

IN THE MATTER OF:

IRISH GRAIN BOARD (TRADING) LIMITED

and

THE COMPANIES ACTS 1963 TO 1983

Judgment of Mr. Justice McWilliam delivered on the 26th day of November, 1984.

On 18th September, 1984, the Bank of Ireland issued a petition to wind up Irish Grain Board (Trading) Ltd. (hereinafter called the Society) on the ground that it failed upon demand made to it to discharge a debt of £4,375,861 alleged to be due to the Petitioner on foot of two Instruments of Guarantee dated 11th November, 1983, whereby the Society guaranteed the repayment to the Petitioner of monies advanced by it to Irish Grain Board Export Limited and Irish Grain Board Limited respectively.

The Society was registered on 11th January, 1973, under the provisions of the Industrial and Provident Societies Act, 1893, and the petition is opposed on behalf of the Society on the grounds that the two transactions were outside the powers of the Society and outside the powers of the Directors of the Society as set out in the Rules of the Society.

Amongst the objects of the Society, as set out in Rule 4, is the following:-

(g) to issue or guarantee the issue of or the payment of principal and interest on the shares, debentures, debenture stock or other securities or obligations of any other society, company or association and to pay or provide for brokerage,

commission and underwriting, in respect of any such issue, and to guarantee the payment of any debts or the performance of any contract or obligation of any society, company or association or undertaking of any person.

Rule 34 of the Society provides that "The business and affairs of the Society shall be conducted by the Board of Directors, who shall have the control of all business carried on by or on account of the Society, .....".

The two instruments of guarantee were executed on behalf of the Society by two directors and the Secretary and the common seal was affixed in the presence of a witness, all in accordance with the provisions of rule 44.

It has been argued on behalf of the Society that, as it is a society registered under the provisions of the 1893 Act, and not a company incorporated under the provisions of the Companies Acts, both transactions were outside the powers of the Society and, if within the powers of the Society, outside the powers of the directors. It is stressed that the provisions of section 8 of the Companies Act, 1963, and Regulation No. 6 of the European Communities (Companies) Regulations, 1973, S.I. No. 163 of 1973, with regard to limitations of the powers of boards of directors not being available as against persons dealing in good faith with a company, do not apply to societies registered under the Act of 1893. As I understand this part of the argument, it is that, without this section and regulation, where an object is expressed in a memorandum of a company or the rules of a society, there must be an express power given in the articles of the company or the rules of the society to enable that object to be carried out and that such a power

cannot be implied. I was referred to Pennington's Company Law, Ed.4 (1979), at page 23.

On behalf of the Petitioner it was argued that paragraph (g) of Rule 4 of the Rules of the Society is in fact a power even though it is included under the general heading of objects of the Society and I was referred to page 21 of Pennington. It was also pointed out that no authority was cited in support of this part of the argument advanced on behalf of the Society.

The passages in Pennington to which I have been referred indicate that many of the provisions in the objects clauses in memoranda of association are really powers to enable the true objects of a company to be satisfactorily carried out. No argument has been advanced on behalf of the Society to the effect that the power to guarantee the payment of money due under any contract or obligation of any society, company or association is not an appropriate or proper power to enable one of the main objects of the Society to be achieved, namely, the object of promoting, facilitating, encouraging, assisting, (financially or otherwise), co-ordinating and developing the marketing of cereals, etc.. Accordingly, it is not necessary for me to consider a situation in which the exercise of a power might be challenged as not being appropriate to advance the main objects of a company or society.

The constitution and provisions for the management of the Society are contained in the Rules and I do not accept that a rule expressly stating that one of the objects of the Society is to guarantee the payment of the debts or the performance of the contracts of any society, company or association or person is inoperative merely because it is included

as an object in Rule 4 and not contained in a separate rule describing it as a power.

With regard to the submission that it was not within the power of the directors to give the guarantees on behalf of the Society, it is argued that Rule 34 is not so wide in its terms as is Article 80 in Table A in the Companies Act, 1963, that express power to give the guarantee should have been given to the directors either by the rules or by the Society in general meeting, that it is manifest from the Rules that a simple resolution of the directors giving these guarantees was ultra vires, and that, the Rules having been open to inspection by the Petitioner, the Petitioner cannot rely on the rule in Royal British Bank .v. Turquand that, where there has been some failure by a company (or society) to comply with a condition with which the other party had no right to insist on proof of compliance, that other party cannot be prejudiced by such failure. It is further argued that, as the Petitioner drafted the resolution to be passed by the directors, it is itself responsible for any failure to comply with any necessary procedures and cannot complain if procedures have been adopted which did not give a valid instrument of guarantee. I was referred to the case of Ulster Investment Bank Ltd. .v. Euro Estates Ltd. and Drumkill Ltd. (1982) 2 I.L.R.M. 57 and to Palmer's Company Law, Ed.22, Vol. 1, p286.

These arguments appear to me to depend entirely on the premise that the Rules did not give the directors power to transact this part of the business of the Society. This has not been established to my satisfaction. Rule 34 could hardly have been worded more clearly in order to give the directors complete power to conduct the business of the Society. On

behalf of the Petitioner I was referred to the case of John Shaw & Sons (Salford) Ltd. .v. Shaw (1935) 2 K.B. 113 and, in particular to a passage from the judgment of Greer, L.J., at page 134, where he stated that "If powers of management are vested in directors, they and they alone can exercise these powers".

I am of opinion that the Society had power to give these guarantees, that giving the guarantees was part of the business of the Society and that the directors were the only persons authorised to transact the business of the Society.

Having come to these conclusions, it is not necessary for me to consider the application of the rule in Royal British Bank .v. Turquand, but it does seem to me that the submission of a draft resolution for execution by the directors would not, of itself, deprive the Petitioner of the benefit of the rule.

*Herbert R. McWilliam.*

13.8.85