THE HIGH COURT

[2011 No. 735 COS]

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

MYLES KIRBY (BY ORDER OF THE COURT)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 18th day of December, 2018

Introduction

1. The applications by the first and second named respondents ("these respondents") to the Court at this time are for orders directing the trial of preliminary issues or a modular trial.

2. On 6th July, 2018, the applicant liquidator ("the liquidator") applied for leave and was granted leave, despite submissions by way of objection only from Counsel for the second named respondent ("Mr. Ronan"), to amend his points of claim by adding a prayer for "*an order pursuant to s. 842 of the Companies Act 2014 that the first and/or second named respondent shall be subject to a disqualification order for such a period as this Honourable Court deems appropriate*". Counsel for the first named respondent ("Mr. Griffin") then opened his application which was adjourned due to time constraints. All parties completed their submissions on the 30th November, 2018. Since July 2018, the parties took the opportunity to amend and close the pleadings to accommodate the additional relief sought. Case management has continued to progress matters as evidenced by the executive summary regarding discovery presented to the Court on 30th November, 2018, and the update on Friday 14th December, 2018, which now leads to consent orders and cross orders for discovery to be complied within six weeks from today.

3. The various claims pursued by the liquidator arise from:-

(i) five payments made by CTO Greenclean Environmental Solutions Limited ("the company") in the period from February to May 2008, in an aggregate sum of €2,064,333.00 to Mr. Griffin; and

(ii) a payment of €600,000 to Mr. Ronan in January 2009.

Chronological Summary

4. The following details are taken from a document submitted on behalf of the liquidator and are set out chronologically to place the current applications in context. It is not clear whether each of the parties will accept the accuracy of all these details at a plenary hearing although the current applications proceeded with little if any controversy about this summary for the purpose of context. The Court can only encourage the parties to agree these details for all purposes.

21.08.2007 The company was awarded a substantial and valuable subcontract in connection with clean up and remediation works to the former Irish steel plant at Haulbowline in Cork Harbour. The contract proved to be very profitable.

11.02.2008 –

26.05.2008 Over €2m was paid into the pension fund of Mr. Griffin by the company.

23.05.2008 The Department of the Environment, Heritage and Local Government ("the Department") directed the said works to cease.

30.05.2008 The main clean up contract was terminated by the Department.

10.10.2008 Mr. Griffin, the company and others, including Mr. Ronan, entered into an agreement whereby Mr. Griffin agreed to sell his shares in the company to other shareholders for €1 in return for payment to Mr. Griffin of 5% of the receipts from the clean-up project up to €5m.

10.10.2008 Mr. Griffin retired as a director of the company on health grounds.

05.01.2009 €600,000 was paid by the company to the pension fund of Mr. Ronan.

31.07.2007 –

28.02.2009 The company recorded revenue of €14,430,404.00, operating profits of €2,049,646.00 and a net profit of €1,762,566.00.

15.10.2010 Judgment was granted in favour of Louis J. O'Regan Limited ("LJOR") against the company in the amount of €596,802.00.

22.12.2011 LJOR presented a petition for the winding up of the company on the grounds that it was unable to pay its debts.

23.03.2012 Laffoy J. made an order directing that the company be wound up and Mr. Joseph Foran was appointed to act as liquidator.

17.06.2013 Mr. Foran resigned as liquidator and Mr. Alan Fitzpatrick was appointed in his stead.

18.12.2014 These proceedings were commenced. At this stage six and half years had elapsed since the last payment was made to Mr. Griffin.

25.11.2015 LJOR applied to remove Mr. Fitzpatrick as liquidator.

22.02.2016 Mr. Fitzpatrick was replaced as liquidator by Mr. Myles Kirby (already identified in this judgment as the liquidator).

14.09.2016 The liquidator applied to be joined as an applicant in these proceedings.

26.04.2017 An order was made joining the liquidator as a co-applicant. An application for a mareva-type injunction was refused by Haughton J. The judgment of Haughton J. [2017] IEHC 246, outlines other background details. Directions for delivery of pleadings were agreed.

17.07.2017 Points of claim were delivered on behalf of the liquidator.

26.09.2017 Points of defence were delivered on behalf of Mr. Griffin.

24.11.2017 Points of defence were delivered on behalf of Mr. Ronan.

22.12.2017 Points of reply were delivered on behalf of the liquidator.

11.01.2018 The notice of motion now before the Court issued on behalf of Mr. Ronan, seeking orders directing that the issues raised in the points of defence on behalf of Mr. Ronan, namely:-

> (i) that the liquidator's claim pursuant to s. 139 of the Companies Act 1990 ("1990 Act") and/or s. 608 of the Companies Act 2014 ("2014 Act") is statute barred by virtue of the provisions of s. 11(1)(e) of the Statute of Limitations 1957 ("SoL 1957"); and
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> (ii) that the liquidator's claim pursuant to s. 298 of the Companies Act 1963 ("1963 Act") and/or s. 612 of the 2014 Act, is statute barred by virtue of the provisions of s. 11(1)(e) of SoL 1957,

be tried by way of a preliminary issue.

15.01.2018 Solicitors on behalf of Mr. Griffin issued the other notice of motion now before the Court seeking:-

> A) an order pursuant to Order 25, rule 1 and/or O. 34(2) of the Rules of the Superior Courts ("RSC") directing a preliminary trial of three issues relating to:-
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> (i) s. 11(1)(e) [i.e. barred],
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> (ii) s.71(1)(a) [i.e. concealment of a right of action by fraud] of the SoL 1957, and
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> (iii) whether Mr. Griffin was a shadow or de facto director of the company in connection with the failure on the part of the company to file accounts on 28th May, 2009 and the subsequent filing of accounts on 12th July, 2010;
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> B) an order pursuant to O. 36(7) of the RSC or the inherent jurisdiction of the court directing a modular trial of the above issues;
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> C) an order pursuant to O. 19(28) of the RSC striking out paragraphs of the Points of Reply because they are unsustainable or are bound to fail.

19.01.2018 The liquidator issued a notice of motion seeking liberty to amend his points of claim to include a relief that the respondents be subject to a disqualification order. That liberty was given in July 2018.

30.11.2018 At the resumption of the hearing of this application, an executive summary about the closing of pleadings and completion of discovery requests and replies was given to the Court before final submissions were made in relation to the applications which are determined in this judgment. Notably, each of the Respondents submitted to the Court different proposed agreed statements of facts in typed format.

14.12.2018 Counsel confirmed to the Court that the terms of the consents to make discovery would be incorporated into one document for ease of future reference and to allow the perfection of an order.

Statute of Limitations

5. Counsel for Mr. Griffin submitted that the liquidator's claim was statute barred if, for the sake of argument, one took the date of commencement of the proceedings issued by LJOR on 18th December, 2014, because the last payment made to Mr. Griffin had occurred in May 2008 which exceeded the six-year limitation period. He continued on to cite the judgment of Shanley J. in *Southern Mineral Oil Company Limited v. Cooney* (No. 2) [1999] 1 I.R. 237 in order to dispose of the claim under s. 286 of the 1963 Act (fraudulent preference which refers to a two-year period before the commencement of the winding up). The claim under s. 298 of the 1963 Act (power of court to assess damages against directors) does not, according to Counsel, even get off the ground due to the binding effect of that judgment. Quite correctly, Counsel concedes that matters are less clear cut when it comes to the claim under s. 139 of the 1990 Act (power of the court to order the return of assets which have been improperly transferred).

6. According to Counsel for Mr. Griffen, concealment as a reply to a statute of limitations plea which is provided for in s. 71 of the SoL 1957 can be dealt with by taking the liquidator's case at its height.

7. Mr. Nicholas O'Keeffe, Solicitor for Mr. Griffin, in his affidavit made various observations to the effect that concealment could not have occurred. Again, quite correctly, it is acknowledged that this is less obviously susceptible to determination as a preliminary issue without a conclusion about the effect of a plea relying on s. 71 of the SoL 1957. It is suggested that this issue could be left over until the other limitation period issues are determined.

Submissions on behalf of Mr. Ronan
8. Counsel for Mr. Ronan urged the Court to accept that the payment to Mr. Ronan was made at a time when the company was comfortably solvent. Lest there be any doubt, none of the Counsel submitted that this Court should make any final conclusion about the merits of the points raised in the pleadings. Rather the Court is invited to take a view on whether net issues are amenable to a preliminary issue trial or to be part of a modular trial. Many submissions for Mr. Ronan replicated those made on behalf of Mr. Griffin.

Summary of submissions for respondents when seeking trial of preliminary issues
9. The claims by the liquidator for recovery of the monies paid to the pension funds of these respondents should be defeated as a result of the elapse of time and the operation of limitation periods, according to Counsel for these respondents. Having a decision on those issues in favour of these respondents will save time and costs in gathering evidence from over ten years ago, according to their Counsel. Further analyses and advices by experts in accounting and the law will also be avoided if the preliminary issues are tried as requested in favour of these respondents. Mr. Ronan, in his succinct grounding affidavit sworn on the 10th January, 2018, concentrates on the neatness of having the statute-like periods determined.

The law
10. The submissions made on behalf of the liquidator and Mr. Griffin referred to the judgment in *Campion v. South Tipperary County Council* [2015] 1 I.R. 716, where McKechnie J. in the Supreme Court considered the test to be used in determining whether an issue ought to be tried by way of preliminary issues. The Supreme Court there dismissed an appeal from the High Court (Charleton J.) and affirmed the decision to refuse an application for a preliminary issue trial. The matter involved a claim against a local authority for issuing enforcement proceedings after an official of the same local authority allegedly informed the developer of lands that certain variations to a planning permission did not require a further application. The Court held that the claims made by the developer involved mixed questions of fact and law and that a claim had been made relying on alleged misfeasance in public office which required an extensive oral hearing.

11. The Supreme Court cautioned against truncated hearings and it is apposite to quote from McKechnie J. at paras. 21-22 as follows:-

> "Encouraging efficiency
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> *In more modern times, particularly in light of litigation becoming ever more complex, costly and lengthy, many attempts at official level have been made to identify ways in which the consequences of such events can be avoided, or at least ameliorated. Hence, both legislative provisions and specific rules of court with that intention in mind have been adopted in several different sectors of litigation, including personal injuries, commercial and competition, to name but some, as well as provision being made for mediation, conciliation and other forms of alternative dispute resolution. (O. 56A, Rules of the Superior Courts 1986). Side by side with these changes there has been much innovation at judicial level by way of case management, modular hearings and other imaginative steps, to the same end. Largely the results have been very positive, but still vigilance must be exercised lest through the prism of expedition, truncated hearings will end up having the opposite effect. I am satisfied that such would be the situation if the appeal in the instant case was allowed.*
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> *Despite the undoubted advantages of such insightful moves, it remains the position that, at primary level, a unitary trial is the starting point. Experience throughout many decades of litigation has shown that in the vast majority of cases this is the best mechanism by which justiciable issues can be determined, not only so as to achieve justice, but also as representing the most expeditious and cost effective way of doing so. Therefore, whilst I greatly favour all suggestions which curtail the possibility of having diffuse and lengthy trials, one must be sure however that what is provided for in that regard will in fact achieve the intended end." (emphasis added by this Court).*

12. The parties have immersed this Court in a lot of detail on a few occasions now. The detailed judgment of Haughton J. and this judgment give a flavour of the drawn-out stages so far. It is about time that this liquidation, which commenced nearly seven years ago, was brought to a conclusion. These respondents are now in their late fifties and all of the parties must cope with events surrounding the retirement of these respondents from the company over ten years ago. The Court and the parties should not lose sight of the imperative to administer justice in a fair manner within a reasonable time.

13. In exchanges between this Court and Counsel it emerged that:-

> (i) Neither of these respondents are prepared to assure the Court that the events taken at their height in favour of the liquidator (including some of those mentioned in the chronology) for the purpose of the trial of the proposed preliminary issues will be accepted at a plenary hearing as fact, if they are dissatisfied with the results of the preliminary trial;
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> (ii) If the preliminary trial of issues does not proceed as one of these respondents expected, each of these respondents reserve their right to appeal those preliminary determinations which may delay any plenary hearing.

14. It is worth emphasising also that these respondents have not agreed one composite set of facts at their height for the liquidator. At some stage towards the end of November 2018 "*a non-exhaustive list of key facts and dates*" was circulated to the other parties on behalf of Mr. Ronan. The solicitors for Mr. Griffin, by letter dated the 28th November, 2018, then sent to the liquidator's solicitors a "*proposed Statement of Agreed facts*". The liquidator was given very little time to respond before the hearing of this application resumed on the 30th November, 2018.

15. This all leads the Court to conclude that these respondents are effectively requesting the Court to evaluate the strength of their statute-like pleas somewhat *in vacuo*. The fourth prayer in Mr. Griffin's notice of motion that the liquidator's claims are bound to fail, encapsulates that which is sought really. Without hearing the evidence about alleged "*concealment and wrongful conduct*" pleaded in the reply delivered on the 22nd December, 2017, such an assessment cannot be made.

16. The partial sacrifice of facts at their height by these respondents in proposed agreed statements of fact is akin to playing a

gambit in chess except that these respondents are unlikely to lose much if they fail in their preliminary trials or in any appeal from those preliminary trials. The permutations are significant in number. What if one of the respondents accepts and the other rejects one or more of the preliminary issue findings? How is a trial judge to assess the facts which were accepted for one argument but are not accepted for another contention? The prospect of further confusion and delay in resolution looms large.

17. Mr. Hayden SC for Mr. Ronan complains that particulars of the bald assertion of "*concealment and wrongful conduct*" ought to have been given. As far as this Court is concerned the thrust of the allegations have been conveyed. One or both of these respondents, if they see fit, are entitled to pursue lines of interrogation and challenge for failure to comply with the relevant rules if the liquidator is in default. On the other hand, they may wish to reserve their positions until the plenary trial. The application before the Court now requires an adjudication of the merits, risks and advantages between a preliminary and a plenary trial.

18. Bearing in mind that the unitary trial is the starting point and that these respondents cannot even agree on one proposed statement of agreed facts for the liquidator to agree and the Court to consider, it is apparent that:-

(i) there is a considerable way still to go on agreeing the facts and then the precise issues for a preliminary trial;

(ii) the saving in costs and time to be spent in Court by pursuing preliminary issue trials when weighed against those to be incurred for a plenary hearing of all extant issues between the parties may not be so different when one takes account of the permutations which can occur following rulings which one or other party may not expect.

(iii) the result of the preliminary trial of issues could lead to an even longer drawn out conclusion to these proceedings than if the parties focused the resources and time of all involved, including that of the Court, on a plenary hearing;

(iv) the liquidator will be well advised to concede sooner rather than later those legal issues which cannot be pursued with any sincerity at a plenary trial because these recent applications highlight perceived difficulties in pursuing some of the claims. That is not to say that the liquidator may have answers to all or some of the difficulties. A trial judge who is made aware of the issues identified by these respondents in these applications and described in this judgment will be in a good position if the opportunity arises "*… to attempt to do justice to the parties by fashioning, where appropriate, orders of costs which do more than simply award costs to the winning side*" as per Clarke J. in *Veolia Water UK plc v. Fingal County Council (No. 2)* [2007] 2 I.R. 81 at para. 6.

(v) the imperative on the Courts to administer justice within a reasonable time cannot be ignored when considering the effect of an order which may delay the ultimate finalisation of the liquidator's claims against these respondents who are retired gentlemen.

19. Therefore, the Court refuses the applications made by these respondents but will continue to case manage the proceedings so that they are ready for a plenary trial in 2019. Six weeks from today is the 29th January, 2019, and I suggest, subject to hearing any further submission from Counsel, that liberty be given to each of the parties to issue a notice of motion returnable to this Court at 10.30am on Tuesday 12th February, 2019, seeking directions or such further other interlocutory orders which will ready the outstanding disputes between the parties for plenary hearing. In the meantime, I make the orders for discovery by consent so that same can be perfected and available for ease of reference.