Neutral Citation Number: [2013] IEHC 256

THE HIGH COURT

[2012 No. 277 COS]

IN THE MATTER OF MJBCH LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF SECTION 222 OF THE COMPANIES ACT 1963

AND IN THE MATTER OF AN APPLICATION BY

MARY MURPHY

APPLICANT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 15th day of April, 2013

1. The applicant, Ms. Mary Murphy, suffered an accident on 20th February, 2010, at the D4 Hotels Complex, Ballsbridge, Dublin 4. Arising out of investigations made on her behalf by her solicitors, they have been informed that MJBCH Ltd. ("the Company") was, at the material time, the occupier of the premises on which the accident occurred. They have further been informed that the Company had taken out a policy of insurance with a named insurance company.

2. The applicant applied to the Personal Injuries Assessment Board and by an authorisation dated 3rd June, 2011, was granted authorisation to commence proceedings against the Company. On 10th August, 2012, plenary proceedings were instituted under High Court Record Number 2012 No. 7988 P between Mary Murphy, plaintiff and JDPHC, MJBCH Ltd., Mountbrook Developments Ltd. and BCPHC, defendants. At the time of institution of the plenary proceedings, the applicant and her solicitors were unaware that on 25th June, 2012, an order had been made by the High Court for the winding up of the Company by the Court and Mr. Declan Taite appointed Official Liquidator thereof.

3. The plenary proceedings were served on the Company in January, 2013. In response, the applicant's solicitor received a letter from the Official Liquidator advising that the Company had been wound up and that the Official Liquidator did not intend to defend the proceedings. Thereafter, the solicitor for the applicant wrote to the Official Liquidator of an intention to make an application pursuant to s. 222 of the Companies Act 1963, seeking retrospective leave of the Court to the commencement of the proceedings. In that letter, the solicitors refer to the English decisions of *In Re Saunders (A Bankrupt)* [1997] Ch. 60, and *Re Colliers International UK plc*. [2012] EWHC 2942 (Ch) as authority for the proposition that this Court could retrospectively make an order pursuant to s. 222 granting leave to commence proceedings. The solicitors also made clear that the applicant was anxious to proceed against the Company in the plenary proceedings in order to protect her position in respect of s. 62 of the Civil Liability Act 1961, having regard to the position taken by other parties in the proceedings to s. 35(1)(i) of the Act of 1961.

4. The present application was served on the Official Liquidator. The Court was informed that in advance of the application, through his solicitors, the Official Liquidator had informed the solicitors for the applicant that he was taking a neutral stance on the application and did not propose incurring the expense of appearing on this application.

5. The primary issue on this application is whether or not the Court has jurisdiction pursuant to s. 222 to make an order granting leave for the commencement of proceedings which has retrospective effect. Put another way, the question is whether or not the Court has jurisdiction to make an order, the effect of which is to validate proceedings commenced after the making of a winding up order but without the prior leave of the Court. If the Court does have jurisdiction, there is the further issue as to whether it should grant the order sought.

The Law

6. Section 222 of the Companies Act 1963 provides:

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

7. Applications pursuant to s. 222 are brought as a matter of course in the Examiner's Court motion list. In recent years, it has been the practice to reject applications made in respect of proceedings commenced after the making of a winding up order and prior to an application under section 222. This was done following the approach of Rattee J. in the English High Court to s. 130(2) of the Insolvency Act 1986, which is expressed in identical terms to s. 222, in *Re National Employers Mutual General Insurance Association Ltd. (In Liquidation)* [1995] 1 B.C.L.C. 232. Until the present application, no counsel or solicitor has sought to challenge the correctness of this approach as the proper construction of s. 222 of the Act of 1963.

8. Counsel for the applicant does so in this application relying, in particular, on the reasoning of and authorities referred to in two decisions also of the English High Court: *Re Saunders (A Bankrupt)* [1997] Ch. 60, and *Re Colliers International UK plc. (In Administration) & Ors*. [2012] EWHC 2942 (Ch), decided subsequent to *Re National Employers Mutual General Insurance Association Ltd.* Counsel, in making the application, informed the Court that he was not aware of any contrary authorities in England and Wales (other than those referred to in these two judgments) and had been unable to find any written Irish judgment on s. 222 of the Act of 1963. The carefully reasoned judgments given by Lindsay J. in *Re Saunders* and David Richards J. in *Re Colliers International UK plc*. appear to me persuasive and necessitate a reconsideration of the former practice of following the approach of Rattee J. in *Re National Employers Mutual General Insurance Association Ltd*. Furthermore, on a full consideration of the issues, there is the additional requirement in Ireland that s. 222 of the Act of 1963 be given a construction consistent with the Constitution, and in particular, the right of access to the courts guaranteed by Article 40.3.

9. The issue is whether, on a proper construction of s. 222, a proceeding commenced against a company which has already been the subject of a winding up order without leave of the court, is a nullity, or whether such a proceeding is merely an irregularity and s. 222 gives the Court jurisdiction to consider retrospectively making an order granting leave for the commencement of the proceedings which has the effect of validating the proceedings already commenced.

10. In *Re National Employers Mutual General Insurance Association Ltd.*, Rattee J. followed an earlier decision of Milmo J. in *Wilson v. Banner Scaffolding Ltd*. (1982) Times, 22 June, in which Milmo J. decided that s. 231 of the Companies Act 1948 (the predecessor of s. 130(2) of the 1986 Insolvency Act) meant that proceedings commenced without leave were a nullity and could not be validated by a retrospective leave from the Court. Milmo J. is reported as determining:

> ". . . the writ as originally issued with the name of the second defendants upon it was a nullity as far as the second defendants were concerned. The prohibition against issue without leave of the court imposed by s. 231 of the Companies Act 1948 was absolute and unqualified."

11. Rattee J. observes:

> "As Milmo J. in *Wilson v. Banner Scaffolding* Ltd. (1982) Times, 22 June pointed out, that provision [i.e. s. 231 of the Act of 1948] was intended by the legislature to protect the interests of the creditors of a company in liquidation by preventing the company being subject to actions once it had gone into liquidation without the court first considering whether such an action ought to be allowed."

12. He subsequently concluded that Milmo J. was correct in his construction of s. 231 of the Act of 1948, and he saw no reason to reach a different conclusion in relation to the indistinguishable provisions of s. 130(2) of the Insolvency Act 1986.

13. This decision was reconsidered in England in 1996 by Lindsay J. in *In Re Saunders (A Bankrupt)* [1997] Ch. 60 in a lengthy judgment which followed three days of *inter partes* submissions. The section under consideration was s. 285(3) of the Insolvency Act 1986, which applies to bankruptcy and insofar as relevant provides:

> "After the making of a bankruptcy order, no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall . . . commence any action or other legal proceeding against the bankrupt except with the leave of the court and on such terms as the court may impose . . ."

14. Whilst the section at issue in *Saunders* related to bankruptcy and not the winding up of companies, there was no distinction made in argument between the relevant sections. Rather, it was submitted to the Court that a significant number of prior relevant English decisions and Commonwealth decisions had not been opened to either Milmo J. or Rattee J. in their decisions already referred to herein and that their conclusions were wrong in principle, insofar as they determined that the commencement of proceedings without leave in insolvency meant the proceedings were a nullity rather than irregular. Lindsay J. having considered in some detail the earlier English decisions and Commonwealth decisions, at p. 82, summarised the position in the following terms:

> "There was a practice in England dating back at least to *Re Wanzer Ltd*. [1891] 1 Ch. 305, a practice recognised to be such at least as early as *R v Lord Mayor of London, ex p Boaler* [1893] 2 Q.B. 146, that proceedings in insolvency begun without the stipulated leave should not be regarded as irretrievably null but rather as existing and capable of redemption by the late giving of leave. Judges and counsel of great experience in England, from *Re Wanzer Ltd* in 1891 to *Re Hutton (a bankrupt),* [1969] 2 Ch. 201, treated retrospective leave in insolvency as a thing capable of being granted and as requiring no particular discussion. As the Court of Appeal emphasised in *Rendall v Blair* 45 Ch. D. 139, the legislature knows well enough how to provide that leave shall be a strict condition precedent to valid proceedings being issued and that clear words are to be used if that is intended, words perhaps even requiring a provision for the dismissal of the proceedings if the condition precedent is not satisfied. Without some such clear language being used the provision can be taken to be directory- the word used in *Rendall v Blair*, and, in Australia, used in *Re Testro Bros Consolidated Ltd* [1965] V.R. 18 and Re Horsham Kyosan Engineering Co Ltd [1972] V.R. 403. To the same effect is the view taken in *Canada (Wheat Board) v Krupski* 26 C.B.R. (3d) 293 and elsewhere that a want of leave is only an irregularity."

Lindsay J. recognised considerable force in a conclusion that the natural construction of the words of s. 130(2) of the Insolvency Act 1986, was in accordance with the conclusions of Milmo J. and Rattee J. Nevertheless, having regard to the decisions to which he referred and the practical inconveniences and injustices described, he decided that the words were capable of more than one legitimate meaning and that he should give effect to the statutory purpose by concluding that the section gave him jurisdiction to grant leave, notwithstanding that the proceedings had already commenced.

15. Notwithstanding this decision in 1996, it appears from the subsequent decision in *Re Colliers International UK plc.* [2012] EWHC 2942 (Ch) given on 24th October, 2012, that there continued to be differing views in the English High Court. In that judgment David Richards J. referred to a decision on the bankruptcy side in *Re Taylor* [2006] EWHC 3029 (Ch) [2007] Ch. 150, in which HH Judge Kershaw Q.C. (sitting as a High Court judge), having reviewed all the authorities and submissions considered in *Saunders*, concluded that the decision was wrong and rejected an unopposed application for retrospective permission to commence an action against a defendant who had been adjudicated bankrupt. Other High Court decisions are also referred to in the judgment, to the opposite effect of the position in *Saunders*.

16. None of the English decisions or Commonwealth decisions are binding on me. Insofar as they consider the proper statutory construction, having regard to the purposes of Acts similar to the Companies Act 1963, they are of assistance. In this respect, the judgment of David Richards J. in *Re Colliers International UK plc*. is of particular assistance. In addressing the question as to whether the proper construction of the various sections required the conclusion that proceedings brought without the required permission under the provisions of the UK Insolvency Act are a nullity, he stated at para. 32:

> "In addition to the consequences of holding that proceedings are a nullity, it is clearly relevant to have regard to the purpose of the provisions in the context of insolvency. It is important to note that the requirement for permission for the commencement of proceedings applies to insolvency proceedings under the control of the court: bankruptcy, winding-up by the court and administration. It does not apply to a company in creditors' voluntary winding-up. This suggests that the real purpose of these provisions is not so much the protection of creditors as the purpose identified by Black LJ in *Boyd v Lee Guinness Limited* [1963] N.I. 149.
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> > 'This section is one of a series of provisions designed to ensure that when a winding-up order has been made by the court the whole of the task of supervising the collection and distribution of the company's assets should be

committed to the winding-up court and, accordingly, that all proceedings having any bearing upon the winding-up of the company should remain under the supervision and control of that court.'

Given that purpose, it is hard to see why the court should not be permitted to grant retrospective permission if in the circumstances it is appropriate to do so."

Having regard, *inter alia*, to such statutory purpose, David Richards J. reached the conclusion that *Re Saunders* was correctly decided and that retrospective permission could be given for the commencement of proceedings under the relevant sections of the Insolvency Act 1986, including s. 130(2), which is stated in identical terms to s. 222 of the Act of 1963.

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

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

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

20. In my judgment, having regard to the purpose of s. 222 as set out above and the above constitutional principles, in the absence of express words which provide that the commencement of proceedings without leave of the court in breach of s. 222 render proceedings a nullity or which preclude the court from granting leave for commencement after the event s. 222 should not be so construed. Whilst s. 222, by its express words provides "no action or proceeding shall be proceeded with or commenced against the company except by leave of the court", it does not provide for the consequences of the commencement of an action without leave of the court. Further, while the words "except by leave of the court" are open to the construction that leave should be obtained prior to commencement, it does not appear to me that, having regard to the statutory purpose and the necessity to construe the restriction on access to the courts strictly, that these words should be construed as precluding the court granting leave for the commencement of the action after the event. A broader construction of the time at which leave may be sought is in accordance with the statutory purpose of controlling proceedings in a court ordered winding up as the entitlement to pursue the action is still under the control of the court. This construction also avoids the potential adverse consequences of a restriction on access to the courts unnecessary to the statutory purpose of s.222, such as failing to commence within a limitation period or incurring the unnecessary expenses of two sets of proceedings. If s. 222 is construed as not giving the court jurisdiction to make an order granting leave after commencement, it inevitably creates a situation which requires at a minimum discontinuance of the proceedings and, if leave is then subsequently granted, recommencement and service of identical proceedings, and if a limitation period has expired there would be further potentially severe adverse consequences for a plaintiff.

21. Accordingly, I have come to the conclusion that the Court does have jurisdiction pursuant to s. 222 of the Act of 1963, to consider granting leave for proceedings already commenced and that if such leave is granted, the order will have the effect of retrospectively authorising the commencement and authorising the continuation of the proceedings for the purposes of s. 222 of the Act of 1963.

22. Notwithstanding this construction, in the normal course, leave should be sought prior to the commencement of the proceedings. However, where this has not been done, it follows the court retains a jurisdiction to consider, retrospectively, the granting of leave. In deciding any such application, the court should take the same approach as it would have taken had the application been made prior to the commencement of proceedings. A plaintiff who fails to comply with the statutory requirement of s. 222 should not gain any advantage by not having obtained leave at the appropriate time.

23. On the facts herein, I have concluded that I should exercise discretion in favour of now granting leave pursuant to s.222 of the Act of 1963. The applicant would have been entitled to such an order if the application had been made prior to the commencement of the plenary proceedings. The applicant contends that she suffered an injury in premises allegedly occupied by the Company. Whilst the Official Liquidator has indicated that there are no funds available to meet any claim, the applicant envisages that she may be able to avail of s. 62 of the Civil Liability Act 1961, and also having regard to her claim against other defendants, she seeks to avoid any prejudice by reason of s. 35(1)(i) of the Act of 1961.There is no prejudice asserted to the winding-up of the Company in now granting leave.

Relief

24. There will be an order pursuant to s. 222 of the Companies Act 1963 granting the applicant leave retrospectively for the commencement of the plenary proceedings referred to in paragraph one of the notice of motion.