

THE HIGH COURT

[2003 No. 5269P]

BETWEEN

EMO OIL LIMITED

PLAINTIFF

AND

SUN ALLIANCE AND LONDON INSURANCE PLC

DEFENDANT

Judgment of Mr. Justice Gilligan as delivered on the 25th day of November, 2005.

1. In these proceedings the plaintiff, an importer and distributor of oil products, claims an indemnity on foot of a contract for "catastrophe credit" insurance as made with the defendant. The parties have agreed to have a preliminary issue determined in relation to the interpretation of the terms of the insurance policy entered into ("the Policy"). The specific matter at issue is whether, where a winding up petition on grounds of insolvency was presented in respect of one of the plaintiff's buyers during the period of the Policy, but the winding up order in respect of that company was made after the expiration of the Policy, the liquidation of that company can be said to have "occurred" within the period of "the Policy". The wording of the issue is

"Whether the insolvency of the insured buyer occurred within the period of insurance under the terms of the policy of insurance, having regard to the terms of Section 220(2) of the Companies Act, 1963".

2. The plaintiff and the defendant entered into a contract for "catastrophe credit insurance" on the 1st May, 1997, which was renewed by correspondence on varied terms at various dates, the last of which was for the period from the 1st August, 2001, to the 31st July, 2002, which was extended to the 31st August, 2002. It provided for cover *inter alia* in the following circumstances:

"The Insurance Provided

The company will indemnify the insured in respect of the aggregate Insured Losses in excess of the Deductible arising during the normal course of the Insured's Business from the Insolvency or Protracted Default of an Insured Buyer.

PROVIDED THAT

A. The Insolvency or Protracted Default of the Insured Buyer occurs during the Period of Insurance ..."

3. The Policy defines "Insolvency" by reference to a number of events, including the following:

"Insolvency shall mean that one of the following has occurred in respect of the Insured Buyer ...

A resolution has been passed for the voluntary winding up or an order for winding up has been made by the Court under Part IV of the [British Insolvency Act 1986]

Liquidation has occurred as defined in Section 247 of the [British Insolvency Act, 1986] (other than a voluntary winding up solely for the purpose of amalgamation or reconstruction on a solvent basis) ... or the equivalent as stipulated or in accordance with the local law of the countries specified under the Geographical Limits."

The "Geographical Limits" are described as "Eire and U.K".

4. On the 29th August, 2002, the plaintiff presented a petition seeking the winding up of one of its customers, Dev Oil & Gas Limited ("Dev Oil"). A winding up order was made on the 11th September, 2002, i.e. after the expiry of the term of the Policy. Once a deduction is made in respect of VAT, the plaintiff alleges that it has suffered a net loss of €647,990.72 as a result of Dev Oil's insolvency. It further alleges that Dev Oil was an insured buyer within the terms of the Policy and that Dev Oil's debts are insured losses under the Policy. None of these matters are admitted by the defendant.

5. I am satisfied in the particular circumstances of this case that it is appropriate to follow the rationale of Laffoy J. in *UPM Kymmene Corporation v. BWG* (Unreported, High Court, Laffoy J., 11th June, 1999) with regard to the construction of a contract. *UPM v. BWG* concerned an alleged breach of warranty by the defendant vendor in relation to the funding of pension schemes contained in a share purchase agreement. Laffoy J stated at p. 24 of her judgment;

"...the basic rules of construction which the Court must apply in interpreting the documents which contain the parties' agreement are not in dispute. The Court's task is to ascertain the intention of the parties, and the intention must be ascertained from the language they have used considered in the light of the surrounding circumstances and the object of the contract. Moreover, in attempting to ascertain the presumed intention of the parties the Court should adopt an objective, rather than a subjective approach and should consider what would have been the intention of reasonable persons in the position of the parties".

6. Section 220(2) of the Companies Act, 1963 provides as follows;

"In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up".

7. Pursuant to s. 220 (2) of the Companies Act, 1963 the plaintiff submits the winding up of Dev Oil by the Court commenced on the date of the presentation of the petition for the winding up, namely the 29th of August, 2002. With regard to the concept of relation back, the plaintiff submits a number of important consequences will flow from such. Reference is made to s. 218 of the Companies Act, 1963, which provides that any disposition of the property of the company made after the commencement is void unless the Court otherwise directs. Reference is also made to s. 286 of the Companies Act, 1963 concerning payments made to creditors which may be deemed to be a fraudulent preference if made within six months of the commencement of the winding up. The plaintiff's submissions also make reference to the issue of floating charges and the void nature of such if created within 12 months prior to the commencement of winding up proceedings. The plaintiff further refers to the power of the liquidator to disclaim any onerous property within 12 months of the commencement of the liquidation as an important consequence of the principle of relation back. Finally the

plaintiff also submits s. 150 of the Companies Act, 1990 is an important consequence flowing from the principle of relation back. Section 150 concerns the requirement that the court must be satisfied the Directors were in fact directors of the company within a 12 month period prior to the commencement of a winding up.

8. On the defendants behalf it is submitted that the definition of insolvency in the policy is predicated on the "occurrence" of liquidation rather than on a deemed "commencement". It is submitted that the provisions of

9. s. 220 (2) of the Companies Act 1963 do not in fact assist the plaintiff. The defendant contend had it been intended to apply the principle of "relation back" to the policy, the term commencement or some similar term would have been used. Instead the defendants contend the policy defines insolvency by reference to the occurrence of liquidation and in this jurisdiction it is submitted that liquidation cannot *occur* unless a winding up order is made or a resolution is passed for the winding up of a company.

10. S. 129 (2) of Part IV of the UK Insolvency Act, 1986 mirrors the exact formulation of s. 220 (2) of the Companies Act, 1963, and provides;

"In any other case, the winding up of a company by the Court is deemed to commence at the time of the presentation of the petition for winding up."

11. At p. 156 of Sealy and Milman's *Annotated Guide to the Insolvency Legislation*, 2004, 7th Ed., they note the effect of s. 129 (2) is to backdate the operation of the winding up order to the time when the petition for winding up was presented.

12. Section 247 of Part VII of the Insolvency Act 1986 (in respect of which there is no Irish equivalent) provides as follows;

"(1) In this Group of Parts, except insofar as the context otherwise requires, "insolvency" in relation to a company, includes the approval of a voluntary arrangement under Part I ... the appointment of an administrator or administrative receiver.

(2) For the purposes of any provision this Group of Parts, a company goes into liquidation if it passes a resolution for voluntary winding up or an order for its winding up is made by the court at a time when it has not already gone into liquidation by passing such a resolution."

13. I take the view it is of significance that the definition of insolvency in the insurance contract refers specifically to the equivalent local law or in accordance with the local law of the countries specified under the geographical limits, namely Eire and the UK.

14. A similar issue arose for consideration in *Mettoy Pension Trustees Limited v. Evans* (1990) 1 W.L.R. 1587. The Court was required to interpret the phrase "going into liquidation" in the rules of a pension scheme in circumstances where a period of just over two months had elapsed between the presentation of a winding up petition and the making of a winding up order. The Court rejected the argument made on behalf of an employee of the company based on s. 229(2) of the U.K. Companies, Act 1948 (which was in materially identical terms to s. 220(2) of the Irish Acts of 1963 that the term "going into liquidation" should be read as the date of the presentation of the winding up petition which argument was maintained on the basis that s. 229(2) of the UK Companies Act, 1948 was expressed to be of general application.

15. Warner J. in rejecting this argument stated at p.1612 of the judgment:

"There is to my mind no doubt that, in ordinary parlance, as Mr. Nugee submitted, a company goes into liquidation in the case of a voluntary liquidation when the resolution for winding up is passed and in the case of a compulsory liquidation when the winding up order is made. Mr. Inglis-Jones relied, however, on section 229(2) of the Companies Act 1948, which provides that, except where the presentation of a winding up petition has been preceded by a resolution for voluntary winding up, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition. Section 229(2) of course re-enacted a provision that had existed in successive Companies Acts at least since 1862 and is now to be found in section 129(2) of the Insolvency Act 1986. It was the Act of 1948 that was in force when Mettoy went into liquidation.

Mr. Inglis-Jones pointed out that section 229(2) is expressed to be of general application. Its terms are not qualified by any such expression as 'for the purposes of this Act'. That contrasts with the terms of, for instance, section 247(2) of the Insolvency Act 1986, which provides:

'For the purposes of any provision in this group of Parts, a company goes into liquidation if it passes a resolution for winding up or an order for its winding up is made by the court ...'

Mr. Inglis-Jones submits that, the draftsman of the 1969 rules having referred to a legal event which is deemed by statute to have occurred at a particular date, a different date cannot be attributed to it. He says that the company, being a creature of statute and its liquidation being provided for by statute, the date of its liquidation is to be determined in accordance with the statute. He adds, though I find this less easy to follow, that the adoption of the date in the Act makes for certainty which is what the trustees need ...

To my mind the phrase 'going into liquidation' points to the actual beginning of the winding up, not to its statutory 'deemed' beginning. Practical considerations which were mentioned both by Mr. Inglis-Jones and by Mr. Nugee support that view. The presentation of a winding up petition does not of itself establish that there will be a liquidation of the company concerned. The petition may be contested. Even if it results in the making of a winding up order, there will be a delay, maybe quite a long delay, between the presentation of the petition and the winding up order. If the date of the presentation of the petition is to be treated, if and when a winding up order is made, as having been the date when the company went into liquidation, there will be, following the presentation of the petition, a period of uncertainty during which no one will know whether the scheme is to be administered as a continuing scheme or as a dissolved scheme, for instance whether or not employee's contributions should continue to be collected.

In the result I think that the reference to the company 'going into liquidation' ... is to be construed, in the case of a compulsory winding up, as a reference to the making of the winding up order."

16. The plaintiff submits *Mettoy Pensions* should be distinguished from the case at hand given the difference in the factual scenarios.

17. In *Re Dynamics Corporation of America* (1972) 3 All E.R. 1046 Templeman J. appears to be taking a different approach to that of Warner J. in *Mettoy Pensions*. *Re Dynamics* concerned an application under s. 226 (b) of the UK Companies Act, 1948, restraining proceedings in actions pending against a number of companies. Winding up petitions were already issued against the American parent company and its subsidiary at the time the motion was made. Templeman J. stated at p. 1050;

"in my judgment, once a petition has been presented everything thereafter is in the course of the winding up a company although it does not necessarily follow that a winding up order will be made at the end of the day."

18. The decision of this Court (Kelly J.) in *Re Eurofood IFSC Limited* (Unreported, High Court, Kelly J, 23rd March, 2004) dealt with a number of insolvency and jurisdictional matters, which included the issue as to whether the presentation of a petition for the winding up of Eurofood IFSC Ltd. under s. 220 (2) of the Companies Act, 1963 and the appointment of a provisional liquidator to it by this Court brought about the opening of main insolvency proceedings under Article 3 of Council Regulation (EC) No 1346/2000 on insolvency proceedings.

19. Kelly J. made an order pursuant to s. 220(2) of the Companies Act 1963 specifically related back to the date of the presentation of the petition. Kelly J. stated as follows in the course of his judgment at p. 22:

"The argument which is advanced on behalf of Signor Bondi to the effect that the definition of "the time of opening of proceedings" in Article 2 is when the final winding up order is actually made is completely inconsistent with the definition in Article 2(f). Indeed, even if there had never been a provisional liquidator appointed it is clear that under Irish insolvency law and in particular Section 220(2) of the Companies Act 1963, an order appointing an official liquidator becomes effective as of the date of presentation of the petition which in this case was the 27th January, 2004 even though an order directing the winding up of the company post dates the date of presentation of the petition. This provision of Irish insolvency law mirrors a similar provision in the law of England and Wales. Such a provision may appear peculiar in other jurisdictions but it has long been a part of the law of this State and its nearest neighbour and was known to the drafters of the Regulation."

20. *Re Eurofoods* was subsequently appealed to the Supreme Court by the Company Administrator, appointed by the Italian Court. However the appeal was confined to Kelly J.'s finding that the decision of the Parma Court of the 20th of February, 2004, should not be recognised in Ireland. (*Re Eurofoods IFSC Ltd*. Unreported, Supreme Court, 27th July, 2004).

21. I am satisfied that the issue to be decided in *Mettoy Pension Trustee Ltd* can be distinguished from the particular circumstances at issue in this case. In *Mettoy Pension Trustee Ltd* the Court was asked to determine the meaning of the words

22. "a company going into liquidation" within the meaning of a deed setting out certain rules concerning a pension scheme whereas the issue to be decided by this Court is as regards the date the Court should attribute to the occurrence of the insolvency within the meaning of the policy and having regard to Irish law. In any event, I prefer to follow the judgment of Kelly J. in *Re Eurofood IFSC Limited* and the view as expressed by Templeman J. in *Re Dynamics Corporation of America*.

23. I take the view in the particular circumstances of this case that in determining the issue that arises in accordance with Irish law and in particular s. 220(2) of the Companies Act 1963, the liquidation of Dev Oil Limited occurred on 29th day of August, 2002, being the date when the petition was presented by reason of the fact of the order that was made by this Court on 11th September, 2002. I follow the rationale of Kelly J. in his interpretation of s. 220(2) of the Companies Act, 1963 to the effect that the order appointing the official liquidator becomes effective as of the date of the presentation of the petition which in this case was at a time within the term of the policy. Accordingly, I come to the conclusion that the issue to be decided is to be resolved in the plaintiffs favour with the insolvency of the insured buyer occurring within the period of insurance under the terms of the policy of insurance having regard to the terms of s. 220(2) of the Companies Act, 1963.