9 pages.

COURT OF APPEAL

14th July, 1994. 143.

Before: Sir Godfray Le Quesne, Q.C. (President)
Sir Patrick Neill, Q.C., and
R.C. Southwell, Esq., Esq., Q.C.

Ex Parte Representation of **Glendale Hotel Holdings, Limited**, praying that the Court set aside the Decision of the Royal Court of the 17th May, 1994, whereby the Royal Court refused to reinstate the said Company, of which Mr. David Eves was a Director, in accordance with the provisions of Article 213 of the Companies (Jersey) Law 1991.

Advocate Mrs. S. Sharpe for the Representor.
The Solicitor General, *Amicus Curiae*.

JUDGMENT

SOUTHWELL, J.A.: This is an appeal by Mr. David Eves from a decision of the Royal Court of 17th May 1994. Before considering the correctness of that decision, it is necessary to set out some of the history of this matter.

Glendale Hotel (Holdings) Limited, which I refer to as Glendale, was incorporated in Jersey in April 1985. In May 1988, Mr. Eves became beneficially interested in 9,992 of the 10,000 ordinary shares of Glendale which are held on his behalf by nominees. Glendale at that time owned and operated a guest house business in the parish of St. Martin.

By 1989, problems had arisen between Glendale and Mr and Mrs Eves on the one hand, and on the other hand the Tourism Committee of the States of Jersey which exercises powers and performs duties under the Tourism (Jersey) Law, 1948. As a result of these problems and their lack of resolution to the satisfaction of the Tourism Committee, the Committee withdrew its registration of Glendale's guest house during the 1989 tourist season on 6th October, 1989. It appears that the guest house was re-registered, subject to certain conditions, for the rest of October 1989. Between November 1989 and May 1990 it appears that the guest house was not registered. The Tourism Committee agreed to

conditions, including the requirement that Mr and Mrs Eves were not to be involved in the day to day management of the guest house or in its business in any way. On 7th August 1990, the Tourism Committee informed Mr Eves that the registration of the guest house was cancelled with effect from 8th September 1990. Mr and Mrs Eves apparently continued to operate the guest house with the result that on 11th October 1990 they were, together with Glendale, fined £3,000 for contempt. The guest house was closed the same day (11th October 1990). The guest house was sold by Glendale on 27th November 1990, apparently at a loss. Funds for the purchase of the guest house had been provided by Hambros Bank. The sale triggered potential liability of Mr and Mrs Eves who had given personal guarantees to Hambros to secure the loan to Glendale. Their guarantees were in turn secured on their matrimonial home, which was also security for a loan by Hambros to them personally for the purchase of their home.

The last statutory return to the Registrar by Glendale was in respect of the year ended 31st December 1990. As a result of Glendale's failure thereafter to deliver returns to the Registrar and to pay the required fees, on 30th June 1992 Glendale was dissolved pursuant to article 38A of the Loi (1861) sur les Sociétés à Responsabilité Limitée. Glendale then ceased to exist as a legal person.

On 24th February 1993, an Order of Justice was signed in respect of a claim by Mr and Mrs Eves for damages against the Tourism Committee. It is material to note that all the events in respect of which this claim has been brought took place before 27th November 1990, when the hotel was sold by Glendale.

In its Answer to the Order of Justice of Mr and Mrs Eves the Tourism Committee has put forward numerous defences, including;

(1) A prescription defence in respect of all matters relied on which occurred before 24th February 1990, i.e. more than 3 years before the Order of Justice was signed, this being the relevant period of prescription in respect of these tortious claims (para. 3).

(2) The contention that Mr and Mrs Eves have no claim in law, any claim (if any) being Glendale's as the legal owner of the guest house (para. 4).

(3) The contention that Article 22 of the Tourism (Jersey) Law 1948 provides the sole remedy by means of a right of appeal against the decisions of the Tourism Committee to revoke the registration of the guest house, and this remedy was not exercised within the prescribed time limit of 2 months.

The Tourism Committee applied to strike out those parts of the Order of Justice which, it contended, represented claims maintainable (because of the rule in Foss -v- Harbottle (1843) 2 Hare 461) only by Glendale and not by Mr and Mrs Eves. The Royal

Court ordered those parts to be struck out on 4th October 1993. On an application to a single Judge of this Court for leave to appeal on 10th February 1994, it was made clear to Mr Eves that the claims which had been struck out could not be maintained except by Glendale, and that Glendale could not be joined as a party in the proceedings unless the dissolution of Glendale were declared void by the Court and it were restored to the Register pursuant to Article 213 of the Companies (Jersey) Law 1991. In Article 213 it is provided (so far as relevant):

> ***"(1) Where a company has been dissolved under this Law, the Désastre Law or the Laws repealed by Article 223, the court may at any time within 10 years of the date of the dissolution, on an application made for the purpose by a 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 and the court may, by the order, give such directions and make such provisions as seem 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.***
>
> ***(2) Thereupon such proceedings may be taken which might have been taken if the company had not been dissolved."***

Thereafter Mr Eves applied to the Royal Court, pursuant to Article 213, in the following terms:

> *"that the Court might declare the dissolution of the Company to have been void and order that the Company be reinstated."*

On 25th March 1994, the Royal Court granted the prayer of Mr Eves' representation subject to the condition that Mr Eves should produce to the Judicial Greffier by 30th April 1994, evidence that all outstanding arrears in respect of annual return fees, fines and income tax relating to Glendale had been paid.

It is accepted by Mr Eves that;

(1) Glendale has no assets;

(2) Glendale has outstanding liabilities for registration fees payable to the Registrar, for income tax, and for Social Security which it cannot meet.

(3) Mr and Mrs Eves are not able to meet these liabilities on Glendale's behalf.

The position regarding any other liabilities of Glendale is unclear. Though Glendale had substantial other liabilities we

were told that Hambros had paid the unsecured creditors 30 pence in the pound in return for their not placing Glendale *en désastre*. Whether the other 70 pence in the pound of these debts remains as a liability of Glendale, and if so, in what circumstances, was not explained to us.

On 29th April 1994, Mr Eves again applied to the Royal Court seeking an order that the condition imposed on 25th March 1994 be removed and that Glendale be reinstated forthwith. On 17th May 1994, the Royal Court refused the application, indicated that the Court would be prepared to consider a further application on behalf of Glendale to declare its dissolution void provided that Mr Eves first produced to the Judicial Greffier, by close of business on 31st May 1994, evidence that all outstanding arrears in respect of annual return fees, fines and income tax relating to Glendale had been paid, and granted Mr Eves leave to appeal to this Court.

Mr. Eves has appealed to this Court and Advocate Sharpe appeared on his behalf. The Tourism Committee was not represented before this Court. At the request of this Court the Solicitor General appeared as *amicus curiae*, and on behalf of the whole Court I wish to express our thanks to her for her concise and most helpful submissions.

In the representation by way of appeal Advocate Sharpe for Mr Eves, in the name of Glendale, asked this Court:

> *"to set aside the judgments of the Royal Court and order that the dissolution of the Company be declared void and that it be reinstated under Article 213."*

Thus what Mr Eves was asking this Court to do was to remove the condition that past return fees, fines and income tax for which Glendale is liable be paid by 31st May 1994.

In the course of her submissions to this Court it was pointed out to Advocate Sharpe that restoration of Glendale to the Register in this manner might well serve no useful purpose. By now any cause of action at the suit of Glendale against the Tourism Committee in tort (in respect of events which necessarily occurred before the sale of the guest house on 27th November 1990) accrued more than 3 years ago and is prescribed. If Glendale were to be restored to the Register and to be joined as a plaintiff in the Order of Justice, the Tourism Committee would appear to be able to secure that the proceedings at the suit of Glendale be struck out as disclosing no viable claim because the Tourism Committee has a complete prescription defence.

In response to these observations Mrs Sharpe sought to extend the order for which Mr Eves applies so as to include an order that Glendale, upon restoration to the Register, be deemed to have been a party to the Order of Justice from 24th February 1993, thereby

placing Glendale in the same position as regards prescription as the existing plaintiffs, Mr and Mrs Eves. But Mrs Sharpe accepted that such an order would be prejudicial to the interests of the Tourism Committee, and could not be made in any event without first giving that Committee notice and an opportunity to be heard.

The wording of Article 213 is different from the wording of the equivalent sections in the English Companies Act, both past and present, and therefore direct guidance cannot be obtained from the many decisions on the English sections, though some general considerations apply equally whether a company is restored to the Register in Jersey or in England.

In the present case there has been no liquidation, and we are not concerned with any of the problems which may arise when an application is made to declare the dissolution of a company in liquidation void.

Under paragraph (1) of Article 213 the Court is empowered when declaring the dissolution to have been void to include in the order ***"such terms as the Court thinks fit."***

This is the first discretion given to the Court.

The second discretion is given by the words:

> ***"and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons"*** (I emphasise the words "all other persons") ***"in the same position as nearly as may be as if the company had not been dissolved."***

When the applicant for restoration of the company is a person who wishes to bring a claim against the company, it appears from the English cases cited in Halsbury's Laws of England, 4th Ed'n., vol. 7(2): Companies, at para. 2188, note 9, that there might be circumstances in which it is appropriate to include in the order a direction that the period between the date of dissolution and the date of restoration to the Register should not be counted for the purposes of prescription.

In the present case, however, the boot is on the other foot. It is Mr Eves who in the name of the company seeks from this Court an order which would prevent the Tourism Committee relying on the period after 24th February 1993, for the purposes of its prescription defence. Mrs Sharpe was not able to cite to us any authority, whether in Jersey or in England, supporting the exercise of the Court's power in this way. I am not satisfied that in the particular circumstances of this application any case has been made out for the exercise of the Court's power in this

such order - a point which I would leave for later decision if and when such decision is necessary. If this Court had considered that any such case had *prima facie* been made out, it would in any event have been necessary to adjourn the appeal so as to enable the Tourism Committee to be given notice and to make submissions.

However, I have already drawn attention to the words "all other persons" in paragraph 1 of Article 213. Any directions which the Court makes under that Article must have universal application and cannot be limited to dealing with the position of merely one other person. I am satisfied that no case has been made out for any general direction in relation to Glendale excluding, for prescription purposes, any part of the period between the date when Glendale was dissolved (30th June 1992) and the date when it would be restored to the Register.

The Solicitor General in her submissions questioned whether, if Glendale had not been dissolved, Mr Eves would in fact have caused Glendale to be a plaintiff in the proceedings against the Tourism Committee, and also whether it had been shown to the Court's satisfaction that Glendale would have a reasonably arguable cause of action against the Committee. She submitted on the first of these points that it was not until it was made clear to Mr Eves in February 1994 that many of the claims he and his wife had put forward could be pursued only by the company, that Mr Eves considered whether to take steps to restore the company to the Register. There is force in this submission, but in my judgment it is not necessary for this Court to reach any conclusion on it. As to whether Glendale would have a reasonably arguable cause of action, I have already expressed my view that prescription would afford the Tourism Committee a complete defence. I leave on one side all the other matters raised by the Tourism Committee in its Answer, including the defence based on the right of appeal under Article 22 of the Tourism (Jersey) Law 1948, a right which Glendale did not exercise.

Mrs Sharpe submitted that in circumstances in which Glendale, Mr Eves and Mrs Eves are unable to meet the obligations to pay return fees or income tax, and would remain unable to meet those obligations unless and until the claim against the Tourism Committee were to succeed, the Royal Court had erred in requiring those obligations to be met by an early date as a condition of restoration of Glendale to the Register.

The Solicitor General, on the other hand, submitted that Article 71 of the Companies (Jersey) Law 1991 prescribes the registration fees to be paid by companies, and that the Court when acting under Article 213 has no power to make an order enabling a restored company to avoid paying such fees, whether such fees have become payable before or after restoration to the Register and whether such avoidance be temporary, by suspension of the obligation to pay, or permanent.

However, she accepted that if the application to restore a company were made by a potential claimant against the company (for example, a third party who wishes to claim against the company for personal injury) the Court would not be able to require such person to meet the company's liability for fees. In those circumstances, she submitted, the obligation would be on the company itself. In theory non-payment by the company could result in the company being once again dissolved. But in practice the Registrar would not act in such a way as to negative the whole purpose of restoring the company to the Register.

In my judgment the power of the Court under Article 213 is a wide one, which has to be exercised in such a way as to ensure justice as between the company and all other persons who have a continuing interest in the existence of the company. It is possible, although it is not necessary now to decide the point, that in some appropriate circumstances this might lead the Court to suspend the requirement on the company to pay registration fees, or income or other taxes or dues owing to the States, or indeed other debts. In the present case I am satisfied that in any event such circumstances do not exist because (amongst other reasons): (1) even if it is assumed that Glendale would have a reasonably arguable cause of action, the Tourism Committee has prescription defence which would be a complete defence to the cause of action if it were now pursued; and (2) I am satisfied that no case has been shown for the making of any order having the effect of limiting the ability of the Tourism Committee to rely on its prescription defence (even assuming that it could be open to us to make any such order).

Accordingly the appeal fails and the Act of the Royal Court must stand.

What I have said in this judgment should not be regarded as in any way prejudging the issues arising between Mr and Mrs Eves and the Tourism Committee in the action between them. Those issues have yet to be tried.

Finally, there is a point of procedure which I should mention. Usually when a dissolved company is restored to the Register there are past registration fees to be paid and past returns to be filed. The English authorities show that the usual course in England is to make the order declaring the dissolution void upon an undertaking by the applicant and the company to pay the fees and file the returns: see Halsbury's Laws (4th Ed'n) vol. 7(2), already cited, at paragraphs 2188 and 2189, where reference is made to "the usual undertaking". In the present case, however, the applicant (Mr Eves) accepted that neither he nor Glendale nor Mrs Eves was in a position to pay. So the undertaking usual in England could not be given. The Royal Court rightly, in my judgment, imposed a condition in lieu of any such undertaking.

THE PRESIDENT: I agree.

NEILL, J.A.: I also agree.

AUTHORITIES.

Loi (1861) sur les Sociétés à responsabilité limiteé: Articles 38-40.

Companies (Jersey) Law 1991: Articles 213, 71.

Tourism (Jersey) Law, 1948.

Companies Act 1985: ss. 651-658.

Palmer's Company Law: vol 2: pp. 15234-15240.

Pennington's Company Law (5th Ed'n): pp. 969-972.

Tyman's Ltd. -v- Craven (1952) 2 QB 100.

4 Halsbury 7(2) para. 2186-2189.

re Boxco, Ltd. (1970) 2 All ER 183.

re Wood and Martin (Bricklaying Contractors) Ltd. (1971) 1 All ER 732.

Norris -v- Emprunt (Jersey) Ltd. (24th January, 1990) Jersey Unreported.

Foss -v- Harbottle (1843) 2 Hare 461.