THE HIGH COURT

[2011 No. 303 COS.]

IN THE MATTER OF UNIDARE PLC (IN VOLUNTARY LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACTS 1963- 2009

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO S. 280 OF THE COMPANIES ACT 1963 (AS AMENDED)

DAVID HUGHES, LIQUIDATOR

APPLICANT

Judgment of Miss Justice Laffoy delivered on 16th day of March, 2012.

1. The application

1.1 This application by David Hughes (the Liquidator), who is the liquidator of Unidare Plc (the Company), which is the subject of a members' voluntary winding up, is made pursuant to s. 280 of the Companies Act 1963 (the Act of 1963) and pursuant to s. 241 of the Act of 1963 seeking an order fixing a time or times within which creditors are to prove their debts or claims or to be excluded from the benefit of any distribution made before those debts are proved. Additionally, the Liquidator seeks a direction or an order pursuant to s. 280 that, following determination and/or discharge of all or any debts or claims made by creditors consequent on the fixing of time under s. 241 for the submission of proofs of debts or claims, the Liquidator shall be at liberty to make an account of the winding up pursuant to s. 263(1) of the Act of 1963 and call a general meeting of the Company for the purpose of laying the said account before the said meeting and giving an explanation thereof, and taking the other steps set out in s. 263, leading to the dissolution of the Company.

1.2 Section 241 of the Act of 1963 provides:

> "The court may fix a time or times within which creditors are to prove their debts or claims or to be excluded from the benefit of any distribution made before those debts are proved."

Section 241 is to be found in Part VI, II (Winding up by the Court) of the Act of 1963. However, I am satisfied that by virtue of s. 276(1)(b) of the Act of 1963, which provides that, without sanction, that is to say, a special resolution in the case of a members' voluntary winding up, the Liquidator may "exercise any of the other powers by this Act given to the liquidator in a winding up by the court", it is open to a liquidator in any voluntary liquidation to seek an order under s. 241. There is a view that, under the current law, it is open to a liquidator in a voluntary winding up to fix a time for proof on penalty of exclusion from sharing in the distribution (*c.f* Company Law Review Group *"General Scheme of Companies Consolidation and Reform Bill- Pillar A"* at Part AII, Head 104). However, having regard to the nature of the claims which have emerged on the winding up of the Company, I consider that it was appropriate for the Liquidator to bring this application.

2. The winding up

2.1 As I have stated, the winding up is a members' voluntary winding up. It was initiated by a special resolution passed at the Annual General Meeting of the Company held on 22nd May, 2006. By virtue of the special resolution the Liquidator was appointed. It is quite clear from the documentation put before the Court that the requirements of s. 256 of the Act of 1963, as amended, were complied with in relation to the winding up.

2.2 It is also clear from the evidence put before the Court that the Company was not only solvent but in a healthy financial state when it was wound up and that the current position is that the Liquidator has substantial assets to distribute among the members. The problem the Liquidator has encountered arises from the existence, or potential existence, of claims of considerable antiquity which have been made against the Company since it went into liquidation or may possibly be made in the future and which may not be statute-barred.

3. The claims

3.1 The claims which have emerged since the Company went into liquidation are claims for personal injuries by former employees of the Company or predecessors of the Company alleged to have been caused by exposure to asbestos during such employment. The Liquidator has put before the Court details of six claims in relation to employees, of which four have been disposed of. Insofar as the Liquidator has been furnished with particulars of the periods of the claimant employees' employment, they range from 1957 to, in one case, 1990. In general, where particulars are available, the relevant periods of employment extend back in time to more than fifty years ago in some cases and more than forty years ago in other cases.

3.2 As regards the knowledge the officers of the Company had in relation to such claims prior to the liquidation of the Company, the Liquidator has exhibited a letter from the secretary of the Company which confirms that neither the executive chairman, nor the former senior independent director of the Company, nor the secretary was aware of any asbestosis/mesothelioma related personal injuries claims against the Company in the period prior to the announcement of the Company's liquidation in May 2006. The Liquidator has confirmed that there is not among the books and records of the Company which were provided to him any lists of employees of the Company or of its predecessor companies for the period from 1950 to 1980, which he considers to be the relevant period. He has pointed out that the Company acted as a non-trading holding/investment company for some time prior to the liquidation, and the employees employed by the Company during that period are not material in the context of the types of claim which necessitated the bringing of this application by the Liquidator.

3.3 The Liquidator has also carried out a thorough investigation of the Company's insurance position in relation to the relevant period, to the extent that he has engaged Insolutions Ltd., a firm of insurance archaeologists, to examine the Company's historic employers' liability cover. He has been able to identify the Company's insurance brokers for the period from 1986 to the date of liquidation. As a result of the work of Insolutions Ltd. he has been able to establish that cover existed back to 1975. However, for the years 1975 to 1977 the excess is unknown and, as regards later periods, although the excess is known, the amount utilised is not, meaning, as I understand the position, that the full excess may have to be funded by the insured for any claims covering the relevant period. It has

been intimated that the Court can be provided with the specific details if required. The Liquidator has averred that, despite the research carried out, he has not been able to establish the insurance position prior to 1975, the period to which most of the claims which have emerged relate. Finally, the Liquidator has not been able to purchase cover since his appointment for the relevant period.

3.4 What I deduce from all the matters set out in the next preceding paragraph, although this was not specifically alluded to by counsel for the Liquidator, is that there is no insurance policy fund which could be "ringfenced" by virtue of s. 62 of the Civil Liability Act 1961 to adequately meet valid employer's liability claims against the Company in liquidation, which are not statute-barred. Insofar as it is relevant, s. 62 provides:

> "Where a person (hereinafter referred to as the insured) who has effected a policy of insurance in respect of liability for a wrong, ... if a corporate body, is wound up ... moneys payable to the insured under the policy shall be applicable only to discharging in full all valid claims against the insured in respect of which those moneys are payable, and no part of those moneys shall be assets of the insured or applicable to the payment of the debts (other than those claims) of the insured ... in the winding-up ..., and no such claim shall be provable in the ... winding-up ...."

What is not clear is whether the problem post-1975 relates solely to the excess and whether the insurers recognise that there are policies in place to meet non-statute barred personal injuries claims against the company in liquidation.

3.5 On the evidence before the Court, the Liquidator has taken the following steps to ascertain the creditors' claims against the Company. In May 2006, notice of the winding up and the appointment of the Liquidator was given in Iris Oifigiuil, as required by the Act of 1963. More importantly, notice was given in the Irish Times (25th May, 2006 and 29th June, 2006) and in the Irish Independent (25th May, 2006) requiring creditors to furnish details of their claims to the Liquidator. The advertisement followed Form No. 35 of Appendix M of the Rules of the Superior Courts, 1986, adapted to suit a voluntary liquidation. At a time when the Liquidator believed that it was appropriate to proceed to a final meeting of members and the dissolution of the Company, in September 2009 he gave notice of the convening of the final meeting in the Irish Times and the Irish Daily Mail, which was to be held on 6th November, 2009. That meeting was adjourned until January 2010 and the adjournment was re-advertised in December 2009 in both the Irish Times and the Irish Daily Mail. Following the re-advertising, the last of the six claims emerged and that claim, the circumstances of which will be outlined later, has been disposed of.

3.6 The two claims which have not been disposed of were the subject of letters in July 2008 from the same firm of solicitors on behalf of two claimants. Proceedings have not been initiated in relation to those claims, despite the fact that in September 2009 and October 2009 the solicitors were notified by the Liquidator of the imminence of the conclusion of the liquidation and the dissolution of the Company.

4. The law

4.1 While, as is pointed out in the annotation on s. 241 in MacCann and Courtney on *The Companies Acts 1963- 2009*, the fixing of a time limit pursuant to that provision is aimed at ensuring that the liquidator can make distributions to those creditors who have submitted their proofs in a timely manner, in the case of members' voluntary winding up it also ensures that he can make a distribution to the members in a timely manner. Subject to compliance with the time limit, the liquidator is also protected against future claims against him personally, to which he might be otherwise amenable, as the authorities to which the Court was referred by counsel for the Liquidator illustrate.

4.2 The earliest of the authorities referred to by counsel was a decision of the Chancery Division of the English High Court in *Pulsford v. Devenish* [1903] 2 Ch. 625. The effect of the judgment of Farwell J. is succinctly summarised in the head note, where it is stated:

> "It is the duty of a liquidator to find out from the books and papers of the company and the statement of affairs who are the creditors of the company, and if any creditor omits to put in his claim the liquidator should communicate with him.
>
> Sect. 133 of the Companies Act, 1862 imposes a statutory duty on the liquidator to pay the debts of the company *pari passu*, and, subject thereto, to distribute the property of the company amongst the shareholders; and whilst the liquidation continues a contributory ... and a creditor can apply ... to the Court for relief in respect of his rights. When the company is dissolved the statutory remedy is gone, but the duty remains, and a contributory or creditor has a remedy at common law for injury caused to him by a breach of the liquidator's statutory duty."

On the facts of that case, Farwell J. held that the liquidator had been guilty of negligence in the discharge of his statutory duty, and was liable in damages to unpaid creditors of the liquidated company of whose claims he was aware and who had no notice of the liquidation until long after the dissolution of the company.

4.3 A similar approach in relation to the duty of a liquidator as regards ascertainment of claims against the company was adopted by the Chancery Division of the English High Court in *In Re Armstrong Whitworth Securities Company Ltd* [1947] 1 Ch. 673. On the facts of that case the company had been its own insurer until 1st June, 1933 in respect of its liability under the Workmen's Compensation Acts. The company was voluntarily wound up in September 1943. The liquidator advertised for creditors. However, no steps, other than this general advertisement for claims, were taken to ascertain the company's position in regard to contingent claims of former employees under the Workmen's Compensation Acts. A final meeting of the company was held in October 1945 and the accounts of the company were duly passed. The liquidator proceeded to distribute the surplus amongst the shareholders but he had not completed the distribution before his death. After the final meeting, four former employees of the company had put in claims for compensation under the Workmen's Compensation Act, 1925 in respect of accidents which occurred before 1st June, 1933. In each case, the incapacity had arisen since the company went into liquidation. In fact, complete records had been kept from 1918 onwards of accidents to employees. Having outlined the information which was available in the records, Jenkins J. stated (at p. 691):

> "In such circumstances, it seems to me that his duty as liquidator was to take all steps reasonably open to him on the information in his possession to ascertain whether any of the former employees concerned did make any such claim. The obvious step open to the deceased liquidator on the information in his possession was to send a notice to each such employee at the address shown in the folder relating to his case, informing him of the liquidation and asking him whether he made any claim. I decline to accept the suggestion that the number of cases involved rendered this course impracticable."

In fact, it is recorded that there were sixteen thousand cases recorded of accidents which occurred before 1st June, 1933. Jenkins J. observed that, in each of the four cases before the Court, communication with the former employee concerned at the address recorded in his folder would, in fact, have reached him.

4.4 Both of the decisions referred to above were applied in *Austin Securities v. Northgate* [1969] 1 WLR 529, which was a decision of the Court of Appeal of England and Wales on an application to stay an action based on a contractual claim on the grounds that the company was being wound up and for want of prosecution by the plaintiffs. Apropos of the duty of a liquidator, Lord Denning M.R. stated (at p. 532):

> "It is the duty of a liquidator to inquire into all claims so see whether they are well founded or not, to pay the good claim, to reject the bad, to settle the doubtful; or, if need be, to contest them. It is only in this way that a liquidator can fulfil his duty ... of seeing that the property of the company is applied in satisfaction of its liabilities *pari passu*. In *Pulsford v. Devenish* ... Farwell J. said:
>
> > '.. I consider to be the duty of a liquidator, namely, not merely to advertise for
> >
> > creditors, but to write to the creditors of whose existence he knows, and who do
> >
> > not send in claims, and ask them if they have any claim ...
>
> In *In re Armstrong Whitworth Securities Co. Ltd* ..., at p. 689 Jenkins J. stated: 'the cardinal principle that in a winding up shareholders are not entitled to anything until all the debts have been paid'; and said, at p. 691, that the duty of the liquidator 'was to take all steps reasonably open to him ...to ascertain whether any of the former employees concerned did make any such claim.'
>
> Now in this case the liquidators did not fulfil that duty. They had knowledge of this claim by the plaintiffs and yet they did not deal with it."

4.5 Having regard to the foregoing authorities, which, in my view, are persuasive as representing the law in this jurisdiction, I consider that it was appropriate for the Liquidator to seek the assistance of the Court, as he has done on this application.

5. Conclusions

5.1 In this case, the personal injuries claims were received by the Liquidator after the advertisement of the notice to creditors and it is reasonable to infer that it was the advertising of the notice which prompted the claims, other than two of the claims.

5.2 One of those two claims was a claim against Wessel Energy Cables Ltd. (Wessel), which purchased the business and assets of Unidare Cables Ltd. (later known as Unidare Conductors Ltd.). The former employee's claim against Wessel was disposed of, apparently, before the winding up of the Company. The extant claim against the Company appears to be a claim by Wessel, presumably, for indemnity. While a plenary summons issued on 13th March, 2007, it has not been served. The evidence is that Wessel was dissolved on 14th September, 2007, although the basis on which it was dissolved is not clear, save that the notice given in Iris Oifigiuil on 14th September, 2007 indicates that it was pursuant to s. 311(5) of the Act of 1963. Unidare Conductors Ltd. has also been dissolved. The evidence put before the Court by the Liquidator is that there is no evidence that the former employee had been employed by the Company. Even though Wessel has been dissolved for in excess of four years, it seems to me that prudence dictates that the Liquidator should notify in writing the solicitors who formerly acted for Wessel, Arthur Cox, of the decision of the Court on this application, given that the time limit set cut in s. 311(8) for bringing an application for a restoration order is twenty years.

5.3 The other of those two claims, which I infer was not prompted by the Liquidator's advertisements, was the final claim received by the Liquidator from Frank Ward & Co. on behalf of the claimant in a letter dated 23rd December, 2009, the timing of which was obviously connected to the fact that the former employee had died on 9th September, 2008 and that the Coroner's inquest into his death held on 23rd November, 2009 concluded that he had died from malignant mesothelioma. It was because of the existence of that claim that the adjourned final meeting advertised for 11th January, 2010 was further adjourned. As I have stated, that claim has been disposed of, although it was not ruled, as was necessary, by the Court when the application was heard. However, Frank Ward & Co. were notice parties on this application and consented to the making of the order sought.

5.4 Aside from the unusual features of the asbestosis/mesothelioma related personal injuries claims which require special consideration, I am satisfied that the Liquidator has taken all steps reasonably open to him to establish the debts of, and claims against, the Company. The Liquidator has also used his best endeavours to ascertain whether any former employees of the Company have personal injuries claims against the Company, which are not statute-barred. The officers of the Company are not aware of the existence of any such claims against the Company prior to its liquidation. There are no employee lists available for the relevant period. The question the Court has to ask is whether there is any other avenue of inquiry open to Liquidator, given that it is generally recognised that asbestos related injury can be symptomless for up to forty years, as was noted recently by the Law Reform Commission in its Report on *"Limitation of Actions"* (LRC 104 - 2011).

5.5 I am also satisfied that the Liquidator has taken all steps reasonably open to him to establish the position in relation to employers' liability insurance. Further, I think it is understandable that he has not been able to obtain cover recently. However, it would be helpful to the Court to know what, if any, acknowledged insurance cover there is to meet non-statute-barred personal injuries claims.

5.6 In relation to the two claims referred to in para. 3.6, which have been made but which have not been pursued, the Liquidator has kept the solicitors who made the claims apprised of the position in relation to the liquidation. It is difficult to see what more he could do, although, for what it is worth, the claimants' solicitors should be notified of the order the Court intends to make.

5.7 As regards the first limb of the relief sought by the Liquidator, I propose making an order fixing Friday, 4th May, 2012 as the date by which creditors and claimants are to prove their debts or claims against the Company or, subject to any further order of the Court, are to be excluded from the benefit of any distribution made before those debts are proved. The order will contain directions that the Liquidator-

> (a) give notice of the making of this order by advertisement in the Irish Times, the Irish Independent and the Irish Daily Mail not later than 30th March, 2012, and
>
> (b) give notice in writing of the making of the order to Arthur Cox, Solicitors, in relation to the claim of Wessel and to the solicitors acting for the two claimants whose claims have not been disposed of referred to at paras. 3.6 and 5.6 above, in each case the notice to be given by letter dispatched not later than the 30th day of March, 2012.

5.8 There remains the possibility that claims for personal injuries against the Company, which are not statute-barred because of the

discoverability test introduced in the Statute of Limitations (Amendment) Act 1991 may emerge in the future. It is difficult to see how the concern which that raises can be eliminated. The only possible independent source of knowledge of asbestosis/mesothelioma related claims against the Company which emerges from the evidence is the Health and Safety Authority, which sought information in relation to one of the former employees of the Company in respect of whom a claim was made after his death, the information having been sought in June 2007. There will be a direction that the Liquidator write to the Health and Safety Authority requesting that any information it has in relation to such claims against the Company be furnished not later than 4th May, 2012.

5.9 I propose adjourning the remainder of the application until a date after 4th May, 2012, which is convenient to the Liquidator, so that the Liquidator can update the Court in relation to the outcome of the advertising and service of the notices referred to at para. 5.7 above and the inquiries referred to at para. 5.8. At that stage it would be helpful if the Liquidator could indicate the attitude of the insurers who provided cover post-1975 and put before the Court any proposal he has to allay the residual concerns in relation to the possible existence of non-statute-barred personal injuries claims against the Company.