Neutral Citation Number: [2011] IEHC 457

THE HIGH COURT

2011 330 COS

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2009

AND

IN THE MATTER OF SECTION 310 OF THE COMPANIES ACT 1963

AND

IN THE MATTER OF WALSH MAGUIRE & O'SHEA LIMITED

JUDGMENT of Miss Justice Laffoy delivered on the 5th day of December, 2011.

1. The Application

1.1 On this application, which was initiated by a petition which was presented on 8th day of June, 2011, Brendan Loughnane (the petitioner) sought an order pursuant to s. 310 of the Companies Act 1963 (the Act of 1963) declaring the dissolution of Walsh Maguire & O'Shea Ltd. (the company) to be void.

1.2 Section 310(1) provides as follows:

> "Where a company has been dissolved, the court may at any time within 2 years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the court to be interested, make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved."

2. Dissolution of Company

2.1 By resolution passed at an extraordinary general meeting of the company on 1st February, 2007, it was resolved that the company be wound up voluntarily and that Charles Carri, Chartered Accountant, be appointed the liquidator for the purposes of such winding up, and that any part of the assets of the company might be divided by the liquidator among the members of the company in specie. On 8th March, 2010, the liquidator filed in the Companies Registration Office (CRO) the various documents demonstrating compliance with the statutory provisions and the taking of the steps required to finalise the members' voluntary winding up. The documents filed disclosed that the liquidator had distributed a substantial sum of money, in excess of €1m, to the members. Subsequently, the company was dissolved, the effective date of the dissolution being 8th June, 2010.

2.2 At the date of the winding up, the directors of the company were Vincent Maguire (Mr. Maguire) and Crohan John O'Shea (Mr. O'Shea).

3. Petitioner's factual basis for seeking to void dissolution

3.1 In his petition as presented, the petitioner contends that he is a person who is interested in having the dissolution of the company declared void because he is a contingent creditor of the company (although the petition erroneously states that the company is a contingent creditor of the petitioner) and that he is the plaintiff in plenary proceedings (Record No. 2004 No. 18973P) which were pending in this Court when the members' voluntary winding up commenced. It is necessary to consider the steps which were taken in the plenary proceedings in some detail.

3.2 The title of the proceedings, as shown on the plenary summons, is "Brendan Loughnane v. Walsh Maguire O'Shea Ltd.". For present purposes, I am not attaching any significance to the fact that the ampersand, which appeared in the name of the company as registered, does not appear in the name of the defendant in the title to the plenary proceedings, which were initiated by plenary summons which issued on 8th October, 2004. As I understand the position, a statement of claim was not delivered, although a draft of a proposed statement of claim has been exhibited for the purposes of this application. In it, the plaintiff claimed injunctive relief in relation to alleged trespass by the defendant on the plaintiff's property at 46, Bolton Street in the City of Dublin, arising from construction works on the adjoining property, 45, Bolton Street, and damages under various headings – trespass, negligence and nuisance. The plenary summons was addressed to the defendant at the registered office of the defendant. It is his claim for damages against the defendant that the petitioner wishes to pursue at this juncture.

3.3 An application for an interlocutory injunction returnable for 12th October, 2005, was brought by the petitioner in the plenary proceedings. However, at that stage, the issues raised by the petitioner appear to have been addressed by interaction between the petitioner's then solicitors and the solicitors who subsequently came on record for the defendant in the plenary proceedings. The motion was adjourned generally with liberty to re-enter.

3.4 On 5th July, 2005, the petitioner issued a motion, returnable for 11th July, 2005, seeking liberty to re-enter the earlier motion. On 6th July, 2005, O'Donnell Sweeney, Solicitors, entered an appearance on behalf of the defendant. On 11th July, 2005, as reflected in the perfected order of the Court, counsel for the defendant gave an undertaking to the Court in relation to entry on 46, Bolton Street. The costs of the motion were reserved. An affidavit sworn by Michael Gillen (Mr. Gillen) had been filed on behalf of the defendant on 11th July, 2005. In that affidavit, Mr. Gillen, whose address was given as the registered office of the company, averred that he was the "Construction Director of the Defendant company in the above entitled action".

3.5 A further motion was issued by the petitioner's then solicitors on 12th July, 2005, which was returnable for 13th July, 2005, in which the petitioner sought an order for the sequestration of the defendant's property by reason of the failure of the defendant to comply with the undertaking given to the Court on 11th July, 2005. On 15th July, 2005, Mr. Gillen swore an affidavit in response to that application, in which he admitted that certain minor activity had been conducted in breach of the undertaking, for which he

apologised on behalf of the defendant. On this application, the petitioner has averred that a further consent order and undertaking was given to the Court and the injunction was disposed of in that manner. The motion appears to have been adjourned generally with liberty to re-enter by consent of the parties.

3.6 The only further action taken by the petitioner in the plenary proceedings was as follows:

> (a) On 7th December, 2007, that is to say, after the members' voluntary winding up of the company had commenced, notice of intention to proceed was served on the solicitors on record for the defendant;
>
> (b) on 10th August, 2010, that is to say, after the dissolution of the company, a further notice of intention to proceed was purportedly served on the solicitors on record for the defendant; and
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> (c) on 14th April, 2011 notice of change of solicitor was filed on behalf of the petitioner.

3.7 On this application, the petitioner has averred to facts and exhibited experts' reports for the purpose of proving that the trespass by the defendant on 46, Bolton Street continued after July 2005 and that the petitioner suffered loss and damage as a result of the conduct of the defendant.

4. History of the Application

4.1 The manner in which the Court has had to deal with the application was not satisfactory. It has created considerable difficulty for the Court by the introduction of a plethora of issues, factual and legal.

4.2 In addition to serving notice on the Registrar of Companies, the Chief State Solicitor and the Revenue Commissioners, notice of the application was given to the firm of solicitors who represent Mr. O'Shea on this application and to Mr. Maguire. By order of the Court (Cooke J.) made on 16th June, 2011, it was ordered that service on Mr. Maguire by registered post would be good and sufficient service. I am satisfied that Mr. Maguire was so served. He did not appear on the application. Mr. O'Shea, who is a notice party, was represented by solicitor and counsel and, in reality, he assumed the status of "respondent" to the petition.

4.3 The petition first came before the Court on 27th June, 2011. At that stage, there was before the Court the petition, the petitioner's notice of motion for directions and the grounding affidavit of the petitioner sworn on 31st May, 2011, and a book of exhibits. Counsel appeared on behalf of Mr. O'Shea and intimated that he was relying on certain authorities. The Court adjourned the matter until 4th July, 2011, in order to read the papers.

4.4 When the matter was back in the Court list on 4th July, 2011, the following additional documentation was put before the Court:

> (a) An affidavit of the petitioner sworn on 30th June, 2011;
>
> (b) a proposed amended petition; and
>
> (c) an affidavit sworn by Mr. O'Shea on 4th July, 2011 and the exhibits therein.

The Court heard submissions by counsel for the petitioner and counsel for Mr. O'Shea. The Court queried whether there had been a response from the Revenue Commissioners to the application. A letter dated 22nd June, 2011, from the Revenue Commissioners was handed into Court in which it was stated that as the application was being made under s. 310, it was considered that it was not necessary to obtain a letter of consent from the Revenue Commissioners. The Court said that it would consider the matter and it was adjourned to 11th July, 2011.

4.5 On 8th July, 2011, counsel for Mr. O'Shea applied to the Court for leave to file two additional affidavits and leave was granted.

4.6 When the matter was in the Court list on 11th July, 2011, the Court directed counsel for the petitioner and counsel for Mr. O'Shea to furnish written submissions addressing the issues which had been raised. Subsequently, comprehensive written submissions were furnished by both counsel.

4.7 In the petition as presented, the petitioner sought to rely on a single ground as justifying the avoiding of the dissolution. That was that substantial damages had been claimed against the company in the plenary proceedings which were pending when the company was dissolved, but no allowance had been made by the company for the debt, which should be found due and owing by the company to the petitioner at the conclusion of the proceedings, prior to the company being dissolved. In other words, the petitioner was seeking to have the dissolution avoided to enable him to pursue his claim in the existing plenary proceedings. The petitioner now seeks to rely on an alternative ground in the proposed amended petition, namely, to have the company restored to enable him to pursue his claim against the company in fresh proceedings to be initiated or by way of claim to the liquidator, which I understand to mean by proving in the liquidation. While I have considered the objections made on behalf of Mr. O'Shea to the application to amend the petition, I am satisfied that it is appropriate to allow the proposed amendment with a view to ensuring that the real issues between the parties may be determined, in accordance with what the Supreme Court identified in *Croke v. Waterford Crystal Ltd.* [2005] 2 I.R. 383 is the primary purpose of the jurisdiction given to the Court under Order 28, rule 1 of the Rules of the Superior Courts 1986 (the Rules) to amend pleadings.

5. Mr. O'Shea's response to the petition on the facts

5.1 In the affidavit sworn by Mr. O'Shea on 4th July, 2011 in response to the petitioner's grounding affidavit, Mr. O'Shea has averred that the petitioner "has issued the proceedings against the wrong company" and that "the proper defendant to those proceedings is Walsh Maguire & Co. Ltd.", which, he averred, was under different ownership and directorship. On 27th February, 2009 that company was wound up by order of the Court and Kieran Wallace was appointed official liquidator for the purposes of the winding up.

5.2 The solicitors acting for the petitioner on this application wrote to Mr. Carri, the liquidator of the company, on 22nd February, 2011 seeking information in relation to the liquidation of the company and inquiring whether the petitioner's contingent debt is reflected in the accounts prepared by the liquidator. In his response of 21st March, 2011, Mr. Carri stated that it was his understanding that the company had ceased to carry out building activity before 31st July, 2003 and was not carrying out any activities in August 2004. He stated that he understood that it was a company called Walsh Maguire & Co. Ltd. which was carrying out contracting works on its own account at the address in question in August 2004. It is clear from the CRO printout exhibited by Mr. O'Shea that Mr. Gillen was a director of Walsh Maguire & Co. Ltd. until he resigned on 31st August, 2007.

5.3 The position of Mr. O'Shea was further amplified by the two additional affidavits filed on behalf of Mr. O'Shea on 8th July, 2011. The first was sworn by Peggy Cosgrove on 5th July, 2011. Ms. Cosgrove was a director and secretary of Walsh Maguire & Co. Ltd. She has averred that Walsh Maguire & Co. Ltd. and the company had a common director, Mr. Maguire, and that for a while both operated from the same address, which was the registered office of the company. She explained that the company's activities were wound down and that, as far as she is aware, the company did not enter into any new contracts from January 2002 onwards. She averred that the works carried out at 45, Bolton Street were carried out by Walsh Maguire & Co. Ltd. and that the company had absolutely no involvement in those works. Her evidence was that O'Donnell Sweeney, Solicitors, represented both the company and Walsh Maguire & Co. Ltd. The second affidavit was sworn by Mr. Gillen on 6th July, 2011, in which he also averred that the contract at 45, Bolton Street was performed by Walsh Maguire & Co. Ltd.

5.4 Counsel for the petitioner has pointed out that there are deficiencies in the evidence before the Court in support of Mr. O'Shea's contention that the petitioner sued the wrong company in 2004. While that is the case, I am satisfied that Mr. O'Shea has raised a genuine bona fide dispute on the facts that the body corporate which was carrying out construction work at 45, Bolton Street in 2004 was Walsh Maguire & Co. Ltd., not the company. However, that dispute cannot be resolved on this application.

5.5 Apart from contending that the petitioner sued the wrong company, it was submitted on behalf of Mr. O'Shea that, as a matter of law, on the proper construction of s. 310, even if the Court is prepared to make an order under that section, the plenary proceedings will not be revived. The petitioner's only option, in such circumstances, will be to institute new proceedings, and, as more than six years have elapsed since the events complained of, the petitioner's claim is statute-barred, it was submitted. That proposition is disputed by the petitioner. In broad terms, the facts relied on by the petitioner as demonstrating a cause of action and an entitlement to damages for trespass at 46, Bolton Street after July 2005 were disputed by Mr. O'Shea. Again, those factual disputes cannot be resolved on this application.

6. <u>Submissions of the parties in outline</u>

6.1 It was submitted on behalf of the petitioner that he has a financial interest in the company being revived, in that he wishes to pursue his claim for damages against the company. It was submitted that for Mr. O'Shea to successfully oppose the relief sought by the petitioner, he would have to convince the Court that the petitioner's claim against the company is bound to fail. As to whether, if the dissolution were declared void, the petitioner would be entitled to continue the plenary proceedings, it was submitted on behalf of the petitioner that the proceedings were not fatally terminated when the company was dissolved, but merely lay in abeyance. It was urged that this Court should not follow the authorities in the United Kingdom, which I will consider later, in which it was held that the avoidance of dissolution of a company, under a statutory provision in that jurisdiction of which s. 310 is the analogue, did not revive the proceedings which were existing at the date of dissolution.

6.2 In relation to the position adopted by Mr. O'Shea that new proceedings against the company would be statute-barred, two arguments were advanced on behalf of the petitioner. First, the petitioner relied on the fact that some of the damage was caused in late July 2005 and early August 2005. Secondly, it was argued that the limitation period ceased to run against the petitioner's claim against the company when the resolution was passed to wind up the company and, accordingly, none of the petitioner's claim is statute-barred as against the company. Counsel for the petitioner recognised that it was arguable that the limitation may have started to run again once the winding up was completed. However, it was made clear that the petitioner was not asking the Court to give a direction that the period of time which passed while the company was dissolved should not count for limitation purposes. By analogy to the decision in *Re Mixhurst Ltd.* [1994] 2 BCLC 19, which I will consider later, it was submitted that there is no need for the Court to embark on a consideration of whether it has jurisdiction to give a limitation direction, and the petitioner is not seeking such a direction.

6.3 In addressing what was characterised as the "putative defence" advanced on behalf of Mr. O'Shea, that the petitioner had sued the wrong defendant because the company did not carry out the construction work at 45, Bolton Street in 2004, it was submitted on behalf of the petitioner that the company is estopped from arguing that it is not the party which carried out the works in 2004/2005 which caused damage to the petitioner's property and that it is not responsible at law for those works. Counsel for the petitioner pointed to various factual matters which it was contended constituted a representation of fact, which was intended to be acted upon, and which was acted upon to the detriment of the petitioner, so that the company while it existed would have been estopped from making the argument that the petitioner sued the wrong defendant. The facts relied on are primarily the manner in which the defence of the interlocutory proceedings was conducted on behalf of the defendant in the plenary proceedings. While the estoppel argument was expressed in more subtle terms than I have expressed it, and was supported by commentary in textbooks and authorities in the submission of counsel for the petitioner, in essence, what was argued on behalf of the petitioner was that, if the point now being made by Mr. O'Shea had been made in 2004 or 2005, the petitioner would have sought to join Walsh Maguire & Co. Ltd. in the proceedings. The position of the petitioner is that Mr. O'Shea has not established that the petitioner does not have an arguable case that there is an answer to Mr. O'Shea's contention that the wrong defendant was sued, on the basis that the company will be found to be estopped from arguing that it did not carry out, and is not responsible for, the works carried out at the site of Bolton Street in 2004 and 2005.

6.4 As regards how the petitioner should proceed, if the Court were to make an order declaring the dissolution of the company void, the position adopted on behalf of the petitioner was that it was reserving its position as to which option it would pursue and would be guided by any findings of law or fact made by this Court in relation to the application of the statute of limitations or the doctrine of estoppel. However, it was acknowledged that, in view of the position adopted by Mr. O'Shea, court proceedings, rather than proving in the liquidation, were likely to be favoured.

6.5 The main plank in the response of Mr. O'Shea continues to be that the petitioner had sued the wrong defendant and that the company, which is the subject of this application, had no liability to the petitioner before it was dissolved. Further, it was submitted that the petitioner is not entitled to rely on the doctrine of estoppel as contended for and, in particular, Mr. O'Shea denies that representations were made on behalf of the company on either its express or ostensible authority and further denies that the petitioner acted to its detriment as a result of representations given on behalf of the company.

6.6 A further plank in Mr. O'Shea's response is that, if the dissolution were to be voided under s. 310, the plenary proceedings would remain a nullity and the petitioner would be required to issue fresh proceedings and that those proceedings would be statute-barred. Further, it was submitted on behalf of Mr. O'Shea that the petitioner would not be in a position to prove his alleged debt in the liquidation.

6.7 Finally, the point was made on behalf of Mr. O'Shea that, as the relief sought by the petitioner is discretionary, the Court should exercise its discretion by refusing to make an order under s. 310 on the grounds of the petitioner's delay in prosecuting his claim. In this connection, it was submitted that the delay on the part of the petitioner has been both inordinate and inexcusable and that the

balance of justice lies in refusing the relief sought by the petitioner on this application. It was submitted that the members of the company should not be put through the inconvenience and costs of having the dissolution declared void just because the petitioner decided to sit on his claim for over six years.

7. <u>The issues/general observations</u>

7.1 The core issues which arise on the application of s. 310(1) on the facts of this application, in my view, are:

> (a) whether the petitioner is a person "who appears … to be interested";
>
> (b) if he is, what criteria should be applied by the Court in the exercise its discretion under s. 310(1);
>
> (c) have those criteria been complied with; and
>
> (d) if the Court decides to make an order declaring the dissolution of the company void, what, if any, terms may or should be imposed on the petitioner?

7.2 On the first issue, namely, whether the petitioner has statutory standing to seek an order under s. 310, it is convenient to quote at this juncture the following passage from the annotation on s. 310 in MacCann and Courtney, *Companies Acts 1963 – 2009*, 2010 Ed. (at p. 581):

> "A member or creditor would also appear to be a 'person interested'. In this regard, the creditor so entitled to apply would include contingent or prospective creditors of the company. However, in the case of a contingent or prospective creditor, he may be required to establish that his claim is neither frivolous nor vexatious and is being bona fide maintained, in order to be allowed to proceed with his petition."

The decision of the Supreme Court in *Re Deauville Communications Worldwide Ltd.* [2002] 2 I.R. 32 is cited as authority for the proposition in the last sentence. Counsel for the petitioner accepted that the statement in the last sentence represents the law.

7.3 In addressing all of the issues outlined above, it seems to me that the Court must have regard to the consequences of making the order sought. The consequences of an order under s. 310 are outlined in MacCann and Courtney (*op. cit*.) (at p. 581), where it is stated:

> "Upon the dissolution being declared void, the company's corporate existence is restored . . . Proceedings may be taken by or against the company as if it had not been dissolved. However, the order of the court does not have the effect of retrospectively validating transactions purportedly entered into by or with the company during the period of dissolution. Accordingly, proceedings which had been commenced by or against the company either prior to or during the period of dissolution, will not be retrospectively validated. While the avoidance of the dissolution of the company is not retrospective, the period of actual dissolution will nonetheless be taken into account in determining whether a claim by or against the company is statute-barred."

7.4 In support of the propositions contained in the penultimate sentence and the sentence which precedes it in the passage quoted above, the editors cite a number of English authorities to which I propose referring later: *Morris v. Harris* [1927] A.C. 252; *Re Mixhurst Ltd.* referred to in para. 6.2 above; and *Philip Powis Ltd*. [1998] 1 BCLC 440. As the editors point out, the consequences which flow from an order under s. 310 differ from the consequences of a restoration order made under s. 311(8) of the Act of 1963 or under s. 12B of the Act of 1982, where validation of existing proceedings is retrospective. The difference was recognised in the decision of the High Court (O'Neill J.) in *Re Amantiss Enterprises Ltd; Framus plc v. CRH plc* [2000] 2 ILRM 177. As O'Neill J. was concerned with an application under s. 12(6) of the Act of 1982, the predecessor of s. 12B of that Act, his observations in relation to the effect of s. 310 were, as counsel for the petitioner submitted, *obiter.*

7.5 As authority for the propositions stated in the last sentence in the passage quoted in para. 7.3 above, the editors cite two decisions of the Court of Appeal of England and Wales: *Re Philip Powis Ltd*. referred to in para. 7.4 above and *Smith v. White Knight Laundry Ltd.* [2001] 2 BCLC 206. They make the point that the position under s. 310 differs from a restoration order under s. 12B of the Companies (Amendment) Act 1982 (the Act of 1982), where the Court may order that the period of dissolution be ignored for the purpose of calculating the limitation period. They also issue a caveat by emphasising that in the United Kingdom, where dissolution is declared void under the equivalent of s. 310, the Court has express jurisdiction in respect of personal injuries and fatal injuries claims to declare that the period of dissolution be ignored for the purpose of the limitation period.

7.6 Because counsel for the petitioner has urged that the Court should –

> (a) find that the existing plenary proceedings have lain in abeyance during the dissolution of the company and will be operable and can be pursued again if the dissolution of the company is voided, and
>
> (b) find that the limitation period ceased to run as regards the petitioner's claim against the company when the resolution to wind up the company was passed,

the first proposition being wholly and the second proposition being partially at variance with the commentary which I have quoted in para. 7.3 above, it is necessary to consider the English authorities cited in support of the commentary, because there is no Irish authority directly in point.

8. <u>The English Authorities</u>

8.1 As is clear from the judgment of O'Neill J., in *Re Amantiss Enterprises Limited*, the provenance of s. 310 and the corresponding provisions of the English Companies Acts (s. 352(1) of the Companies Act 1948, which was subsequently replaced by subs. (1) and (2) of s. 651 of the Companies Act 1985) is traceable to s. 223 of the Companies (Consolidation) Act 1908, which was repealed in this jurisdiction by the Act of 1963. The consequences of an order under s. 223 were considered by the House of Lords in *Morris v. Harris* [1927] AC 252. Sub-section (1) of s. 310 is a verbatim replication of subs. (1) of section 223.

8.2 In *Morris v. Harris*, the consequences of an order under subs. (1) of s. 223 were summarised rather graphically by Lord

Blanesburgh (at p. 269) as follows:

> "The company is restored to life as from the moment of dissolution but, continuing a convenient metaphor, it remains buried, unconscious, asleep and powerless until the order is made which declares the dissolution to have been void. Then, and only then, is the company restored to activity."

Insofar as is relevant for present purposes, what had happened in *Morris v. Harris* was that Mr. Harris had a claim against a company, which had gone to arbitration before the company was dissolved, and after dissolution the arbitrator made an award in favour of Mr. Harris. Mr. Harris obtained an order at first instance under s. 223 declaring the dissolution of the company void and subsequently he claimed to be admitted to prove in its liquidation. The liquidator rejected this proof and his decision was affirmed by the High Court, but the decision of the High Court was reversed by the Court of Appeal. That is the context in which the consequences of an order under s. 223 were considered.

8.3 The outcome of the appeal to the House of Lords was that the cause was remitted back to the High Court with a direction that the respondent was entitled to prove in the liquidation of the company. In considering the language and effect of s. 223, Lord Sumner, in his speech, contrasted the wording with the wording of the effect of a restoration order where the company had been struck off as provided for in the Act of 1908. He stated (at p. 257):

> "The words 'to have been void', in s. 223, appear, it is true, so far as they go, to have some retrospective effect, and tend to some extent to support [Mr. Harris's] argument. On the other hand, the remaining words, which define the order, point rather to a declaration removing a bar to such action as might otherwise have been taken, than to one validating past proceedings, taken since the dissolution through ignorance or disregard of it and consequently invalid. The remaining words, 'and thereupon such proceedings may be taken, as might have been taken if the company had not been dissolved,' seem to me to point conclusively in the same direction. They describe an authority given to the parties concerned to do, 'thereupon' and accordingly thereafter, things which they might have done but obviously had not done theretofore, and, but for the order, could not have done after the dissolution."

Later, Lord Sumner, in a passage relied on by counsel for the petitioner, stated (at p. 259):

> "The object of the provision was, I think, to give a fresh start to proceedings, which owing to the dissolution had been impossible and had not been taken, and thereupon it was to be open to those concerned to take them in the future as if the dissolution had not happened. In my opinion most of the proceedings in the arbitration in this case, and, above all, the award itself, are null, for they were taken and made against a company which did not exist, and no subsequent validity has been or could be given to them. The respondent must therefore prove his claim afresh in proceedings, to which [the company] will be a party."

8.4 The application of the decision in *Morris v. Harris* to legal proceedings against a company which had commenced before dissolution, as is the case on this application, was considered by the Chancery Division of the English High Court in *Re Philip Powis Ltd.* [1997] 2 BCLC 481, where Sir John Knox quoted and applied the following passage from the judgment of Megaw L.J. in the Court of Appeal in *Foster Yates & Thom Ltd. v. H. W. Edgehill Equipment Ltd.* (1978) 122 SJ 60:

> "Apart from authority, I should have taken the view that when a corporate body is dissolved as a result of a voluntary winding up, any action which is pending at the date of dissolution ceases, not temporarily and provisionally, but absolutely and for all time. If the company is brought to life under s. 352, the cause of action is still there. It can, subject to any question of limitation, be pursued by fresh proceedings. If both parties to the abortive action consent, no doubt the pleadings, discovery, etc. which had taken place in the abortive action before the dissolution could be treated as having been steps taken in the new action. But that would be a matter of consent. "

In applying that principle, Sir John Knox stated that, where there is a corporate party which is dissolved, the proceedings come to a permanent end on dissolution and do not go into abeyance or its equivalent.

8.5 The facts in *Re Philip Powis Ltd*. were that the applicant, who had been an employee of the company, was claiming damages for personal injuries arising out of an accident which occurred in February 1985. Just three days short of the expiration of the three year limitation period, in February 1988, he issued a writ claiming damages for negligence, and breach of statutory duty in respect of his personal injuries. A lodgment into Court was made by the company in 1993. However, no further steps were taken on the applicant's behalf in the proceedings. The company was dissolved in September 1995. The application to avoid the dissolution was brought under s. 651 of the Companies Act 1985. It is important to emphasise, as has been noted by the editors of MacCann and Courtney, that s. 651, at the time it was being considered in *Re Philip Powis Ltd.,* contained two specific provisions in subs. (5) and subs. (6), which have no counterparts in this jurisdiction. Sub-section (5) provided that an application to void the dissolution for the purpose of bringing proceedings against the company for personal injuries or fatal injuries might be made at any time, that is to say, outside the normal two year period for bringing such an application but mandated that no order should be made "if it appears to the Court that the proceedings would fail by virtue of any enactment as to the time within which proceedings must be brought". Sub-section (6) provided that nothing in subs. (5) affected the power of the Court on making an order under s. 651 to direct that the period between the dissolution of the company and the making of the order should not count for the purposes of any such enactment. Therefore, in *Re Philip Powis Ltd*., the Court had to consider whether the application of a special limitation provision, s. 33 of the Limitation Act 1980, might provide an escape for the applicant notwithstanding that primary limitation period had expired. It was held that it did not on the facts. Accordingly, the applicant was unsuccessful at first instance.

8.5 On appeal to the Court of Appeal from the decision of Sir John Knox (*Re Philip Powis* [1998] 1 BCLC 440), it was noted by Morritt L.J. that the appellant had abandoned an argument raised on the appeal against the finding that the dissolution of a corporate defendant causes pending proceedings to come to a permanent end. However, the Court of Appeal reversed the decision at first instance and held that there was an arguable case that an application under s. 33 of the Limitation Act 1980 would succeed. On that basis, a declaration was made that the dissolution was void and that the period between the dissolution of the company and the making of the order should not count towards any enactment as to the time within which proceedings must be brought.

8.6 On the issue as to whether the petitioner's claim is statute-barred, and in support of his contention that, as regards the petitioner's claim against the company, the limitation period ceased to run when the resolution was passed to wind up the company, counsel for the petitioner referred to the decision of the English High Court in *Re Mixhurst Ltd*. [1994] 2 BCLC 19 and, in particular, to the following passage from the judgment of Evans-Lombe J. (at p. 23):

> "This order is sought, it would seem, very much out of an abundance of caution. It is well established that on a

> dissolution being declared void, the company is restored to the state it was in immediately prior to the dissolution becoming effective. In the case of the company therefore, this company would be restored to its state of being in the process of liquidation shortly before it was dissolved. It is also well established, *inter alia*, by the decision in *Re General Rolling Stock Co.* (1872) LR 7 Ch. App. 646, a decision of the Court of Appeal concerning a compulsory winding up, that periods of limitation cease to run once a winding up has commenced and the rights of those claiming in the liquidation therefore crystallise at the commencement of the winding up. It is also well established by authority that the same principles apply to voluntary windings up. Therefore in this case any relevant period of limitation ceased to run on 5th April, 1990 when the resolution to wind up this company was passed."

8.7 The application under consideration in *Re Mixhurst Ltd*. was for an order pursuant to s. 651 of the Companies Act 1985. In broad terms, the applicant's claim against the dissolved company was in the nature of a claim for professional negligence and breach of duty arising in connection with advice given before 23rd September, 1986. Writs were issued in July and September 1992 the last being issued on 20th September, 1992, against the company. However, the Company had been dissolved in June 1992, following the finalisation of a members' voluntary winding up, which had commenced on 5th April, 1990. Evans-Lombe J. stated that he had no difficulty making an order declaring the dissolution to have been void, stating that the application had been made within the necessary two year period by a potential creditor whose claim to be a creditor was certainly more than a shadowy claim. He had difficulty, however, with the second part of the order sought, which evoked the observations quoted above. It was an order (referred to as a "limitation override order") that the period between the dissolution and the order declaring the dissolution void should not count in assessing the limitation period. Having quoted extensively from the speeches of Lord Sumner and Lord Blanesburgh in *Morris v. Harris*, Evans-Lombe J. held that he had no jurisdiction under s. 651 to make a limitation override order (contrasting the provisions of s. 651 and the provisions of s. 653 dealing with the making of a restoration order following a strike off). But he stated that he did not believe that that would have any material impact on the prosecution of the litigation.

8.8 A similar point in relation to the statue of limitations ceasing to run once a winding up had commenced was made in the Court of Appeal in *Re Philip Powis Ltd*., the basic facts of which have been outlined earlier. The case is complicated, not only by reason of the fact that s. 651 contains special conditions in relation to personal injuries actions, but also by the fact that the respondent on the application under s. 651 was the insurance company which had indemnified the company. However, it was argued in the Court of Appeal that the purpose of the application and the justification for the order sought was twofold: first, to enable the applicant, Mr. Harrison, to prove in the liquidation, or otherwise enforce his rights against the liquidator and contributories; and, secondly, to institute fresh proceedings. The second purpose was considered in the context of the special limitation provisions in relation to personal injuries actions, which are not relevant for present purposes. In relation to the first purpose, Morritt L.J. stated (at p. 447):

> "On the date that the company resolved to go into voluntary liquidation, namely 13th March, 1995, the action brought against the company by Mr. Harrison was pending. Accordingly, the potential liability of the company was a debt within the definition contained in the Insolvency Rules 1986 … , susceptible of proof in the ordinary way notwithstanding the uncertainty as to liability or amount … . Counsel for the insurers accepted that if the company had been liable as claimed then such a liability was prima facie provable. He also accepted that at the commencement of the winding up the claim was not statute-barred because the running of time had been stopped by the issue of the writ on 25th February, 1988. It was not disputed that the effect of an order under s. 651 declaring the dissolution to have been void would be to recreate the company in the condition in which it had been when dissolved, namely in members' voluntary winding up. Thus subject only to an order …. confirming the appointment of the original liquidator, which is sought by … the originating summons, Mr. Harrison would be in a position to enforce his rights by proof or otherwise."

8.9 Morritt L.J. rejected arguments advanced on behalf of the insurance company that the Court should not, as a matter of discretion, grant the order sought because of alleged prejudice to the insurers. Having stated that the company might have applied for an order to strike out the action in 1993 but, given the payment into Court, an application to strike out was not certain to succeed, Morritt L.J. continued (at p. 448):

> "In any event, the company made no such application; instead it went into liquidation and was dissolved without any apparent attempt to deal with the claim of Mr. Harrison. Neither the company nor the insurers can reasonably complain if now Mr. Harrison seeks to enforce his rights in that liquidation as though it had not been dissolved."

8.10 The most recent English authority to which the Court was referred is the decision of the Court of Appeal in *Smith v. White Knight Laundry Ltd*. [2001] 3 All ER 862. The facts there were that the claimant was the widow and personal representative of a former employee of the defendant company from 1950 to 1956, who in April 1999 brought a fatal injuries claim against the defendant company on the basis that her husband had died in February 1995 from mesothelioma which he had contracted when he came into contact with asbestos while he was in the employment of the company. The company had been dissolved in 1963. Prior to the institution of the proceedings, in accordance with normal practice at the time, the claimant had brought an application under s. 651(1) of the Companies Act 1985 ex parte and in January 1998 she obtained the order sought, in which it was directed that the period from dissolution to the date of the order was to be discounted for limitation purposes. The company defended the action for damages brought by the claimant subsequently on the basis that the claim was statute-barred, either because it had not been brought within three years of the deceased's death, or because he had had the requisite knowledge about his condition more than three years before his death. It was further contended that the Court should not make a direction under s. 33 of the Limitation Act 1980 allowing the action to proceed notwithstanding that it would be otherwise statute-barred.

8.11 The Court of Appeal was concerned with the trial of a preliminary issue as to limitation sought by the company. Dealing with the effect of the order voiding the dissolution, having referred to *Morris v. Harris*, Jonathan Parker L.J. stated (at para. 53):

> "In the passages from the speeches of Lord Sumner and Lord Blanesborough on which [counsel for the claimant] relies . . . a crucial distinction is made between on the one hand the corporate existence of the company, which is restored as from the date of the dissolution, and on the other hand proceedings which had taken place during the period of dissolution (referred by Lord Blanesborough as 'corporate activity'). In *Morris v Harris* the House of Lords decided that purported acts of a dissolved, and hence non-existent, company were not validated by the subsequent avoidance of the dissolution. But that is not the instant case. In the instant case, all that is needed for the accrual of a cause of action against the company is corporate existence, no question of 'corporate activity', in the sense in which Lord Blanesborough used that expression, arises."

It was concluded by the Court of Appeal, therefore, that, by virtue of the restoration order, the claimant's cause of action against the company accrued on the date on which it would have accrued but for dissolution, so that, aside from the application of s. 33 of the Act of 1980, the claimant's claim was statute-barred. The effect of the direction made under s. 651 at first instance had been to put her in precisely the same position as if she had obtained relief under s. 33. Justice required that the direction be set aside so that

the company's insurers would have an opportunity of being heard on the issue of limitation and in opposition to the claimant's application under section 33.

9. Petitioner's standing: Conclusion

9.1 I am satisfied that the petitioner is "a person who appears . . . to be interested" within the meaning of s. 310(1) and, accordingly, has *locus standi* to bring this application under s. 310. I have already noted that his counsel accepts that, as a contingent or prospective creditor, the petitioner may be required to establish that his claim is neither frivolous nor vexatious and is being *bona fide* maintained. At the time the plenary proceedings were initiated in October 2004 it was contended by the petitioner that he did have a cause of action against the company for injunctive relief and damages for trespass to 46, Bolton Street. On the basis of the case advanced by him, the cause of action accrued in 2004. The plenary proceedings were undoubtedly initiated within the limitation period. The petitioner pursued the proceedings through the interlocutory applications up to July 2005. Thereafter, prior to the dissolution of the company, the proceedings lay fallow except for the filing and serving of the first notice of intention to proceed in December 2007. Notwithstanding that the proceedings were not further progressed before the dissolution of the company, I have no doubt that the petitioner has established that his claim against the company is neither frivolous nor vexatious and was being *bona fide* maintained.

10. Criteria to be applied under s. 310(1) and whether they have been complied with: conclusion

10.1 The first test on the wording of s. 310 is whether the application is brought in time, that is to say, within two years of the date of dissolution. That test has been met in this case. The second is whether the person bringing the application has standing to bring it and, as I have found at para. 9.1 above, that test is met on this application. Thereafter, the Court has a discretion as to whether to make the order sought or not. Although it is not spelt out in the section, in my view, it is implicit that the Court will exercise its discretion in a manner which is fair and equitable and in a manner which maintains the balance of justice between the applicant, in this case the petitioner, on the one hand, and the persons who will be affected if an order declaring the dissolution is void is made, in this case, the directors and the members of the company to whom the surplus assets have been distributed in specie on the dissolution of the company. In that balancing act, in my view, the petitioner must demonstrate that he has a legitimate purpose in seeking to have the dissolution declared to have been void. That necessitates, adopting terminology used by Morritt L. J. in *Re Philip Powis Ltd.*, (at p. 446), referring to the approval by Hoffman L.J. of an earlier statement of Megarry J., that it must be demonstrated that the achievement of the purpose is not "merely shadowy", although it does not have to be firmly established or highly likely to prevail.

10.2 The purpose for which the petitioner seeks to have the dissolution of the company declared to have been void is to enable him to pursue its claim against the company, either by pursuing the existing plenary proceedings, proving in the winding up if and when the company is revived, or initiating fresh proceedings against the company. That is unquestionably a legitimate purpose. Absent the opposition of Mr. O'Shea, one could readily conclude that the petitioner's claim is not "merely shadowy", having regard to its history and the manner in which the existing plenary proceedings and the interlocutory injunction applications therein were dealt with by the parties and, in particular, by the defendant.

10.3 However, having regard to the various strands of Mr. O'Shea's opposition to the application before the Court, which raise issues of fact on which there is conflict and difficult issues of law, if it is the case that they would be maintainable in a proper procedural structure, that would inevitably lead to a different conclusion. The dilemma for the Court is in deciding to what extent it has jurisdiction, and it is appropriate, to express a view on the issues raised.

10.4 The first comment which I consider that it is apt to make in relation to Mr. O'Shea's opposition is the obvious observation that it comes not from the company but from one former member of the company. Although Mr. O'Shea has articulated the type of opposition which it is reasonable to infer might be articulated on behalf of the company, in the absence of the company, it seems to me that it would be inappropriate to express any view on the issues raised by Mr. O'Shea, unless the Court is satisfied that it has jurisdiction, and it is necessary to, determine the issues for the purpose of the application of section 310.

10.5 Secondly, I am satisfied that the Court has jurisdiction and that it is necessary to express a view on the effect of an order under s. 310 on the existing plenary proceedings. Notwithstanding that it was urged by counsel for the petitioner that the Court should not be persuaded by the English authorities that the plenary proceedings, which were initiated before dissolution but not finalised, will not revive on the voiding of the dissolution, if an order to that effect is made, and that such an outcome was not part of the ratio in *Morris v. Harris* (as suggested in Keay, "*McPherson's Law of Company Liquidation*" (2001) at p. 895), as a matter of construction of the Act of 1963, it is not possible to ignore the difference in effect of an order made under s. 310(1) and an order under s. 311(8). In contradistinction to the wording of s. 310(1), which is quoted at para. 1.2 above, it was expressly stated in s. 311(8) in its original unamended form (i.e. before it was amended by the Companies (Amendment) No. 2 Act 1999) that when an order is made that the name of the company be restored to the register under that provision –

> ". . . the company shall be deemed to have continued in existence as if its name had not been struck off; 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 name of the company had not been struck off."

Since the amendment of s. 311(8) in 1999 the discretion of the Court has been broadened to empower it to make "such other order as seems just", including an order of the type set out in sub-section (8A).

10.6 When one compares s. 310(1) with s. 311(8), in my view, the intention of the Oireachtas as to the scope of the exercise of the Court's discretion under s. 310 in the context of the effect of an order under that section becomes quite clear. In particular, I do not think that the words "upon such terms as the court thinks fit" in s.310 give the Court discretion to give ancillary directions or make ancillary provisions of the type envisaged in s. 311(8). What the Oireachtas intended I believe was that, in an order under s. 310(1), terms might be imposed, for example, as to bringing the winding up to a conclusion in a situation where the purpose of voiding the dissolution was to enable the liquidator to deal with some unfinished business, or to deal fairly with the liability for costs of the application.

10.7 In my view, if the declaration sought by the petitioner is made, it will have the effect stated in s. 310(1), which I believe is the effect which was outlined in *Morris v. Harris* and the English authorities in which it was followed, and also by O'Neill J. in *Re Amantiss Enterprises Ltd.*, albeit *obiter*. Accordingly, the Court's decision cannot be based on a proposition that the petitioner will be entitled to continue the plenary proceedings against the company if the dissolution of the company is voided.

10.8 Thirdly, I do not consider that the Court has jurisdiction on this application, or that it is appropriate, to make a finding as to whether, if the petitioner were to initiate fresh proceedings after the making of an order under s. 310, its claim, based on the events of 2004 and 2005, would be statute-barred. Nor do I consider it appropriate to express a view on whether, if the company in liquidation is revived, it would be open to the petitioner to prove its claim in the winding up on the basis that it is a live claim. While the petitioner relies on the *General Rolling Stock Co.* principle, which was applied in *Re Mixhurst Ltd.* referred to above, and was more recently applied by the Court of Appeal in England and Wales in another case relied on by counsel for the petitioner, F.S. *Compensation Scheme Ltd. v. Larnell (Insurances) Ltd*. [2006] QB808, this is not the appropriate procedural structure in which, nor the appropriate time at which, to determine the effect of the commencement of the members' voluntary winding up on the petitioner's claim against the company.

10.9 Fourthly, it would be wholly inappropriate for the Court to express a view on the basis of affidavit evidence, which has not been the subject of cross-examination, on the contention of Mr. O'Shea that the petitioner sued the wrong defendant. However, as I have stated, I accept that Mr. O'Shea is acting *bona fide* in contending that the wrong defendant was named, notwithstanding the course of events in relation to, and the conduct of the defence of, the interlocutory applications in the summer of 2005. It follows that I do not consider it necessary to express a view on the petitioner's contention that the company, if it is revived, will be estopped from contending that it was not the proper defendant to the petitioner's claim. In any event, I consider that the Court has no jurisdiction, and that it would be wholly inappropriate, to express a view on that issue on this application.

10.10 Finally, on the question of delay, there is a process whereby either under various provisions of the Rules or under the Court's inherent jurisdiction, a defendant can seek to have proceedings against it dismissed by reason of delay or want of prosecution on the part of the plaintiff. It was open to the company, as a defendant in the plenary proceedings, to bring an application for dismissal before it was dissolved and it may be that it would have been successful. I express no view on that issue. However, the fact is that the company did not bring any such application. Instead, the members' voluntary winding up was brought to completion and the dissolution of the company was procured without addressing the proceedings which were pending against the company in this Court. Whatever the explanation for that occurrence, it would be neither just nor equitable for the Court to refuse the petitioner's application under s. 310 on the ground that the petitioner delayed in prosecuting the proceedings, which, *prima facie*, is the case, when the company chose not to pursue any process available to it to have the proceedings disposed of.

10.11 In summary, none of the bases on which Mr. O'Shea contends that the petitioner's claim against the company was, and is, bound to fail can properly be addressed by the Court at this time on this application. Therefore, I am satisfied that the petitioner has met the criterion that the purpose for which he seeks an order under s. 310 is a legitimate purpose. Mr. O'Shea has not on any of the arguments advanced on his behalf displaced the conclusion that, having regard to the history of the plaintiff's claim, it is not "merely shadowy".

10.12 Accordingly, I am satisfied that the Court should make an order under s. 310(1) declaring the dissolution of the company to have been void. When, as is clearly his intention, the petitioner pursues his claim against the company, he will be clearly on risk that his claim may not succeed if the company defends his claim on the bases on which Mr. O'Shea has opposed this application. It is impossible to assess that risk, but it is something which the Court must have regard to in imposing terms in relation to the making of the declaration.

11. <u>Imposition of Terms: Conclusions</u>

11.1 In the petitioner's written submissions, it was submitted that if an order is made under s. 310, the petitioner should be entitled to his costs against the company (as costs in the liquidation) and against Mr. O'Shea on a joint and several basis, subject to account being taken of the costs and time involved in relation to the petitioner's application to amend its petition. Because of the risk which the petitioner will face when he pursues his claim, which is alluded to in para. 10.12 above, it is impossible to assess at this juncture whether the petitioner will be successful or unsuccessful in pursuing his claim. If it transpires that he is unsuccessful, then justice requires that he bear the costs of this application. That was the approach adopted by Kenny J. in *In re Nelson Car Hire Ltd.* (1973) 107 ILTR 97, in circumstances where the Revenue Commissioners sought an order under s. 310. Kenny J. stated (at p. 102):

> "The costs of this application will be reserved: if the claims for duty which the Revenue wish to make are unsuccessful, those who oppose the order will be awarded their costs of the proceedings on a solicitor and client basis."

It will be a term of the making of the declarations sought by the petitioner that, if the petitioner is unsuccessful in its claim against the company, Mr. O'Shea will be entitled to his costs of this application on a solicitor and client basis. Subject to that, the costs of the application will be reserved and the costs issue will be adjourned generally with liberty to either the petitioner, the company or Mr. O'Shea to re-enter.

11.2 Both on his original petition and on his amended petition the petitioner has sought that an accountant nominated by him should be appointed liquidator of the company in the order declaring the dissolution of the company void. In my view, it would be wholly inappropriate to make such an order. When the order is made, the company will be recreated and it will be recreated in members' voluntary liquidation. Mr. Carri will resume his role as liquidator. If Mr. Carri is unwilling to continue in that role, that will be a matter between him and the members of the company. It will be for the members of the company to determine who shall be the liquidator for the purposes of concluding the winding up.