

THE SUPREME COURT

JUDICIAL REVIEW

No 280/2000

**KEANE C.J.
DENHAM J.
MURPHY J.
MURRAY J.
HERBERT J.**

BETWEEN

DUNNES STORES IRELAND COMPANY,

DUNNES STORES (ILAC CENTRE) LIMITED AND MARGARET HEFFERNAN

APPLICANTS/RESPONDENTS

AND

GERARD RYAN AND THE MINISTER FOR ENTERPRISE, TRADE AND

EMPLOYMENT

RESPONDENTS/ APPELLANTS

AND

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

Judgment of Mr. Justice Herbert delivered on the 1st day of February 2002

Pursuant to the provisions of the Section 19(2)(a) of the Companies Act, 1990 directions may be given by the Minister if she is of the opinion that there are circumstances suggesting that it is necessary to examine the books and documents of the “body”, as defined by Section 19(1) of the Act with the view to determining whether an inspector should be appointed to conduct an investigation of the body under Companies Acts. The bodies in question in this instance are Dunnes Stores Ireland Company and Dunnes Stores (Ilac Centre) Limited. The appointment of an inspector refers to the power of the court to appoint one or

more competent inspectors to investigate the affairs of a company and to report thereon, on the application the Minister pursuant to Section 8 of the Act.

Section 19 of the Act is solely concerned with the production of books or documents. To be successful in an application under Section 8(1) of the Act, the Minister must satisfy the court that there are, “circumstances suggesting”, that some one or more of the matters specified in that subsection have occurred, are occurring or will occur. Subsection 19(2)(a) of the Act is available to be called in aid by the Minister as a sort of preliminary check, assessment or a verifying process in determining whether or not to make an application to the Court under Section 8(1) of the Act.

The vesting of such a power in the Minister is in the interest of saving court time, expense and probably unwelcome publicity for the body or bodies in question.

In my judgment, to avail of this preliminary screening process all that is requisite is that the Minister should be of the opinion that there are circumstances suggesting that an application to the Court under Section 8(1) might be necessary and with this in mind that a review of the relevant books or documents or the body or bodies in question was appropriate before a final decision to proceed was made.

It is important not to overlook that the opinion to be formed is that of the Minister alone: it is not the opinion of the Court or an opinion based on some other objective standard. The basis for this opinion is no more than that there are, “circumstances” which act upon the mind of the Minister. What these “circumstances” are, is not defined in the Companies legislation and in my judgment it is not for the Court to say what they might be, but I venture to suggest that they at least should be identifiable matters of substance.

The subsection merely provides that these, “circumstances” should suggest to the Minister that the particular course of action should be considered. Once again the test is entirely subjective, and in my judgment involves no more than that a positive indication should be presented to the mind of the Minister that it is necessary to examine the books or documents of the body or bodies with a view to making a determination whether or not to

rn(Dunnes Stores JR).J.rtf

apply to the Court under Section 8(1). There is no suggestion of legal or civil standards of proof being requisite.

In my judgment, “necessary” is not used in any extreme or compelling sense in this subsection. In my judgment it has the meaning of, “reasonably required”, in contrast to merely optional. Again, it is important to emphasise that the question of whether it is or is not reasonably required is not a matter of objective proof, or an issue to be decided by the Court. The determination is that of the Minister alone and that decision may not be usurped by the court and may only be set aside on clear proof that it flies in the face of fundamental reason and common sense.

Incorporation under the Companies Acts involves accepting the overseeing power of the Minister. Persons who bind themselves together to constitute the legal entity known as the “Company” cannot choose to enjoy the manifold privileges and benefits of incorporation while rejecting the less convenient aspects, such as the supervisory role of the Minister. It is for the more the effective discharge of this function that the Oireachtas saw fit to confer on the Minister the right to examine the books or documents of the bodies in the circumstance specified in Section 19(2)(a) to 19(2)(h). In my judgment the nature of the power conferred upon the Minister by Section 19(2)(a) is intentionally expressed in wide and general terms relating as it does to a form of preliminary enquiry, in contrast to the very specific occasions for such intervention by the Minister instanced in subsections 19(2)(b) to 19(2)(h).

In my judgment it is not sufficient for the Minister to cite, “a general concern about standards of corporate governance”, without more, as a basis for giving the direction under Section 19(2)(a).

I consider that Section 19(2)(a) cannot be construed in isolation from Section 8(1), and the circumstances suggesting to the Minister the necessity to examine the books and documents of the body or bodies must also suggest to her that an application to Court under Section 8(1) is reasonably required.

A departure from the, “standards of corporate governance”, so far as this phrase is capable of a sufficiently certain definition, is not as such a ground upon which the Court may appoint an inspector under Section 8(1).

In my view, if the Minister has concerns about the proper management and control of a body or bodies, the matters giving rise to that concern must be clearly identified and must be such as suggests the presence of fraud, *misfeasance*, misconduct or unlawfulness of the type indicated in Section 8(1).

In the present case, having regard to this view of its meaning extent and purpose, I believe that the Minister was entitled to give a direction under Section 19(2)(a).

In the Schedule exhibited at “A” in the affidavit of Paul Appleby sworn on the 27th of November, 1998, under the heading “Section 19(2)(a)”, the first reason advanced for the decision of the Minister to give the direction refers to, “the circumstances outlined under the following headings”. This reference is to specific findings of the *McCracken and Buchanan Inquiries* set out in the statement of the other reasons.

This first reason then goes on to state that these circumstances:-

“Gives substantial cause for concern as to the standards of corporate governance operating in Dunnes Stores Ireland Company and (the emphasis is mine), suggest that it is necessary to examine the books and documents of the Company to determine whether an inspector should be appointed to conduct an investigation of the body under the Companies Act.”

In my judgment these reasons are cumulative and severable. Even though the Minister could not rely upon unspecified concerns about the standards of corporate governance, she was entitled to rely upon the identified findings of the *McCracken and Buchanan Inquiries* without more, for the purpose of giving the direction under Section 19(2)(a).

I also agree with the decision of the Chief Justice, for the reasons set out by him, that the Minister was entitled under Section 19(2)(d) to give the direction in this case.