

THE HIGH COURT

1985 No.2425P
1983 No.8478P

IN THE MATTER OF THE PMPA OIL COMPANY LIMITED (In Liquidation)
AND IN THE MATTER OF THE COMPANIES ACTS 1963 to 1983

IN THE MATTER OF THE PRIVATE MOTORISTS PROVIDENT SOCIETY LIMITED
AND IN THE MATTER OF THE INDUSTRIAL AND PROVIDENT SOCIETY ACTS
1893 to 1978
AND IN THE MATTER OF THE COMPANIES ACTS 1963 to 1983

J U D G M E N T

DELIVERED BY THE HONOURABLE MR JUSTICE DECLAN COSTELLO
ON 28 APRIL 1988

APPEARANCES

For the Liquidator

Niall Fennelly, SC
Ian Finlay, BL

Instructed by

McCann, Fitzgerald, Sutton & Dudley
31 Upper Pembroke Street
Dublin 2

For the Administrator

Peter Kelly, SC
Michael Collins, BL

Instructed by

Arthur Cox & Co.
42 St Stephen's Green
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PMPA OIL COMPANY LIMITED

By motion of 25 March 1987 the Official Liquidator, Mr Horgan, of the PMPA Oil Company (appointed by Court Order of 6 May 1985) applied for an order under s.229 of the 1963 Act directing Mr Kevin Kelly, the Receiver of the Company, to deliver to him the Company's books and records, to account to him, and to file under s.224 a Statement of Affairs, Mr Kelly having been appointed Receiver and Manager by order of the Court on 25 October 1983 under the provisions of the Insurance (No.2) Act 1983.

The facts giving rise to the present controversy are to be found in affidavits which Mr Kelly and Mr Horgan filed on the motion.

On 11 March Mr Justice Murphy made an order that the Receiver should pay to the Official Liquidator all monies of the Company in his possession or control and deliver to the Examiner and the Official Liquidator a statement of receipts and expenditure. The order went on to require the Receiver to "deliver to the Official Liquidator Points of Claim setting out the basis and details of his claim to be refunded all or part of the monies transferred to the Official Liquidator". Points of Claim were later delivered and Points of Defence to them filed on 23 December 1987. I have heard the issues thereby raised on the basis of the original affidavits filed on the motion of 25 March 1987.

Paragraph 13 of the Points of Claim stated that the Receiver "seeks the following directions and orders on the following issues". And subparagraph (1) which follows reads:

"A direction as to whether the Receiver and Manager is a receiver for the purposes of section 98 of the Companies Act, 1963".

Section 98 makes provision for preferential payments when a receiver is appointed on behalf of the holders of any debentures secured by a floating charge and provides that the debts which in a winding-up would be paid in priority to all other debts by virtue of the provisions of Part VI of the 1963 Act shall be paid out of the assets coming into the hands of the receiver in priority to any claim for principal or interest in respect of the debenture under which he was appointed. A direction is sought by Mr Kelly because of what is termed the possibility that a claim for preference might arise under the section. In the Points of Claim it was stated that "Questions have been raised by the Revenue Commissioners as to the relevant priority of the various claims made by the creditors of the Company", and it was explained that the Receiver had retained certain sums pending a resolution of the order and manner in which the liabilities of the Company should be discharged.

I was not informed as to the exact terms of the claim (if any) which had been made on the Revenue's behalf, and I presume that if it had been formulated with any precision the letter in which this was done would have been exhibited. I did give some consideration to the desirability of adjourning the matter to inquire whether the Revenue wished to argue the point, but the construction of the section is so clear and as four-and-a-half years have elapsed since the appointment was made during which time the claim for preference could have been formally advanced had it been considered a good one, I felt that an adjournment was unnecessary.

Section 98 manifestly only gives preference in cases where the receiver has been appointed under a floating charge. In this case the Receiver was appointed under the provisions of the Insurance (No.2) Act 1983 and so this section does not apply. It follows that Mr Kelly is not a receiver within the meaning of the section and it also follows that it is not necessary to give the directions or make the orders referred to in sub-paragraph (2) of Paragraph 13 as they would only arise if section 98 applied to the receivership.

The Receiver by sub-paragraph (3) of paragraph 13 also sought a direction as to whether corporation tax which may have arisen in respect of deposit interest earned during the currency of the receivership is the liability of the company rather than that of the Receiver. It was, however, conceded on the Receiver's behalf that it was not necessary to give a direction on this matter as the point of law had been determined by a decision which I gave on 9 October 1986, In the matter of Wayte (Holdings) Ltd (in receivership), which established that the liability was that of the company.

It follows, therefore, that the Receiver is not entitled to have refunded any part of the sums which he has paid over to the Official Liquidator.

I propose, with the consent of both parties, to make an order discharging the Receiver and Manager and terminating the receivership. The order will contain a recital that the Official Liquidator has agreed to recommend to the Examiner that the Receiver be entitled to be paid a sum of £8,639 out of the Company's assets in respect of his remuneration for the period 5 June 1987 to 23 October 1987.

PMPA PROVIDENT SOCIETY

By a motion dated 25 March 1987 the Official Liquidator, Mr Horgan, of the PMPA Provident Society applied for directions as to whether two debts due by the Society to PMPA Insurance plc (in administration) amounting to £90,880 are entitled to rank in priority over other debts due to the ordinary unsecured creditors of the Society. The application arises in the following circumstances:

By order of the Court Mr Horgan was appointed on 5 December 1983 provisional liquidator of the Society and was appointed on 19 December its official liquidator and the Society was ordered to be wound up. Before his appointment Mr Kevin Kelly had on 23 October 1983 been appointed provisionally as administrator of PMPA Insurance plc by Court order and on 25 October had been appointed provisionally receiver and manager of the property and assets of the Society. On 14 November he was appointed administrator of PMPA Insurance plc and on the same day permanent receiver and manager of the Society, all his appointments having been made under the provisions of the Insurance (No.2) Act 1983. The Society was a "body" connected with the PMPA within the meaning of the 1983 Act (s.4)

The affairs of the Society and those of the PMPA had been closely interlinked. All the operations of the Society were in fact carried out by approximately 70 employees of the PMPA, whose salaries were paid by the PMPA. A charge was raised annually against the Society in the month of March of each year in respect of these payments. In addition the PMPA made payments on behalf of the Society in respect

overheads and other charges and raised a management charge on the Society also on an annual basis. For the period 25 October 1983 to 5 December 1983 Mr Kelly arranged that the PMPA would continue to provide the services of its employees for the benefit of the Society and would continue to discharge overheads on its behalf. The two sums referred to in the motion are in respect of employees' salaries for this period and overheads which were discharged in respect of this period.

Before these proceedings an application had been brought to the Court in the administration of the PMPA by Mr Kelly to determine his right to retain funds which had come into his hands under a number of different headings. On 5 November 1986 judgment on these claims was delivered by the Supreme Court. In relation to the two sums referred to in the notice of motion before me it was held that these were debts due by the Society to the PMPA because they were monies expended for the use of the Society, but the judgment of the Chief Justice expressly drew attention to the fact that no issue had arisen on the appeal before the Supreme Court as to the question of priority of these debts. Later, in the course of correspondence between the solicitors for the parties it was maintained on behalf of Mr Kelly that these debts were payable in priority to the ordinary unsecured debts of the Society, and as a result the Official Liquidator of the Society has brought the present motion for the determination by the Court of this issue.

The judgment of the Supreme Court proceeded on the basis that in the ordinary course of events when a court appoints a receiver and

manager of a business of a company there is conferred on him a right to be indemnified in respect of his remuneration, costs and expenses out of the assets of the company and to enjoy priority over other claims in respect of these items. As there was nothing in the order by which Mr Kelly was appointed receiver and nothing in the Insurance (No.2) Act 1983 which would alter the ordinary rules, then it followed that the Receiver was entitled to the priority he claimed for his remuneration and for his costs and expenses. But the Court did not hold that the effect of the order of his appointment was to give the Receiver any priority in respect of the two items of claim now before me; it held that these were debts payable by the Society to the PMPA but expressly declined to decide whether they had any priority.

It is accepted by Counsel on the Receiver's behalf that there is nothing in the Companies Act 1963 which supports the Receiver's present claim to priority. It was, however, urged that priority is obtained by virtue of his original appointment on 14 November 1983 and by virtue of the operation of the 1983 Act. I do not think that this is so. Certainly the Receiver is entitled, as the Supreme Court has found, to priority payment in respect of his remuneration and the expenses he incurred as receiver. But the sums now claimed are not expenses incurred by him as receiver (as, inferentially, the Supreme Court has found). They were payments made by the PMPA (on his direction as administrator of its affairs) for the benefit of the Society (a) in respect of wages of its employees who were seconded to work for the benefit of the Society, and (b) in respect of some of the Society's overheads. So the claim is now in relation to debts due to the PMPA, not for expenses incurred by Mr Kelly as receiver of the Society, and I cannot

see how the PMPA can claim any priority for the debts thus arising. It so happened that the administrator of the PMPA carried out certain functions as receiver and manager of the Society but that fact does not alter the legal relationship between the PMPA and the Society and does not operate to give priority to the debt which came into being in the circumstances which I have outlined.

I propose, therefore, to direct that the debts referred to in the Notice of Motion are not entitled to any priority in the liquidation of the Society.

Ann Kenny
Official Stenographer
28th April 1988

Approved
JK
27.4.88