



Welsh Government spends £300,000 fighting company restoration to avoid paying copyright royalties for Dylan Thomas photographs it used without permission

The Welsh Ministers v. Haydn Price and the Registrar of Companies – Court of Appeal: A3/2016/4256

Article by David Bowden



David Bowden Law is a registered trademark and business name of Promeritum Consulting Limited Registered in England Number 7077741 Registered Office 43 Overstone Road Hammersmith London W6 0AD VAT Registration Number GB 980 7971 69

David Bowden Law is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation.
BSB authorisation number: ER161545

Welsh Government spends £300,000 fighting company restoration to avoid paying copyright royalties for Dylan Thomas photographs it used without permission

The Welsh Ministers v. Haydn Price and the Registrar of Companies - A3/2016/4256

Executive speed read summary

Mr Price is a journalist and made some radio programmes about the late Welsh poet, Dylan Thomas. Mr Watkins had taken an iconic photograph of Dylan Thomas in 1937 called 'Just Married'. Mr Price bought the rights to the photograph from Mr Watkins' widow. Mr Price's business – Pablo Star Limited – had been struck off the register of companies. He made an application to restore that company. He gave undertakings to the Companies Court including that the purpose of the application was so that his business could pursue claims for copyright infringement. His company was duly restored to the register of companies. Mr Price set up another company – Pablo Star Media Limited. His first company assigned its copyrights to the 2nd one. Mr Price applied to vary the undertakings which was granted. The effect of restoration of the 1st company was that it validated the assignment to the 2nd company. Visit Wales is the national tourist board for Wales. It is now under the control of the Welsh Ministers. Visit Wales had used the 'Just Married' photograph extensively in print and on-line media but it had not cleared the rights. The copyright in the photograph subsists until 2037. Visit Wales offered Mr Price £100 for the photograph which he rejected. Visit Wales threatened to 'destroy' Mr Price. A nuclear war then erupted with there being no limit to the amount of tax payer's money that Visit Wales could spend. Over 18 months after the restoration order was made the Welsh Ministers applied to the Companies Court to intervene claiming that Mr Price had not disclosed the existence of the inter-company assignment when he applied to vary his undertakings. A registrar in the Companies Court refused to read Mr Price's skeleton argument and made a joinder order in favour of the Welsh Ministers. This joinder was overturned on appeal by Judge Behrens. The Court of Appeal gave permission for a rare 2nd appeal on the basis that it involved an important point of principle as to the correct test to be applied by the Companies Court on applications to restore companies to the register. This appeal has now been heard by a full court presided over by the Master of the Rolls. The Registrar of Companies was joined, claimed it was neutral on the appeal but said that in appropriate cases the court should be willing to join a 3rd party to a restoration application. It says that the Companies Court should apply a broader test to restoration applications than previously. Mr Price says not only is it too late to make such an order but that he has done nothing wrong. So far the Welsh Ministers have spent over £300,000 and rising in legal costs. Judgement has been reserved.

The Welsh Ministers v. Haydn Price and the Registrar of Companies

A3/2016/4256

17 October 2017

Court of Appeal, Civil Division (Sir Terence Etherton, Master of the Rolls, Lord Justice Longmore and Lord Justice Irwin)

What is the special photograph of Dylan Thomas?

In 1936 the Welsh poet Dylan Thomas was introduced to Caitlin MacNamara by Augustus John in a pub in Fitzrovia in London. Dylan Thomas is said to have drunkenly proposed to Miss MacNamara there and then. The couple married on 11 July 1937 in Penzance. Shortly after their wedding a photograph of them was taken by Vernon Watkins known as 'Just Married'.

Who owns the rights to this photograph?

Ownership of the copyright in this photograph passed from Mr Watkins to his widow, Gwendoline, on his death 1967. By a written agreement dated 21 August 2011 the copyright was assigned by Mrs Watkins to Pablo Star Limited for £350. The photograph is included in a judgment of the Intellectual Property Enterprise Court and can be found and seen here: www.bailii.org/ew/cases/EWHC/IPEC/2017/2541.html. In 1993 the European Union (with its Directive harmonizing the term of protection of copyright and certain related rights 93/98/EEC) extended the term of copyright protection from 50 years to 70 years. The copyright in this photograph will run for the life of Mr Watkins as photographer '*and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public*'. The copyright in 'Just Married' is now set to expire on 31 December 2037.

What is the connection between Mr Price and Dylan Thomas?

Mr Price is a journalist who now lives in Ireland. He went to stay in Swansea to make some radio programmes about Dylan Thomas which were broadcast. When he was there he met Mrs Watkins. Afterwards Mrs Watkins told Mr Price that she was amenable to selling some photographs to him after she had spoken to her family. Mr Price bought the rights to 2 Dylan Thomas photographs from Mrs Watkins and then held the copyright in the photographs throughout the world.

Welsh Government spends £300,000 fighting company restoration to avoid paying copyright

royalties for Dylan Thomas photographs it used without permission

The Welsh Ministers v. Haydn Price and the Registrar of Companies - A3/2016/4256

What are the facts of the case?

Visit Wales had used the 'Just Married' photograph of Dylan Thomas in its print and digital publications promoting tourism to Wales in a number of different countries throughout the world including:

- The Netherlands,
- Germany,
- Spain & Catalonia,
- Canada, and
- USA.

Visit Wales had not cleared the rights before using the copyright photograph. Visit Wales offered Mr Price the sum of £100 for the photographs as a worldwide royalty payment which he rejected. A member of staff employed by the Welsh Assembly Government is alleged to have told Mr Price that if he did not take the £100 offered he would seek to 'destroy' him. Mr Price has issued copyright infringement proceedings in a number of jurisdictions seeking damages for unauthorized use of the copyright photographs. Mr Price has registered his copyrights in the USA in the Library of Congress. Mr Price told the Court of Appeal he now holds judgements for sums totaling £9000 for damages for copyright infringements.

What costs have been incurred?

During the course of Mr Price's oral submissions, he said that he had submitted requests under the Freedom of Information Act 2000 to the Welsh Assembly Government. In response, the Welsh Ministers said that so far they had spent over £300,000 of tax payer's money on this case. It is not clear whether this includes the costs of this appeal or not.

Are the Welsh Ministers the correct party?

The appeal was brought in the name of 'The Welsh Ministers'. However the Dylan Thomas photographs which are said to infringe the copyright now owned by Pablo Star Media Limited had been used by Visit Wales. The Wales Tourist Board ('WTB') is a statutory corporation which was established by the Development of Tourism Act 1969. WTB started to trade and use the business name Visit Wales from December 1998 onwards after it had registered the www.VisitWales.com domain name in October 1997. Responsibility for tourism was transferred to the Welsh Assembly Government by the Government of Wales Act 1998. The Wales Tourist Board (Transfer of Functions to the National Assembly for Wales and Abolition) Order 2005 **2005 No. 3225 (W.237)** said in article 4 that '*upon the transfer of its functions, property, rights and liabilities to the Assembly*' that the WTB '*is to cease to exist*'. However the 1969 Act was not repealed and an order made by the Welsh Assembly cannot not repeal a statute enacted by the Westminster Parliament. This is not an unimportant issue here because schedule 1 paragraph 2 of the DTA 1969 provides that the WTB 'shall not be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown'. It is not clear whether the correct party to have brought these proceedings is the WTB but no point on this was made by any party in the appeal.

What companies does Mr Price control which are relevant to this case?

There are 2 companies registered in England and Wales which are relevant:

- **Pablo Star Limited** – company number: 04865232. This was incorporated on 13 August 2003. Its stated nature of its business is '*television programme production activities*'. Mr Price (a journalist by profession) is now its sole director, company secretary and shareholder.
- **Pablo Star Media Limited** – company number: 09039350. This was incorporated on 14 May 2014. It too has stated that the nature of its business is '*television programme production activities*'. Again Mr Price is its sole director.

Who acted in this case in the Court of Appeal?

The Welsh Ministers could not spend enough taxpayer's money on this case and turned to the most expensive lawyers they could find. Mr Michael Todd QC and Mr Jack Rivett (both of Erskine Chambers, 33 Chancery Lane, London) instructed by Geldards LLP in Cardiff represented the Welsh Ministers in the Court of Appeal. Mr Todd QC also represented the Welsh Ministers in the High Court appeal.

Mr Price although not a qualified lawyer with rights of audience was permitted to act for and appear on behalf of Pablo Star Limited in the Court of Appeal and both courts below. Mr Christopher Buckley of Radcliffe Chambers in Lincoln's Inn instructed by the Government Legal Department represented the Registrar of Companies.

Welsh Government spends £300,000 fighting company restoration to avoid paying copyright royalties for Dylan Thomas photographs it used without permission

The Welsh Ministers v. Haydn Price and the Registrar of Companies - A3/2016/4256

What other rulings have there been on this point?

The Court of Appeal have looked at company restoration twice before in *Stanhope Pensions and Blenheim Leisure*. The Outer House of the Court of Session in Scotland has also looked at this recently in *Spring Salmon*.

What relief did Mr Price seek from the Companies Court?

On 5 November 2013 the Registrar had written to Pablo Star Limited (PSL) under section 1003 of the Companies Act 2006 saying that '*unless cause is shown to the contrary at the expiration of 3 months*' PSL would '*be struck off the Register and the company dissolved*'. It appears that no cause was shown and on 18 February 2014 (PSL) was dissolved by the Registrar of Companies. Mr Price then issued a claim form on PSL's behalf on 10 April 2014 seeking to restore PSL to the register of companies.

What did the Registrar in the Companies Court rule on the restoration application?

The restoration application was heard and determined by Miss Registrar Derrett in the Companies Court on 13 June 2014. The Treasury Solicitor on behalf of the Registrar signed a consent order agreeing to the restoration subject to a number of undertakings by Mr Price including:

- PSL will '*not carry on business or operate in any way other than to take the necessary steps to pursue claims against (a) New Directions Publishing Inc, (b) Visitwales.com, and (c) Nancy Galbraith seeking damages for alleged breach of copyright*' referred to in Mr Price's witness statement.

On 26 May 2015 Mr Price made an application to amend these undertakings. His application was unopposed and was granted by a further order of Registrar Derrett dated 18 June 2015.

How did the Welsh Ministers become embroiled in this case?

On 8 January 2016 the Companies Court sealed an application on behalf of the Welsh Ministers seeking:

- joinder of the Welsh Ministers into the restoration proceedings,
- an order that the restoration was invalid and should be revoked, and
- an order that the copyright assignment from PSL to Pablostar Media Limited (PSM) was invalid and the ownership of the copyright remains vested in the Crown as *bona vacantia*.

The Welsh Ministers claimed that Mr Price's witness statements in support of his restoration application were '*seriously misleading*' and there had been breaches of the undertakings he gave to the Companies Court. Surprisingly Ms Registrar Barber on 2 March 2016 granted the application of the Welsh Ministers for joinder and ordered Mr Price to pay their costs.

What did HH Judge Behrens rule in the High Court on 1st appeal?

Mr Price sought permission to appeal the order of Ms Registrar Barber. This was heard by HHJ Behrens on 14 October 2016 and his reserved judgment granting permission to appeal and allowing the appeal was handed down on 25 October 2016 [2016] EWHC 2640 (Ch).

The judge ruled that the right to be joined in restoration proceedings was a limited exception to the ordinary practice of the Companies Court. A third party's desire to assist the court in determining whether it had been misled was not a proper basis for joinder. Parliament had entrusted the policing of restoration applications to the Registrar of Companies. It was for the registrar to raise with the court issues of breach of an undertaking and/or misleading witness statements if he chose to do so. If he did not do so, it was not for anyone else to raise it with the Companies Court, other than by way of challenge to the registrar's decision in judicial review proceeding. As the Welsh Minister's desire to assist the Companies Court was not a proper basis for joinder, and since its rights were not directly affected by the restoration order, Registrar Barber's decision had not been made in accordance with established principles and could be allowed to stand.

On what basis was permission granted for a 2nd appeal to the Court of Appeal?

Lord Justice Floyd granted permission to appeal on 2 February 2017 to the Welsh Ministers under Civil Procedure Rules 1998 part 52.7(2)(a)(ii) on the ground that the appeal raised an important point of principle or practice as to the correct test to be applied by the Companies Court on applications to restore companies to the register.

Welsh Government spends £300,000 fighting company restoration to avoid paying copyright royalties for Dylan Thomas photographs it used without permission

The Welsh Ministers v. Haydn Price and the Registrar of Companies - A3/2016/4256

What does the Companies Act 2006 provide?

These provisions of the Companies Act 2006 are relevant to striking companies off the register or restoring them:

- section **1000** - Power to strike off company not carrying on business or in operation
- section **1012** - Property of dissolved company to be bona vacantia –
'When a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution ... are deemed to be bona vacantia and (a) accordingly belong to the Crown.'
- section **1029** - Application to court for restoration to the register
'(1) An application may be made to the court to restore to the register a company... (c) that has been struck off the register (2) An application under this section may be made by ... (b) any former director of the company'
- section **1032** - Effect of court order for restoration to the register
'(1) 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.... (3) The court may give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register'.

What does the Civil Procedure Rules 1998 say about joinder?

Part 19 deals with 'Addition and Substitution of Parties' and 19.2 makes these 2 general provisions for 'change of parties':

- '19.2 (2) The court may order a person to be added as a new party if –**
- (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings, or*
 - (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.'*

What were the grounds of appeal?

Although there were 5 grounds of appeal in the Notice of Appeal from the Welsh Ministers, by the time of the hearing they said it boiled down to only 1 point. That is the circumstances in which a court should permit a 3rd party to be joined to company restoration proceedings under CA 2006 section 1029.

Was there a Respondent's Notice by Mr Price?

Yes. This raised a number of points but the principal one was that there had been a delay of over 18 months before the Welsh Ministers make their application. Mr Price says that others will be prejudiced if any application is granted as their will be uncertainty as to the validity of transactions or actions taken by the company during that period.

What submissions did the Welsh Ministers on behalf of Visit Wales as appellant make?

Its written submissions can be summarized as:

- The court has a wide discretion to permit joinder under CPR part 19.2(2),
- Judge Behrens applied an excessively narrow approach to the circumstances in which a 3rd party should be joined to restoration proceedings,
- In considering whether to allow joinder a court should take account of the assistance which an intervenor may provide to the court,
- Joinder of the Welsh Ministers may assist the Companies Court in determining whether it has been misled,
- The power to assign by PSL to PSM the right to bring copyright infringement proceedings against the Welsh Ministers outside the USA and Canada was outside the scope of the undertakings given by Mr Price to the Companies Court,
- The decision of Registrar Barber was correct and her ruling should be restored, and
- The copyright assignment by PSL to PSM has exposed the Welsh Ministers to infringement claims to which they were not exposed at the time that PSL was struck off the register of companies.

Mr Todd's oral submissions made these points:

- The effect of the restoration of PSL to the register was to treat acts done by PSL before restoration as being valid. The copyright assignment from PSL to PSM would be immediately validated upon the making of a restoration order,

Welsh Government spends £300,000 fighting company restoration to avoid paying copyright

royalties for Dylan Thomas photographs it used without permission

The Welsh Ministers v. Haydn Price and the Registrar of Companies - A3/2016/4256

- There was a lack of candour or frankness on Mr Price's part when he made the application to vary the undertakings in omitting to mention the copyright assignment,
- The Welsh Ministers can only challenge the validity of the copyright assignment in restoration proceedings,
- There was no evidence of solvency of PSL before Registrar Derrett when she made the restoration order,
- *Blenheim Leisure* is directly on point and should be followed,
- Although there has been delay by the Welsh Ministers in their application there has '*not been any undue delay*'.

What submissions did the respondent Mr Price make?

In a confident and fluent performance (predominantly without the use of any speaking notes) Mr Price made these submissions during his 90 minutes of submissions which were listened to intently by all 3 judges with few interventions. Mr Price had prepared an additional bundle of authorities. He referred the judges to a number of these and invited them to read a number of sections of those judgements whose text was not read aloud in court.

- Mr Price maintained he had not done the things that the Welsh Ministers said he had done,
- The case law shows that only where there has been a change in the position after the restoration order was made to that subsisting before it was determined, can the order be disturbed.
- Once a company has been restored to the Register it is too late to interfere with a restoration order,
- His only error was to say he wanted to restore PSL 'solely' to pursue the copyright claims,
- The use of the word 'solely' was not a desire by Mr Price to mislead,
- The Welsh Minister's case does not stand up when you scratch it,
- Registrar Barber did not consider the case properly but Judge Behrens fully considered it, applied the correct principles and came to correct conclusion,
- The Welsh Ministers had falsely accused Mr Price of saying he was a qualified lawyer in contested infringement proceedings in Ireland. He had not said this but rather had told the court he had obtained a diploma in intellectual property law. The Welsh Ministers could have obtained a transcript of those proceedings but despite spending £300,000 so far on this case did not spend a small amount on obtaining this transcript.
- When the Welsh Ministers are challenged on what misrepresentations they allege Mr Price made to the Companies Court it is '*all a bit vague*'.
- The correct approach is that set out by Mr Justice Neuberger in *Blenheim Leisure* especially the 3rd judgment.
- Mr Price gave undertakings to the Companies Court that he would pursue claims against 3 entities for breach of copyright. He has done exactly that and now has judgments against 2 of those entities.
- The attorneys instructed by the Welsh Ministers have billed them over \$100,000 contesting Mr Price's copyright infringement claim in New York. The New York courts have upheld the validity of the copyright assignment from PSL to PSM.
- Registrar Barber wrongly ignored what would be the effect of her granting an order allowing the Welsh Ministers to intervene. She refused to even read Mr Price's skeleton argument.
- Judge Behrens came to the correct conclusion that the restoration order could only be disturbed where something had changed which it had not. This point was supported below by counsel then instructed by the Registrar of Companies.
- What the Welsh Ministers want to achieve is to have PSL struck off the register of companies to avoid paying copyright royalties lawfully due to PSM.
- The Welsh Ministers have wrongly claimed that they are immune from suit because of sovereign immunity.
- The application by the Welsh Ministers to the Companies Court has been made far too late.
- The Companies Court must restore a company to the register where either 1 of the 2 statutory gateways are met which they have been met here.
- The Court of Appeal must look at this from '*the reverse side of the telescope*' and consider instead what would be the effect on Mr Price and his businesses if 3 years later an order was made allowing the Welsh Ministers to intervene and then try to have the restoration order revoked.
- The Welsh Minister has no real or valid defence to the copyright infringement claim. Instead the Welsh Ministers have said they want to make Mr Price bankrupt.

Welsh Government spends £300,000 fighting company restoration to avoid paying copyright

royalties for Dylan Thomas photographs it used without permission

The Welsh Ministers v. Haydn Price and the Registrar of Companies - A3/2016/4256

- The Court of Appeal in *Taylor v. Lawrence [2003] QB 528* ruled that it was necessary in order to justify reopening of proceeding that it be '*clearly shown that a significant injustice had occurred*' and that there was '*no other effective remedy*'. This is not the case here.

What was the written case advanced by the Registrar of Companies?

The Registrar's written case made these points:

- The Registrar is '*neutral as to the determination of the appeal*',
- The Registrar submits Judge Behrens was wrong to say that the policing of company restoration applications had been entrusted exclusively by Parliament to the Registrar of Companies,
- No such policing role is assigned to the Registrar under Part 35 of CA 2006,
- Although Part 31 of CA 2006 deals with dissolution of companies and their restoration to the register, the only role assigned to the Registrar is an administrative one principally a requirement to publish notice of restoration under section 1031(3) of CA 2006,
- The Registrar is only made a party to a restoration application as a '*matter of court practice*',
- The Registrar has neither the expertise or experience nor resources or manpower to police restoration applications,
- In '*appropriate cases the court should be willing to join a 3rd party*' to a restoration application,
- A broader test should be applied by the Companies Court '*where there is an arguable case that the court has been misled*' and a restoration order should not have been made,
- A 3rd party who wants to argue that a restoration claim simply '*lacks merit has nothing relevant to say*', and
- Where a 3rd party has been sued by a company which ought not to have been restored, the Registrar '*can easily see an argument that such party should be permitted to challenge the restoration order*'.

What did the Registrar of Companies say at the hearing? Did it continue to maintain it was neutral?

No.

Although the Registrar concluded its written submissions by saying it was '*neutral as to the application of such principles to the facts of this case and whether the appeal should be allowed*', it buckled at the hearing. By then the Registrar was saying that all it did was a basic paper sift on a restoration application to ensure it met time limits and it extracted standard undertakings from applicants. The registrar's counsel said it had '*no instructions on a floodgates argument*' and with that its position changed from being neutral to supporting the Welsh Minister's case. It then prised the door wide open by submitting that the Registrar '*was supportive of 3rd parties being joined for*' the purpose of probing the solvency of a company which was seeking to be restored.

Were any new points advanced at this appeal hearing?

The Court of Appeal said it had read the Registrar of Companies' skeleton argument. Its counsel said he did not want to add anything but he was then probed for 20 minutes on a number of issues that were troubling the judges. He conceded that in a restoration case, it was essentially a paper based sift and the Registrar did not examine whether a restored company would be viable or not. The undertakings that the Registrar seeks from companies seeking restoration are standard ones similar to the ones that were given to Registrar Derrett here. Company restoration applications are no longer dealt with by the Companies Court but by district judges in Central London County Court instead. The Registrar's principal concern is maintaining the integrity of the register of companies. The Registrar's counsel was forced to concede following an intervention by Lord Justice Irwin that if a company had been dissolved, there had been no winding up process and even where the company had no assets that was not a reason not to restore it. Most restoration applications are dealt with on papers usually by consent but judges call some in for a hearing. Where an undertaking given on restoration is breached, the Registrar will not take any action.

What were the rulings the court made previously about company restoration in *Blenheim Leisure (Restaurants) Limited*?

The restoration of this company also went to the Court of Appeal and judgements about it were made on 3 separate occasions:

- **Court of Appeal** – 26 July 1999.

Blenheim Leisure's landlords disputed whether its sub-tenancy had expired or continued under the Landlord and Tenant Act 1954. Blenheim Leisure was struck off the company register and its assets passed to the

Welsh Government spends £300,000 fighting company restoration to avoid paying copyright

royalties for Dylan Thomas photographs it used without permission

The Welsh Ministers v. Haydn Price and the Registrar of Companies - A3/2016/4256

Crown as *bona vacantia*. The landlord served notices which terminated the lease because the Crown was not in occupation. Blenheim Leisure applied for restoration. The landlord applied to be added to the proceedings on the basis that restoration might give a deemed continuous existence to Blenheim Leisure and revive the lease. The landlord submitted that it should be joined as a 3rd party because its presence was necessary to ensure the disputed matters were sufficiently considered. The Court of Appeal (by a majority of 2-1) ruled that where the rights of a 3rd party were affected it was entitled to be joined and that the Companies Act conferred a wide discretion on the court when determining restoration applications. There was a requirement that restoration order be just which enabled 3rd party rights to be taken into consideration.

• **Chancery Division** (Neuberger J) – 7 October 1999.

Two creditors of Blenheim Leisure submitted that £180k was owed to them and that this money should be repaid as a prior condition of the restoration. The judge allowed the creditors' application in principle because the Companies Act gave the court power to order restoration on certain limited conditions. However, the exercise of that power was limited since an application to restore a company involved an administrative element and should not be seen as having the full status of ordinary court proceedings.

• **Chancery Division** (Neuberger J) – 28 October 1999.

An application was made requesting the court to reconsider its decision dated 7 October 1999 to restore Blenheim Leisure to the register. This application was refused. Although the court had jurisdiction to consider its earlier application (given that no order had yet been drawn up) it was undesirable on the facts for a judge to be asked to in the absence of exceptional reasons such as mistake by the court, failure to consider a relevant legal point or discovery of new facts. The court would not automatically accede to a request to re-open the matter and the discretionary power to reverse or modify a case would only be exercised if there were strong grounds to show that it would be allowing justice to be done.

What authorities were referred to in oral argument?

These authorities (listed chronologically) are relevant in this case and are referred to in either the oral and/or written submissions:

Re Portafarm Limited [1986] BCC 99 (High Court, Chancery, Harman J)

Restoration applications are usually to all intents and purposes *ex parte*. The Registrar of Companies will assist the court on whether the requirements of Companies Act have been satisfied but has no other interest except in securing its costs. The making of a restoration order does not determine whether an applicant has a claim against the company or the company has a claim against a 3rd party. All that is required is that the claim should not be merely shadowy. A 3rd party who wants to say that proceedings which the revived company proposes to bring against him have no prospect of success should not be entitled to intervene.

Stanhope Pensions Trust v. Registrar of Companies [1994] BCC 84 (Court of Appeal - Lord Bingham MR, Hoffmann and Henry LJJ)

The purposes for which section 651 of the Companies Act 1985 could be invoked were either to enable a liquidator to distribute an overlooked asset or a creditor to make a claim not previously made. The judge below erred in holding that he should not make an order. Although it was unclear how much or for how long Forte could claim under the indemnity, the entitlement to recover something was not merely shadowy and therefore the court should exercise its discretion to restore Forte to the register.

Re Jayham Limited [1995] 2 BCLC 455 (High Court, Chancery, Companies Court - HHJ Maddocks)

The court had jurisdiction to order the joinder of a 3rd party whose rights would be affected to a restoration application. The test to be applied in determining joinder was whether the 3rd party merely wished to argue that the applicant had no claim against the company or that the proceedings which the revived company proposed to bring against him had no prospect of success. In this case he should not be entitled to intervene. If however a restoration order would directly affect the rights of the 3rd party irrespective of whether the applicant had any claim against the company or vice versa joinder would be allowed. Here the applicant had an arguable case that it would not be just for the company to be restored because restoration would have the effect of depriving him of his main defence against the landlord's claim. The application for joinder on the restoration claim would be granted.

Re Blenheim Leisure (Restaurants) Limited [2000] BCC 554 (Court of Appeal – Nourse, Aldous and Tuckey LJJ). See above.

Taylor v. Lawrence [2002] EWCA Civ 90 (Court of Appeal - Lord Woolf LCJ, Lord Phillips MR, Ward, Brooke and Chadwick LJJ)

The Court of Appeal had a residual jurisdiction to reopen proceedings in order to avoid real injustice in exceptional circumstances. To justify this it was necessary that it be clearly shown that a significant injustice had occurred and that there was no other effective remedy.

Welsh Government spends £300,000 fighting company restoration to avoid paying copyright

royalties for Dylan Thomas photographs it used without permission

The Welsh Ministers v. Haydn Price and the Registrar of Companies - A3/2016/4256

Spring Salmon & Seafood Ltd v. Advocate-General of Scotland [2010] CSOH 82 (Outer House, Scotland, Lord Glennie)

A person who would be directly affected by a company restoration order could be heard in opposition to that application. However it had normally to be shown that he had altered his position on the strength of the striking off and would suffer some loss or damage if the company was restored, which he would not otherwise have suffered. The applicant's claimed prejudice here was said to be they would suffer as a result of restoration. This stemmed from the fact that their position would revert to that which prevailed before the striking off. The striking off had given them an advantage which restoration would remove. However that did not give them title and interest to object on the basis that they would be directly affected by the restoration order.

Practice Note (Companies Court: Claims for an Order Restoring the name of a company to the register) [2012] BCC 880

www.gov.uk/government/uploads/system/uploads/attachment_data/file/419253/Companies_Court_Practice_Note_Appendix_D_Company_Restoration_Guide_March_2015.pdf

What interventions did the judges make? What points seemed to be troubling them?

The Master of the Rolls made the most interventions. He started by questioning whether CPR part 19.2(2)(a) could apply saying that he understood how CPR 19.2(2)(b) could apply. He then challenged Mr Todd's submissions on *Re Jayham* saying he was '*not sure that is right*'. Although the Master of the Rolls had been counsel for the intervenors in *Stanhope Pensions* he confessed that he had '*no recollection at all*' of the case. He then challenge Mr Todd as to whether it was '*desirable*' to open up the restoration proceedings adding that the Court of Appeal had to be aware of the implications of its ruling outside this case. He then questioned whether the floodgates would be opened if it became easier to challenge restoration orders which Mr Todd denied. He then asked what did it matter if the Companies Court was prepared to accept the enlarged undertakings that Mr Price offered. He noted that pursuit of an infringement claim against VisitWales.com was in the undertakings given by Mr Price to the Companies Court on the restoration application. As to Mr Price's undertakings, the Master of the Rolls stressed that these were '*permissive*' and that Mr Price did not have to sue. He too then pressed Mr Todd what misrepresentations Mr Price had made. He then wanted to know what the sanction was for breach of any undertakings given on a restoration application. The Master of the Rolls then challenged Mr Todd that the Welsh Ministers were seeking '*2 bites of the cherry*' in intervening in the Companies Court and then raising a defence in the infringement proceedings. He wanted to know from the Registrar's counsel who raised the issue as to whether a restore company would be '*viable*' or not. He then asked what would be the status of actions taken by a company if a restoration order was set aside. He then noted that there was an '*inherent jurisdiction to set aside an order obtained improperly short of fraud*' but again he pressed Mr Todd in his reply about his concern about floodgates being opened. In a concluding intervention, the Master of the Rolls said that Mr Price had put his points '*very clearly*' and that he had got all of his points.

Lord Justice Longmore started his interventions by stating that on an *ex parte* application any person affected could apply to change the order made. He then challenged Mr Todd whether the Welsh Ministers' case was for breach of undertakings or a misrepresentation and asked what that misrepresentation was. However Mr Todd was unable to give a clear answer. He then asked where the evidence was for misrepresentation to which Mr Todd was unable to answer. He then pressed Mr Todd saying that at its highest this was merely a case of non-disclosure rather than misrepresentation. Longmore LJ then put to Mr Todd that it did not matter if the Welsh Ministers had breached copyright to the undertakings Mr Price gave on his restoration application and he pressed this point more than once. The 3rd time he pressed this point, Longmore LJ said that Mr Todd was making a serious allegation alleging misrepresentation by Mr Price and he wanted to be clear what the untruths were. Again Mr Todd gave vague answers. Longmore LJ was scathing of Mr Todd's submission that in failing to disclose the copyright assignment that amounted to a misrepresentation at all. Longmore LJ pointed out that Mr Price had always reserved his rights to sue the Welsh Ministers. Then Longmore LJ challenged Mr Todd that the Welsh Ministers in the copyright infringement proceedings could seek an order for security for costs against PSM and that this would be the '*usual route*'. After lunch Longmore LJ pointed out to Mr Todd that PSL had been restored to '*enable*' it to sue his client. During Mr Todd's reply, Longmore LJ put to him that if Mr Price was in breach of any undertakings given, the usual route is to proceed for contempt of court.

Lord Justice Irwin made the fewest interventions. He started by noting that the restoration order was a consent order. He then went on to note in Mr Price's witness statement that he had said he wanted to

Welsh Government spends £300,000 fighting company restoration to avoid paying copyright

royalties for Dylan Thomas photographs it used without permission

The Welsh Ministers v. Haydn Price and the Registrar of Companies - A3/2016/4256

regain control of copyrights and questioned what 'regain control' meant. Irwin LJ agreed that security for costs could be ordered where PSM had no obvious assets. Irwin LJ shared the Master of the Rolls' concerns about restoring a company which was '*unviable*' because of its debts.

What did the Court say about judgment in this case?

The Master of the Rolls said that judgement would be handed down '*in due course*'. He said the court may distribute a draft judgment in advance, and if it did so, it wanted all sides to agree an order. It may be that no advance copy is distributed and all sides will have to attend at a handing down hearing. No indication was given as to when judgement would appear. Whether this judgement appears this side of Christmas 2017 remains to be seen.

19 October 2017

David Bowden is a solicitor-advocate and runs [David Bowden Law](#) which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.