[2020] JMSC Civ. 157

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013HCV06512

BETWEEN	**MICKEEL JOHNSON**	**CLAIMANT**
AND	**ALU GLASS LIMITED**	**DEFENDANT**

IN OPEN COURT

Sean Kinghorn instructed by Kinghorn & Kinghorn for the Claimant.

Ruel Woolcock instructed by Ruel Woolcock & Co. for the Defendant.

Heard July 14, 15 and 20, 2020.

Defendant company removed from the Register of Companies prior to trial date – Whether trial can proceed in the absence of the defendant pursuant to the Rule 39.5 of the Civil Procedure Rules, 2002, as amended – Whether the defendant company must first be restored to the Register of Companies – Effect of restoration pursuant to sections 336(1) and 337(6) of the Companies Act on the current proceedings.

N. HART-HINES, J (Ag.)

BACKGROUND

[1] On November 3, 2011, the claimant was employed to the defendant company as a glass cutter and while in the process of moving glass, his left wrist was cut. A medical report dated June 18, 2012 from the May Pen Hospital diagnosed a "traumatic transaction of left radial artery". A medical report dated July 20, 2012, prepared by Dr. Orlando Thomas, General Practitioner indicated that the claimant "suffered a severed median nerve in his forearm" and that "his hand will remain partially useless for the rest of his life". Prior to receiving the injury, the claimant was left handed. On November 25, 2013, he instituted proceedings in the Supreme Court seeking damages against the defendant for negligence and/or breach of the **Occupier's Liability Act** and/or breach of contract.

[2] The case was first fixed for trial for three days to commence on November 28 2017. However as at the Pre-Trial Review ("PTR") on September 18, 2017, it appears that the parties had not fully complied with the orders made at the Case Management Conference ("CMC") and a judge extended the time for compliance with CMC orders to October 1, 2017, failing which, the statement of case of the party in default should stand struck out. The PTR was adjourned to October 25, 2017 at 9 a.m. but no one attended the hearing.

[3] On the first day of the trial on November 28, 2017, the defendant had not complied with the "unless order" made at PTR hearing on September 18, 2017. The trial was adjourned pending the hearing of an application for relief from sanctions by the defendant. The application for relief from sanctions was granted on February 19, 2020. The matter was then fixed for trial for one day on July 14, 2020.

THE HEARING AND SUBMISSIONS

[4] On July 14, 2020 this matter was listed for trial before me. A status letter from the Companies Office of Jamaica dated July 10, 2020 was sent to a Case Progression Officer by counsel for the defendant, and this was brought to my attention. The letter stated:

> *"Dear Sirs,*
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> <u>*Re: ALU. GLASS LIMITED Reg. #82443*</u>

We are in receipt of your request for information regarding the status of the captioned company. This letter serves to advise that a search of our records was conducted and the results are as follows:

The above-captioned company was incorporated under the Companies Act of Jamaica on the 14th day of July 2011. The company was removed on the 25th day of March 2020 and no longer appears on our register."

[5] Counsel Mr. Kinghorn submitted that the trial could proceed in the absence of the defendant pursuant to the rule 39.5 of the Civil Procedure Rules 2002 as amended ("CPR"). Counsel Mr. Woolcock appeared in court on behalf of the defendant, though he indicated that he did not have instructions from the company, which no longer existed. The court asked both counsel to prepare and file written submissions in limine and the matter was adjourned to July 15, 2020.

[6] On July 15, 2020 the court had the benefit of both written submissions, although they had not been filed. However, the court required more time to give consideration to the submissions, as well as some cases which the court found in its own research. The matter was adjourned to July 21, 2020 for the court's decision.

[7] Mr. Kinghorn indicated the bases for his submission as follows:

1. *There is no evidence before the Court which details the manner in which the Company was removed from the Register of Companies. This is important as a Company can be removed from the Register in different ways. One of the ways that the Company can be removed is by the action of the Registrar (Section 337). If this occurs the Company is not treated as at an end of its life. The Company may within 20 years of being struck of, apply to be restored. In this event, the life of a Company could not be treated as being at an end.*

2. *There is no formal Application supported by Affidavit evidence from Counsel who appears for the Defendant for a Stay of the Proceedings. Counsel has appeared without more. His presence presumes that the Company, even if not on the Register of Companies, still exists. Certainly, his instructions must have come from the Defendant.*

3. *There has been no Application by Counsel on record to remove his name from the record on the basis that the Company no longer exists. Again, Counsel's appearance without more, presumes that his Retainer continues and that there is no obstacle to him representing the Defendant. For him to do so the Defendant would still have to be in existence.*

[8] Mr. Woolcock submitted that the dissolution of the company and its removal from the Register of Companies meant that no action or proceedings could continue against the company. Counsel submitted that once the company has already been dissolved, it would first be necessary to restore the company to the register. However, counsel submitted that that would be after a successful application by an interested party under section 284(4) of the **Companies Act** to defer the date of the dissolution for such period as the Court thinks fit. Finally, Mr. Woolcock submitted that it might be futile for a litigant to apply for the company to be restored to the register where the company has no assets against which a judgment sum could be levied.

[9] Counsel referred the court to the decision of ***Smith v White Knight Laundry Ltd*** [2002] 1 WLR 616, for the position that where a prospective claimant applies for a declaration that the dissolution of the company is void, such a declaration required a direction (under the English Companies Act 1985) permitting the claimant to pursue her cause of action which became statute barred in the period between dissolution and restoration. The direction permitting the claimant to pursue her claim after the limitation period was similar to an extension of the time within which to sue pursuant to section 33 of the English Limitation Act 1980. In that case, since the defendant and its insurers were not present when the direction was made, the direction was set aside to permit a court to hear from both sides in an application under section 33 of the Limitation Act 1980.

[10] Our **Limitation of Actions Act 1881** does not contain a provision similar to section 33 of the English Act, giving the court the power to extend the limitation period. I therefore believe the point that Mr. Woolcock was making in relying on the ***Smith*** case is that restoration of the defendant to the Register of Companies will not resuscitate the claimant's case, nor permit him to sue afresh, since his claim is now statute barred.

THE ISSUE

[11] The issues for the consideration of the court are:

1. what is the effect of a removal from Register of Companies;

2. whether the defendant company must first be restored to the register by the Registrar of Companies before the trial can commence; and
3. whether restoration to the register is sufficient to cause the proceedings to continue.

THE LAW

[12] It is settled law that once a company is removed from the Register of Companies, it ceases to have legal personality and ceases to exist. What this court must consider is whether the current proceedings have died with the company's removal from the register, and whether they can be revived upon its restoration to the register. The answer depends on how the company came to be removed from the Register of Companies.

[13] The status letter from the Companies Office of Jamaica does not offer any explanation for the removal of the company from the Register of Companies. Nonetheless, I will examine the law on how a company might be reinstated to the register.

[14] At the outset, I must state that I do not agree with counsel Mr. Woolcock that section 284(4) of the **Companies Act** ("the Act") would be applicable, as such an order could not be made after the company has been dissolved, if it has been. Sections 336(1) and 337(6) of the Act are applicable since they provide for two methods of restoration. I will have regard to the guidance in cases which have interpreted similar provisions.

Restoration to the Companies Register after a court order pursuant to section 336

[15] If a company has been voluntarily wound up and dissolved, the court has the power to declare dissolution of the company to be void. In order for the court to make such an order, an application must be made to the court by a liquidator of the company or by any other interested person, pursuant to section 336(1) of the Act. It seems that after such an application is granted, the order would have to be served on the Registrar of Companies ("the Registrar"), directing that the company be restored to the register. Section 651(2) of

the 1985 English Companies Act[1] bears wording identical to that in section 336(1) of our Act. This section has been interpreted by the English courts as permitting a court to make an order which operates prospectively but not retrospectively. I will discuss this further below. Section 336(1) provides:

> ***"336(1)*** *Where a company has been dissolved, the Court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator C of the company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon* ***such proceedings maybe*** *[sic]* ***taken as might have been taken if the company had not been dissolved****. (my emphasis)*

Restoration to the Companies Register by the Registrar pursuant to section 337(6)

[16] Section 337(6) of the Act provides that an application may be made to the Registrar by the company or member or creditor, to restore the company where it was struck off the register. In this jurisdiction[2], only the Registrar can restore the company to the register where it was administratively struck off. Section 337(6) is similar to section 353(6) and section 653 of the 1948 and 1985 English Companies Acts (respectively), save for the fact that the English provisions permitted applications to be made to the court. The wording of section 337(6) and the English section 653 indicates that these sections operate retrospectively. Section 337(6) states:

> ***"337(6)*** *If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the Registrar on an application made by the company or member or creditor before the expiration of twenty years from the publication in the Gazette of the notice aforesaid- may, if satisfied that-*
> *(a)the company was at the time of the striking off carrying on business or in operation; or*
> *(b) 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 such registration, the company shall be deemed to have continued in existence as if its name had not been struck off****." (my emphasis)*

The effect of an order pursuant to section 336(1) on pending proceedings

[17] I am guided by English cases interpreting similar provisions and which considered the effect of restoration on proceedings begun before the date of dissolution, or begun

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[1] See too its predecessor section 352(1) of the 1948 Act.
[2] Unlike several other Caribbean islands where an application might to be made to the Court.

during the interval between the dissolution and restoration. The House of Lords decision in ***Morris v Harris*** [1927] AC 252 is instructive as regards the interpretation of the words in sections 223 and 242 of the 1908 English Companies (Consolidation) Act (which are similar to our sections 336(1) and 337(6)[3]). It was held that a court order declaring the dissolution of a company to have been void (as under section 336) does not affect the validity of proceedings commenced during the interval between the dissolution and the court order. Those proceedings remained invalid, but could be restarted after restoration.

[18] As regards section 223, Lord Sumner said at pages 257 and 258:

> *"The words "to have been void," in s. 223, appear, it is true, so far as they go, to have some retrospective effect, and tend to some extent to support the respondent's argument.* ***On the other hand, the remaining words****, which define the order,* ***point rather to a declaration removing a bar to such action as might otherwise have been taken, than to one validating past proceedings****, taken since the dissolution through ignorance or disregard of it and* ***consequently invalid****. The remaining words, "and thereupon such proceedings may be taken, as might have been taken if the company had not been dissolved" seem to me to point conclusively in the same direction. They describe an authority given to the parties concerned to do, "thereupon" and accordingly thereafter, things which they might have done but obviously had not done theretofore, and, but for the order, could not have done after the dissolution.* ***I think these words do not affect the validity*** *or the contrary* ***of steps taken during that interval****…."*
>
> *...* ***The object of the provision was, I think, to give a fresh start to proceedings****, which owing to the dissolution had been impossible and had not been taken, and* ***thereupon it was to be open to those concerned to take them in the future*** *as if the dissolution had not happened." (my emphasis)*

[19] The case of ***Re Philip Powis Ltd*** [1997] 2 BCLC 481 is similar to the instant case. There, the plaintiff was employed by the defendant company and in the course of his work, he suffered an injury to his back in 1985. A writ was filed and served on the eve of the expiration of the limitation period in 1988, claiming damages for negligence and breach of statutory duty in respect of his personal injuries. However, the matter moved slowly on both sides after the writ was served. Eventually in May 1993 notice was given by the company's solicitors that £5,000 had been paid into court in satisfaction of the plaintiff's cause of action, including interest. The plaintiff did not accept that payment. No further steps were taken in the proceedings other than letter writing. The company had

[3] The sections of the 1908 Act are identical to sections 651 and 653 of the 1985 English Act.

passed a resolution for voluntary winding up in March 1995 and was dissolved in September 1995. When the plaintiff became aware of the dissolution he applied to the court under section 651 of the 1985 Act for an order declaring the dissolution of the company to have been void, for a direction under section 651(6) of the Act that the period between dissolution and the date of the restoration of the company be excluded from the limitation period in respect of his personal injuries action, and for a direction that the personal injuries action be deemed to be valid and continuing, notwithstanding the dissolution of the company.

[20] Sir John Knox (sitting as a judge of the High Court) considered the decision in ***Morris v Harris*** and ruled that in making an order under section 651(1) declaring a dissolution void, the court did not have jurisdiction to add terms validating proceedings which were started before the company was dissolved, as those proceedings had come to an end. He considered the Court of Appeal decision in ***Foster Yates & Thom Ltd v HW Edgehill Equipment Ltd*** (1978) 122 SJ 60 wherein Megaw LJ said:

> *"… when a corporate body is dissolved as a result of a voluntary winding up,* ***any action which is pending at the date of dissolution ceases, not temporarily and provisionally, but absolutely and for all time****. If the company is brought to life again under s 352, the cause of action is still there.* ***It can, subject to any question of limitation, be pursued by fresh proceedings****." (my emphasis)*

[21] Sir John Knox found ***Foster Yates*** binding on him as it analysed the legal effect of abatement of proceedings through voluntary winding up and dissolution of a company which was a party to proceedings. He said at page 493:

> *"Where there is a corporate party which is dissolved, the proceedings come to a permanent end on dissolution and do not go into abeyance or its equivalent. In my view, once one reaches that conclusion it would need very explicit statutory authority to allow the court subsequently to restore to life that which had come to a permanent end."*

[22] The English courts have therefore ruled that once a company is wound up and dissolved, proceedings instituted against it cease upon its dissolution, and can only be pursued by fresh proceedings when the company is restored, provided that the claim is not statute barred.

The effect of restoration under section 337(6) on pending proceedings

[23] When the company is restored under section 337(6), it is "*deemed to have continued in existence as if its name had not been struck off*". The effect of this restoration is that it retrospectively validates proceedings which existed and acts done before the company was struck off the Companies Register, as well as proceedings commenced by or against a company during the period of its dissolution. The English Court of Appeal confirmed this in ***Joddrell v. Peakstone Limited*** [2013] 1 All ER 13 at paragraph 49. Munby LJ compared the effects of orders under section 651 and section 653 of the 1985 Act and stated at paragraph 29:

> *"[29] …* ***In the first case*** **[section 651]*****, the order had no retrospective effect except to restore the company's corporate existence. It did not validate any actions or activities that had taken place during the period of dissolution. In particular it did not restore to life an action which, having been commenced before the company was dissolved****, had abated on the company's dissolution, nor did it bring to life an action which, purportedly commenced while the company was dissolved, was a nullity.* ***In the other case*** **[section 653]*****, by contrast, the effect of the deeming provision was to validate retrospectively what had happened while the company was dissolved, so that once the restoration order was made the company was to be regarded as never having been dissolved****." (my emphasis)*

[24] In ***Tymans Ltd v Craven*** [1952] 1 All ER 613 the English Court of Appeal considered the effect of the provision in section 353(6) of the Companies Act 1948 on acts done by or on behalf of a company during the period where it was removed from the register. The Court held that the words "*deemed to have continued in existence as if its name had not been struck off*" meant not only that the corporate existence of the company was preserved, but was also that the restoration operated retroactively. The company was to be regarded as never having been dissolved. This meant that as at the date of the hearing of its application for the grant of a new lease (while it was struck off the register), its application was deemed valid, or was validated by the restoration to the register.

[25] The effect of restoration is that proceedings are deemed to remain in existence. However, in the Court of Appeal decision in ***Top Creative Ltd and another v St Albans District Council*** [1999] EWCA Civ 1774, Roch LJ said that "*it would be desirable*" for the

court to make a declaration that the action itself has been restored, following restoration of the plaintiff company to the Companies Register.

ANALYSIS

[26] The status letter from the Companies Office of Jamaica does not state the reason for the removal of the defendant company from the Companies Register. The matter cannot be progressed without the court knowing the reason for the removal, as different consequences flow from the different manner of removal and from the method of restoring the company to the Register of Companies.

[27] If the defendant company was voluntarily wound up and dissolved, restoring it to the register pursuant to section 336(1) of the Act would not revive or validate the current proceedings, which would have died with the dissolution of the company. The trial cannot proceed pursuant to the CPR rule 39.5 in those circumstances. On the other hand, if the company was administratively struck off, restoring it to the register pursuant to section 337 of the Act would revive the current proceedings. There is a third possibility, and it is that the company might have been struck off by the Registrar, and then its directors saw the opportunity to voluntarily wind up the company and have it dissolved. In such as case, the company might be said to have had two deaths, but the proceedings can be revived[4].

[28] At this time the defendant does not exist. However, that is insufficient. This court can only make an order based on adequate information being made available to it.

[29] In exercising my case management powers, I must have regard to the overriding objective of ensuring that cases are dealt with fairly. Striking out the claim or declaring the proceedings to be at an end, when in fact they might not be, would prejudice the claimant and would be contrary to the overriding objective. I must have to regard to the fact that the claim became statute barred on November 3, 2017. I can only strike out the

[4] See ***Re Townreach Ltd, Re Principle Business Machines Ltd*** [1994] 3 WLR 983.

claim once I am satisfied that the defendant company was wound up and dissolved, and a restoration to the register would be futile, since a fresh claim cannot be filed.

[30] Rule 1.3 of the CPR provides that the parties have a duty to help the Court to further the overriding objective of dealing with cases justly and expeditiously. This duty extends to counsel and legal representatives of the parties, and it is settled that it includes notifying the court immediately when a case is unlikely to proceed, in order to reduce the risk of serious waste of resources and judicial time[5]. This means that counsel Mr. Woolcock ought to have notified the court and the claimant's counsel as soon as he was notified that the defendant was removed from the Register of Companies. If notification was given immediately after the removal in late March 2020, enquiries could have been made with the Companies Office of Jamaica and the court would have more information available to it at this time.

[31] In my opinion, the overriding objective is best served by permitting the claim to remain on the court list, although the defendant company does not currently exist. Once more information is obtained from the Companies Office of Jamaica, the court might make an informed decision regarding the progression of, or, the striking out of the claim. The matter will therefore be adjourned to a further date, pending further information.

DISPOSITION

[32] Despite the urgings of counsel Mr. Woolcock, this court is not prepared to proceed on the assumption that the company was voluntarily wound up and dissolved. It might be that the company was administratively struck off by the Registrar instead, in which case, the proceedings can be revived upon restoration to the Companies Register.

[33] In the absence of evidence or appropriate documentation indicating the basis for the removal of the defendant company from the Companies Register, I am not prepared to declare that these proceedings permanently ceased to have any existence once the company was deregistered, or to strike out the claim. Instead, I will order that the trial

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[5] See ***Tasyurdu v Secretary of State for the Home Department*** [2003] EWCA Civ 447.

cannot proceed at this time, until further information is obtained as regards how the defendant company came to be removed from the register.

[34] I now make the following orders:

1. The trial cannot proceed at this time, until the defendant company is restored to the register pursuant to section 337 of the **Companies Act**, if the Registrar of Companies is so able to do.
2. The matter is fixed for Pre-Trial Review on September 18, 2020 at 11 a.m. for half an hour, for affidavit evidence or communication from the Registrar of Companies indicating how the defendant company came to be removed from the Register of Companies.
3. If the claimant intends to make an application to the Registrar of Companies for the defendant to be restored to the Register of Companies pursuant to section 337(6) of the **Companies Act**, such application must be made and considered by the Registrar before the Pre-Trial Review on September 18, 2020.
4. If the Registrar orders that the defendant be restored to the register, the claimant must file an affidavit indicating same and exhibiting appropriate documentation from the Companies Office of Jamaica, and seek a declaration that the action itself has been restored, following said restoration.
5. Attorney for claimant to file this order.