

Cases & legislation referred to:

The Companies (Guernsey) Law, 2008

The Companies (Guernsey) Law, 1996

Carr v States of Guernsey Housing Authority (unreported 15th August 2012)

The Housing (Control of Occupation) (Guernsey) Law, 1994

The Royal Court Civil Rules, 2007

Re Cornish Manures Ltd [1967] 1 WLR 807

The Companies Act 2006

Flightlease Holdings Guernsey Limited v Flightlease Ireland Limited [2009-10] GLR 38

Sparks v Harland [1996] 1 WLR 143

Hill v C A Parsons & Co Ltd [1972] Ch. 305

Willow Wren Canal Carrying Co Limited v British Transport Commission [1956] 1WLR 213

Hitchins v Hill (unreported, 16th November 2010)

Introduction

1. This is an application by James Toynton, made solely in his capacity as former liquidator of Whitecliff Investments Limited (hereafter referred to as “the Company”). The initial application was dated 18th July 2012 but was subsequently amended with the court’s leave on 17th August 2012. The application as so amended (hereafter referred to as “the Application”) is brought principally under Section 511 of The Companies (Guernsey) Law, 2008. Because the time limit in Section 511 is only 21 days and the events involved took place in 2008, the first paragraph of the Application seeks an extension of that 21-day period in which an application can be made. A second paragraph then seeks either the modification or setting aside of an action or decision of the Registrar of Companies in respect of the Company to remove its name from the Register or not to give notice under Section 353(3) of the 2008 Law or under Section 76 of its predecessor measure, The Companies (Guernsey) Law, 1994. In the alternative, the Application invites the Court to exercise its inherent jurisdiction and discretion to restore the Company to the Register of Companies, conditional on making the usual statutory payments to the Registrar, Her Majesty’s Procureur and Her Majesty’s Receiver-General in relation to any costs incurred in respect of the Company arising from, and otherwise payable since, its dissolution.
2. In support of the Application is an Affidavit of the Applicant, sworn on 17th July 2012, to which is exhibited a number of documents. The underlying purpose of the Application is to enable some assignments of construction contracts, which were ineffectively purported to be assigned in 2007 to another company, LS Aldersgate Limited, to be freshly assigned in the correct manner. The Application raises the interesting and novel question of the status of a company under the 2008 Law after it has been dissolved following a members’ voluntary winding up. In particular, it highlights a potential, and now recognised, lacuna within Guernsey’s company law legislative framework, something which has been addressed in a different way in other jurisdictions, especially in England and Wales.
3. Advocate Newman appeared on behalf of the Applicant and Advocate Evans on behalf of the Respondent, the Registrar of Companies, on whom the Application was served in accordance with the provisions of Section 511 of the 2008 Law. Both lodged Skeleton Arguments and have elaborated upon the submissions set out therein at the original hearing and I am grateful to them for their assistance.
4. Following the original hearing, Advocate Newman requested that I suspend the preparation of this judgment pending the outcome of a debate in the States of Deliberation then scheduled for November 2012. I did so, directing that, if Advocate Newman thought fit, the matter should be re-listed at a suitable Interlocutory Court for consideration as to whether there should be an opportunity to make further submissions. The matter was duly listed on 14th

December 2012. Advocate Newman lodged a short Supplementary Skeleton Argument addressing one aspect of the Applicant's submissions. I was informed that Advocate Evans did not see the need to add to what she had previously submitted. I am afraid that other matters have since intervened, with the consequence that it has taken me far longer than I would have wished to resume working on this judgment. I hope the delay has not caused the parties any inconvenience.

Background

5. Whitecliff Investments Limited was incorporated on 6th October 2000 with registered number 37439. At the beginning of 2007, the Company had issued 10,000 ordinary shares of £1.00 each, one of which was held by Land Securities plc and 9,999 of which were held by LS Aldersgate Limited, both companies having the same registered address at 5 Strand Street in London. By special resolution on 7th February 2008, the members of the Company resolved that the Company be wound up voluntarily and, in accordance with the Company's Articles of Association, to divide amongst the members in specie, any part of the assets of the Company. The Company appointed the Applicant and Anthony Pickford, also of Grant Thornton Limited, as joint liquidators. The liquidators performed their functions in accordance with the 1994 Law and duly convened a general meeting of the Company to be held on 10th June 2008, which was then adjourned and re-convened on 20th June 2008, for the purposes of laying the account before the members, showing the manner in which the winding up had been conducted and how the property of the Company was disposed of. Notice of that final meeting was submitted by the Applicant to Her Majesty's Greffier on 20th June 2008, pursuant to Section 88(1)(b) of the 1994 Law. In accordance with the provisions of Section 88, upon the expiry of three months from the date of the notice of that final meeting, the Company was deemed dissolved and removed from the Register of Companies by the administrative act of the Registrar on 20th September 2008.
6. The Applicant has further explained that the reason for incorporating the Company was to hold the long leasehold interest in a property located at 140 Aldersgate Street in London. That property was redeveloped and a number of construction contracts were entered into by the Company. It is the benefit of those contracts that were purportedly assigned to LS Aldersgate Limited by way of assignments dated 25th May 2007. The long leasehold interest in 140 Aldersgate Street was transferred by the Company to LS Aldersgate Limited on 9th August 2005. Having completed the purpose for which Whitecliff Investments Limited had been incorporated, the members duly resolved that it should be wound up and any surplus assets distributed to them. The final account shows that £1,375,000 was available for distribution *pari passu*.
7. Because the assignments of the construction contracts to LS Aldersgate Limited in 2007 have been shown to be ineffective, due to the deeds of assignment referring to an English company of the same name with its own registration number as opposed to the Guernsey company, the Applicant has also explained that LS Aldersgate Limited will be unable to bring proceedings against some of the various construction entities to rectify certain defects in the construction work. Advocate Newman clarified that the limitation period for bringing such claims will expire in early 2014, hence the reason for making this Application now.

Extension of Time

8. Paragraph 2 of the Application seeks to set aside the action of the Registrar to remove the Company from the Register and/or to modify his decision not to give notice, as permitted, under section 353(3) of the 2008 Law (or its predecessor provision) to enable cause to be shown as to why the Company should not be struck off after its affairs were fully wound up. Therefore, the first question I must consider is whether or not the Application is time barred, because it is common ground that the Application was not made within the period specified in the Law.

9. Section 511(4) of the 2008 Law provides:

“Subject to any direction given by the Court –

(a) the applicant shall give notice of the application to the Registrar,

(b) where the applicant is not the company in respect of which the application is made, the applicant shall give notice of the application to the company (or, where the company is inchoate, to the person who appears to the applicant to be responsible for the company), and

(c) the application shall be made within 21 days after the day of the action, direction, decision or determination of the Registrar.”

10. On behalf of the Registrar, Advocate Evans submitted that there are three potential constructions to give to that subsection. It may confer an unrestricted discretion to extend time, or it may confer a discretion to extend time if an extension is sought within the 21-day period referred to, or it may confer no discretion at all. In relation to the last possible interpretation, she drew my attention to a recent decision of this Court in the case of Carr v States of Guernsey Housing Authority, which was delivered on 15th August 2012. That case turned on the construction of Section 56(2) of the Housing (Control of Occupation) (Guernsey) Law, 1994, which requires that an appeal under that Law be instituted by way of summons, which shall be served upon the Minister within a period of two months immediately following the date of the notice giving the decision which is the subject of the appeal. The conclusion I reached in relation to that provision was that the statutory language did not enable any extension of time to be given by way of the Court exercising any discretion. The difference with Section 511(4) of the 2008 Law is that the opening words read *“subject to any direction given by the court”*. Accordingly, in my judgment, the legislature has provided the ability for the Court to depart from insisting on strict compliance with the 21-day time limit referred to in paragraph (c). The Court is permitted to direct differently in an appropriate case. Therefore, unlike in the Carr case, there is some discretion provided to the Court.

11. There is no suggestion in Section 511(4) that the only time at which such a discretion could be exercised by the Court is within the 21-day period after the day of the action, direction, decision or determination of the Registrar which is the subject of those proceedings. It would, in my view, be unusual to limit the time at which such a discretion could be exercised to that 21-day period. Although not directly in issue, the general power set out in Rule 50(2)(a) of The Royal Court Civil Rules, 2007 to *“extend or shorten the time for compliance with any rule, practice direction, order or direction of the court, even if the application for an extension is made after the time for compliance has expired”* supports the argument that extensions of time by way of direction given under Section 511(4) of the 2008 Law can be granted after the expiry of the 21 days referred to in paragraph (c). The consequence, therefore, is that the Court has a discretion to permit an application under Section 511 to be pursued even after the expiry of the relevant 21-day period, but such a discretion must, of course, be exercised judicially.

12. Before deciding whether this is a case in which it is appropriate to give a direction modifying the 21-day period for instituting proceedings under Section 511 of the 2008 Law, I consider it appropriate to analyse the way the case is put on behalf of the Applicant and to assess whether the prospects of success are real as opposed to fanciful.

13. The action to which the Applicant refers is that of the Registrar removing the Company's name from the Register. The relief the Applicant seeks in respect of that act is to reverse it. However, Advocate Newman accepted that the Registrar had no capacity under the 1994

Law, or under the 2008 Law, to do anything other than remove the Company's name from the Register following its dissolution in accordance with the provisions of the law applicable in September 2008. He further submitted that the consequence of reversing that act would be that the Company remained dissolved, but that its name remained on the Register of Companies. He recognised the difficulties the Applicant faced in advancing that argument further and duly focused his attention more on the alternative approach, being the Registrar's decision not to give a notice under Section 353(3) of the 2008 Law or, insofar as it continued to apply, Section 76 of the 1994 Law.

14. The reason why Advocate Newman has had to address the position under the 1994 Law and the 2008 Law is that the provisions of the 2008 Law came into force on 1st July 2008. The liquidators' notification under Section 88 of the 1994 Law was given on 20th June 2008. Paragraph 10 of Schedule 4 to the 2008 Law provides that "*Proceedings in relation to the winding up of a company instituted before the commencement of this Law may continue as if this Law had not been enacted*". This transitional provision means that the Company arguably continued to be deemed to be dissolved three months following the notice given by the liquidators. Alternatively, Section 400(4) of the 2008 Law produced the same outcome. On receipt of the notice of 20th June 2008, the Greffier, the then Registrar of Companies, could (so Advocate Newman submits) have decided to exercise his powers under Section 76(2) of the 1994 Law to give notice, by which the Company may have been dissolved earlier than three months after the liquidators' notice.
15. Because the substance of the provisions is the same, it does not affect the outcome of this Application to determine whether the 1994 Law regime continued or whether the 2008 Law regime applied from 1st July 2008. If I needed to determine the issue, I would incline to the view that "proceedings", albeit not involving Court proceedings, had been commenced in respect of the Company prior to 1st July 2008, meaning that anything required could, if so desired, have occurred under the provisions in the 1994 Law. Either way, Advocate Newman has to concentrate on the period of one month immediately following 20th June 2008, which straddles the date of commencement of the 2008 Law. He submits that, if the Registrar had served a notice under Section 76 (or alternatively under Section 353 of the 2008 Law), the effect of that notice would have been that the Company would potentially have been struck off in accordance with the relevant section, meaning that thereafter the opportunity to apply to restore it would become available to *inter alia* the Applicant.
16. Taking the provisions in the 2008 Law as being those to which reference can more usefully for the future be made, the difficulty with this line of reasoning is that it draws attention to a perceived tension between the wording in Section 353 on the one hand and Section 400 on the other. Section 400 is the provision under which the liquidators give notice to the Registrar that the affairs of the company have been fully wound up. Section 353, on the other hand, can apply where the Registrar of Companies has reason to believe that the affairs of a company have been fully wound up. The difficulty arises in a case such as the present one, where the liquidators have served a notice in accordance with Section 400, because the material from which the Registrar will have reasonable cause to believe comes from the information supplied to the Registrar by the liquidators themselves. In those circumstances, it would be rather circular for the Registrar then to be required to serve notice on the liquidator at his last known place of business in accordance with Section 353(4)(a). In my judgment, this is a sufficient reason for not construing Section 353 (and its predecessor Section 76) in the way suggested by Advocate Newman. In order to engage Section 353, the Registrar should, in my view, form his "*reason to believe*" from something arising independently from information supplied by a liquidator through serving notice pursuant to Section 400.
17. Where matters are proceeding under a voluntary winding-up in such a way that the liquidator believes that he has completed his statutory functions and the members hold a final meeting and a notice is then transmitted to the Registrar, the dissolution of the company three months' later operates by virtue of the provisions in Section 400. Section 353, by contrast, enables the

Registrar, of his own motion, to take steps to bring about the striking off and dissolution of the company where he has reasonable cause to believe that the liquidator is not performing the functions duly accorded to him under the Law. The alternative scenario is where a winding-up is underway, but there is no liquidator currently holding office and no steps taken to fill that gap. In both of those cases, the action of the Registrar in precipitating the dissolution of the company concerned by serving notice on the world at large and to specific interested persons, enabling them to show cause within two months why that step should not be taken at the conclusion of the two-month period, is quite understandable. It offers a means of forcing the early determination of the company's existence and results in its name being struck off the Register. That is not, however, the position in which the Company found itself in 2008.

18. This is not a case in which any criticism has been levelled at Mr Toynton, or indeed Mr Pickford, for the way in which they handled the liquidation of the Company. Further, there is support for the conclusion that Section 400 applies, and not Section 353, by reference to the case in Re Cornish Manures Ltd [1967] 1 WLR 807, in which it was found that under a similarly worded provision in The Companies Act 1948 it was not necessary that the affairs of a company should have been fully wound up before the liquidator could validly make his return, only that those affairs should have been fully wound up so far as the liquidator was aware. In other words, where a liquidator has done everything that he properly could at the time to satisfy himself that the company's affairs have been fully wound up and holds a final meeting in accordance with the provisions of the Law, subsequent information suggesting that the affairs had not been fully wound up does not affect the validity of the steps that have already been taken. Once a company is dissolved in accordance with the provisions of the relative enactment, the liquidators' involvement comes to an end, the company is deemed to be dissolved, and so ceases to exist. That is the position pertaining to the Company in the instant case.

Exercise of discretion

19. The evidence given by the Applicant does not set out explicitly the chronology relating to when he first became aware that the purported assignments of the benefit of the construction contracts had been ineffective due to the errors in describing the assignee company. Whilst I accept that alternative ways forward may have been considered at that time, on the material placed before me I am not satisfied that this application was brought in as timely a fashion as it should have been, bearing in mind the 21-day time limit imposed in Section 511(4)(c) of the 2008 Law. The implication from the legislature enacting a reasonably short time limit is that, where a person wishes to set aside or modify any action, direction, decision or determination of the Registrar of Companies, steps should be taken as soon as reasonably practicable thereafter so that the effect of the action, etc. does not have time to crystallise as regards third parties in the meantime. Therefore, whilst accepting that the Court does have a discretion to modify or extend that time limit where appropriate, I am not satisfied that the circumstances of this case are such that the Court's discretion should be exercised so as to allow paragraph 2 of this Application to proceed.
20. If I am wrong about whether or not to exercise the Court's discretion in this regard, in any event, the Application pursuant to Section 511 of the 2008 Law is still, in my judgment, flawed. Whilst I make no finding about whether the Applicant is a person who is directly affected by the action or decision he seeks to challenge, which in itself may pose a significant hurdle for him to overcome, I struggle to see how an administrative act of removing the Company's name from the Register following dissolution could be set aside in the manner suggested by Advocate Newman. To all intents and purposes, the Applicant, as liquidator, believed the Company's affairs had been fully wound up. It was the choice of everyone concerned to bring about the Company's dissolution. The Registrar's action was purely a consequential administrative step and cannot, in my view, be reversed more than four years later. That would be tantamount to restoration of the Company by a different route.

21. Similarly, the suggestion that a decision not to give notice in accordance with Section 76 of the 1994 Law, or Section 353 of the 2008 Law, could somehow be modified to become a decision to give such notice some years after the event is also, in my view, something which Section 511 of the 2008 Law does not cover. As I have already noted, this step by the Registrar is designed to enable an earlier dissolution of a company than might otherwise occur or in circumstances where dissolution could not readily be achieved. It is dependent on seeing first if anyone objects by permitting them to show cause. The reality for the Company here is that no one would have sought to show cause had such a notice been given by the Registrar. The errors in the assignments did not come to light until later. By that time, the Company would have been dissolved anyway. Given the source of the information that the affairs of the company had been fully wound up, the Registrar had no reason to see if anyone wished to show cause. It is, therefore, quite artificial to suggest now that the Registrar should somehow have been expected to give notice under Section 353 (or under Section 76 of the 1994 Law) or that the Registrar could somehow resurrect the dissolved Company by giving notice at a date later than 20th July 2008.
22. For these reasons, even if I had been minded to grant para. 1 of the Application, I would have dismissed para. 2. As the 2008 Law stands, the Applicant does not, in my view, have a remedy under its provisions to enable the Company to be restored to the Register.

Restoration under inherent powers or prospective legislation

23. The Applicant's alternative argument prayed in aid the inherent jurisdiction to do justice for the dissolved Company or to rely on the doctrine that permits regard to be had to pending legislation. In effect, paragraph 3 of the Application invites the Court to treat itself as able to restore a company on very similar terms to the regime provided for in the 2008 law, but without reference to the statutory framework.
24. On behalf of the Applicant, Advocate Newman suggested that Guernsey law is both inadequate and unfair because it is not in line with that of other jurisdictions, in particular England and Wales. He notes that the 2008 Law was drawn from developments in company law in that other jurisdiction, notably The Companies Act 2006. He seeks to support an argument that the Court can have regard to the position under English law by reference to what Southwell LB said in Flightlease Holdings (Guernsey) Limited v Flightlease (Ireland) Limited 2009 to 2010 GLR 38 and two passages in paragraph 91 of that judgment:
- “(2) *since its importation into Guernsey law in the 1880s, it has naturally been appropriate to look to English law to help in the solution of problems concerning companies which are not covered by Guernsey statutes or customary law; ...*
- (7) *Guernsey, as a significant centre for financial services of many kinds, needs to develop its commercial laws in ways which provide just solutions in the relatively complex situations which arise, for example, in liquidations of commercial companies. English law provides, in my judgment, a more developed system of insolvency law for use by analogy, than the relatively undeveloped solutions in similar situations in Scots law.*”

25. As I indicated in Amazing Global Technologies Limited (in Liquidation) (unreported, 11th June 2012), “*I have no hesitation in endorsing those conclusions of Southwell LB as being sound guidance of general application*” (para. 51). However, following that guidance does not automatically mean that just because something appears in the 2006 Act and has been omitted from Guernsey's 2008 Law, it must necessarily be imported into the Guernsey statutory company law framework. I consider it a significant factor that the 2008 Law is a comparatively recent enactment, where the States of Deliberation had a choice as to how much material to draw from the 2006 Act, and, in this instance, they chose not to elaborate on the provisions relating to restoration of companies that already appeared within the 1994 Law. Accordingly, the Flightlease principles, if they can be called that, do not assist. There is, in

my view, a difference between how a provision is interpreted, or whether some equitable principle can be adopted and applied, and the re-writing of the statutory framework to include provisions that have not been enacted as part of Guernsey's domestic law, presumably as a matter of express choice of the legislature.

26. At the original hearing, Advocate Newman drew attention to a consultation document, dated May 2012, which set out a number of different amendments to Guernsey's Company Law regime that the Commerce and Employment Department proposed could usefully be made. One of the proposed changes squarely covers the position in which the Company finds itself, namely to make express provision for the restoration of companies that have been dissolved on completion of a winding-up, in appropriate circumstances. Advocate Newman originally submitted that the Court could have regard to such a proposal in deciding whether or not to exercise a discretion under its inherent powers to permit the restoration of a company finding itself in the position of the Company. As I have already indicated, the reason for Advocate Newman requesting that I suspend preparation of a judgment in this case was because of the publication of Billet d'Etat XXIII of 2012 for the November meeting of the States of Deliberation shortly after the conclusion of the original hearing. In that Billet d'Etat, the Commerce and Employment Department sought resolutions from the States of Deliberation approving in principle such an amendment to the 2008 Law. The short debate took place on 28th November 2012 and the resolutions agreed en bloc with the Department's proposed amendments and directed the preparation of legislation. The particular amendment to assist the Company is described in para 4.63 of the Department's Report. As a result, Advocate Newman submits that the Applicant's arguments are strengthened because the Court ought to take into account that an amendment that will benefit the Company is in hand or, perhaps more accurately, that a decision in principle has been taken and the typical approach to legislating in this jurisdiction is that once a decision in principle has been reached, the legislation will be enacted without further detailed debate.
27. In advancing that submission, Advocate Newman relies upon the words of Sedley J in Sparks v Harland [1996] 1 WLR 143 (at page 147F):
- "...there is in my judgment no rule of law that impending legislative change is never a material consideration in the exercise of the court's powers and discretions. Everything, it seems to me, turns upon the subject matter and the relevance of the pending legislation or possibility of change to the issues which the court has before it."*
28. In that case, Sedley J reached his conclusion after considering the different approaches in two earlier cases. He followed what the Court of Appeal had said in Hill v C A Parsons & Co Ltd [1972] Ch. 305. In the Hill case, Part II of the Industrial Relations Act 1971 was about to come into force and the court concluded that regard needed to be had to the position under that Act when it was brought into force by ministerial order. The contrary position had been reached in Willow Wren Canal Carrying Co Limited v British Transport Commission [1956] 1WLR 213. Legislation was going through Parliament at the time but was not going to reach the statute book in time to stave off the Plaintiff's damages claim. Upjohn J decided that the court should not proceed upon the basis of legislation not yet in force or to act in anticipation of changes to the statutory position.
29. The passage from Sparks v Harland to which I have referred was relied upon by Deputy Bailiff Collas (as he then was) in Hitchins v Hill (unreported, 16 November 2010). In that case, the guiding principle was "*to deal with cases justly*" in accordance with rule 1(1) of The Royal Court Civil Rules 2007. It was an interlocutory judgment, just as it was in Sparks v Harland and Hill v C A Parsons & Co Ltd. To that extent, therefore, the present case, being an application for final resolution, rather than an interlocutory hearing, is more akin to the position in the Willow Wren case than any of the other three.

30. In my judgment, it would be premature for the Court to allow an application to restore a dissolved company in circumstances where the legislature has not yet provided the route for such a restoration to be given effect. A company is brought into existence under the 2008 Law and ceases to exist under the terms of the 2008 Law. As section 1 provides:

“A company is a legal person, separate from its members, which comes into existence upon incorporation and continues until it is removed from the Register of companies.”

31. The effect of the Company’s dissolution in 2008 was that it ceased to exist. In my view, breathing life back into such an extinct person can only be achieved through a route confirmed by the legislature rather than created by the Court. The fact that such a change to the 2008 Law has now been approved, at least in principle, means that the desirability of enabling such a step to be taken has been recognized. That said, until the legislature has enacted the provision, and probably until it has been brought into force, the Court simply cannot know the basis on which such an application can be brought and whether there may be any hurdles that the Applicant in this case would be unable to surmount. For example, I do not know whether a former liquidator of a company will be empowered to bring such an application. I note that an application for administrative restoration to the Register pursuant to section 1024 of the 2006 Act “*may only be made by a former director or former member of the company*”, whereas an application to the court for restoration to the Register pursuant to 1029 of the Act may be made *inter alia* by any former liquidator of the company (see subsection (2)(j)). This suggests it may become possible for the Applicant to apply to the Court for restoration of the Company but, until the draft legislation is published, the precise mechanism remains unclear. I do not believe that it would be a proper exercise of any power available to the Court under its inherent jurisdiction to jump the gun and pre-empt the regime that must in due course be created by the legislature.
32. Accordingly, whilst I have some sympathy with the Applicant, who is trying to rectify the position in which the Company in dissolution finds itself, I will for those reasons also dismiss paragraph 3 of the Application.

Costs

33. The final paragraph of the Application seeks the Applicant’s costs of and occasioned by the Application to be paid by the Company. The consequence of my decision is that no company exists. It would, therefore, not be possible for paragraph 4 of the Application to be granted. This aspect of the Application was necessarily dependent on the restoration of the Company being ordered. Once the application for restoration failed, paragraph 4 of the Application effectively falls away. It is, therefore, dismissed. In those circumstances, unless either party wishes to argue differently, in which case notification must be given within 7 days of this judgment, I propose to make an order that the Applicant pays the Respondent Registrar’s costs on the standard recoverable basis.