THE HIGH COURT

[2003 No. 146 COS]

IN THE MATTER OF COMMAND FINANCIAL SERVICES LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2013

Judgment of Ms. Justice Laffoy delivered on 24th day of April, 2013.

The application

1. This is an application by AIG Europe Limited (the Petitioner) for an order that the dissolution of Command Financial Services Limited (the Company) on 29th April, 2011 be declared void pursuant to s. 310(1) of the Companies Act 1963 (the Act of 1963).

2. The circumstances in which the Company was dissolved were that, on 24th April, 2011, the Registrar of Companies (the Registrar) struck the name of the Company off the register pursuant to her powers under s. 12(3) of the Companies (Amendment) Act 1982 (the Act of 1982). That power of strike off arises where a company has failed to comply with its statutory obligations to make annual returns. The degree of default on the part of the Company prior to 24th April, 2011 is not clear on the evidence before the Court, but, in any event, there was default. The strike off was published by the Registrar in Iris Oifigiúil on 29th April, 2011. Thereupon, by operation of s. 12(3) of the Act of 1982, the Company was dissolved.

3. Section 310(1) provides that "the Court may at any time within two years of the date of dissolution make an order declaring the dissolution to have been void". Therefore, in this case, the jurisdiction would appear to expire in four days time, on 28th April, 2013. This application, which was initiated by a petition presented and a notice of motion issued on 3rd April, 2013, first came before the Court on 15th April, 2013, and it was then adjourned for one week and was heard on 22nd April, 2013.

Service

4. I am satisfied that the petition and the notice of motion and a grounding affidavit were duly served on:

(a) the last directors of the Company, namely, Cyril Keegan and Cliff O'Brien;

(b) the Registrar;

(c) the Revenue Commissioners; and

(d) the Chief State Solicitor.

I am also satisfied that the directors of the Company were aware that the application was for hearing on 22nd April, 2013, but they did not attend.

Appearance

5. At the hearing on 22nd April, 2013, both the Registrar and the Revenue Commissioners were represented. There was no appearance on behalf of the Chief State Solicitor. There was no letter from the Chief State Solicitor indicating the attitude of the Minister for Public Expenditure and Reform (the Minister) to the application.

The standing of the Petitioner to seek an order under s. 310

6. Section 310(1) provides that an order may be made under the section on an application being made for that purpose by the liquidator of the company or by any other person who appears to the Court to be interested.

7. The circumstances in which the Petitioner claims "to be interested" is that it indemnified the Company in relation to certain proceedings in the High Court, engaged legal representatives to act on behalf of the Company and defrayed the costs and expenses of such legal representatives. The proceedings in question were in the Commercial Court and were between John Betson and Others., as plaintiffs, and Gerard Killaly and Others, including the Company, as defendants (Record No. 2009/6428P; 2009 No. 337 COM). By order of the High Court (Peart J.) made on 18th January, 2011, it was ordered by consent that the action be struck out as against the Company and that the Company do recover against the plaintiffs the costs up to 23rd January, 2010 to be taxed in default of agreement. On this application an interim bill of costs in the sum of €64,381.10 has been exhibited. The Petitioner claims entitlement to the costs pursuant to the relevant policy of insurance. The purpose of seeking to have the dissolution of the Company declared void is to enable the Petitioner to recover the costs to which the Company is entitled under the order of 18th January, 2010.

Attitude of the Registrar of Companies

8. The Registrar of Companies issued a letter of 22nd April, 2013 to the Petitioner's solicitors in which it was stated that the Registrar had obtained advice that the Petitioner does not have standing to bring an application to restore the Company to the register pursuant to s. 12B(3) of the Act of 1982. Having outlined the circumstances in which the Company became dissolved, the letter continued:

> "If that dissolution is now voided pursuant to s. 310, the Company will revert to 'Struck Off' status, being the status which the Company had immediately prior to its dissolution on 29th April, 2011.
>
> A section 310 order does not place a struck off company back on the register
>
> – although its dissolution has been voided pursuant to s. 310, the company remains struck off. On that basis, it may be that your client will continue to face problems in attempting to enforce the costs order made in favour of the Company.
>
> Subject to you and your client being aware of the fact that the effect of a section 310 being filed with CRO will be to change the Company's status from 'Dissolved' to 'Struck Off', the Registrar of Companies has no objection to the making of the order sought by you in this matter."

That letter was copied to the Chief State Solicitor. At the hearing of the application counsel for the Registrar informed the Court that the Registrar was not objecting to the order sought, but was not expressing any view on its effect.

Attitude of the Revenue Commissioners
9. As is usual on applications to restore a company, the position of the Revenue Commissioners was set out on affidavit, in this case, an affidavit of Joe Hughes sworn on 11th April, 2013. That affidavit exhibited letters dated 10th April, 2013 to each of the directors of the Company requiring filing of outstanding tax returns in relation to the Company. Further, it indicated that the Revenue Commissioners were reserving their right to seek an order under s. 12B(4) of the Act of 1982 to make the directors personally liable for all revenue liabilities arising during the period of dissolution. My understanding of the position of the Revenue Commissioners at the hearing was that they considered that the Court had a discretion to void the dissolution but they considered that the Court should make the usual orders which it makes on an application under s. 12B(3) of the Act of 1982.

Form of order under s. 310
10. The form of order which the Court has jurisdiction to make under s. 310(1) is –

> ". . . an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void . . .."

The only other guidance which subs. (1) gives is that it provides that on the making of the order "such proceedings may be taken as might have been taken if the company had not been dissolved". That aspect of the section is of no relevance for present purposes.

Conclusions on application
11. Subject to one qualification, being satisfied that the Petitioner is "interested", I am satisfied that it is appropriate to make an order declaring the dissolution to have been void. The qualification is that the Court does not know what the attitude of the Chief State Solicitor on behalf of the Minister to the making of such an order is. As is pointed out in the annotation on s. 310 in MacCann & Courtney on *Companies Acts 1963 – 2012*, an application should be on notice to the relevant State authorities, including the Minister. Whilst the application was on notice to the Minister, it would appear that the Chief State Solicitor, on behalf of the Minister, did not come before the Court or express a view on the application because of the urgency with which the matter was dealt with on 22nd April, 2013. From the perspective of the Minister, the importance of an order under s. 310 is that any assets of the Company, which vested in the State under s. 28 of the State Property Act 1954 on its dissolution, will re-vest in the Company when the dissolution is declared to be void. The State notice parties who appeared have taken a constructive view in relation to this application, and I would anticipate that the Minister would adopt the same approach. Therefore, the qualification is that a letter from the Chief State Solicitor indicating that the Minister has no objection to an order being made under s. 310 must be filed with the registrar of the Court before an order in the terms sought can be perfected.

12. A further issue remains, which, in reality, is the most important issue. Counsel for the Petitioner submitted that the Court should not only make an order declaring the dissolution of the Company to have been voided, but the Court should also make an order restoring the Company to the register. Counsel for the Petitioner relied on two authorities:

> (a) *In re Belmont & Co. Ld.* [1952] 1 Ch. 10, which was a decision of the Chancery Division of the High Court in England; and
>
> (b) *In re Test Holdings (Clifton) Ltd.* [1970] 1 Ch. 285, which was also a decision of the High Court in England.

13. In the *Belmont* case, the application under the section then in force in the United Kingdom, which corresponded to s. 310(1) was made by the Commissioners of Inland Revenue, who had made various assessments to tax on the company prior to dissolution which, at the time of dissolution, were the subject of appeals which the Commissioners were unable to progress unless the dissolution was declared void. Wynn-Parry J. held that he had jurisdiction, not only to make the declaration but also to restore the company to the register. On this point, he stated (at p. 15):

> "In my view section 352 is unaffected by section 353, and the effect of declaring a dissolution void under that section where a company has been struck off the register under section 353 is to bring about the same position as obtained before the dissolution took place, and that therefore under section 352 there is inherent in the court jurisdiction to order restoration to the register of the name of a company struck off under section 353."

By way of explanation the analogue of s. 353 in the Act of 1963 was s. 311, in its original form before it was amended by the Act of 1982.

14. In the *Test Holdings* case, Megarry J. followed the decision in the Belmont case, having first analysed critically the finding that the Court could make an order restoring the company to the register. He observed (at p. 291) that counsel for the Registrar of Companies had not urged upon him that he ought to refuse to follow the *Belmont* decision, partly because the case had been relied upon in many cases. He expressed the view that, if the *Belmont* case had not been decided, it might have been a close question whether or not to decide the matter as it was decided in that case. However, he came to the conclusion (at p. 292) that, the decision being there, on the whole the right course for a judge a first instance was to follow it.

15. Obviously, what is of concern to the Court is to preclude a situation in which s. 310 would be invoked in circumstances in which the applicant could avail of the remedies provided for in s. 311 of the Act of 1963 or in s. 12B(3) of the Act of 1982 so as to avoid the strictures which are imposed in making orders under those sections. I accept that that is not the objective of the applicant in this case. However, because of the urgency of the matter because the time-span provided for in s. 310 is about to expire, this aspect of the matter was not, in my view, adequately explored through legal submissions and, in particular, apart from the helpful contents of the letter of 22nd April, 2013 from the Registrar, the Court has not had the benefit of submissions on behalf of the Registrar, whom I regard to be the real *legitimus contradictor* on the application as regards this issue.

Order
16. Accordingly, subject to there being forthcoming a letter of no objection from the Minister, as outlined earlier, I propose making an order precisely in the terms of s. 310, namely, an order declaring the dissolution of the Company to have been void. An order in those terms is certainly within the jurisdiction of the Court and it takes the urgency out of the matter.

17. If any dispute arises later as to the broader implications of the order, the matter can be re-entered for further submissions.