

THE HIGH COURT

2002 No. 608 J.R.

BETWEEN

**DUNNES STORES IRELAND COMPANY
AND DUNNES STORES (ILAC) CENTRE LIMITED**

APPLICANTS

AND

CYRIL HOULIHAN

AND

THE DIRECTOR OF CORPORATE ENFORCEMENT

RESPONDENTS

JUDGMENT of Mr. Justice O'Neill delivered the 9th day of May 2003.

The Applicants in this case were given leave, by order of the High Court (Murphy J.) made on 27th of September 2002 to apply for a variety of relief's including an order of certiorari and declarations, in relation to an instrument of delegation dated 26th July 2002 whereby the second named Respondent pursuant to the powers invested in him under section 13 of the Company Law Enforcement Act 2001 [hereinafter referred to as the Act of 2001] delegated the powers vested in him under section 19 of the Companies Act 1990 (as amended by Section 29 of the Company Law Enforcement Act 2001) and Section 14 of the Company Law Enforcement Act 2001, arising from the authorisation of Gerard Ryan by the Minister for Enterprise Trade and Employment on the 13th day of August 1998 to require Dunnes Stores (ILAC Centre) Limited to produce the books and documents specified

by him forthwith and to exercise all necessary powers under the said Company's Act 1990, [hereinafter referred to as the Act of 1990] to the first named Respondent.

The events leading up to these proceedings began on 22nd July 1998 when the Minister for Enterprise Trade and Employment (hereinafter referred to as "the Minister") informed the Applicants herein of the appointment of Mr. George Maloney as the aforesaid authorised officer for the purposes of section 19 of the Company's Act 1990. In response to that, the Applicant issued proceedings in which inter alia they alleged bias or the appearance of bias on the part of that authorised officer Mr. Maloney. Mr. Maloney stood down and Mr. Gerard Ryan was appointed by the Minister in his place.

Subsequently the Applicant's challenged the appointment of Mr. Ryan on the grounds that the Minister had failed to give reasons, and the Applicants were successful in this challenge. Reasons were then given by the Minister, but the Applicants were dissatisfied with the reasons given in support of the appointment of Mr. Ryan and an application for relief by way of judicial review was commenced. These proceedings commenced on 21st January 1999 when the High Court (Budd J.) granted leave to the Applicants to apply for relief by way of judicial review. A stay on the taking of any further steps by Mr. Ryan pursuant to section 19 of the Company's Act 1990 was granted, pending the determination of these proceedings. The matter came on for full hearing before Kinlen J. on 6th July 1999 and the Applicant's appealed the Judgment of Kinlen J. to the Supreme Court, which on 8th February 2000 allowed the appeal, set aside the order of the High Court in its entirety and remitted the entire proceedings for a determination by the High Court. This further hearing in the High Court took place before Butler J. who delivered his judgment on 29th July 2000, concluding that the Minister's appointment of Mr. Ryan

was ultra vires. The Respondents in these proceedings appealed to the Supreme Court from the judgment of Butler J. and in its judgment delivered on the 1st February 2002 the Supreme Court allowed the Appeal, upholding the appointment of Mr. Ryan and the validity of the demand which had been made by him. The constitutional issues which were raised in the case, but not determined by Butler J. were remitted to the High Court for determination. The hearing of these constitutional issues proceeded before Kearns J. who in his judgment delivered on the 5th day of June 2002 rejected the claim that section 19 (5) of the 1990 Act was unconstitutional but upheld the claim that section 19 (6) of the 1990 Act as enacted was unconstitutional. By this time section 19 (6) of the 1990 Act had been replaced by a new statutory provision in the Company Law Enforcement Act of 2001. On 12th June 2002 Kearns J. removed the stay on the exercise by Mr. Ryan of his powers in relation to the Applicant companies, which had being granted by Budd J. on 21st January 1999.

Immediately following the lifting of this stay, Mr. Ryan the authorised officer by letter of 25th June 2002 addressed to the second named Respondent resigned as an authorised officer in respect of each of the two Applicant companies stating as his ground for so resigning, the fact that these two companies had not been prescribed for the purposes of section 34 of the Company Law Enforcement Act of 2001.

Soon after that i.e. on 26th day of July 2002 the second named Respondent pursuant to Section 13 of the Act of 2001 delegated his powers under section 19 of the Act of 1990 as amended by section 29 of the Act of 2001 to the first named Respondent, arising from the authorisation of Mr. Ryan, for the purposes of directing the Applicant companies to produce the books and documents that would be specified by the first named Respondent.

Thereafter by letter of 26th July 2002 the first named Respondent wrote to each of the Applicant companies, disclosing the delegation to him by the second named Respondent of the aforesaid powers and enclosing a copy of the warrant under the seal of the Minister whereby she appointed Mr. Ryan as an authorised officer, and also enclosing the instrument of delegation dated 26th July 2002 and calling upon the Applicant companies to produce to the first named Respondent the documentation set out in that letter, and setting a time table for compliance with that demand. There then ensued correspondence between the solicitors for the Applicants and the Respondents in which issues relating to the power of the first named Respondent to make the aforesaid demand were explored, but in this correspondence the parties failed to reach an agreement or understanding on these issues. As a consequence this application for judicial review was moved by the Applicants.

The statutory provisions relevant to the issues raised in these proceedings are as follows:

1. Section 19 of the Companies Act 1990,
2. Sections 12, 13, section 14 subsections (1) (2) (3) and (6) and sections 29 and 34 of the Company Law Enforcement Act 2001.

For the Applicants it was submitted as follows:

1. That the second named Respondent has claimed that the authorised officer process has, despite the provisions of the 2001 Act, the lack of prescription, and the resignation of Mr. Ryan being prolonged and this approach is clear from the terms of the instrument of delegation.
2. None of the powers vested in the Director pursuant to 2001 act arise from the authorisation of Mr. Ryan by the Minister and no such powers could

arise in circumstances where the Applicants were not prescribed under section 34 and where Mr. Ryan's authorisation is no longer in existence.

- . As the Minister has not prescribed the Applicants pursuant to section 34 of the 2001 Act, the Minister's power has also terminated. Mr. Ryan was not entitled, at the time of the director's purported delegation to "continue to exercise" any powers and neither was the Minister.
- . Section 34 of the 2001 Act deals directly with the prolongation of the powers of officers authorised under section 19 of the Companies Act 1990, to require the production of books and records. Such officers may, to such extent as may be prescribed, continue to exercise the powers conferred on them. No such prescription was made in the case of the two Applicant companies.
5. It is clear from section 34 that if the section did not exist the effect of subsections (2) and (3) of section 14 of the 2001 Act would be to prevent the Minister or any officer of the Minister from continuing to exercise the powers conferred on them pursuant to section 19 of the 1990 Act. Therefore if the requirements of section 34 are not met, and it was submitted they are not met in the present case, neither the Minister nor any authorised officer may continue to exercise those powers. It follows that the powers enjoyed by both the Minister and the authorised officer are at an end and do not continue to exist for any purpose.
6. It was submitted that the contention that section 34 applied only where it is intended to continue under the auspices of the Minister a process commenced under section 19 of the Companies Act 1990 with the result therefore, that it was not available to the Respondents, was a mistake in

interpretation of section 34. It was submitted that section 34 recognises a fact, viz, that at the date that the 2001 Act was introduced, existing appointments were in being, and that they were capable of being saved under section 34 to the extent that there were prescribed. It was submitted this section was necessary because the appointments had their origin in a decision of the Minister and were being conducted by the Minister or an officer authorised by her, and that at all times the authorised officer is acting on his own behalf and not as a person delegated to exercise the Minister's powers as that concept has being introduced in section 13 of the 2001 Act.

7. It was submitted that the words at the beginning of section 4 "*notwithstanding subsections (2) and (3) of section 14 ...*" make it clear that the purpose of section 34 is to supersede those subsections of section 14. The Respondents must ignore this [or place unwarranted reliance on section 14], to justify the failure of the Director to fulfil his obligation to reach a reasonable decision as to whether or not an inspection is warranted.
8. The Minister did not prescribe the two Applicant companies under section 34 and thus she chose not to continue the appointment of Mr. Ryan, and the second named Respondent misunderstanding his powers, had no power to extend Mr. Ryan's investigation. Mr. Ryan's authorisation was terminated by the absence of prescription a fact recognised by him in his letter of resignation.
9. It was submitted that the Minister's function or power to appoint an authorised officer, under section 19 of the 1990 Act was not transferred to the second named Respondent by section 29 of the Act of 2001 and hence

it was submitted that section 29 of the act of 2001 which included a new section 19, replacing the entirety of the old section 19 in the act of 1990, did not effect a relevant amendment of the old section 19, within the meaning of section 14 (6) of the Act of 2001 because there was no transfers of that power or function from the Minister to the director.

10. It was submitted that as section 29 of the Act of 2001 did not bring about a relevant amendment of section 19, that the reliance placed by the Respondents on section 14 subsections (2) and (3) is misplaced. To activate the operation of these two subsections required a relevant amendment to section 19 of the Act of 1990, which did not take place.
11. It was submitted that the investigation commenced by the Minister and conducted through the appointment of Mr. Ryan was necessarily terminated by the failure to prescribe the Applicant companies pursuant to section 34, a fact unequivocally recognised by Mr. Ryan in resigning as authorised officer. This brought about a situation where the process initiated by the Minister came to an end and no longer had any continued existence. Therefore there was nothing for the Director to either revive or continue by resorting to sections 14 (2) and (3), even if the subsections had any application which it was submitted they didn't.
12. It was submitted that it is clear from section 34 (1), that without this enabling provision there were two species of official person who could not continue to carry out their respective powers. The Minister not having prescribed the two Applicant companies, the authorised officer cannot continue to exercise his power.

13. This resulted in a situation where the second named Respondent was forced to argue that his position was governed by section 14 (2) and (3). It was submitted that if there was an automatic carryover or function under section 14, there would be no need for prescription. However as the power to appoint an unauthorised officer is not transferred, section 14 (2) and (3) have no application.
14. It was submitted that the director cannot continue something begun by the Minister which has ceased to exist because of the absence of prescription, there being nothing in existence to be "*carried on or completed*" as required by section 14 (2) of the 2001 Act.
15. For the purposes of such 14 (6) in order for something to be relevantly amended it must have the effect of transferring a function from the Minister to the second named Respondent. It is quite clear that the entire scheme of section 29 of the Act of 2001 which replaces the old section 19 of the Act of 1990, discontinues the whole process and with it the power of appointing an authorised officer.
16. It was submitted that the second named Respondent has sought by way of a strange interpretation of section 14 of the Act of 2001 to avoid the clear obligation, if he wished to conduct an investigation as envisaged by section 29 of the Act of 2001, to form the necessary opinion for that purpose which could then be subject to challenge.

For the Respondent it was submitted as follows:

1. The substitution by section 29 of the 2001 Act of an entire provision for the previous section 19 of the Act of 1990 had the effect of transferring a function from the Minister to the second named

Respondent. It is therefore a provision which is the subject of a “*relevant amendment*” or has been “*relevantly amended*” within the definition of those terms as is set out in section 14 (6) of the Act of 2001,

- . It was submitted that Mr. Ryan was a person authorised by the Minister under a relevantly amended provision namely section 19 of the 1990 Act immediately prior to coming into force of the 2001 Act and therefore, by virtue of section 14 (3) of the 2001 Act he is to be regarded as having been so authorised by the second named Respondent under that provision as relevantly amended, i.e. with the benefit of the new section 19 which is contained in section 29 of the 2001 Act.
3. Following the enactment of the 2001, Mr. Ryan was pursuant to section 14 (2) of the 2001 Act, entitled to carry on or complete, by virtue of the amendment of section 19 of the 1990 Act, by section 29 of the 2001 Act, the production of documents which have been sought, thereafter under the authority of the second named Respondent. From the 28th November 2001 when the relevant provisions of the Act of 2002 came into force Mr. Ryan was prevented at that time from taking any step by virtue of the stay under the order of Budd J. , of the 21st January 1999. However, subject to that stay, Mr. Ryan was authorised by the second named Respondent under section 14 (3) of the Act of 2001 to carry on or complete the process begun by his appointment, under the authority of the second named Respondent as provided for in section 14 (3) of the 2001 Act.

4. Following the resignation of Mr. Ryan on 25th June 2002 the second named Respondent, under the provision of section 14 (2) was entitled to carry on and complete the process in respect of which Mr. Ryan had been appointed as authorised officer, and from which he had resigned, and the second named Respondent was under section 13 of the Act of 2001 entitled to delegate his powers under section 19 of the Act of 1990 as amended by section 29 of the 2001 Act, to the first named Respondent as was done pursuant to the instrument of delegation.
5. It was submitted by the Respondents that section 34 (1) of the 2001 Act gives to the Minister in relation to bodies which were the subject of an authorisation under section 19 of the 1990 Act a discretion to continue to exercise the powers contained in section 19 – 23 of the Act of 1990, by her, or an authorised officer, if one had been appointed. This discretion was to be exercised by way of prescribing the bodies to be effected and the extent of the powers to be exercised. It was submitted that the Minister had not exercised that discretion under section 34 in relation to the Applicant companies, and hence section 34 was of no relevance in these proceedings.
6. Section 14 (3) of the Act of 2001 was a “*deeming*” provision, which had the effect that from the 28th November 2001, the second named Respondent was to be regarded as having authorised Mr. Ryan and under section 14 (2) both Mr. Ryan and the second named Respondent were entitled to complete the investigation under the new section 19 as inserted by section 29 of the Act of 2001.

Thus what happened in this case was that Mr. Ryan continued with the process but with the stay in place. Soon after the stay was lifted by Kearns J., Mr Ryan resigned and at that stage under section 14 (2) the second named Respondent had the power himself to continue the process, which is what occurred.

When the second named Respondent proceeded accordingly he made a delegation as he was entitled to under subsection 13 (4).

7. When Mr. Ryan resigned, the second named Respondent had two options; he could have continued himself or delegated his function, as he in fact did. Thus there was a consistent continuum resulting from section 14 (3), from the time when the Act came into force. From the 28th November 2001 Mr. Ryan was entitled to carry on the process started and in doing so was to be regarded as so authorised by the second named Respondent under the provisions of section 14 (3).
8. Under the old section 19 the Minister could give directions or appoint an authorised officer to do it. Under the new section 19 as inserted by section 29 of the Act of 2001, in substance the same thing can be done by the Director who can now delegate his function and power under section 13 (1) to an officer of the second named Respondent. It was submitted that following the enactment of the 2001 Act Mr. Ryan was to be regarded as having been authorised by the second named Respondent under section 14 (3), and he and the second named Respondent had the power to carry on under section 19 as amended.
9. Section 34 (1) requires for its operation, that the Minister make an order. This section begins with the words “notwithstanding

subsections (2) and (3) of section 4". These words indicate that the dominant provision is section 14 (2) and (3). Section 34 gives to the Minister power to make an order in the form of a statutory instrument prescribing certain things as set out in the section. Thus the Minister must make a decision as to whether or not to activate the provisions of section 34 in relation to certain companies. In the instance case she did not do that. The words "*notwithstanding subsection 2 (2) and (3) of section 14*" are there to prevent conflict between the second named Respondent and the Minister; to keep their respective functions separate. Without these words there would be a risk of conflict arising from the exercise by the Minister of the discretion given to her under section 34, arising out of the dominant operation of section 14 (2) and (3).

10. In this case the Minister did not consider it appropriate to make an order under section 34 in respect of the two Applicant companies and therefore they passed under the Act of 2001 solely into the remit of the second named Respondent, under the aegis of section 14 (2) and (3). It was submitted that section 14 (2) and (3) were the primary or dominant provision but could be displaced by the exercise by the Minister of her discretion under section 34 (1). When the discretion given to the Minister under section 34 is exercised by means of a statutory instrument the companies thus effected remain under the auspices of the Minister and do not come within the function and powers of the second named Respondent. Where she does not activate section 34, section 14 (2) and (3) apply as set out above.

11. The absence of provision for the appointment of an authorised officer in the new section 19, is covered or catered for in subsections 14 (2) and (3) which expressly provide for, in the case of subsection (2), by the use of the words *“by or under the authority of the Minister”* and in the case of subsection (3) by the use of the words *“a person authorised by the Minister”*.

It was submitted that when Mr. Ryan resigned, the second named Respondent was entitled to continue himself under subsection 14 (2) or as he chose to do to delegate to the first named Respondent under subsection 13 (1).

Decision.

It is clear from the submissions of both parties, the Respondents place great reliance on the application of section 14 subsections (2) and (3). It is the application of these subsections, which, if the Respondents are correct in their submissions, gives to the second named Respondent the legal power to continue the process commenced by the Minister, by the delegation to the first named Respondent of the functions and powers of the second named Respondent pursuant to section 13 (1), resulting ultimately in the demand made of the Applicant companies by the first named Respondent.

Thus I propose first to consider whether or not section 14 (2) and (3) have application to the circumstances of this case.

Whether or not they do have application to this case depends on whether the new section 19 of the Act of 1990 as inserted by section 29 of the Act of 2001, *“relevantly amends”* the old section 19. That necessarily involves a consideration of subsection 14 (6) which reads as follows:

“(6) In this section, relevant amendment” in relation to a provision of the companies acts, means an amendment by this or any other section of this Act which comprises or includes the substitution for “Minister” for “Director” (including the substitution of an entire provision or part of a provision which has the effect of transferring a function from the Minister to the Director), and “relevantly amended” has a corresponding meaning.

The relevant part of the subsection insofar as this case is concerned is clearly the latter portion which is included within the brackets. The question which necessarily arises is whether the new section 19 has the effect of transferring a function from the Minister to the second named Respondent. As will be recalled the Applicants submit that this has not happened in this case because the function of appointing an authorised officer has not been transferred. In my view this is to take a very limited and indeed erroneous view of the application of section 14 (6), to what was done in the new section 19. Comparing the new section 19 to the old section 19, clearly demonstrates that the core function as set out in section 19 subsection (1) is transferred from the Minister to the Director. That function is revealed in subsection (1) of both new and old and is to the effect, that, in the old section the Minister may, subject to subsection 2, give direction to any body being one of the considerable variety of corporate entities, set out therein, and in exactly similar terms in the new section 19 the function that is given to the director is, subject to subsection 2, to give directions to any body being the exact same corporate entities as are enumerated in subsection 1 of the old section 19. In both new and old the provisions of subsection 2 are in similar terms.

The significant change which is pointed to by the Applicants is that under subsection 3 of the old section 19 there is a power in the Minister to appoint an authorised officer to carry out her function and manifestly that exact power is not transferred to the second named Respondent under the new section 19. However under section 13 of the Act of 2001 the second named Respondent can delegate his function to an officer of the second named Respondent who would appear to me be then in an analogous position to an "*authorised officer*" appointed under the old section 19.

What is important in my view for the purposes of section 14 (6) of the Act of 2001 is that the primary function of the minister of giving directions and of the nature of the directions that may be given namely, "*requiring the body, at such time and place as may be specified in the direction, to produce such books or documents as may be so specified*" is identical in both the new and the old section 19. In the case of both the new and old section 19 the power can only be exercised, where, as provided for in subsection 2 of both new and old section 19, only, if in the case of the old section 19 the Minister is of opinion that there are circumstances suggesting, and in the case of the new section 19, that the Director is of opinion that there are circumstances suggesting, the variety of circumstances which are set out in paragraphs A – H in the old subsection and A to I in the new subsection. The new sub paragraph 19 (2) (i) in the following terms "*The body may be in possession of books or documents containing information relating to the books or documents of a body which comes within the terms of one or more of paragraphs (A) to (H)*", seems to be in the nature of a residual provision and does not in my view in any sense alter the nature or extent of the functions and powers transferred from the Minister to the second named Respondent in the new section 19.

I have come to the conclusion therefore that the new section 19 does within the meaning of section 14 (6) of the Act of 2001 effect a "*relevant amendment*" of the old section 19 in that the functions of the Minister under the old section 19 are transferred to the second named Respondent under the new section 19. That being so it would seem to me that subsections 14 (2) and (3) of the Act of 2001 do have application to the new section 19 as inserted by section 29 of the Act of 2001.

The next question which then arises is whether or not subsections 2 and 3 of section 14, properly construed, give to the second named Respondent a capacity to delegate his powers to the first named Respondent, so that he could then make the demand which is impugned in these proceedings.

The answer to this question necessarily involves a consideration of the application of section 34 of the Act of 2001 and what role it has to play in the circumstances of this case, and the interaction between Section 34 and subsections 14 (2) and 14 (3).

In my view the effect of subsection 3 of section 14 is that from the coming into force of the Act of 2001, or its relevant provisions, on 28th November, 2001, that the status of Mr. Ryan as an authorised officer altered to the extent, that whereas before he was authorised by the Minister, after coming into force of the Act of 2001 he came to be regarded as or indeed to be authorised by the second named Respondent.

The application of subsection 3 must be seen in conjunction with the application of subsection 2 of section 14. That subsection, in my view gives to the second named Respondent a discretion to carry on or complete the direction given by the Minister initially under section 19 to examine certain books and records of the Applicant companies. Thus clearly, as part of the exercise of that discretion it would

be open to the second named Respondent to decide to discontinue the pursuit of any such direction by the Minister. It would seem to me that the effect of subsection (3) of section 14, is that in the absence of any such positive direction to discontinue by the second named Respondent, that an authorised officer appointed by the Minister could continue his function and be deemed or regarded as being authorised by the second named Respondent. In my view that was the position between the 28th November 2001 and the resignation by Mr. Ryan in June 2002. At that point in time it obviously became necessary for the second named Respondent to consider whether he would exercise the discretion given to him by subsection 2 of section 14 and to decide that either by himself or by way of delegation, to carry on and complete the pursuit of the directions given originally by the Minister. As we know, he decided to adopt the latter course and proceed by way of delegation under section 13. In my view he was entitled to do that and indeed, while it has been forcibly argued by the Applicants that section 14 could not be relied upon, the argument was not advanced that the second named Respondent could not avail of his power to delegate in circumstances where he could rely on sections 14 (2) and (3). I take the view that in circumstances where he was entitled to rely upon section 14 subsections 2 and 3, that he was in those circumstances also entitled to avail of the process of delegation set out in section 13 of the Act of 2001.

That brings me then to the question of the involvement of section 34. It would seem to me that the purpose of this section is to enable the Minister, in her own discretion, to decide whether or not to retain possession or control over a direction previously given by her or by an authorised officer and the method whereby this discretion is exercised is by way of a process of prescription done in the form of a statutory instrument. The effect of such a prescription would be that the Minister or

authorised officer would continue to carry out and complete the direction originally given. This could or course give rise to a potential conflict between the exercise of her discretion and the exercise by the second named Respondent of his powers and functions by virtue of section 14 subsections 2 and 3. Such a potential conflict is in my view clearly anticipated and avoided by the use of the phrase in section 34 (1) “notwithstanding subsections (2) and (3) of section 14” and, where the Minister does decide to exercise her discretion under section 34 (1) in my view the exercise by her or her authorised officer of the discretion to carry on and complete the direction previously given, overrides the discretion of the second named Respondent to carry on and complete the process initiated by the Minister or an authorised officer, and, in those circumstances, the authorised officer would not be deemed or regarded as being authorised by the second named Respondent as would otherwise be the case, as provided for in subsection 14 (3). In this case the Minister in not exercising her discretion under section 34 (1) in relation to the Applicant company thereby allowed the dominant provision of subsections 2 and 3 of section 14 to prevail and it was, in my view, within the power of the second named Respondent under the provision of subsection 2 of section 14 to exercise his discretion to carry on and complete the direction originally given by the Minister or his authorised officer Mr. Ryan. As stated earlier until the resignation of Mr. Ryan his position was governed by section 14 (3) which had the effect of deeming him to be authorised by the second named Respondent.

In my view the submission of the Applicants to the effect that the non prescription of the Applicant companies by the Minister brought a complete end to the process originally initiated by the minister through her authorised officer, is incorrect. As said above, from the 28th November 2001 until the resignation of Mr. Ryan the

process had continued validity in law under the ageis of section 14 (3). After the resignation of Mr Ryan the second named Respondent, was in my view entitled to make a positive exercise of his discretion under subsection 14 (2) to carry on and complete the process. The decision by the Minister not to exercise her discretion under section 34, merely had the effect of leaving unfettered the application of subsection (2) and (3) of section 14; it did not alter the status in law of the directions previously given to the Applicant companies. The application of subsections 2 and 3 of section 14 in my view had the effect of affording continuous legal validity to that process up to and including the making of the demand impugned in these proceedings.

In conclusion therefore I have come to the view that I should refuse the reliefs claimed in these proceedings.

Approved 9/5/03

Gaylaout O'Neill