i) that he has an arguable case that he will succeed in the action, and (ii) the anticipated disposal of a defendant's assets is for the purpose of preventing a plaintiff from recovering damages and not merely for the purpose of carrying on a business or discharging lawful debts."

Hamilton C.J. emphasised the requirement of certain intent on the part of a defendant at p. 419:-

> "Consequently, the cases establish that there must be an intention on the part of the defendant to dispose of his assets with a view to evading his obligation to the plaintiff and to frustrate the anticipated order of the court. It is not sufficient to establish that the assets are likely to be dissipated in the ordinary course of business or in the payment of lawful debts."

43. Earlier in this judgment I have outlined the case made by the Official Liquidator in his principle grounding affidavit and exhibits. I am satisfied that the first limb of the test for a *Mareva* injunction is satisfied and that the Official Liquidator has an arguable case that he will succeed in the main proceedings.

44. The Official Liquidator relies firstly on *inter partes* correspondence to establish the intent required to support the case for injunctive relief. On 28th June, 2016 his solicitors wrote to Mr. Griffin's solicitors requesting an undertaking that "the relevant funds are not dissipated", and he relies upon the refusal to give such an undertaking in a response dated 5th July, 2016. Solicitors for Mr. Griffin by letter dated 22nd August, 2016 also declined to consider a request by the Official Liquidator's solicitors to identify the location of the amounts of payments the subject of the proceedings.

45. However in an affidavit sworn on 19th October, 2016 Mr. Griffin gave considerable detail in relation to his assets. He stated that he left his employment with the Company in 2008 and had not worked since that date due to ill-health, apart from some advisory and unpaid work for his daughter's company. He is fifty-four years of age and has a pension from a private health insurance policy of approximately €17,000.00 per annum and no other income. He stated that he regularly drew down monies from his pension fund in order to live and that the position was as follows:-

> "(a) There is a sum of €200,000.00 presently in his pension fund held with Davies Stockbrokers.
>
> (b) In 2008 he received permission from the Revenue Commissioners to access the pension fund due to his ill-health and drew down 25% as a tax free sum. He regularly drew down the balance of money in the pension fund at different stages over the eight years since 2008, paying tax of in or around 52% on the amount of each drawdown. After these drawdowns he has a sum of around CAD$630,000.00 Canadian Dollars deposited in the Bank of Montreal in Vancouver. He explains:-

> "The reason that the money is in the bank is that I have long connections with Canada over a 30 year period. My brother lives in Canada and I have spent the entire of the four summers prior to this year living in Canada with my wife. We were not able to go to Canada this year because of my son's illness, to which I will refer later."

(c) From the money drawn down from the pension fund he transferred to his wife a sum of €60,000.00 for her own use. He explained that his only other asset "is my family home held jointly with my wife … and located at Blakehouse, Spring Hill, Carrigtwohill, Co. Cork. There is a mortgage on the property".

Mr. Griffin then gives details of his son's serious illness diagnosed earlier this year, the result of which has been that Mr. Griffin has become financially responsible for his son including significant medical costs. A letter from Mr. Griffin's solicitors Coakley Moloney dated 18th November, 2016 also states that:

> "…Mr. Griffin has no intention whatever of leaving this country, and your insinuation regarding the sale of his house is completely incorrect. The house has been for sale since 2003."

46. In relation to Mr. Ronan the Official Liquidator similarly relies upon a refusal in correspondence to give an undertaking not to dissipate the relevant funds. This was requested by Maples solicitors on behalf of the Official Liquidator by letter dated 28th June, 2016. There was no initial response but an undertaking was declined by letter dated 25th July, 2016 from Mr. Ronan's solicitors Augustus Cullen Law. In their letter they refer to Mr. Ronan's pension and argue that "pension law provides a prohibition on the assignment of benefits". In response to further correspondence, by email dated 8th September, 2016, Augustus Cullen Law referred to the Supreme Court decision in *O'Mahony v. Horgan* and stated:-

> "There is no evidence in this case that our client is proposing to remove or dissipate these assets".

47. In the affidavit sworn by Mr. Ronan on 14th October, 2016 he refers to the funds paid to him by the company on 5th January, 2009 as follows:-

> "21. I say that the Liquidator is trying to say that the date of 5th January, 2009 is the date of my pension payment but in fact payments were made to me up to 9th April, 2008. I refer to Liquidator's Affidavit at paragraph 43. The funds were put back into the company in December 2008 so that the tax could be paid on my salary and the company could make the pension contribution. It is denied this is a fraudulent disposition or that the Company ought not to have made this pension payment."

48. Mr. Ronan then states at para. 26:-

> "The allegation made by the Liquidator at paragraph 76 of his Affidavit that I refused an Undertaking, is denied. I am advised by my pension and legal advisors, that I am not permitted at law to assign or undertake to assign the benefit of my pension or to interfere with, or restrain the functions of my trustees, or undertake to do so, by giving the Undertaking sought. I deny that not giving the Undertaking does not interfere with the maintenance of the status quo of the pension pending the determination of the proceedings …
>
> 27. I have no legal entitlement to restrict my pension trustees with the Undertaking sought herein, or to wrongfully prefer the Petitioner over my legitimate Creditors. However I confirm I have not interfered with the role of my pension trustees in the maintenance and security of the €600,000.00 pension investment, the subject matter of this application, or otherwise dissipated the said €600,000.00 pension investment."

It is also noteworthy that Mr. Ronan in his affidavit describes himself as:-

> "David Ronan, Farmer, of Castleblake, Rosegreen, Cashel in the County of Tipperary".

Counsel for Mr. Ronan confirmed that he is indeed a farmer at that address.

49. I am not satisfied that the Official Liquidator has satisfied the test in *O'Mahony v. Horgan* in relation to the granting of *Mareva* type injunctive relief. There is not sufficient evidence of an intention on the part of either Mr. Griffin or Mr. Ronan to dispose of their assets with a view to evading any obligations that they may have to the Company (which are of course denied) or to frustrate the anticipated order of the court were the Official Liquidator to succeed.

50. In the case of Mr. Griffin I am impressed by the detail given in his affidavit sworn on 1st October, 2016. He gives plausible accounts in relation to his drawdown from his pension funds, and it is noteworthy that this has taken place regularly since 2008, and could not be said to have been precipitated by the application brought by Louis J. O'Regan Limited, or by the present motion. While his family home in Co. Cork is currently for sale, it has been on the market for many years. While circumstances may yet change, the Official Liquidator has not satisfied the O'Mahony test.

51. In the case of Mr. Ronan there is no evidence of any intention to dissipate his assets, nor is there any evidence from which any such inference could be drawn. The refusal to give an undertaking alone is insufficient evidence for the court to grant a far-reaching injunction restraining him from dealing with his assets pending the trial of the proceedings.

Delay

52. This is a further and related reason, which is relied on by the respondents, why the court is unwilling to grant an injunction. It is now five years since a liquidator was appointed to the Company. The first two liquidators chose, for whatever reason, not to bring s. 139 proceedings. Although Mr. Kirby cannot be blamed for any delay as he was only appointed in February 2016, he must take the consequences of the extended delay resulting from inactivity by the Company in liquidation/his predecessors generally since March 2012. Louis J. O'Regan Limited initiated the proceedings in December 2014, and included a claim for injunctive relief. However that aspect of it was not pursued at the interlocutory stage. Although neither respondent could point to any specific prejudice, both raised on affidavit and in argument the delay in seeking injunctive relief as a reason why it should not be granted.

53. Viewed from the respondents' perspective, and viewed objectively, the delay in proceeding was, by any standards, very significant. As time passed without any action being taken by a liquidator or a creditor, the respondents were entitled to organise their affairs without anticipating such proceedings. It also cannot be overlooked that the very same delay gives rise to the respondents' pleas that the Official Liquidator's substantive claims are now statute barred.

54. I also note that in relation to loss or damage that the first or second named respondents might suffer in the event that the court granted injunctions, the Official Liquidator is willing to give an undertaking as to damages, but limited to €75,000.00 in each case. An undertaking of this nature has been given some consideration by the courts. O'Flaherty J. had the following comment to make in *O'Mahony v. Horgan* at p. 422:-

> "As regards the undertaking as to damages, I know of no case where a limit has been put on the amount that may be required to be paid, if it is held that the injunction was improperly obtained, nor do I think it right in principle that such a limit should be placed in view of the far-reaching implications involved in any restraint that is imposed on a party by reason of such an injunction prior to judgment."

Had this Court been willing to grant injunctions it would only have been upon the basis that the Official Liquidator give unlimited undertakings as to damages.

Conclusion

55. Accordingly, I will grant the relief sought at paragraph 1 of the Notice of Motion dated 14th September, 2006 joining the Official Liquidator as a Co-Applicant to the above proceedings, but the application for interlocutory relief at paragraph 2 is refused. The further relief sought at paragraph 3 was not pursued at hearing and is declined. It is desirable that the proceedings be case-managed and I will hear the parties further in relation to directions on the exchange of pleadings.