

Finlay C.J.  
Hederman J.  
McCarthy J.

THE SUPREME COURT  
153/86

BETWEEN

IRISH COMMERCIAL SOCIETY LIMITED  
(In Liquidation)

Plaintiff

and

PETER PLUNKETT AND OTHERS

Defendants

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JUDGMENT delivered on the 16th day of June 1986 by  
FINLAY C.J.

*New s.l.r.s.*

This is an appeal brought by the Plaintiff from the Order of Barron J. in the High Court, made on the 13th May 1986 by which the proceedings herein against all the Defendants were struck out with costs on the determination of a preliminary issue of law.

The proceedings which were brought by the Plaintiff were proceedings against the Defendants stated to have been brought at the behest of the Registrar of Friendly Societies pursuant to Section 14(8) of the Industrial and Provident Societies' (Amendment) Act 1978 for damages for

misfeasance and breach of trust, damages for negligence and breach of duty, damages for misconduct in connection with the promotion, formation and carrying on of the business of the Plaintiff and for certain other ancillary relief by way of injunction and declaration.

The Plaintiff society is an industrial and provident society and by Order of the High Court dated the 27th February 1985 was ordered to be wound up compulsorily and an official liquidator was appointed. The official liquidator with the sanction of the Court instituted proceedings against all but the two last named Defendants in this action, claiming various reliefs, some of which at least overlapped with the relief claimed in these proceedings. On the 30th October 1985 the official liquidator entered into an agreement subject to the approval of the Court, compromising those proceedings, and there is presently pending before the High Court an application by him for approval of that compromise. To that application the Registrar of Friendly Societies, appointed pursuant to the Act of 1978 is a notice party.

In short, the judgment of Barron J. in the High Court on a preliminary issue of law raised before him with the consent of the parties in these proceedings was that the Registrar upon the Order having been made for the winding up by the Court of the Plaintiff society had no further power pursuant to Section 14(8) of the Act of 1978 to institute proceedings in the name of the society.

The Registrar of Friendly Societies did not seek or obtain either the agreement of the official liquidator or the sanction of the Court for the institution of these proceedings.

The judgment of Barron J. contains a carefully composed history of the Plaintiff society and the dealings of the Registrar with it and also contains reference to all the material provisions of the Act of 1978. It is unnecessary for me to repeat these here, but it is necessary to set out the precise subsection under which the present proceedings purport to have been instituted, which is Section 14(8)(a):

"Where it appears to the Registrar, after consideration of a report under Section 13, that proceedings ought in the public interest to be brought by a society for damages in respect of any fraud, misfeasance or other misconduct in connection with the promotion or formation of the society or the carrying on of the business of the society for the recovery of any property misapplied or wrongfully retained, he may bring proceedings for that purpose in the name of the society."

(b) The Minister may indemnify a society against any costs or expenses incurred by it in or in connection with any proceedings brought under paragraph (a)."

The other relevant Section of the Act is Section 19 which at subsection (1) reads as follows:

"Subject to this Section a society may be wound up only in accordance with Part VI of the Act of 1963 and accordingly that Part of that Act shall, subject to any necessary modifications, apply as if the society were a company."

Subsection (3) (a):

"Notwithstanding anything in Section 215 (as applied by this Section) of the Act of 1963, an application under that Section for the winding up of a society may be made by the Registrar.

(4) The winding up of a society shall not bar the right of the Registrar to apply to have it wound up by the Court."

The application of Part VI of the Act of 1963 to the winding up of a society created by Section 19 applied to it, of course, inter alia Section 229 providing that where a winding up Order has been made the liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled. Section 231 is also applied and provides that the liquidator in a winding up by the Court shall have power with the sanction of the Court or of the Committee of Inspection to bring or defend any action or other legal proceeding in the name and on behalf of the company, and at subsection (3) that the exercise by the liquidator in a winding up by the Court of the powers conferred by that Section shall be subject to the control of the Court.

This has the result that even if the sanction obtained by the liquidator to bring an action on behalf of the company were obtained from a committee of inspection his conduct of the action would still be under the control of the Court.

In short, the decision of Barron J. in the High Court was that if as was asserted on behalf of the Plaintiff it

these proceedings the Registrar had a right without obtaining the sanction of the Court, after an Order for the compulsory winding up of a society to institute the proceedings mentioned in Section 14(8) of the Act of 1978 it could be exercised in such a manner as to constitute a reversal of a decision by the Court refusing sanction to the liquidator to institute proceedings seeking the same relief and if so operated would be invalid having regard to the provisions of the Constitution under the decision of this Court in The DPP v. Costelloe 1984 I.L.R.M.

On behalf of the Appellant it was submitted that this decision was in error for the following reasons.

1. Section 14(8) created a new cause of action not otherwise available to a society by reason of the inclusion in it of the phrase "other misconduct" and therefore a liquidator could not institute proceedings in the name of the company for the identical cause of action provided for in Section 14(8) and accordingly a decision by the Registrar so to proceed could not be a reversal of a decision by the Court to refuse sanction for the

institution of proceedings.

2. The provisions of subclause (b) of Section 14(8) entitling the Minister to grant an indemnity to the society in respect of the costs and expenses of proceedings brought under that subsection gave to the whole action a different character than an action brought by the Liquidator.

3. It was submitted that there was no specific provision contained in the Act of 1978 purporting to restrict the right of the Registrar to institute proceedings in the name of the company under Section 14(8) to a time when the company was still trading and had not been compulsorily wound up, and having regard to the purpose, intention and general provisions of the Act that no such restriction should be implied. In this context reliance was placed on the similarity between Section 14(8) and Section 170 of the Companies Act granting to the Minister for Industry and Commerce power to institute proceedings in the name of a company and to the decisions in Selangor United Rubber v. Craddock 1967 1 W.L.R. and Selangor United Rubber v. Craddock 1969 1 W.L.R. where the

Chancery Division of the High Court of England considered the provisions of Section 169 (4) of the English Companies' Act 1948 which was identical to the relevant provisions of Section 170 of the Act of 1963. On the issues thus raised I have come to the following conclusions.

I am satisfied that Section 14(8) of the Act of 1978 does not create a cause of action not previously known to the law. It is in my view clearly a Section procedural in nature and enabling the Registrar to institute proceedings so as to pursue certain causes of action set out in the subsection which exist in a friendly society under circumstances in which he is satisfied that the friendly society has not instituted the appropriate proceedings and is unwilling to do so. It manifestly is designed to remedy the situation where a friendly society is under the control of persons who have been guilty of fraud, misfeasance or misconduct to the loss of that society and is therefore not going to sue the persons who control it. I reject the contention made on behalf of the Appellants that the words "other misconduct" contained in the



subsection can be construed as indicating conduct on the part of the proposed defendant which did not constitute a tort. It is, in my view, clear that if the Legislature intended by this subsection to create a liability in damages which was previously unknown to the law that it would have had to have done so in clear and express terms.

It follows from these conclusions that a situation could arise in which a liquidator on a compulsory winding up would seek the sanction of the Court to institute proceedings against parties claiming the precise relief which the Registrar is entitled to claim under section 14(8).

I have considered the question as to whether the existence of a right (though not an obligation) in the Minister for Industry and Commerce to indemnify the society against costs and expenses involved in proceedings instituted by the Registrar in their name under Section 14(8) must mean that the action which the Registrar commences could never be the same action which the liquidator would be entitled to commence, and that

accordingly a decision by the Registrar to institute proceedings after an order for the winding up of the company would not be a reversal of a decision by the Court to refuse sanction to an action. There can be no doubt that if this power is exercised by the Minister, it would be a factor in the propriety of instituting proceedings which would be absent in the case of a claim being brought by a liquidator. I am not satisfied, however, that that means that there is a fundamentally different proceeding, or that it means that the power given to the Registrar if exercisable after an Order for winding up ceases to be a power which could be operated so as to reverse the decision of the Court.

In the Selangor cases it is clear that the proceedings under Section 169 of the Companies Act 1948 in England were instituted by the Board of Trade after an order for the liquidation of the companies concerned had been made, but it is of considerable significance, in my view, that they were so instituted with the approval of the Liquidator and that he was a co-plaintiff in them. The issue as to

whether, even with the approval of the liquidator and with him as a co-plaintiff in the proceedings the Board of Trade's right to institute proceedings under Section 169 in the name of the company survived the order for the winding up of the company was not raised in those cases, nor is there any decision on it. I do not consider that the decision in those cases, even if I were prepared to follow it, would resolve the issue which arises in this appeal.

With regard to the general contention made on behalf of the Appellant that in the absence of a specific provision a restriction on the right of the Registrar should not be implied, I am satisfied that the position is as follows.

The provisions of Section 19 of the Act of 1978 applying to a friendly society, Part VI of the Act of 1963 and the provisions with regard to winding up of companies therein contained is quite clear and explicit and is unconditional, save for the special amendments made in it. Having regard to my view of the true interpretation of Section 14(8) the survival beyond the time of an order

for compulsory winding up of the Registrar's right to institute proceedings under that subsection would be a fundamental alteration of the provisions of Section 231 of the Act of 1963 and indeed of the entire machinery provided by Part VI of the Act of 1963 which envisages that every step and transaction in relation to a company being wound up by the Court is under the control and direction of the Court. Furthermore, it seems to me that the obvious purpose of Section 14(8) is, as I have indicated, to enable the Registrar to institute proceedings against persons who may have been guilty of fraud, misfeasance or other misconduct in connection with the promotion, formation or carrying on of the business of a society, under circumstances where, by reason of the control by those persons of the society, the society will not itself seek remedies against them. Once that is the purpose of Section 14(8) then it becomes quite unnecessary as soon as an order for the winding up of the society by the Court has been made, for the Court is then vested with the most ample powers to direct the liquidator in the name of the

society to sue and the control which the proposed Defendants previously had of the affairs of the society, has ceased.

I am, therefore, satisfied that the learned High Court Judge, Barron J., was correct in his decision in this preliminary issue and indeed in the reasons which led him to reach that decision and I would dismiss this appeal.

It is, of course, clear that the Registrar is entitled to bring to the notice of the High Court on the hearing of the application by the Liquidator for approval of the compromise all the information and allegations upon which he made the decision to institute these proceedings.

*appeared.*  
*J. a. Finley*  
*16.6.1986*