In The Supreme Court of Bermuda

COMMERCIAL COURT

CIVIL JURISDICTION

2015: No.63

IN THE MATTER OF BERMUDA COMPOSITE CONSTRUCTION LTD

AND IN THE MATTER OF SECTION 261(6) OF THE COMPANIES ACT, 1981

RULING
(in Chambers)

Date of hearing: July 16, 2015

Date of Ruling: August 10, 2015

Mr. Chen Foley, Sedgwick Chudleigh Ltd., for Mr. Kevin Bean-Walls ("the Petitioner")
Mr. Richard Horseman, Wakefield Quin Ltd., for Island Construction Ltd. and Mr. Zane DeSilva (affected parties)
Mr. Jeffrey Elkinson, Conyers Dill & Pearman Ltd., for Bank of N.T. Butterfield & Son Ltd. (the "Bank", an affected party)

Introductory

1. The Company was struck off the register and dissolved on or about November 12, 2004. By a Petition dated February 12, 2015, the Petitioner (a shareholder or member) sought an Order restoring the Company to the register. That relief was granted by me on March 13, 2015.

2. The Petitioner also sought a direction that the time during which the Company was dissolved should not count for limitation purposes. That application was adjourned on March 13, 2015 so that the Petitioner could give notice to parties affected, notably

those parties who were likely to be defendants in the otherwise potentially be time-barred action it was proposed to commence.

3. There is no known local precedent for this Court granting what is apparently known as a '*Donald Kenyon* direction' or a 'limitation direction'. Such a direction was apparently first made in the English case of *In re Donald Kenyon Ltd.* [1956] 1 WLR 1397. English case law on the Court's powers when restoring a company to the register is highly persuasive and ordinarily will be followed. Section 261(6) of our Companies Act 1981 is derived from section 353(6) of the English Companies Act 1948[1]. Both provisions read as follows:

> "*(6)If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the Court on an application made by the company or member or creditor before the expiration of twenty years from the publication of the notice aforesaid may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon copy of the order being delivered to the Registrar for registration the company shall be deemed to have continued in existence as if its name had not been struck off; and the Court may by the order give such directions and make such provisions as seems just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.*" [emphasis added]

4. Mr. Foley helpfully placed an array of relevant decided cases before the Court[2]. In light of the English authorities, it was not disputed that this Court possessed the jurisdictional competence to direct that time should not run against the Company for particular limitation purposes during the period of its dissolution. Rather, the affected parties contested whether the conditions for the exercise of this discretion had been shown to exist in all the circumstances of the present case.

5. It is accordingly necessary to firstly consider the nature of the Court's jurisdiction to give directions designed to, in effect, 'turn back the clock', when restoring a company which has been struck off to the register. The nature and extent of this discretionary jurisdiction will next be considered with a view to clarifying the circumstances in which the discretion may properly be exercised, particularly when the application is made by a shareholder and/or for the benefit of the company and its shareholders as opposed to being made by or for the benefit of its creditors. Finally, the practical

[1] The modern provision found in section 1032(3) of the Companies Act 1985 (UK) is substantially similar: "*The court may give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register.*"

[2] Mr. Horseman submitted two overlapping cases.

question of how (if at all) the discretion should be exercised on the facts of the present case will be addressed.

Findings: jurisdiction to suspend time running for limitation purposes during the period of dissolution when restoring a company to the register

The jurisdiction to make a direction in favour of the Company and/or its shareholders

6. In *Re Donald Kenyon Ltd.* [1956] 1 W.L.R. 1397, Roxburgh J entertained an application by a shareholder to restore a company to the register so that it could be wound-up and its assets distributed to its shareholders. Because the petition disclosed that all debts of the company had now become statute barred, the judge (at page 1399) identified the following issue as arising:

> " *The only question, and it is upon which there is at present no authority, is whether I ought to put in the order certain words for the protection of creditors who had not become statute-barred at the date of the dissolution.*"

7. In the absence of specific authority, Roxburgh J relied upon a general authority on the meaning of the pertinent word in the English provision corresponding to our own section 261(6): "*and the Court may by the order give such directions and make such provisions as seems just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.*" In *Tyman's Ltd.-v-Craven* [1952] 2 Q.B. 100 at 111, the Master of the Rolls construed the function of this statutory power as being:

> "*…to enable the court (consistently with justice) to achieve to the fullest extent the 'as you were position', which, according to the ordinary sense of those general words, is prima facie their consequence.*"

8. So a limitation period-related direction was first given not on the application of the company or its shareholders for their benefit after the restoration of the company; rather the direction was first made to prevent creditors being prejudiced by a restoration order made for the benefit of the company and its shareholders. However, Mr. Foley clearly established that a limitation direction can be made on the application of the company or a shareholder. As Jonathan Parker LJ held, summarily rejecting a jurisdiction argument, in *Regent Leisuretime Ltd.-v-Natwest Finance Ltd* [2003] EWCA Civ 391:

> "*62. Nor, in my judgment, is there any basis for Mr Sutcliffe's submission that the jurisdiction conferred by the second limb of section 653(3) to give a*

limitation direction is confined to a limitation direction in favour of creditors: the subsection must in my judgment also confer jurisdiction to give a limitation direction in favour of the company which is being restored, where it seems to the court just to do so."

Principles governing the exercise of the discretion to make a limitation direction

9. Mr. Foley emphasised the breadth of the Court's discretion. His Honour Judge Keyser QC did very recently opine as follows in *Davy-v-Pickering et al* [2015] EWHC Ch 380:

"*30. The discretion under section 1032(3[3]) is a wide one. It is confined only by the touchstone of justice ("as seems just") and by the express purpose that the directions must serve ('placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register')…*

36. In my view, the judgment of Jonathan Parker LJ does not lay down any test of 'exceptional circumstances' that is applicable to the present case. (I very much doubt whether he was intending to lay down any legal test at all; his remarks seem rather by way of observation as to the infrequency with which a direction of the kind sought in that case would be justified.) As the passage makes clear, the Court of Appeal was concerned with a different situation from that which is before me. The company, Regent, had been restored to the register on the application of its directors, pursuant to section 653 of the Companies Act 1985, for the purpose of enabling it to bring a claim against the bank, which they said had caused Regent loss and damage by making fraudulent misrepresentations. As Jonathan Parker LJ observed, "considerations of essential fairness" may more readily justify interference with the limitation regime in the interests of adversely affected third-party creditors than in those of the company that itself has both failed to bring its claim and allowed itself to be struck off the register.

[3] See footnote 1 above.

37. Nonetheless, I consider that Mr Adams is correct to submit that the logic of Jonathan Parker LJ's dictum requires that, in the case of third-party creditors as in that of the company itself, one have proper regard to the regime in the Limitation Act 1980. The dictum makes clear that any limitation direction, if it has any effect, will tend to override the statutory limitation regime. The fact that this result may be more readily justified by considerations of common fairness when the interests of third parties are concerned does not detract from the need to show proper grounds why such a direction should be made. The dictum of Megarry J in Re Lindsay Bowman Limited (above) also makes clear that a limitation direction must be justified in each case and is not a matter of routine."

10. Clearly, the breadth of the jurisdiction superficially described in paragraph 30 is significantly limited by the more textured consideration of the circumstances under which the jurisdiction will in practice be exercised, which follows in paragraphs 36 to 37. These observations were made in the context of an application by a creditor for a limitation direction, and clearly support the view that fairness may more easily be shown to require such a direction where the applicant is a creditor. The finding that no exceptional circumstances need to be established must be viewed against this contextual background. The operative policy finding was that fairness is easier to establish when a limitation direction is sought by a creditor as opposed to the company.

11. This was the central thesis cogently advanced by Mr. Horseman, who referred the Court in the course of his submissions to the following passages in the *Regent Leisuretime* case. This case, after all, was a case where the Court of Appeal approved a judge's decision to set aside a limitation direction initially made in favour of the company in the context of granting a restoration application made by a director. Jonathan Parker LJ (with whom the other members of the Court of Appeal panel agreed) stated as follows:

"*90… Whilst considerations of essential fairness may justify the giving of a limitation direction in favour of third party creditors (as they did, for example, in Donald Kenyon), the same cannot so readily be said of a limitation direction in favour of the company being restored to the register: indeed, <u>on</u>*

the face of it fairness will generally require that the company, like any other claimant faced with a limitation defence, should be left to attempt to meet that defence by recourse to the statutory regime in the 1980 Act.

91. In the instant case, I cannot discern any such exceptional circumstances as might serve to justify the limitation direction which the District Judge made, and I accordingly conclude that the judge was right to delete the limitation direction from the order. The fact that Mr Amos took no step to initiate a claim by the Company, despite the fact that (as he has told us) he did not learn that the Company had been struck off until the Spring or Summer of 2000, by which date time had in any event expired, seems to me to reinforce that conclusion." [emphasis added]

12. Mr. Elkinson also submitted that exceptional circumstances were required to justify making a limitation direction in favour of a restored company.

13. I would summarise the principles governing the exercise of the discretion to make a limitation direction as follows:

(a) a sufficient justification for making an order which will override the usual statutory limitation period must always be made out and the discretion may not be exercised lightly;

(b) the principal consideration should be what the requirements of fairness require in light of the factual matrix out of which the application arises;

(c) it will usually be easier to justify the making of a limitation direction where it is sought to assist a creditor who has been prejudiced by the company being struck off the register and dissolved. In my judgment this is primarily because:

(i) creditors will, more often than directors or shareholders of the company itself, be genuinely ignorant of the company's dissolution and ill-equipped to take protective steps before a limitation period expires,

(ii) the scenario of a company incurring debts and then being abandoned by its management and then being struck off is a recognised source of injustice which the courts are not infrequently called upon to remedy,

(iii) company 'insiders' are usually well placed to monitor any internal irregularities and will usually be expected to be routinely monitoring a company's affairs. Save in rare circumstances, 'insiders' will usually be aware of a company being struck off soon after this occurs;

(d) exceptional circumstances will therefore ordinarily be required to justify making a limitation direction in favour of a company.

Findings: should a limitation direction be made in favour of the Company in the present case?

Relevant facts

14. The Petitioner avers that he was unaware of steps being taken in 2004 by the Registrar to strike the company off the register and denies seeing the related advertisements. He and co-director Leon Williams both assert that they were not involved in the day-to-day management of the Company after its incorporation on May 1, 2000. He does not explain in either of his two Affidavits when he first became aware of the striking-off. However, a lawyer's letter was written on his behalf as early as July 17, 2007 to the Bermuda Housing Corporation which indicated that he was investigating various irregularities and had "*expressed a desire to resurrect his company*". On the same date a similar letter was sent, also seeking information, to the Bank. The Petitioner in his Second Affidavit avers that he first wrote to the Bank seeking information about the Company's affairs in 2006. On December 15, 2007, the Royal Gazette reported that the Police had received a forgery complaint in relation to the cheques issued by the Company.

15. In the Petitioner's First Affidavit, the reason for the restoration application was explained as follows:

> "*10. I would like to have the Company's name restored to the register in part because the Company is a judgment creditor in respect of a judgment debt that remains outstanding. I also believe it is necessary for the Company to trace various payments made to and from its accounts which I believe to be questionable, with a view to recovering payments made from the Company's accounts that ought not to have been made.*"

16. The First Leon Williams Affidavit deposes that $212,815.30 was advanced by the Bank on the basis of cheques on which his signature had been forged. This appears to be the same allegation which formed the subject of the December 15, 2007 newspaper story, the author of which inferred that the forged signature belonged to either the Petitioner or Mr. Williams. The Petitioner's Second Affidavit explains the steps he took to investigate the affairs of the Company after its dissolution and the claims it is intended to pursue. No or no satisfactory explanation is offered as to why the Petitioner had to spend so many years since 2006 (when he commenced investigating the Company's affairs) before restoring the Company to the register. The Company itself (acting if not through its directors through a liquidator) would have been in the best legal position to access information about its own affairs. It is admitted that further investigations as to potential claims still need to be carried out. The Petitioner deposes:

> "*49. Now that the Company has been restored, it should be allowed continue the investigation work that I have started. If it has claims against individuals and companies that caused it to suffer loss, those claims should be permitted to go ahead.*"

17. Apart from enforcing a default judgment for $400,000 (which would not be time-barred), those claims are largely speculative and not clearly particularised but the broad factual foundation advanced may be summarised as follows. The Company received nearly $5 million from the Bermuda Housing Corporation for building 14 dwellings having originally contracted to build 20 dwellings for $4.2 million. It makes no sense that the Company lost money, especially since it paid no social insurance. Accordingly, money must have been misappropriated. A claim against the Bank for improperly honouring forged cheques was clearly asserted, however. The Petitioner

deposes in his Second Affidavit as follows:

> "*51. I believe there are possible claims against Zane DeSilva, David Woodward and the Bank of Butterfield. None have been particularly helpful with my efforts to understand what happened with the Company.*"

18. In the First Affidavit of Zane DeSilva, it is deposed that the forgery allegations were fully investigated by the Police in 2007 and that he was completely exonerated. It also suggested that the default judgment may well have been satisfied following a settlement. He further states that in 2002, following a falling out, the Petitioner and Mr. Williams agreed that he and Mr. Arthur Pitcher should take over management of the Company:

> "*26…There was no fraud as alleged. If cheques were signed in contravention of any signing authority registered with the Bank, it was likely done as a result of the document signed by Mr. Bean-Walls and Mr. Williams authorizing us to take over the company and finish the project*…"

19. If this is correct, the Company may not have the standing to complain about any mandate breaches which may have occurred, or indeed, to establish legally recoverable loss. As regards delay, Mr. DeSilva avers as follows:

> "*2…I do not have a lot of documentation in my possession that relate to these matters any more save a few newspaper articles and some electronic copies of documents that my former attorneys were able to locate….Had he brought the application to restore the company and pursued his baseless allegations closer to the time, I would have had access to the necessary documentation in order to defend me against these frivolous and scandalous allegations.*"

20. The First Arthur Pitcher Affidavit robustly denies any wrongdoing, and concludes as follows:

> "*10. I do not have any documentation that relates to this matter. The issues*

raised by Mr. Bean-Walls date back some 11 to 15 years ago and he was well aware of the matters he is complaining of years ago. Had Mr. Bean-Walls wished to bring some claim, he could have done so a long time ago."

21. Mr. Elkinson by way of argument asserted that the Bank would have difficulty in producing documents due to the delay. It seemed to me to be inherently probable that disapplying the limitation period to permit proceedings to be brought so long after the relevant events occurred would cause any potential defendant similar prejudice.

22. It is not appropriate or necessary to make findings on the various issues in controversy as to the merits of the potential claims it is suggested the Company ought to be assisted to pursue. Nevertheless, the facts which are undisputed (or which cannot seriously be disputed) may be summarised as follows:

    (1) it is admitted that the Petitioner was aware of the Company's 2004 dissolution by 2006 at which point he already had concerns about its management;

    (2) it is further admitted (and confirmed by lawyers' letters) that the Petitioner consciously contemplated restoring the Company to the register as long ago as mid-July 2007;

    (3) it is admitted that the Petitioner thereafter spent more than 7 years investigating these concerns (rather than applying to restore the Company and issuing, if necessary, protective writs to preserve claims);

    (4) it is obvious and/or this Court is bound to find in any event that the Petitioner was aware of the matters which form the basis of the only clearly identified claim (the claim against the Bank in respect of the supposedly forged cheques) since in or about 2007 at the very latest;

    (5) it is self-evident that as a director and shareholder the Petitioner had an array of legal rights while the Company was active to ensure that its affairs were properly conducted, even if he ceded day-to-day operational control

of the Company to other directors;

(6) bearing in mind that the Petitioner contends that key information was concealed from him (so that any causes of action would not accrue until he had the requisite knowledge to assert a claim), any claims the Company had against its former controllers in respect of events occurring between 2001 and 2004 would not have been time-barred by 2007 in any event;

(7) even now, the limitation direction is sought not to allow clearly formulated and demonstrably arguable claims to be immediately commenced. The present application is made on the basis that further investigations must be carried out to ascertain whether claims exist which are worth pursuing;

(8) the potential defendants would likely be prejudiced by the loss of documents due to the passage of time since the relevant events occurred and clearly would be prejudiced by being deprived of their usual limitation defences;

(9) while the assertion that the Bank's mandate was not complied with in respect of various 'forged' cheques is wholly credible on its face, another former director has also credibly (if tentatively) implied that the Company may lack the standing to complain about any mandate breaches which occurred.

Should a limitation direction be made in the present case?

23. Mr. Foley very ably advanced the best possible case that could have been advanced to persuade this Court to make a limitation direction. But when the relevant legal principles and the relevant facts of the present case are carefully scrutinised, it is clear that no sufficient case for the exceptional relief sought has been made out. This conclusion can be supported by a brief review of the contrasting facts of the authorities placed before the Court, before recalling what the crucial principles governing the exercise of the discretion under section 261(6) actually are.

24. The decided cases placed before the Court illustrate the following practical fact-based points:

(a) in no case was a limitation direction made in favour of the company (excluding the one case where the direction was initially made but subsequently set aside);

(b) in *Re Donald Kenyon Ltd.* [1956] 1 W.L.R. 1397 , where a shareholder petitioned to restore the company to the register, the first recorded limitation direction was given in favour of creditors at the instance of the court;

(c) absent unusual circumstances, one would expect an application to restore made by a company insider to be made much sooner than 11 years after the striking-off or, indeed, nearly 8 years after the Petitioner admits to having discovered the company had been struck off. In *Re Donald Kenyon Ltd.* [1956] 1 W.L.R. 1397, the company's business had been taken over by mortgagees in 1940 and, after her son died in 1942, the petitioner was the sole shareholder. The company was struck off in 1949 having been inactive for 9 years, and, against this unusual background the petition was presented for restoration in or about 1956, some seven years after the striking off occurred;

(d) in contrast to the *Donald Kenyon* case:

(i) in *Regent Leisuretime Ltd.* [2003] EWCA Civ 391, the company was struck-off in November 1998. Two directors applied to restore the company in March 2001, less than three years later;

(ii) In *Re Lindsay Bowman Ltd.*, the company was struck-off 1968 and the shareholder/company petition was presented in 1969;

(e) even where creditors have sought a limitation direction in the restoration context, they have generally acted more promptly than the petitioner in the present case so that the impact of the direction is not that great. In *Davy-v-Pickering* [2015] EWHC 380(Ch), the company was struck off in March 2012 and the restoration application was filed by the creditor in November 2013. The restoration application was granted in July 2014, proceedings were commenced against the company in January 2015 and the creditor sought the limitation direction to meet any limitation defence which have been raised;

(f) the suggestions made in the course of argument in the present case that there is a public interest in the Company being properly wound-up finds no support in any of the cases referred to in argument as a relevant consideration for exercising the discretion to give a limitation direction;

(g) in the only case placed before this Court where an application for a limitation direction to enable the applicant to pursue specific claims was actually granted, *Davy-v-Pickering* [2015] EWHC 380(Ch), the merits of the applicant creditor's claim (which had already been actually commenced) were clearly taken into account. The court noted in reviewing the facts:

> "10… *It is not for me to adjudicate on the merits of Mr Davy's claim against the Company. However, in the light of his evidence in this case and of the determination of the Financial Services Compensation Scheme ("FSCS") mentioned below, the claim appears at present to have realistic prospects of success, subject to questions of limitation.*" [emphasis added]

25. Whether justice requires this Court to use the extraordinary power of disapplying the provisions of the Limitation Act 1984 to permit the Company itself to pursue potential claims which would (or might) otherwise be time-barred involves an assessment of the extent to which such a direction would be fair taking into account:

(a) the extent to which it is possible for Petitioner to fairly complain that the Company itself was prejudiced by the impact of the striking off and dissolution on its ability to pursue the proposed claims;

(b) the extent to which the Petitioner has acted reasonably promptly and not lost the right to complain that it is unfair for the potential defendants to be able to deploy limitation defences;

(c) the extent to which the Petitioner is able to demonstrate claims of sufficient viability to justify 'reviving' claims which would otherwise be

lost;

(d) the extent to which the potential defendants may be prejudiced by the effluxion of time in being able to effectively contest any claims.

26. In my judgment, the Petitioner's ability to <u>fairly</u> complain about prejudice to the Company flowing from the striking off is razor thin. He has been guilty of unjustified delay: "*willing to wound and yet afraid to strike, just hint a fault and hesitate dislike*"[4]? He has not yet formulated or filed a claim and still requires time to investigate the viability of potential claims. The sincerity of the Petitioner's sense of grievance and his apparently deep-seated desire to rake over the long-extinguished coals of this commercial venture are, regretfully, wholly irrelevant considerations. The passage of time since the relevant events occurred (nearly 15 years) gives rise to an inevitable inference of prejudice to the potential defendants' fair hearing rights if their ability to avail themselves of their rights under the Limitation Act 1984 were to be wrested from them retrospectively at this stage. The application for a limitation direction must accordingly be refused. The various factual considerations mentioned above have been assessed under the following umbrella legal policy guideline principles. As Jonathan Parker LJ stated in *Regent Leisuretime –v-Natwest Finance Ltd.* [2003] EWCA Civ 391, delivering the leading judgment for the English Court of Appeal:

> "*90… Whilst considerations of essential fairness may justify the giving of a limitation direction in favour of third party creditors (as they did, for example, in Donald Kenyon), the same cannot so readily be said of a limitation direction in favour of the company being restored to the register: indeed, on the face of it fairness will generally require that the company, like any other claimant faced with a limitation defence, should be left to attempt to meet that defence by recourse to the statutory regime in the 1980 Act.*"

[4] Alexander Pope, '*Epistle to Dr. Arbuthnot*'.

Conclusion

27. For the above reasons, the Petitioner's application for a limitation direction under section 261(6) of the Companies Act 1981 to enable and/or to assist the Company to investigate and possibly pursue various claims in respect of matters which occurred between 10-15 years ago is refused. I will hear counsel, if required, as to costs.

Dated this 10th day of August, 2015 _____

IAN R.C. KAWALEY