

THE HIGH COURT

2010 92 COS

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 106 OF THE COMPANIES ACTS 1963 – 2005

AND

IN THE MATTER OF INVESTMENT OPTIONS AND SOLUTIONS LIMITED

BETWEEN

BANK OF SCOTLAND (IRELAND) LIMITED

APPLICANT

AND

INVESTMENT OPTIONS AND SOLUTIONS LIMITED

NOTICE PARTY

Judgment of Miss Justice Laffoy delivered on the 19th day of March, 2010.

1. This is an application by the applicant for an order pursuant to s. 106 of the Companies Act 1963 (the Act of 1963) directing rectification of the particulars of a deed of mortgage and charge dated 22nd June, 2001 made between the notice party and the applicant delivered to the registrar of companies.
 2. While not specified in the notice of motion, the error which requires to be rectified occurred in the following manner:
 - (a) The mortgage and charge the subject of the application is dated 22nd June, 2001 on its face. It was duly stamped. It was registered in the Registry of Deeds on 18th October, 2001.
 - (b) A Form No. 47 was lodged in the Companies Registration Office (CRO) on 6th July, 2001. The form was executed by the directors of the notice party on 3rd July, 2001 and the particulars were verified on the same day, 3rd July, 2001, by the solicitor for the applicant. In the particulars of charge contained in the Form No. 47 the date and description of the instrument creating the charge was given as follows: "Deed of Mortgage & Charge dated 3rd Day of July, 2001". That is the date which requires to be rectified because, as I have stated, the date which appears on the deed is 22nd June, 2001.
 3. On 7th December, 2001 the Registrar of Companies issued a certificate of registration pursuant to s. 104 of the Act of 1963. Predictably, in the certificate the date of the deed of mortgage and charge was given therein as "Tuesday, the 3rd Day of July, 2001".
 4. In the grounding affidavit on this application it is averred that the date which was inserted on the Form No. 47 was the date on which the mortgage was sent to the Revenue Commissioners for stamping, rather than the date the document was executed. It is further averred that the error recently came to the applicant's attention. In fact, on the 2nd December, 2009 the applicant appointed a receiver over the assets of the notice party comprised in the deed of mortgage and charge dated 22nd June, 2001 and in a mortgage and debenture dated 28th May, 2003.
 5. Insofar as is relevant for present purposes, s. 106(1) provides as follows:

"The court, on being satisfied that ... the omission or mis-statement of any particular with respect to any such charge ... was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the court just and expedient, order ... that the omission or mis-statement shall be rectified."
 6. There is a useful résumé of the effect of that provision in MacCann and Courtney on *Companies Acts 1963-2006 2008 Ed.* at p. 225, in which it is stated:

"An error in the particulars delivered to the Registrar will not affect the validity of the charge, once a certificate of registration has been issued pursuant to [the Act of 1963], s. 104. Courtney [*The Law of Private Companies* ... para. 21.090] argues therefore that an application for rectification may be superfluous, particularly if the court were to impose the same conditions as are applied in the case of an order extending time. In any event, the jurisdiction conferred on the court by s. 106 only allows it to correct an omission or mis-statement in the delivered particulars and does not allow for the deletion of an entire entry. Furthermore, the court's jurisdiction is confined to rectifying errors in the particulars which are required by law to be delivered to the registrar of companies: there is no jurisdiction to order the rectification of factual errors in particulars the delivery of which is not required by law."
- A number of points arise out of that résumé which require to be commented on in the context of this application.
7. First, s. 104 of the Act of 1963, which deals with the certificate of registration, provides:

"The registrar shall give a certificate under his hand of the registration of any charge registered in pursuance of this Part, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of this Part as

to registration have been complied with.”

The conclusiveness of the certificate of registration relates to compliance with the statutory registration requirements. There is a wealth of authority for the proposition that, because of the conclusiveness of the certificate, the registration of the charge cannot be challenged even when the registration requirements have not in fact been observed. On this application, counsel for the applicant relied on three Irish authorities: *Lombard and Ulster Banking (Ireland) Ltd. v. Amurec Ltd.* [1976-77] I.L.R.M. 222; *Re Shannonside Holdings Ltd.* (Unreported, High Court, Costello J., 20th May, 1993,) and *Re Valley Ice-Cream (Ireland) Ltd.* [1998] IEHC 119. Having regard to the effect of s. 104, a question arises as to whether this application is superfluous. Counsel for the applicant answered that question on the basis that the receiver, in reliance on his powers under, *inter alia*, the deed of mortgage and charge dated 22nd June, 2001, intends selling assets of the notice party and queries may arise as to his authority to do so and as to title derived therefrom, because of the mis-statement of the date thereof. It seems to me reasonable, in order to obviate such potential difficulties, to apply to have the mis-statement of the date of the deed of mortgage and charge in the particulars filed in the CRO rectified.

8. Secondly, I am satisfied that it would not be appropriate to impose the same conditions on this application as are applied in the case of an order extending time. When an application is made under s. 106 for an order extending the time for a registration of a charge, the invariable practice is to include a “without prejudice” provision, for example, an express saver for the rights of any other secured creditors acquired during the period between the expiration of the twenty one days within which the particulars should have been delivered to the CRO pursuant to s. 99 of the Act of 1963 and the actual registration of the particulars on foot of the extension of time. In this case, the CRO search against the company exhibited discloses three charges against the notice party: the deed of mortgage and charge the date on which is incorrectly given as 3rd July, 2001; the mortgage and debenture dated 28th May, 2003 in favour of the applicant, on foot of which the receiver was appointed; and a judgment mortgage registered on 28th September, 2009 by Andrew McNabb. The applicant has put both the notice party and Mr. McNabb on notice of this application and there is proof of service of the notice of motion before the Court. Further, correspondence between Mr. McNabb’s solicitors and the applicant’s solicitors has been exhibited. However, there was no appearance on behalf of Mr. McNabb at the hearing of the application on 15th March, 2010. Nonetheless, I have noted what was stated in the correspondence from Mr. McNabb’s solicitors. Having said that, I am satisfied that, on the facts of this case, it would not be appropriate to include the usual condition which is imposed when an extension of time is granted under s. 106. The position here is that the charge was created on 22nd June, 2001. The Form No. 47 was received in the CRO on the 6th July, 2007, albeit with a mis-statement of the date of creation of the charge. However, the Form No. 47 was received within twenty one days after the date of the creation of the charge, as required by s. 99. Aside from the conclusiveness of the certificate of registration under s. 104, I am satisfied that s. 99(1), which provides that failure to deliver the prescribed particulars within twenty one days after creation of a charge “shall, so far as any security on the company’s property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company” could not be applied in this case so as to render the deed of mortgage and charge dated 22nd June, 2001 void as against Mr. McNabb.

9. On the evidence before the Court, I think it is reasonable to infer that the mis-statement of the date on the Form No. 47 was accidental. I am satisfied that an order should be made under s. 106. That the order will direct the Registrar of Companies to rectify the mis-statement of the date of the instrument creating the charge by substituting 22nd June, 2001 for 3rd July, 2001 in the registered particulars and the certificate of registration.