Neutral Citation Number: [2020] EWCA Civ 227

Case No: B3/2019/0355

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM STOKE-ON-TRENT COUNTY COURT
AND FAMILY COURT
HHJ Rawlings
D40YM662

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2020

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE HOLROYDE
and
LORD JUSTICE PETER JACKSON

- -

Between:

KEVIN COWLEY	**Appellant**
- and -	
L.W. CARLISLE & COMPANY LIMITED	**Respondent**

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- -

Dirk van Heck (instructed by Walker Prestons Solicitors Limited) for the Appellant
Simon Hughes (instructed by DWF LLP) for the Respondent and for Royal & Sun Alliance PLC

Hearing date: 12 February 2020

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Approved Judgment

Lord Justice McCombe, Lord Justice Holroyde and Lord Justice Peter Jackson:

1. This is the judgment of the court on the appeal of Mr Kevin Cowley ("the Appellant") from the order of 14 November 2018 of HH Judge Rawlings sitting in the County Court at Stoke-on-Trent. By his order the judge dismissed the Appellant's appeal from the order of 31 May 2018 of District Judge Etherington striking out the Appellant's claim against L.W. Carlisle Limited ("LWC"), the party named as the Third Defendant in the proceedings. The judge also ordered the Appellant to pay the Third Defendant's costs of the appeal (not to be enforced without the permission of the court), summarily assessed at £4,200 (inclusive of VAT). Permission to appeal to this court was granted by Irwin LJ by his order of 5 November 2019.

2. The proceedings involve a claim by the Appellant for damages for noise induced hearing loss alleged to have been sustained by him in the course of his employment, by four different employer companies, between 1963 and 2000. The claim in total is said to be in the region of £5000 in value. It is most disturbing, therefore, to note first, the figure for costs appearing in the judge's order under appeal and secondly, to see that the Costs Schedules delivered for this present appeal (from what were merely the interim orders below involving only one of four defendants) claim sums of £19,367.52 and £23,420,16 respectively. The costs expended on this satellite litigation, therefore, stand at a little less than £50,000 in relation to just one defendant to a claim worth only £5,000. We return to that matter at the end of this judgment.

3. The Appellant's employment with LWC is said to have been between 1978 and 1983. The other defendants are three other companies called Latham International Limited (employment period 1963-4), Tata Steel Limited (employment period 1964-1977) and Patera Engineering Limited (employment period 1996-2000). LWC had been struck off the register of companies and was dissolved on dates unknown to us. That was the position, known to the Appellant's solicitors, when the proceedings were issued and at all stages of the proceedings in the court below. The issues before us all arise from the fact of LWC's dissolution before the issue of the proceedings.

4. According to a chronology produced by the Appellant's solicitors for this appeal, on 25 June 2018, i.e. after the District Judge's order but before either of the two hearings before Judge Rawlings concerning the appeal to him, application had been made to the High Court on behalf of the Appellant for an order restoring LWC to the Register. It does not appear from the transcript of the appeal hearing before Judge Rawlings, which was produced to us, that the judge was informed of that fact. Mr Hughes who appeared before the judge, as he does before us, confirmed that the judge was not so told.

5. What the Appellant's solicitors' new chronology in our bundles did not reveal, however, was that, on 5 February 2019, in the High Court at Manchester, it had been ordered that LWC be restored to the Register of Companies. This court was informed of that fact for the first time at the hearing of the appeal. There was no hint of this in any part of the two files or other papers lodged for the appeal. The information appears only to have emerged when (on the day before the appeal) the court enquired of Mr Hughes as to the source of his instructing solicitors' authority to act for LWC, given that the company appeared no longer to be in existence.

6. All that said, the procedural background underlying the appeal is as follows.

7. Solicitors acting for the Appellant, purported to send a letter before claim to LWC on 3 January 2017. On 15 August 2017 the solicitors issued the claim against all four intended defendants, including LWC. The claim form was formally issued by the court on 1 September 2017. On 13 December 2017, according to a "certificate of service", the Appellant's solicitors posted the claim form, together with supporting documents, and a response pack, by way of purported service, to the then non-existent LWC at an address at Newlands Street, Shelton, Stoke-on-Trent, identified as its "last known place of business".

8. It is said that at the time of this purported service the solicitors also wrote a letter in these terms:

> "RESTORATION OF THE THIRD DEFENDANT TO THE REGISTER OF COMPANIES
>
> The Claimant notes the Third Defendant has not yet been Restored to the Register of Companies.
>
> The Third Defendant will undoubtedly accept that that the effect of *Peaktone Ltd v Joddrell* [2012] EWCA Civ 1035 is that Proceedings which are served against a Dissolved Company can be retrospectively validated if the Company is subsequently Restored to the Register of Companies.
>
> The Claimant accepts that that the effect of *Peaktone Ltd v Joddrell* [2012] EWCA Civ 1035 does not remove the need for the Third Defendant to be Restored to the Register of Companies.
>
> Please be advised that the Claimant will be lodging an Application to restore the Third Defendant to the Register of Companies.
>
> In the event that the Third Defendant proceeds with an Application to Strike Out the Claimant's Claim against the Third Defendant the Claimant will, in turn, produce evidence to the Court that Restoration Proceedings are imminent and will be seeking costs of, and incidental to, resisting any such Application.
>
> Furthermore, in the event that the Third Defendant proceeds, absolutely unnecessarily, with an Application to Strike Out the Claim the Claimant reserves the right to refer the Court to the Third Defendant's conduct in this matter.
>
> CLAIMANT'S PROPOSED COURSE OF ACTION
>
> In light of the fact that the Third Defendant has not yet been Restored to the Register, and the Third Defendant may take issue with the same at this stage, the Claimant considers that the most appropriate and cost effective way to deal with any such

> disagreement between the parties is indeed to agree a formal Stay pending the Restoration of the Third Defendant to the Register of Companies."

Copies of the documents appear to have been sent at the same time to the insurers for the former LWC, Royal Sun & Alliance Insurance PLC ("the Insurers") on whose instructions Mr Hughes and his instructing solicitors now act.

9. On 12 March 2018, the Insurers wrote to the Appellant's solicitors stating (correctly) that "our insured is dissolved and therefore proceedings cannot be served on them…". They also said in the same letter that, therefore, they assumed that the case against LWC was not proceeding and that they intended to close the file.

10. However, on 27 April 2018, solicitors for the Insurers purported to lodge an Acknowledgment of Service on behalf of LWC indicating an intention to contest the jurisdiction on the basis that, in the absence of a restoration of LWC to the register, the proceedings were a nullity. In a covering letter those solicitors stated that, "…we are instructed to act on behalf of L.W. Carlisle & Company Limited". The source of any such instructions from LWC was not disclosed. The solicitors also invited the Appellant's solicitors to notify them immediately if they had attempted to restore, or had restored, LWC to the register and to provide evidence of that.

11. On 2 May 2018, again purportedly on behalf of LWC, the same solicitors issued an Application Notice for an order striking out the claim as against LWC, pursuant to CPR 3.4(2), as an abuse of process and/or for an order pursuant to CPR 11(6) for a declaration that the court had no jurisdiction or would not exercise its jurisdiction against LWC.

12. On 18 May 2018, the Appellant's solicitors received from the court the notice of acknowledgment of service, noting the name of the same solicitors said to be acting for LWC. On 25 May 2018 notice of hearing of the Insurers' application in the name of LWC was given for 31 May 2018.

13. The application duly came on for hearing before the District Judge on that day. It was argued for the Appellant that, notwithstanding the dissolution of LWC, the proceedings had been properly served on it at its last known place of business and that an order restoring the company to the register would validate that service retrospectively. The District Judge took the position in argument that,

> "…this Court will only allow process against a company that exists and will only correct errors in procedure where there is imminent restoration, and that is your problem…"

He pointed out that the procedural submissions missed that point. The Appellant's representative (not Mr van Heck who appears for the Appellant for the first time on the hearing of the appeal to this court) said that all he could do, therefore, was to make an application for a stay of the proceedings.

14. The District Judge's reaction to that application was this:

> "JUDGE ETHERINGTON: You cannot because it has to be supported by evidence because I have to consider the effect on the other parties and I also have to consider, almost in addendum(?) [sic] manner, why they have waited until now for that and why they have done nothing at all since September to do what they now what [sic: want] the stay to achieve. If you had said to me, only if Mr Navid had said in his statement, 'We issued this, we did not apply our mind. Insurers usually let this go, this one hasn't. We're now underway with an application to restore. We are going to need another three or four weeks,' you would have been in an entirely different position, but for Mr Navid to sit back with loads of factious technical arguments that all amount to nought and still have done nothing practical. In the time he did all of that nonsense, he could have restored the company to the register, and that is the problem."

("Mr Navid" there referred to is a Mr Naveed who had made a witness statement advancing the procedural arguments on the Appellant's side.)

15. The District Judge proceeded to make the order striking out the claim against LWC and assessed "its" costs at £555.00. The District Judge ordered the Appellant's solicitors to pay that sum to the Insurers by 14 June 2018 or to serve a witness statement to show cause why that order should not be made against them. Permission to appeal against the strike out order was refused.

16. After an intermediate hearing on 2 October 2018 as to the permitted ambit of any appeal, Judge Rawlings granted limited permission to appeal from the District Judge's order.

17. The appeal was heard by Judge Rawlings on 14 November 2018. Before the judge two broad points were argued. First, it was submitted that if the District Judge, in making his order, had sought to act under CPR 11 he had been wrong to do so as the procedural requirements of that rule had not been observed; and secondly, it was argued that, if the judge had been acting under CPR 3.4(2)(c), he was wrong to have done so on an application by the non-existent company and was wrong, in any event, to strike the claim out.

18. The judge found that the District Judge had not decided the matter on the basis of an absence of jurisdiction under CPR 11 but that he had acted instead pursuant to the strike out power under CPR 3.4. He found that, whether or not a jurisdictional challenge might have been made, it remained open to the court to exercise its case management powers to strike out a claim on the basis that the purported defendant did not exist and no sensible steps had been taken on the Appellant's behalf to procure the company's restoration to the register. The judge then found that, under CPR 3.4, the judge had exercised that discretion and had not erred in principle in making the order that he did.

19. The judge found that the District Judge had (essentially) made his order because of the Appellant's excessive delay in seeking to restore LWC's name to the register, given that the Insurers had clearly required that step to be taken before dealing with the substance of the claim. The main reasons given by the judge appear in three passages in his judgment (at [23], [24] and [25]) as follows:

"23. At the start of the hearing District Judge Etherington pointed out that no application for a stay had been made and District Judge Etherington also indicated that he was not satisfied, if he did grant a stay, in the absence of any information as to why an application to restore the Company had not been made or as to when it was intended that it would be made; that he could have confidence that the solicitors for the Appellant would proceed promptly to do so. The Appellant then made an application for a stay, at the hearing, which was refused. The District Judge mentioned also proportionality and it is apparent that the claim is worth around £5,000. Or thereabouts, and there are four Defendants and, therefore, proportionality is relevant in that context.

24. …It seems to me that the key factors are that notwithstanding that the insurance company may not have indicated until May 2018 that they required the Company to be restored to the register, no steps were taken to restore the Company to the register, nor had any application been made for a stay of the proceedings whilst the Company was restored, nor was there any evidence before District Judge Etherington that the Appellant actually intended to apply to restore the Company to the register and, if so, when that would be done. It is, therefore to my mind, not really a surprise that District Judge Etherington refused to grant a stay of the proceedings whilst an application was made to restore the Company to the register in circumstances where the proceedings would be held up for all four Defendants until such time as that was done…

25. If he did not grant the stay, then was it appropriate for him to strike out the claim? Well, in that respect, I may or may not have come to a different decision but, again, I cannot say that the exercise of his discretion fell outside the generous ambit of that discretion. He was entitled to take a robust attitude to a failure by the Appellants to take the steps that were necessary in order to allow the proceedings to proceed. It is remarkable not so much that the Appellants had not made an application to restore the Company to register before the application to strike out the claim was served upon his solicitors but that, in the month after the application was issued and served applying to strike out the claim on the basis that the Company had not been restored, that not only had the Appellants not taken any steps towards the restoration of the Company but that there was no evidence before the Court that they had any intention of doing so or, if they had such an intention, when the application would be made. In those circumstances, I think that District Judge Etherington was entitled to conclude, taking into account the position of four Defendants against whom these proceedings were being held up, whilst no steps had been taken to restore the Company to the register that it was appropriate to strike out the claim…".

20. On the present appeal, it is argued that the District Judge had been wrong to strike out the claim under CPR 3.4 in a case where the proper challenge was under CPR 11 and the provisions of that rule had not been complied with. It is argued that if the provisions of CPR 11 are not complied with, in a case of a jurisdictional challenge, it is not open to subvert those requirements by the backdoor by invoking the power under CPR 3.4: *Hoddinott v Persimmon Homes (Wessex) Ltd.* [2007] EWCA Civ 1203. However, as Peter Jackson LJ pointed out in argument, *Hoddinott* was a case in which the defendant making the application was a fully functioning company which had not been struck off.

21. The principal argument advanced in the Appellant's written argument is based upon *Joddrell v Peaktone Ltd.* [2012] EWCA Civ 1035. That was a case where proceedings had been begun against a defendant company which, like LWC, had been struck off the register of companies. Crucially, however, the company in that case had subsequently been restored to the register by the time it made its applications to the court. It sought to strike out the proceedings, which had been begun in the period of its dissolution, as being a nullity. The argument centred upon the effect of the restoration order. Section 1032(1) of the Companies Act 2006 provides as follows:

> "(1) The general effect of an order by the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register."

22. In that case, the District Judge struck out the claim. The claimant appealed and his appeal was allowed by HH Judge Stewart QC (as he then was). This court dismissed Peaktone's appeal. It was held that the effect of section 1032(1) and the restoration order was retrospectively to validate the action which was, therefore, no longer a nullity.

23. The problem in the case arose because the 2006 Act had produced a single power to restore, or bring back to life, a company that had been struck off and dissolved in place of the two parallel powers contained in earlier statutes.

24. Under the Companies Act 1985 (as under several previous Companies Acts, going back to 1900), there existed two separate powers, ultimately reflected in sections 651 and 653 of the 1985 Act. The power under s.651 was to "make an order … declaring the dissolution to have been void". Section 653 gave a power to order the restoration to the register of a dissolved company. The effect of such an order was that the company was "deemed to have continued in existence as if its name had not been struck off". The parallel section 651 had no "deeming provision" like the one that applied to companies restored under s.653.

25. The two different statutory powers had given rise to a series of decisions as to the effect of proceedings brought against companies during the period of dissolution. These were analysed in the judgment of Munby LJ (as he then was) (with whom Etherton LJ (as he then was) and Lewison LJ agreed) in the *Peaktone* case.

26. In that case, Judge Stewart had found that the effect of s.1032(1) of the 2006 Act was to validate an action purportedly commenced by or against a restored company during its period of dissolution. That decision was affirmed by this court on the subsequent appeal.

27. Before Judge Stewart and in the Court of Appeal the Appellant had also argued (as does the Appellant here) a second point, involving two separate submissions: (i) that the company's challenge was a challenge to the jurisdiction of the court and that, as no proper application had been made under CPR 11, the challenge should be dismissed (see *Hoddinott*); and (ii) *Peaktone* had submitted to the jurisdiction (inter alia) by making its application to strike out the proceedings and had thus waived any right it might have had to challenge the court's jurisdiction: *Global Media International Ltd. v ARA Media Services Ltd.* [2007] 1 All ER (Comm) 1160.

28. In *Peaktone* Munby LJ said that Judge Stewart had reached no final conclusion on point (ii), but had said that if he had been wrong in relation to the effect of section 1032(1) he would have allowed the claimant's appeal on point (i): see [50] – [51] in *Peaktone*. In this court, it was decided that Judge Stewart was correct about the effect of s. 1032(1) and it was not necessary, therefore, to consider either of the arguments arising on this second part of the case. Munby LJ said: "I propose to say nothing more about it".

29. In this case, Mr van Heck for the Appellant submits that Judge Stewart was correct in his view on point (i) raised in the second part of the *Peaktone* case and that the claimant's submission on point (ii) was also correct. It is argued that as the Insurers here did not comply with CPR 11 within the requisite time limits, the acknowledgment of service which they submitted and/or the strike out application constituted a submission to the jurisdiction of the court. Mr van Heck submits that, whatever the reticence of this court on these points in *Peaktone,* we should now find that the claimant's submissions in that case were correct and that Judge Rawlings was in error in rejecting such submissions in the present case.

30. Whatever may be the retrospective effect of the order restoring LWC to the register of companies may be, and whilst it may well be that (as in *Peaktone*) many, if not all, of the steps taken in the action would now be validated, we have to judge whether the orders below were properly made on the basis of the facts before the judges who made those orders. When they each reached their decisions LWC had been struck off and had been dissolved. The company no longer existed, and the judges had to work on that basis.

31. Mr van Heck's argument has to proceed on the basis that the judges below should have found that valid service had been effected upon LWC. That, however, would have required the judges to assume that service had been effected upon a company which at that time did not exist. That could not have been a correct assumption. At that date, there had been no such service. Therefore, the second issue that arose in *Peaktone* (with its two heads (i) and (ii)) was not open before either of the judges below and is not open to the Appellant on this appeal.

32. The only question that arises, therefore, is whether the District Judge was entitled to strike out the claim under CPR 3.4 and whether he was correct to do so. As LWC was not in existence at any relevant time in these proceedings, there may have been real difficulty in the Insurers making any application in its name in the action in reliance on a purported authority given by LWC. There was no company in existence to give them authority to act. If authority was thought to have been given by any provision of an insurance policy effected by LWC in the past, it seems such an authority to the Insurers to act as agents for the company may well have lapsed along with its dissolution, just as any agent's authority would lapse on the death of the principal. Mr Hughes submits

that the authority revived, under section 1032(1) of the 2006 Act, on the making of the restoration order. He may be right, but it is not necessary for us to decide the point for the purposes of this appeal.

33. Whether the Insurers' application was properly brought or not, the District Judge had this action before him, involving a number of defendants. He was entitled to consider how best to progress it in the exercise of his case management powers. In our judgment, therefore, he was entitled to consider whether the overriding objective was properly served by the continued presence in the action of the name of a non-existent company. He was entitled to consider whether he should exercise the power to strike out the claim purportedly brought against LWC and he did not err in principle in making the strike out order that he did for the short reasons that he gave. The good reasons for making that order were also properly articulated by Judge Rawlings in the passages of his judgment which we have quoted above.

34. In our judgment, the District Judge cannot be faulted for striking out the claim against LWC and Judge Rawlings was correct to dismiss the appeal. Mr van Heck accepted that, if the appeal were dismissed then the costs order made by Judge Rawlings would also have to stand undisturbed. So far as the costs order made by the District Judge is concerned, Mr van Heck informed us that there was no appeal against that order. Accordingly, the appeal as a whole is dismissed.

35. Two further matters call for mention.

36. First, what is to be done in the difficult position facing insurance companies in the circumstances such as those facing these Insurers when they heard of the claim in 2017? An order restoring a company to the register might render insurers retrospectively liable for significant sums in proceedings which they have been in no position to resist. Without being prescriptive, we think that the wise course would be for such an insurer to notify the claimant of the dissolution of the company (if he or she did not know of it already) and to invite/require him or her to make an application for restoration of the company to the register and to apply to the court seised of the main claim for a stay of the substantive proceedings in the interim. In the absence of co-operation in this respect on the part of the claimant, the insurer should write to the court notifying it of the situation and asking it to consider making an order for a stay of its own motion until notified of any order for restoration. Following such a stay, if nothing is done after a sensible time, it would (we think) be open to the insurer to invite the court (of its own motion) to strike out the proceedings.

37. As for the costs of the present proceedings and whatever order is ultimately made between the parties or against legal representatives, there appears to us (on present information) good reason to think that the Appellant's solicitors should not expect the Appellant personally to bear any of the costs of any party of the proceedings (including his own costs) in this court or in the County Court at either level. Those costs were occasioned essentially by the misguided commencement of proceedings by the solicitors against LWC at a time when it was known that that company had been dissolved and was not in existence and without taking prompt steps to pursue the restoration of the company to the register.