IRISH COMMERCIAL

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THE HIGH COURT

1984 No. 2277P

BETWEEN/

IRISH COMMERCIAL SOCIETY LIMITED (IN LIQUIDATION)
IRISH COMMERCIAL SOCIETY GROUP LIMITED (IN LIQUIDATION)
IRISH COMMERCIAL FINANCE LIMITED (IN LIQUIDATION)
AND IRISH SAVINGS BUILDING SOCIETY (IN LIQUIDATION)

Plaintiffs

-and-

PETER PLUNKETT, PONDERWOOD SOCIETY LIMITED,
RICHMOND ROAD INDUSTRIAL ESTATE (1976) LIMITED,
STAKE TAVERN LIMITED, SALTILLO LIMITED AND
LILLIS INVESTMENTS PLC

Defendants

Judgment of Miss Justice Carroll delivered the 6th day of June 198

The liquidator of the plaintiff companies obtained an interim injunction in this matter against the defendants. The defendants have consented to the continuation of the injunction in an amended form subject to one proviso. They are concerned about the undertaking as to damages given on behalf of the plaintiff companies by the liquidator. They have asked the court to hold that if the plaintiff companies are in fact called on to pay damages on foot of the undertaking, that this

sum should be paid in priority to other debts of the company under Rule 129, Order 74. They say that if the payment of damages has no priority, the undertaking as to damages is meaningless and the injunction should not be granted at all.

Mr. Kelly for the liquidator argued that such damages could not be given priority under Rule 129 in view of the judgment of the Supreme Court In Re. Van Hool McArdle Ltd., Revenue Commissioners v Donnelly (24th of February 1983, delivered by the Chief Justice). Mr. Foley and Mr. O'Keeffe for the defendants argued that priority could be given.

The problem that I see is that the defendants are in effect asking for judgment in advance on a hypothetical situation. Arguments can only be made where there is a 'legitimus contradictor'. This would of necessity have to be a creditor who would be affected by the judgment. However ably the case against giving priority may be argued by Mr. Kelly, his client, the liquidator, is unaffected by the outcome.

Therefore, it appears to me that the court must decline to make any pronouncement on the matter which is (a) hypothetical, and (b) where all the necessary parties are not before the court.

The next consideration is whether, in view of the uncertainty about the priority of the hypothetical damages, the court should decline to

grant an injunction.

In my opinion there is an arguable case that damages paid on foot of an undertaking given by a liquidator on behalf of a company in order to get in assets, is an expense properly incurred.

I do not think that interpretation is precluded by the judgment of the Chief Justice In Re. Van Hool McArdle Ltd.

In that case one of the questions which the court was asked to answer was whether capital gains tax payable on a sale was an expense incurred in the realisation of an asset within the meaning of Rule 129. That was answered in the negative in the High Court and was not appealed. Therefore it did not fall to the Supreme Court to consider the meaning to be attached to the phrase "fees and expenses properly incurred in preserving, realising or getting in the assets". The Judgment of the Chief Justice effectively dealt with the subsequent paragraphs of Rule 129, i.e. priorities after payment of fees and expenses incurred in preserving, realising or getting in the assets.

Since, in my opinion, an interpretation allowing priority to damages payable on foot of an undertaking is not ruled out by virtue of the judgment of the Supreme Court, I propose to accept the undertaking as to damages given by the liquidator on behalf of the plaintiff companies and grant an interlocutory injunction in its amended form. The parties must

await an actual assessment of damages on foot of that undertaking to find out if such damages in fact get any priority under Rule 129.

Approved
Nellie Carroll.