Neutral Citation No: [2020] NIQB 64	*Ref:* HOR11191
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 02/03/2020

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

ANDRONICS COMMUNICATIONS LTD

Plaintiff

and

AIB GROUP (UK) TRADING AS FIRST TRUST BANK

Defendant

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HORNER J

Background Facts

[1] In the previous judgment HOR11022, [2020] NIQB 66, I set out the history of the present dispute. I was concerned that Robert Andrews ("RA"), a personal litigant, who was unable to afford legal representation in a complicated case which raised difficult legal issues would be at an unfair disadvantage. I was told that the Law Society and the Bar would not provide pro bono assistance to someone with serious health issues who undoubtedly required it. I regard this state of affairs with both concern and disappointment. The Law Society and the Bar Council need to look seriously at their policies on providing legal assistance to deserving litigants such as RA who obviously require professional support and advice. Fortunately, the Attorney General ("the AG") stepped up to the mark and agreed to make legal argument on behalf of RA. The court is indebted to both the AG and to Mr Gowdy, who represented the defendant ("the bank"), for the quality of their submissions.

The relevant facts are these:

(i) A petition for winding up the plaintiff was presented on 12 August 2008.

(ii) The plaintiff was wound up on 20 November 2008 and its bank accounts were closed on that date.

(iii) On 20 October 2010 the plaintiff was dissolved on the conclusion of its winding up.

(iv) On 31 January 2014 the plaintiff was restored to the Register of Companies by order of the Chancery Division (Companies) of the High Court of Justice in Northern Ireland.

(v) On 9 October 2014 the plaintiff commenced legal proceedings against the bank alleging, inter alia, breach of contract, negligence and breach of statutory duty.

(vi) On 5 April 2016 the plaintiff was struck off and dissolved yet again for failing to submit returns.

(vii) On 29 June 2016 the bank applied to strike out the proceedings on the basis that, inter alia, the action was not properly authorised by the plaintiff.

(viii) On 8 September 2016 the plaintiff was again restored to the Register.

(ix) On 16 March 2017 Mr Kenneth Pattullo was appointed as liquidator of the plaintiff.

(x) On 5 September 2017 Kenneth Pattullo as liquidator disclaimed the cause of action against the bank.

(xi) On 19 September 2017 Kenneth Pattullo as liquidator filed a notice of disclaimer in court.

(xii) On 6 November 2017 Robert Andrews ("RA") a former director of the plaintiff, applied to set aside the appointment of Kenneth Pattullo as liquidator and to set aside the disclaimer of the cause of action against the bank.

(xiii) On 25 October 2018 RA withdrew the application to set aside the appointment of Kenneth Pattullo as liquidator and also his application to set aside the disclaimer of the cause of action.

(xiv) On 22 February 2019 Master Bell struck out the claim brought by the plaintiff against the bank and awarded costs personally against RA.

(xv) On 24 February 2019 RA appealed against that part of the order which required him to pay costs personally. He did not appeal the order itself initially.

(xvi) On 29 March 2019 well outside the time permitted by the Rules of Judicature (NI) 1980 ("the Rules") RA purported to appeal the entirety of the Master's order.

[2] The appeal is out of time: see Order 58 Rule 1(3) which provides that the Notice of Appeal must be issued within five days after the order was made, and must then be served not less than two clear days before the date of the hearing. The notice of the appeal was issued some 35 days after the date of the Order and was not served on the bank in advance of the hearing on 12 April 2019 contrary to the Rules. In fact, it has not been served at all. I have been asked to extend time. The factors which a court should take into account in deciding whether to exercise its discretion to extend time are those set out in *Davis v Northern Ireland Carriers (1979) NI 19* which I considered in my earlier judgment at paragraph [9].

[3] These principles are:

(i) Whether time is sped. In this case time is sped and no reason has been offered as to why this was allowed to happen.

(ii) When the time has expired the extent to which the party applying is in default. No explanation whatsoever has been provided as to why the Notice of Appeal was not served within a time limit.

(iii) The effect on the opposite party of granting the application and, in particular, whether he can be compensated by costs. The court is not in a position to reach any conclusion about whether or not a costs order would be sufficient compensation. The court does not even know whether or not RA will be in a position to discharge an order for costs.

(iv) Whether a hearing on the merits has taken place or would be denied by refusing an extension. In this case RA has had a hearing before the Master on the merits.

(v) Whether there is a point of substance.

(vi) Whether the point is of general, not merely particular, significance. In this case there are potentially points of general significance.

(vii) Finally, the rules of court are there to be observed.

[4] It seems to me that if RA has no point of substance, especially no point of general significance, to put forward, this court should refuse leave to extend time to

appeal. The other factors all weigh very heavily in the balance against extending time to appeal.

DISCUSSION

Does RA have locus standi to appeal?

[5] Order 5 Rule 6 limits the circumstances in which any company may issue proceedings otherwise than through a solicitor:

> "(2) Except as provided by paragraph (3), or under any statutory provision, the body corporate may not begin or carry on any such proceedings otherwise than by a solicitor.
>
> (3) A body corporate may begin and carry on any such proceedings by an employee if—
>
> (a) the employee has been authorised by the body corporate to begin and carry on proceedings on its behalf; and
>
> (b) the Court grants leave for the employee to do so."

Accordingly, RA requires the leave of the Court to act on behalf of the plaintiff, but there are two pre-conditions which he must satisfy before he can seek the court's permission. These are:

(a) He must be an employee of the plaintiff, and

(b) He must be authorised by the plaintiff to represent it.

[6] There is not a shred of compelling evidence which has been placed before this court which would allow it to conclude that RA had been authorised by the plaintiff to act on its behalf. However, before the court can even consider whether RA has been duly authorised, it should first determine whether RA is an employee of the plaintiff. The difficulty which RA faces is that a compulsory liquidation of the company terminates all of a company's contracts of employment by operation of law: e.g. see paragraph [22] of *Rose v Dodd* [2005] EWCA Civ 957.

[7] A compulsory winding up order was made on 20 November 2008 and this required the liquidator to get in all the plaintiff's assets and make distributions of those assets to the creditors and/or the shareholders of the plaintiff in accordance with the statutory priorities.

[8] "A company is a legal person; it is not a human person but nevertheless it is a person. The winding up of a company and the completion of its liquidation may be likened to the death of a person. The funeral rites of the liquidated company are its dissolution. Once, therefore, the liquidators realised the assets, paid off the creditors or distributed assets *in specie* to them, and distributed or paid any surplus to the contributories, then the liquidation is finished": see "Corporate Insolvency: The Law in Practice in Northern Ireland" Gowdy and Gowdy (2013), Chapter 22.01.

Section 1012(1) of the Companies Act 2006 provides:

> "When a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (including leasehold property, but not including property held by the company on trust for another person) are deemed to be *bona vacantia* and—
>
> (a) Accordingly belong to the Crown, or to the Duchy of Lancaster or to the Duke of Cornwall for the time being (as the case may be), and
>
> (b) Vest and may be dealt with in the same manner as other *bona vacantia* accruing to the Crown, to the Duchy of Lancaster or to the Duke of Cornwall."

[9] There is strong legal authority for the proposition that the effect of a winding up order determines the authority of the Board of Directors to manage the affairs of the company.

In *Measures Bros Ltd v Measures* [1910] 2 Ch 248 Buckley LJ in the English Court of Appeal said at 256:

> "What has happened is that the plaintiffs did not by affirmative action on their part determine the employment either rightly or wrongly, but that by the operation of the winding-up order made on 13 October, 1909, the office itself came to an end."

In *Re Union Accident Insurance Co Limited* [1972] 1 All ER 1105 at 1113 the court said:

> "It is of course well settled that on the winding-up the Board of Directors of a company becomes *functus officio* and its powers are assumed by the liquidator."

This makes good sense. The function of a liquidator is to ensure that all the assets of the company are realised for the benefit of the creditors and the shareholders. His task would be made impossible if directors of the company were able of their own initiative to launch legal proceedings on behalf of a company which was being wound up. I am therefore satisfied that a former director of a company has no standing to issue legal proceedings on behalf of a company once a winding up order has been made. In this case, RA was not only *functus officio* when he purported to commence proceedings on behalf of the plaintiff, but he also had no authorisation to do so.

Did the restoration of the plaintiff to the Register also restore RA to his position as director?

[10] RA argues that when the plaintiff was restored to the Register, he likewise was restored to his position as director of the plaintiff. The circumstances in which an application may be made to the court for restoration to the Register include the one that was taken here, namely where a company has been dissolved after winding up under Chapter 9 of the Part 5 of the Insolvency (NI) Order 1989 ("the Order") and Section 1029(1)(a) of the 2006 Act. This is the path which was followed here. Section 1029(2) provides that different persons may make an application under that section. These include: "Any **former** director of the company": see Section 1029(2)(b). So a former director of the company may make an application to have the company restored to the Register.

[11] Section 1032 of the 2006 Act deals with the effect of a court order for restoration to the Register. Section 1032(1) provides:

> "The general effect of an order by the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register."

[12] Similar provision is made in Section 1028(1) in relation to administrative restorations.

[13] But restoration of a company under Section 1032 (or Section 1028) does not "undo" the dissolution. It does not return a company to the control of its directors. Nor does it remove the company from liquidation. Mr Gowdy on behalf of the bank says it is well recognised that where a company is dissolved after liquidation, it can only be restored to the Register in certain circumstances, namely to permit the liquidator to realise and distribute an asset which was overlooked in liquidation, or to permit a creditor to make a claim against a company which has not been made in the liquidation. He relies on the comments of Hoffmann LJ in *Stanhope Pension Trust Limited v Registrar of Companies* [1994] 1 BCLC 628 at 632:

"In *Re Servers of the Blind League* [1916] 2 All ER 298 at 299 Pennycuick J said:

> '**Generally speaking, the purpose of an order under Section [651] is to enable distribution to be made of an asset which belonged to the company before dissolution but which, for some reason, was overlooked and has vested in the Crown as *bona vacantia* ...'**

But the section can also be used to enable a new or increased claim to be made by a creditor. For example, in recent years, particularly since the section was amended in 1989, it has become fairly common for dissolutions to be declared void to enable a former employee of the company to make a claim for personal injury (for example, negligence in allowing him to contract an insidious industrial disease) which was not or could not have been made at the time of the company's liquidation. The purpose of such applications is to obtain judgment against the company which can be enforced against his insurer under the Third Party's (Rights Against Insurers) Act 1930. This Act provides that a right to indemnity under a contract of insurance vested in the claimant on the date of the winding up and does not become an asset in the liquidation. The applicant will therefore not have to prove as a creditor. He will need to revive the company only to obtain the judgment which establishes the company's right to indemnity: *Bradley v Eagle Star Insurance Co Limited* [1989] BCLC 469.

I think it would therefore be nowadays more accurate to say that ordinarily the purposes of Section 651 are either to enable a liquidator to distribute an overlooked asset or a creditor to make a claim which he has not previously made. …"

He then went on to state at p 634(i):

"I also accept that the liquidator is entitled to complete the winding up and file his final accounts and report, with the consequence that the company is thereafter dissolved. But the finality of the dissolution has qualified the express provisions of Section 651. While a power under that section remains exercisable, the dissolution is

> not final. The company may be revived, **the liquidation re-opened** and new or increased claims made."
> (Emphasis added)

[14] Mr Gowdy submits that the clear tenor of the authorities operates on the basis that restoration still leaves a company in liquidation. In the *Stanhope Pension Trust Limited* case the circumstances in which a company might be restored to the Register after liquidation and dissolution are defined. These are to enable the liquidator to distribute an overlooked asset or to enable a creditor to make a claim which had not previously been made. It follows that if the restoration enables the liquidator to distribute an asset, the fact of the restoration must be that the company remains in liquidation, in other words it is not returned to the control of its directors. Otherwise, as Mr Gowdy has pointed out, there would be a conflict as to which organ has control of the company. At page 631 in *Stanhope* Hoffmann LJ said:

> "Post is a solvent company and so the landlord says that the liquidator of Forte will be able to recover under the indemnity … It will be an asset in the liquidation."

It is important to highlight that Hoffmann LJ refers to the liquidator of the company, not to the company itself or the company's director. He also says at page 635:

> "The company may be revived, the liquidation re-opened and new or increased claims made."

Accordingly, it appears that Hoffmann LJ's understanding is that the reopening of the liquidation follows automatically on the revival of the company. No separate application is necessary nor does the court have to exercise the separate discretion as to whether or not to re-open the litigation.

[15] The *Stanhope* decision was followed in *Re Oakleague Limited* [1985] 2 BCLC 624 where a company was restored to the Register to enable a liquidator to distribute an overlooked asset including an asset of which the liquidator was aware but he had not considered it to have had any value. It followed *Stanhope* thus accepting that the company remained in liquidation.

[16] In *Re Philip Powis Limited* [1998] 1 BCLC 440 the Court of Appeal noted at pages 446-447:

> "Now the purpose of the application and the justification for the order sought is, first, to enable Mr Harris to prove in the liquidation, or otherwise enforce his rights against the liquidator and contributories and, second, to institute fresh proceedings against the company for damages for personal injuries."

It goes to say:

> "It was not disputed that the effect of an order under Section 651 declaring the dissolution to have been void would be to recreate the company and the condition in which it had been when dissolved, namely in members' voluntary winding up. Thus subject only to an order under Section 108 of the 1986 Act confirming the appointment of the original liquidator, which is sought by para [4] of the originating summons, Mr Harrison would be in a position to enforce his rights by proof or otherwise."

[17] It is thus clear that the argument of the plaintiff that restoration of the company to the Register restored the plaintiff to the control of its director(s), instead of returning the plaintiff to its status as a company in liquidation is contrary to a number of highly persuasive authorities.

Nowhere does RA or the AG offer any legal authority in support of the contention that:

> "When Andronics Communications Limited was restored to the Company Register in 2016 it was also returned to its position before the fraud (sic) i.e. as a solvent company with its directors in place without the appointment of a liquidator … There does not appear to a previous case regarding a company ending up in liquidation as a result of deliberate fraud to put it there but to (his) mind, common law applies."

Remember section 1032(1) of the 2006 Act explicitly states:

> "The general effect of an order by the court for restoration to the register is that the company is deemed to have continued in existence **as if it had not been dissolved** or struck off the register." (Emphasis added)

[18] Accordingly, I am unpersuaded by the argument advanced by RA that a court ordered restoration "undoes" the liquidation process itself, including specifically the winding up order dated 20 November 2008. In my view the effect of a restoration order is to return the plaintiff to its status as a company in liquidation. As the AG points out:

> "It is only the dissolution that is undone. An insolvent company is not transformed into a solvent company on restoration."

The effect of the disclaimer

[19] Article 152(3) of the Insolvency (NI) Order 1989 prescribes that:

> "A disclaimer under this Article -
>
> (a) Operates so as to determine, as from the date of the disclaimer, the rights, interests and liabilities of the company in or in respect of the property disclaimed; but
>
> (b) Does not, except so far as is necessary for the purpose of releasing the company from any liability, affect the rights or liabilities of any other person."

It follows that once a cause of action is disclaimed by the liquidator of the plaintiff it is no longer vested in the plaintiff which has no right or interest in the cause of action from the date of disclaimer. This also means that the plaintiff cannot be liable for costs in respect of that cause of action. Therefore neither the plaintiff nor RA can pursue the claim against the bank.

[20] It is also worth noting that RA applied on 6 November 2017 to set aside the appointment of Kenneth Pattullo as liquidator together with the disclaimer of the cause of action. On 25 October 2018 RA withdrew both applications, apparently after having taken legal advice. I note the order made by Master Kelly dated 25 October 2018 which names RA on behalf of Andronics Communications Limited as the applicant and records that he was represented by counsel and states that the court struck out his application having heard from RA's counsel and the solicitor for the respondent.

[21] The un-contradicted evidence is that RA had the opportunity to challenge the disclaimer but with the benefit of legal advice chose not to do so. On the basis of the information before this court it was a wise choice. It is now too late for RA to change his mind. His appeal is out of time and there is no basis upon which a court can extend time.

CONCLUSION

[22] RA has no prospect of successfully challenging the decision of the Master because:

> (a) On the present evidence before the court he is neither authorised to represent the plaintiff nor legally entitled to do so.

(b) The restoration of the dissolved plaintiff company to the Register did not return power to the Board of Directors. Instead any authority remains vested in the liquidator.

(c) If, contrary to my previous conclusion, the restoration of the plaintiff company did return authority to the Board of Directors in general and RA in particular, the cause of action which the plaintiff seeks to pursue has long since been lawfully disclaimed and the action is dead.

[23] In the circumstances it would be pointless to extend time to appeal as any appeal from the Master's decision is bound to fail. There is no point of substance to be tried. I have carefully considered the factors set out in *Davis v Northern Ireland Carriers* and have no hesitation in concluding that I should refuse to extend the time to appeal.

[24] For the record I have considered submissions on some difficult legal issues. I consider that the Master was correct in making the order that he did. I propose to dismiss the appeal and affirm the Master's order. I will give the parties a few days to digest the contents of this judgment before I receive submissions on what is the appropriate costs order for this court to make. I am content to deal with this on the basis of written submissions but I am prepared to receive supplementary oral submissions if that is a wish of the parties. Nothing further occurs.