Neutral Citation Number: [2020] EWHC 1561 (Ch)

CR-2019-007173

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTERS OF BCB ENVIRONMENTAL MANAGEMENT LIMITED (IN LIQUIDATION) & ORS
AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL
Date: 23/06/2020

Before :
ICC JUDGE BARBER

- -

Between :

(1) KEVIN JOHN HELLARD
(2) IAN RICHARDSON

Claimants

- and –

(1) REGISTRAR OF COMPANIES
(2) BEGBIES TRAYNOR (CENTRAL) LLP **Defendants**
(3) BEGBIES TRAYNOR (SY) LLP
(4) GARETH RUSLING
(5) ASHLEIGH WILLIAM FLETCHER
(6) GERALD MAURICE KRASNER
(7) JOHN RUSSELL

- -

Olivier Kalfon (instructed by Gunnercooke Solicitors LLP) for the **Claimants**
Tina Kyriakides (instructed by Hill Dickinson LLP) for the **Second to Seventh Defendants**
The **First Defendant** did not appear and was not represented
Hearing dates: 14 and 15 May 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

ICC Judge Barber

1. The Claimants seek to restore thirty-one companies ('the Companies') to the register of companies pursuant to s.1029 Companies Act 2006 and to be appointed as liquidators over the restored companies pursuant to s.108 Insolvency Act 1986. The restorations are sought with a view to investigating the fees charged by the former officeholders of the Companies and potentially bringing claims in respect of the same. The former officeholders (save for the Sixth Defendant) all previously worked at the P&A Partnership, a partnership providing formal insolvency services.

2. The restoration claims currently before me are all supported by HMRC, a creditor of each of the Companies. HMRC has stated that it is not in a position to commit public funding to making the restoration claims itself.

3. Twenty-nine out of the thirty-one claims are opposed by the Second to Seventh Defendants ('the Intervenors'). The Intervenors were joined as Defendants upon their own application (by consent). The Intervenors include three former officeholders (the Fourth, Fifth and Seventh Defendants), whose fees HMRC wish to be investigated in the event that the Companies are restored.

4. The grounds upon which the Intervenors oppose restoration of the Companies are in summary:

   (1) that the Claimants have no locus to seek restoration of the Companies to the register;

   (2) that, if, contrary to the Intervenors' primary argument, the Claimants do have locus, it is not just for the Companies to be restored and/or the court should not exercise its discretion in favour of restoration.

Locus Standi: Statutory Framework

5. Under the Companies Act 2006 ('CA 2006'), there is a single procedure for restoring companies. So far as material for present purposes, s.1029 CA 2006 provides as follows :

> (1) An application may be made to the court to restore to the register a company - ….
>
> (2) An application under this section may be made by –
>
> (a) the Secretary of State,
>
> (b) any former director of the company,
>
> (c) any person having an interest in land in which the company had a superior or derivative interest,
>
> (d) any person having an interest in land or other property –
>
> (i) that was subject to rights vested in the company, or
>
> (ii) that was benefited by obligations owed by the company,

> (e) any person who but for the company's dissolution would have been in a contractual relationship with it,
>
> (f) any person with a potential legal claim against the company,
>
> (g) any manager or trustee of a pension fund established for the benefit of employees of the company,
>
> (h) any former member of the company (or the personal representatives of such a person),
>
> (i) any person who was a creditor of the company at the time of its striking off or dissolution,
>
> (j) any former liquidator of the company,
>
> (k) where the company was struck off the register under section 1003 (voluntary striking off), any person of a description specified by regulations under section 1006(1)(f) or 1007(2)(f) (persons entitled to notice of application for voluntary striking off),
>
> or by any other person appearing to the court to have an interest in the matter'

6. Section 1031(1) CA 2006 goes on to provide:

> '(1) On an application under section 1029 the court may order the restoration of the company to the register –
>
> (a) if the company was struck off the register under section 1000 or 1001 (power of registrar to strike off defunct companies) and the company was, at the time of the striking off, carrying on business or in operation;
>
> (b) if the company was struck off the register under section 1003 (voluntary striking off) and any of the requirements of sections 1004 to 1009 was not complied with;
>
> (c) if in any other case the court considers it just to do so.'

Historical Context: Companies Act 1985 sections 651 and 653

7. The Companies Act 2006 introduced a significant change in the statutory framework for applications to restore. As helpfully summarised in the judgment of Munby LJ in Joddrell v Peaktone Ltd [2013] 1 WLR 784 at paragraphs [11] to [17]:

> '[11] … Prior to that, and for many years, successive Companies Acts had distinguished between two different routes to a judicial restoration of a dissolved or struck off company.

> [12] The first, which originated in 1900 and thereafter appeared successively in section 242 of the Companies (Consolidation) Act 1908, section 295 of the Companies Act 1929, section 353 of the Companies Act 1948 and section 653 of the Companies Act 1985, conferred on the court the power in defined circumstances, though exercisable for up to 20 years after dissolution, to order the restoration to the register of a company previously struck off by the Registrar of Companies. The effect of such an order was stated as being that the company is "deemed to have continued in existence as if its name had not been struck off".
>
> [13] The other, which originated in 1907 and thereafter appeared successively in section 223 of the 1908 Act, section 294 of the 1929 Act, section 352 of the 1948 Act and section 651 of the 1985 Act, conferred on the court a general power, though exercisable only within two years of the date of dissolution of the company, to "make an order… declaring the dissolution to have been avoided". The statute provided that "thereupon such proceedings may be taken as might have been taken if the company had not been dissolved". Importantly, the "deeming" provision was not included.
>
> [14] I should add that section 651 of the 1985 Act was amended by section 141 of the Companies Act 1989 so as to remove the two-year limitation where the purpose of the application was to enable personal injury proceedings to be brought against a dissolved company.
>
> [15] As Judge Stewart noted, the 2006 Act replaced these two separate procedures with a new single procedure. …
>
> [17] For present purposes there are three things to be noted about this new statutory regime: first, as I have already mentioned, that there is now a single procedure; second, that the previous time limits of two years and twenty years have been replaced with a single period of six years (albeit subject to the exception in relation to personal injury proceedings which had been introduced by the 1989 Act); third, and most significant, that the crucial words "deemed to have continued in existence as if", which had previously applied only where the application was made pursuant to section 653 of the 1985 Act, and not where the application was made pursuant to section 651, now applied by virtue of section 1032(1) in every case.'

8. Section 651 of the Companies Act 1985 ('CA 1985') was the section usually resorted to when dissolution followed completion of a liquidation and further assets or claims came to light: In re Townreach [1995] Ch 28 at 31C.

9. The wording in s1029(2) CA 2006 is similar to that which was contained in section 651 CA 1985:

> '(1) Where a company has been dissolved, the court may, on an application made for the purpose by the liquidator of the company or by any other person appearing to the court to be interested, make an order, on such terms as the court thinks fit, declaring the dissolution to have been void.'

10. On behalf of the Claimants, Mr Kalfon submitted that the 'sweep up' provision in section 1029(2) is a wide provision capable of including any number or type of applicants. In this regard he referred me to Re Test Holdings (Clifton) Ltd [1970] Ch 285, in which Megarry J described the phrase "any other person who appears to the court to be interested" is one of "great amplitude" (at p289D). He also referred me to Wynn Parry J in Re Belmont Co Ltd [1952] Ch 10, who at p.13 said that an application can be made "by any member of what may well be a very wide class". Mr Kalfon further submitted that the class of people who could fall within the sweep up provision is not limited by the specific classes who are given express standing.

11. On behalf of the Second to Seventh Defendants, Ms Kyriakides submitted that s.1029(2)(a)-(k) incorporated much of the previous jurisprudence relating to those applicants who were regarded by the court as having a sufficient interest to apply for restoration, such as the Secretary of State. She went on to submit that the sweep up provision should be construed in accordance with previous case law. Previous case law, she argued, established that those who had an interest in restoration were those with either a proprietary or pecuniary interest in the company or those who needed the company to be restored in order to enable them to carry out their statutory duties. In support of this, she referred the court to three cases.

12. The first case was Wood and Martin Bricklaying Contractors Ltd [1971] 1 WLR 293. In this case, the applicant had been appointed as the liquidator of a company at a time when, unbeknown to him, the company had been dissolved. The applicant then carried out his duties as liquidator. When he became aware of the company's dissolution, he applied for the dissolution to be declared void under section 352 the Companies Act 1948 (the predecessor section of section 651) on the basis that he was the "liquidator" of the company, alternatively, a person who was interested in its restoration. The court rejected the former argument, but accepted the latter, on the grounds that he had a possible quantum meruit claim against the company and was also, potentially at least, himself exposed to a claim for intermeddling with Crown property, there having been no disclaimer by the Crown under s. 355 of the 1948 Act. In such circumstances, Megarry J concluded that 'it would be somewhat unreal to say that this applicant has no interest of a proprietary or pecuniary nature in resuscitating the company. The situation is unusual, but the possibility of a claim being made by the applicant and the possibility of a claim being made against him, when added together, seem to me to remove him from the category of person who cannot fairly be regarded as having any proprietary or pecuniary interest of this kind. It does not, I think, have to be shown that the interest is one which is firmly established or highly likely to prevail: provided it is not merely shadowy. I think it suffices for the purpose of section 352'.

13. The second case to which Ms Kyriakides referred me is that of Roehampton Swimming Pool [1968] 1 WLR 1693. In this case, an infant had been injured in a swimming pool owned by a company that had been dissolved. The infant and his mother as next friend lived in Germany and instructed English solicitors. As the limitation period for the infant's claim was shortly to expire and there was not sufficient time to make any claim in their name, a partner in the firm of the English solicitors, Mrs Dymond, applied in her own name for the dissolution to be declared void under section 352 of the Companies Act 1948. Mrs Dymond argued that she was the agent of the infant and her mother and that that was a sufficient interest. Megarry J rejected that argument. Having considered Stevens v Hutchinson 1953 Ch 299, (a case which decided that a receiver by way of equitable execution was not a 'person interested' for the purposes of s.30 of the Law of Property Act 1925), Megarry J continued:

> 'The word "interest" is, of course, susceptible of more meanings than one; and like so much of the English language, its meaning often has to be discerned from the context. In relation to making an order for the revival of a defunct company, it seems to me to be more probable that the word refers to a pecuniary or proprietary interest than that it embraces all matters of curiosity or concern. After all, those who are interested in companies are nearly always interested financially or in a proprietary way; the whole field is dominated by finance. I cannot conceive that Parliament intended that a man who felt a lifelong concern for dissolved companies should be free to gratify his passion by reviving them under section 352, however deep and genuine his feelings, and whether his affections were spread among all such unfortunates, or were concentrated on one favoured corporation; and I do not think that Mr Instone's argument carries him that far. What he said, when I asked him to define the interest that Mrs Dymond had, was in essence that she was interested as being the claimant's solicitor; and he did not elaborate on this concept.
>
> Such an interest seems to me to be something less than even the personal rights to which Upjohn J referred in Stevens v Hutchinson; indeed, it seems more akin to the solicitous interest which a man has in the welfare of his wife, of which Lindley LJ spoke in Smith v Hancock [(1894) 2 Ch 377]. A solicitor is naturally interested in his or her clients, and in the success of their litigation; but I cannot see that this makes the solicitor a "person who appears to the court to be interested" in relation to a dissolved company against which the client has a claim. Whether the cases were lost or won, the solicitor will be entitled to the proper costs, and will not have any proprietary interest in any part of the fruits of victory. Accordingly, in my judgment Mrs Dymond is not a "person who appears to the court to be interested" within the meaning of section 352.'

14. The third case to which Ms Kyriakides referred me was that of Re Townreach Limited [1995], where the court held that in an application under s.651 CA 1985, the Secretary of State, whilst not having a pecuniary or proprietary interest, did have a sufficient interest on the basis that restoration was necessary in order to enable the Secretary of State to carry out his statutory duties in the regulation and supervision of the companies sought to be restored. Judge Paul Baker QC, sitting as a High Court judge, reasoned as follows:

> 'The first question is whether the Secretary of State is "any other person appearing to the court to be interested" within section 651 of the Act of 1985. Mr Charles submits that this point is a simple one of statutory construction of the ordinary words. The Secretary of State is claiming to be interested in seeking the order so that he can properly perform his statutory duties in the regulation and supervision of companies. I am bound to say on first impression that does seem to me a more than adequate reason for the Secretary of State to interest himself in this matter. …
>
> The only reason why one hesitates over this is because there has been a certain amount of authority about the meaning of "person … interested" in this section to which I was referred.'

15. Judge Paul Baker QC went on to consider In re Roehampton. Having referred to the passage quoted at paragraph 13 above, the learned deputy continued:

> 'Now, by no stretch can the Secretary of State's interest be equated to those rather fanciful examples that Megarry J referred to, and I would not read that case as meaning that necessarily there had to be a financial interest in the applicant before he could apply'

16. Having next considered In re Wood and Martin, the learned deputy continued:

> 'Those authorities have been rightly called my attention by Mr Charles, but I have to say that I do not think either of them prevents me from holding that the Secretary of State is a "person …. interested." I am clearly of the opinion that the Secretary of State, in a case where there are reasons for him to act in the regulation of companies, is a person appearing to the court to be interested, and his interest is that he needs to have those companies restored so that he can perform his statutory duties.'

17. These cases, Ms Kyriakides submitted, supported her contention that to establish locus, a claimant seeking restoration of a company must show either a pecuniary or proprietary interest in the company or a need for the company to be restored in order to enable the claimant to carry out his or her statutory duties.

18. There are few reported authorities on locus under s.1029(2) itself. In Barclays Bank v Registrar of Companies [2016] 2 BCLC 453, Norris J allowed a former administrator, Mrs Sharma, to pursue an application to 'rescind' a restoration order (which had been made on the application of a major creditor) and to make representations on other related heads of relief which had yet to be determined. In considering the issue of Mrs Sharma's locus, Norris J considered (on an obiter basis) whether Mrs Sharma would have had locus to make the restoration application herself. He rejected the contention that a former administrator would automatically fall within the category of persons 'appearing to the court to have an interest in the matter' of restoration, but concluded that, on the facts of that case, Mrs Sharma had established an interest.

19. Mr Kalfon relies upon Barclays as confirming that there is no need to show a pecuniary/proprietary interest or pre-existing statutory duties in order to establish locus. I do not consider the ruling in Barclays to be that clear cut. There were a number of issues before the court in Barclays which, whilst addressed separately, were acknowledged by Norris J (at [16]) to be 'interconnected'. Mrs Sharma was said to be responding to what she perceived to be 'the possibility of a claim against herself or her firm in relation to the conduct of the administration' ([17]); arguably a financial interest: see too [19]. Moreover, having noted that the 'rescission' provision of r.7.47 IA 1986 employed by Mrs Sharma as the basis of her application was of no use to her (restoration being a Companies Act matter), Norris J ultimately treated her challenge of the restoration order as an appeal by 'someone adversely affected by [the restoration order] although not then a party to the proceedings (see para 52.1.1.3 of the White Book)': Barclays at para [23].

20. Against that backdrop, I do not consider Barclays as authority for the proposition that there is no need to show a pecuniary/proprietary interest or pre-existing statutory duties in order to establish locus.

21. That said, I do not accept the authorities relied upon by Ms Kyriakides as laying down a hard and fast rule that a pecuniary/proprietary interest or pre-existing statutory duties must be shown either.

22. Overall, whilst there is guidance in existing caselaw, highlighting various factors considered relevant to the issue of standing, in my judgment it would be wrong to treat the reported cases as providing a comprehensive checklist of factors which must be present to establish standing. What may be a sufficient factor for the purposes of establishing standing in one case should not be treated as a necessary factor in another. The court should be slow to attempt to legislate on the scope of a provision which parliament has deliberately left open. The issue of who may or may not qualify as a 'person … interested' must always depend on consideration of the actual circumstances of each case.

23. From existing caselaw, however, what is clear is that the Claimants must identify some interest in the 'matter' of restoration beyond idle (or officious) curiosity: Roehampton Swimming Pool [1968] 1 WLR 1693. As put by Hoffmann J, albeit in a different statutory context: 'not everyone who volunteers himself as interested… will be a person "interested"…': Bradshaw v University College of Wales [1988] 1 WLR 190.

24. I turn then, to consider the Claimants' case on locus.

What is the Claimants' 'interest'?

25. The evidence in support of the restoration claims did not directly address the basis on which the Claimants maintained an interest in the restorations sought.

26. Mr Richardson's first witness statement dated 7 June 2019 asserted simply that 'It is the Claimants' position that the Claimants have standing to bring this application (a) to restore the Company, under section 1029(2) of the Companies Act 2006 and (b) for the Claimants' appointments as joint liquidators, under Section 108 of the Act. The issue will be developed further by way of legal submissions at the hearing.'

27. This was not an altogether satisfactory start. As rightly submitted by Ms Kyriakides, the question whether or not a person has an interest is (at least in part) a question of fact. The lack of evidence on this issue was highlighted by Mr Rusling in his first statement dated 7 October 2019 in answer to the claims. At paragraph 14 of that statement, having noted that the Claimants did not fall within the specific categories listed in section 1029(2)(a) to (k), he continued: 'If they are seeking to claim that they have an interest in the … Companies, they have failed to identify in their evidence what that interest is alleged to be and what evidence they rely upon.' Notwithstanding filing evidence in reply, the Claimants still did not grasp this nettle in their evidence, instead again asserting (by Mr Richardson's second statement, of 14 February 2020, at paragraph 6) that it was a 'matter for detailed legal submission'.

28. Drawing from Mr Kalfon's skeleton argument and submissions, the factors relied upon by the Claimants in support of their contention that they have an 'interest in the matter' of restoration of each of the Companies appear to be as follows:

(1) HMRC, as a creditor of each of the Companies, supports the restorations and the Claimants' appointment as replacement officeholders, in order that independent investigations may be undertaken into the fees charged by the former officeholders: skeleton argument, paragraph 64. The Insolvency Practitioners Association ('IPA'), which is the regulator of the various practitioners who were officeholders at P & A, has confirmed that it has no objection to the applications being brought.

(2) The Claimants' interest is 'concomitant' with that of HMRC. As put at paragraph 65 of Mr Kalfon's skeleton argument: 'HMRC cannot carry out the investigations themselves. They require the appointment of an independent IP in order to investigate the conduct of the former officeholders. The Claimants are applying to restore the Companies, with HMRC's support, in order that they may fulfil that function.'

(3) On the caselaw, the Claimants undoubtedly have a sufficient interest to apply for their appointment as replacement officeholders under s.108 IA 1986, which is the second limb of their applications: see Re a Licence-holder, Abbot & Ors [1997] BCC 666, Supperstone v Auger [1999] BPIR 152, and Re A & C Supplies Ltd [1998] BCLC 603. In order for that to happen, the Companies must first be restored: skeleton argument, paragraph 67. As put in submissions: 'the second limb of the Claimants' application' (for s.108 appointment) 'feeds into the first' (for restoration);

(4) The Claimants have already been appointed officeholders in respect of three companies in place of officeholders who worked at the P & A partnership with a view to investigating the fees charged by those former officeholders. The three companies

were (1) FW Mason & Sons Limited ('FWM'), where the former officeholders were Messrs Andrew Philip Wood and Christopher Michael White; (2) William Sessions Limited ('Sessions'), where the former office holders were Mr Russell and Mr White and (3) Ugo Stores Limited ('UGO'), where the former officeholders were Mr Russell and Mr Rusling.

(5) Making a finding that the Claimants have standing would be entirely consistent with the original purpose of restorations, which was to allow the distribution of an asset which belonged to the company but has been overlooked: Stanhope Pension Trust Ltd [1994] 1 BCLC 628 at 632; Re Servers of the Blind League [1960] 1 WLR 564 at 565. Locus for making a restoration claim should be interpreted consistently with this purpose: skeleton argument paragraph 70.

(6) The Claimants' appointment is in the wider public interest. Ordinarily creditors are able to look to the former liquidator to seek restoration where further potential assets are discovered. Messrs Rusling, Fletcher and Russell (D4, D5 and D7) would have standing as former liquidators of a number of the Companies, but actively oppose restoration, notwithstanding HMRC's wish that restoration take place. The court should be vigilant to ensure that potential misconduct of a former officeholder and officer of the Court is properly investigated so that confidence is maintained in the propriety of office-holder appointments: skeleton argument paragraph 79. The court should adopt a pragmatic approach to locus such as that adopted by Blackburn J in Re A & C Supplies Ltd [1998] 1 BCLC 603.

29. With regard to (1) and (2), the mere fact that HMRC is a creditor of each of the Companies and supports the Claimants' restoration claims is not, of itself, sufficient to give the Claimants locus to bring the restoration claims in their own names. I am fortified in this conclusion by the approach adopted by Megarry J in Roehampton. For similar reasons, the mere fact that the IPA does not oppose the Claimants' restoration claims does not suffice.

30. With regard to (3), the mere fact that the Claimants would have locus to seek s.108 appointments as liquidators of the Companies if the Companies were restored to the register (and wish to seek such appointments in the event that the Companies are restored) does not, in my judgment, render them 'persons…. interested' for the purposes of s. 1029. I reject the submission that the second limb of the Claimants' application feeds into the first. In this regard the Claimants are no different to any other officeholders who might wish to seek appointment in the event that the Companies were restored. As matters stand, the Claimants are strangers to the Companies.

31. With regard to (4), I was taken to no persuasive evidence to suggest that the Claimants required restoration of the Companies in order properly to fulfil their duties as officeholders of any of FWM, William Sessions and UGO Stores or to assist in investigations in relation to those companies. It was not how the Claimants put their case in their written evidence or in the skeleton argument filed on their behalf. Indeed, Mr Richardson confirmed in his first witness statement (at paragraph 35) that the Claimants' investigations into both FWM and William Sessions were already complete. It was only after I asked Mr Kalfon during the course of the hearing whether the Claimants maintained that they required restoration in order to fulfil their duties as officeholders of UGO that it was submitted that they did. I was taken to no

evidence in support of that contention however; and the course of the various investigations undertaken by the Claimants in relation to FWM, William Sessions and UGO, as set out in the evidence, and the timeline of those investigations, suggested otherwise. On reviewing the evidence before me, the only links between FWM, William Sessions, UGO Stores and the Companies appear to be (1) that former officeholders were in each case drawn from P & A and (2) that FWM, William Sessions, UGO and the Companies were all allegedly victims of an alleged culture of over-charging and fee-dumping at P & A. In my judgment those links, of themselves, are not sufficient to warrant the conclusion that the Claimants are 'persons… interested' in the restoration of the Companies for the purposes of s.1029.

32. With regard to (5) and (6), it is in my judgment important not to conflate the purpose of seeking restoration (that being in order to investigate the conduct of the former office holders) with the question whether a given person has standing to seek restoration. If there are matters to be investigated, it is open to any person with locus under s.1029 to seek restoration for that purpose. The mere fact that, working from publicly available records and at their own expense, the Claimants have identified matters in relation to the Companies which (prima facie) appear to warrant investigation does not of itself render the Claimants 'persons … interested' for the purposes of s.1029. In my judgment, to rule otherwise would set an unhealthy precedent.

33. The parties could find only one example of a case in which an officeholder with no prior connection to a company was permitted to seek its restoration. That application, however, came before the court unopposed and was not the subject of detailed legal argument. It also arose in very different circumstances, the officeholder in question having been tasked with taking over the appointments of one former officeholder whose licence had been revoked by his licensing body.

34. Having considered the points raised on behalf of the Claimants individually, I now pause to consider whether, taken collectively, they suffice to establish locus. In my judgment, they do not.

Conclusions

35. On the evidence before me, the Claimants have failed to establish that they are 'persons … interested' for the purposes of s.1029 CA 2006. In my judgment they do not have locus to seek restoration of the Companies.

36. In the light of my conclusions on the issue of locus, it is unnecessary for me to address the remaining issues argued before me on whether it would be just to restore the Companies and on whether the court should exercise its discretion to grant restoration.

37. For the reasons given, I propose to dismiss the claims. I shall hear submissions on costs on the handing down of judgment.

ICC Judge Barber

15 June 2020