

## THE HIGH COURT

[2013 No. 101 COS]

**IN THE MATTER OF HIBERNATION THERAPEUTICS GLOBAL LIMITED (IN LIQUIDATION) AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009 AND IN THE MATTER OF SECTION 222 OF THE COMPANIES ACT 1963****HUGH FRANKLIN SMISSON III, TRIMAX MEDICAL MANAGEMENT INC. AND CHELSEA WORLDWIDE LLC****APPLICANTS****JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 24th day of January 2014**

1. Hibernation Therapeutics Global Ltd. (In Liquidation) ("the Company") was wound up by order of the High Court made on 22nd April, 2013, and Mr. Michael McAteer was appointed Official Liquidator thereof. At the date of the making of the winding up order, there were plenary proceedings [2012 No. 3760P] ("the plenary proceedings") pending before the High Court in the Commercial List. The Company had been added as a plaintiff to the plenary proceedings and is a defendant to a counterclaim made therein.
2. This application is brought pursuant to s. 222 of the Companies Act 1963, by Mr. Hugh Franklin Smisson III ("Mr. Smisson"), who is both a defendant and a counterclaim plaintiff in the plenary proceedings, on his own behalf and on behalf of the other two counterclaim plaintiffs, namely, Trimax Medical Management Inc. and Chelsea Worldwide LLC (all three will be referred to as "the counterclaim plaintiffs"). The application is brought on notice to the Official Liquidator.
3. The background facts to the plenary proceedings and the present application are set out in two affidavits of Mr. Smisson and one of the Official Liquidator. Insofar as I refer to facts in this judgment, I am not making any finding of fact, but merely referring to the facts as stated in the affidavits and assumed to be true for the purposes of this application. It is not intended, by any reference to facts in this judgment, to affect the ability of any party to litigate and dispute such facts in the plenary proceedings. The Company appears to have been established as a joint venture entity for the purpose of holding and controlling intellectual property relating to the combined usage of several FDA approved drugs. The only valuable asset held by the Company is stated to be such intellectual property.
4. The plenary proceedings primarily relate to complex disputes in relation to the shares in the Company and alleged acts and omissions by persons connected with the Company.
5. In this application, the counterclaim plaintiffs seek liberty to proceed with so much of the counterclaim as seeks a declaration that they are the legal and/or beneficial owners of the shares held in the Company by Chelsea Worldwide Ltd. and/or Gibro Nominees Ltd. Consequential to that claim, they also seek an order pursuant to s. 222 of the Companies Act 1963, and/or the inherent jurisdiction of the Court requiring the Company to rectify its share register so as to reflect the legal and/or beneficial interest of the counterclaim plaintiffs in the shares held by Chelsea Worldwide Ltd. and/or Gibro Nominees Ltd. They are not seeking leave to proceed with any other part of the counterclaim pleaded against the Company.
6. Since the commencement of the winding up, the Official Liquidator has sold the intellectual property held by the Company and realised a sum of €1.61 million. It is common case on this application that despite the sum realised, there will only be a small distribution for the Company's creditors and that there will be no surplus available for distribution to any shareholders of the Company.
7. It appears to follow from those facts that, *prima facie*, the shares in the Company the subject matter of the disputes in the plenary proceedings are now valueless.
8. However, Mr. Smisson, in his affidavits, avers that he and Chelsea Worldwide LLC ("the third counterclaim plaintiff") are currently defending proceedings brought by Triad Investments in Cleveland, Ohio. He further avers that if Trimax Medical Management Inc., the second named counterclaim plaintiff, establishes in the plenary proceedings that it is entitled to be registered as the owner of the shares in the Company in dispute, he has been advised by his U.S. lawyers that there will be good grounds to resist the claims for damages against him and the third counterclaim plaintiff in the proceedings in Ohio.
9. In such factual circumstances, it is submitted on behalf of the counterclaim plaintiffs that notwithstanding the absence of any value to the shares in dispute or any potential distribution, that there is a potential value to the counterclaim plaintiffs in being permitted now to proceed with so much of their counterclaim against the Company as relates to the ownership of the shares in the Company. It is further submitted that the Company is a necessary party by reason of the reliefs claimed as outlined above.
10. The Official Liquidator objects to the Court now granting the order, essentially on two grounds. Firstly, he is concerned that if an order is granted under s. 222 of the Companies Act 1963, permitting the counterclaim plaintiffs to proceed against the Company, he may be precluded from making the envisaged distribution to creditors and finalising the winding up of the Company in a timely manner. He is also concerned about potential added costs for the liquidation. The Official Liquidator has averred that he does not know whether the Company ever held a share register or where the share register is if it did exist. He is concerned in that context as to any potential added costs in the liquidation if the counterclaim plaintiffs were to succeed in obtaining an order that the Company rectify its share register.
11. The Official Liquidator separately brought an application pursuant to s. 231 of the Act of 1963 and has been granted leave by the Court to serve a notice of discontinuance on behalf of the Company as a plaintiff in the plenary proceedings. Counsel for the Official Liquidator has informed the Court that if leave is granted to the counterclaim plaintiffs to proceed against the Company in the plenary proceedings, it is unlikely the Liquidator will seek leave to defend same on behalf of the Company.

**Section 222 of the Companies Act 1963**

12. Section 222 provides:

"When a winding up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose,"

13. Counsel referred me to the judgment of Laffoy J. in *Wright-Morris v. Irish Bank Resolution Corporation Ltd. (In Special Liquidation)*

[2013] IEHC 385. That judgment relates to an application pursuant to s. 6(2)(b) of the Irish Bank Resolution Corporation Act 2013, which precludes the issue of actions against IBRC without the consent of the Court. It was agreed, in that application, by counsel for both parties that the Court could get guidance as to the nature of its discretion under s. 6(2)(b) of the Act of 2013, from the authorities on s. 222 of the Act of 1963. However, no Irish authority was brought to the attention of Laffoy J. and she noted in her judgment that no such authority is cited in the annotation on s. 222 in McCann & Courtney, *Companies Acts 1963 to 2012* (Dublin, 2012). Laffoy J. was referred to decisions of the English High Court and Court of Appeal in *Re Exchange Securities and Commodities Ltd.* [1983] B.C.L.C. 186, and in *Re Aro Co. Ltd.* [1980] Ch. 196, in which, in relation to the analogous provision in s. 231 of the UK Companies Act 1948, the English courts determined that s. 231 "gives the court an equal freedom to do what is right and fair in the circumstances" (*Aro* at p. 209). Further, in *Re Exchange Securities and Commodities Ltd.*, Mervyn Davies J. indicated at p. 195 that the approach should be "that leave should be refused under s. 231 if the action proposed raised issues which can conveniently be decided in the course of the winding up". Laffoy J. applied both those principles to the application of s. 6(2)(b) of the Act of 2013, and it is clear from para. 22 of her judgment that she takes the view that they similarly apply to s. 222 of the Act of 1963. I respectfully agree.

14. In a judgment delivered on 15th April, 2013, in the matter of *Re MJBCH Ltd. (In Liquidation)* [2013] IEHC 256 (which concerned the jurisdiction of the Court to grant leave retrospectively for the commencement of plenary proceedings), I considered the purpose of s. 222 and referred to what had been stated by Black L.J. in the Court of Appeal in Northern Ireland in *Boyd v. Lee Guinness Ltd.* [1963] N.I. 49 at p. 57, in relation to the analogous provision in that jurisdiction:

"This section is one of a series of provisions designed to ensure that when a winding-up order has been made by the court the whole of the task of supervising the collection and distribution of the company's assets should be committed to the winding-up court and, accordingly, that all proceedings having any bearing upon the winding-up of the company should remain under the supervision and control of that court."

In *MJBCH*, I then stated:

"17. In this jurisdiction, s. 222 of the Act of 1963 only applies to a winding up by the Court and the Companies Acts do not impose a leave requirement on the commencement of proceedings against a company in voluntary liquidation, including a creditor's voluntary liquidation. It appears to me that the purpose of s. 222 is not simply the protection of creditors, but rather, primarily the purpose identified by Black L.J. in the Court of Appeal in Northern Ireland in *Boyd v. Lee Guinness Ltd.*, of placing all proceedings in relation to the company being wound up by the court under the supervision of the court.

18. In an Irish context, s. 222 of the Act of 1963 must, of course, be construed in accordance with the ordinary meaning of the words used so as to give effect to the purpose intended by the Oireachtas. Such purpose is presumed to be one which is consistent with the Constitution.

19. The restriction imposed by s. 222 of the Act of 1963 on the commencement of proceedings against a company following the making of a winding up order is a restriction on a potential plaintiff's constitutional right of access to the courts guaranteed by Article 40.3 and deriving from Article 34.3.1 (*McCauley v. Minister for Posts & Telegraphs* [1966] I.R. 345). The requirement for leave as a restriction on the general constitutional right of access to the courts should be strictly construed (*Murphy v. Greene* [1990] 2 I.R. 566)."

15. The purpose of s. 222, as expressed above and the constitutional requirement that the restriction imposed thereby be strictly construed also applies to the exercise of the Court's discretion.

16. On the facts of this application, the complex disputes in relation to the ownership of the shares in the Company at issue in the plenary proceedings cannot be conveniently determined in the course of the winding up proceedings. The counterclaim plaintiffs, as applicants in this application, have put before the Court what they perceive to be a potential benefit for them (and, in converse, a potential prejudice) if they are not permitted to continue the plenary proceedings, at least in relation to their claim to the ownership of the shares in the Company. No application has been brought in the plenary proceedings seeking to strike out the counterclaim. On those facts, applying the principles set out above, the Court should not now make any further assessment of the merits of the counterclaim or the potential benefits to the counterclaim plaintiffs of pursuing same.

17. Section 222 permits the Court to grant leave "subject to such terms as the court may impose". In the course of the hearing, it was submitted on behalf of the counterclaim plaintiffs that the objection and concerns expressed by the Liquidator might be met by the imposition of terms. In particular, counsel for the applicants submitted that leave to proceed could be subject to a time constraint to avoid any delay to the liquidation. Mr. Smisson in his grounding affidavit has stated that no costs will be sought by the counterclaim plaintiffs against the Company in the plenary proceedings if it does not defend their claims. It also appears that the Court may pursuant to s.222 of the 1963 Act impose terms in relation to the discharge of costs which may be incurred by an official liquidator by reason of the leave to proceed granted. On the facts herein, having regard to the nature and stated purpose of the counterclaim in so far as it relates to the Company, it appears that the potential distribution to creditors should not be reduced by any additional costs or expenses which may be incurred by the Official Liquidator if the Court now grants leave to proceed.

18. I have concluded that applying the principles set out above to the facts of this application that it is just and fair that the Court now give liberty to proceed subject to terms in relation, both to any potential costs and expenses which may be incurred by the Company or the Official Liquidator by reason of the continuation of these proceedings against the Company and to avoid delay in the distribution to the creditors and the application by the Official Liquidator to the Court for final orders.

## Relief

19. There will, subject to the terms below, be an order pursuant to s.222 permitting the counterclaim plaintiffs to continue with so much of its counterclaim as relates to the reliefs sought at paras. 1 and 3 of the defence and counterclaim delivered on 17th September, 2012 in the plenary proceedings [2012 No. 3760P] i.e. :

"1. A declaration that the Counterclaim Plaintiffs are the legal and/or beneficial owners of the shares held by the Plaintiff and/or Gibro Nominees Ltd. in the first defendant.

...

3. If necessary, an order pursuant to section 122 of the Companies Act 1963 and/or the inherent jurisdiction of the Court requiring the First Defendant to rectify its share register to reflect the legal and/or beneficial interest of the Counterclaim

Plaintiffs in the shares held by the Plaintiff and/or its nominee, Gibro Nominees Ltd.”

20. The terms subject to which leave is granted are:

(i) The counterclaim plaintiffs do not seek any order for costs against the Company in relation to the counterclaim in the plenary proceedings unless the Official Liquidator hereafter defends same.

(ii) The solicitors for the counterclaim plaintiffs give an undertaking to the Court that the counterclaim plaintiffs will discharge the reasonable costs, remuneration and expenses of the Official Liquidator incurred hereafter in relation to any matters required to be done by him by reason of the leave now granted to the counterclaim plaintiffs pursuant to s. 222 and in relation to any steps required to be taken by the Official Liquidator pursuant to any relief which may be obtained by the counterclaim plaintiffs in the plenary proceedings. Any dispute as to the quantum of such reasonable costs, remuneration and expenses is to be determined by the Court in this winding up proceeding.

(iii) The leave to proceed with the above claims in the counterclaim in the plenary proceedings shall be limited in time to the hearing of the Official Liquidator's application for final orders in this winding up proceeding.

(iv) The application by the Official Liquidator for final orders shall be brought on notice to the counterclaim plaintiffs in the event that at that date, the counterclaim in the plenary proceedings has not been finally determined.

(v) Liberty at that time to the counterclaim plaintiffs to apply for leave to proceed beyond that date and to the official liquidator for the imposition of such additional terms as may be necessary for the purposes of the orderly and timely winding up of the Company.

21. Prior to making the order granting leave, I will require an undertaking from the solicitors for the counterclaim plaintiffs, in substance, in the terms identified above. The reason for which I am requiring the undertaking to be given by the solicitors is that the counterclaim plaintiffs are, I understand, outside of the jurisdiction and therefore the enforcement of any undertaking given by any of them to the Court would present difficulties. It appears to me that it must be a matter for their solicitors to place themselves in the position that they can give the required undertaking to the Court.