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Court of Appeal blasts the Welsh Ministers for spending ‘*considerable sums*’ fighting company restoration to avoid paying royalties for unauthorised use of Dylan Thomas photo

*The Welsh Ministers v. Haydn Price and the Registrar of
Companies - [2017] EWCA Civ 1768*

Article by David Bowden

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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. 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 made a joinder order in favour of the Welsh Ministers. This joinder was overturned on appeal by Judge Behrens. The Court of Appeal has dismissed the Welsh Ministers appeal ruling that even giving the joinder test in CPR part 19.2(2) a wide interpretation the Welsh Minister had not made out a case for joinder. It also ruled that there were important practical considerations for strictly limiting the circumstances in which 3rd parties are joined to applications to restore a company to the register because there may be many third parties who perceive that their interests may be indirectly affected by restoration and who may wish to advance all manner of reasons for seeking to prevent or reverse an order for restoration. The inter-company copyright assignment was not a material reason for refusing to restore Pablo Star Media to the register of companies. So far the Welsh Ministers have spent over £300,000 in legal costs. The Welsh Ministers were also ordered to pay Mr Price's costs summarily assessed in the sum of £4,657.

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

[2017] EWCA Civ 1768

7 November 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. The copyright in this photograph will run for the life of Mr Watkins as photographer and for 70 years after his death. The copyright in '*Just Married*' is set to expire on 31 December 2037.

What is the connection between Mr Price and Dylan Thomas?

Mr Price is a journalist. 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. Mr Price bought the rights to 2 Dylan Thomas photographs from Mrs Watkins and then held the copyright in the photographs.

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, Canada, and the USA.

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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.

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.

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

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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 practice as to the correct test to be applied by the Companies Court on company restoration applications.

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 **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 authorities are referred to in the judgement?

These 7 authorities (listed chronologically) are referred to in the judgement:

Servers of the Blind League [1960] 1 WLR 564 (High Court, Chancery, Pennycuik J)

The purpose of an order under section 352 of the Companies Act 1948 was to enable distribution to be made of an asset which belonged to the company before dissolution but which had since vested in the Crown as *bona vacantia*. Since the asset in question had never belonged to the company, and the order sought would dispossess other persons who had obtained a vested interest in the residuary share under a title not derived from the company, it was not a case in which the court should exercise its discretion to declare the dissolution void

Livesey v. Jenkins [1985] AC 424 (House of Lords – Lords Hailsham LC, Scarman, Keith, Bridge and Brandon)

The court could not properly exercise its discretion (here under section 25(1) of the Matrimonial Causes Act 1973) unless it was provided with correct, complete, and up-to-date information. Each party was under a duty to make full and frank disclosure of all material facts to the other party and to the court. That principle applied also to exchanges of information leading to consent orders without further inquiry by the court. A consent order would be set aside. However it is not every failure of frank and full disclosure which would justify a court in setting aside an order but rather it will only be in cases when the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good. Parties who apply to set aside orders on the ground of failure to disclose some relatively minor matter or matters, the disclosure of which would not have made any substantial difference to the order which the court would have made or approved, are likely to find their applications being summarily dismissed with costs against them.

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

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

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 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.

Regent Leisuretime Limited v. NatWest Finance Ltd [2003] EWCA Civ 391 (Court of Appeal – Schiemann, Jonathan Parker and Keene LJJ)

Under section 653(3) of the Companies Act 1985 the court had a wide discretion when dealing with a restoration application to take into account the rights of third parties who would be directly affected by an order for restoration. NatWest Finance who as a third party would be prejudiced by a limitation direction sought by the company was entitled to be heard in opposition to it.

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 were the issues the Court of Appeal had to decide?

The Master of the Rolls said that the determination of this appeal depended on these 3 issues:

- Was the test for joinder under Civil Procedure Rules 1998 part 19.2 made out by the Welsh Ministers?
- Did what Mr Price say in his evidence in his applications in the Companies Court make any difference?
- What was the effect of the inter-company copyright assignment to the Welsh Ministers?

What did the Court of Appeal rule on joinder under CPR part 19.2?

The Master of the Rolls started by laying bare what the Welsh Ministers were up to with a poignant observation that *‘the Welsh Ministers wish to be joined to the proceedings in order to have the Restoration Order revoked, with the retrospective effect of nullifying the assignment, so as to deprive both Pablo Star and Media of any cause of action against the Welsh Ministers for infringement of the copyright’*.

He then went on to observe that CPR 19.2 conferred a *‘discretion on the court to join a party if the conditions in 19.2(2)(a) or (b) are satisfied’*. Etherton MR said that *‘on its literal wording’* CPR 19.2(2)(a) was *‘directed to a situation where, prior to the joinder of the new party, there already exists a dispute’* but that in this case *‘there is not and has never been, strictly speaking, any dispute’*. However he said CPR 19.2 ought *‘to be given a wide interpretation’* and that the phrase *‘in dispute’* ought to be read as *‘in issue’*.

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On this Etherton MR said that the Companies Court proceedings were ‘*commenced to determine whether or not Pablo Star should be restored to the register of companies*’ and this was ‘*the matter in issue*’. On its face he ruled that that application of the Welsh Ministers to intervene was ‘*capable of falling within CPR 19.2(2)(a)*’. However as the CPR 19.2(2)(b) the Master of the Rolls was clear that he did not consider that this second condition namely that it was ‘*desirable to add the Welsh Ministers, is satisfied*’.

He rejected Mr Price’s submission that only an appeal or the commencement of fresh proceedings by the Welsh Ministers was the only appropriate route saying the he did ‘*not accept that*’ this ‘*would be necessary or appropriate*’. However Etherton MR ruled that the ‘*Welsh Ministers are not directly affected by the Restoration Order in a way that would justify their joinder*’.

As to whether it was ‘*desirable*’ to add a new party, the Master of the Rolls said there were ‘*two lodestars*’ being

- policy objective of enabling parties to be heard if their rights may be affected, and
- the Overriding Objective in CPR part 1.

However he ruled that there were ‘*important practical considerations for strictly limiting the circumstances in which third parties are joined to applications to restore a company to the register*’ noting that ‘*there may be many third parties who perceive that their interests may be indirectly affected by restoration and who may wish to advance all manner of reasons for seeking to prevent or reverse an order for restoration rather than wait to face and, where appropriate, resist actions of the company against them or others which the company perceives to be in its best interests*’.

The Master of the Rolls adopted the reasoning in *Stanhope* that it was ‘*well established that the court will not allow the intervention in proceedings for restoration by a third party who merely wishes to argue that the proceedings which the revived company proposes to bring against the third party have no prospect of success*’. Going on Etherton presciently observed that Welsh Ministers were alleged to be ‘*in no worse position after restoration than before*’ but merely that the restoration order ‘*retrospectively validated the assignment*’ with the consequence that the Welsh Ministers might ‘*be exposed to proceedings*’ by PSM and that it ‘*did not bring into existence a new asset or a new liability but merely changed the identity of the person who could enforce the copyright*’.

Etherton MR approved the decision in *Servers of the Blind League* noting that the application there had been refused because the order would ‘*dispossess other persons who obtained a vested interest in the asset under a title not derived from the company*’. The Master of the Rolls considered *Stanhope* and *Blenheim Leisure* but then distinguished them observing that the ‘*contrast with the present case is clear*’ and that so ‘*far as concerns the interests of the Welsh Ministers, restoration of Pablo Star to the register of companies did not create a new asset of the company which had not previously existed nor did it create a new or substantively different liability*’ but rather that ‘*the liability of the Welsh Ministers for its infringement existed both before dissolution and after restoration*’ and this was irrespective of ‘*whether or not the precise amount of that liability is now greater than it was prior to dissolution because of continued acts of infringement in the meantime*’.

However the Master of the Rolls ruled that the court did have ‘*power under CPR 19.2(2) to join a third party to restoration proceedings for such a purpose in an appropriate case*’ but that he did not consider that ‘*this is an appropriate case*’ because the jurisdiction to add 3rd parties is ‘*capable of providing an opportunity for all manner of opportunistic applications by persons who consider that they would be or might be adversely affected if the company was restored*’ observing that the ‘*present application by the Welsh Ministers is a good example since the evidence discloses that very considerable sums have been deployed in pursuing the application before three different levels of the judiciary*’.

What did the Court of Appeal say about Mr Price’s conduct in the Companies Court?

The Master of the Rolls then turned to the findings made by HHJ Behrens as to whether, as the Welsh Ministers claimed, the Companies Court had been ‘*seriously misled in granting the Restoration Order and in making the Variation Order*’. Etherton MR agreed with counsel for the Registrar of Companies that Judge Behrens was wrong to say that it was ‘*for the Registrar, and no one else, to raise with the court issues of breach of an undertaking or misleading witness statements*’. On this he ruled that ‘*no statutory provision has been identified to support the Judge’s proposition*’.

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Etherton MR noted that once jurisdiction had been established, the Registrar does not ‘go on to consider, let alone address the court on, the issue of the suitability of restoration in any particular case’ and neither did the Registrar ‘monitor compliance with undertakings or refer any breach of undertakings to the court’.

The Master of the Rolls criticized Mr Price for the manner in which he had redacted the inter-company copyright assignment saying that ‘on the face of it, that conduct of Mr Price is open to serious criticism’ and that ‘despite extensive evidence and submissions by Mr Price, he has provided no explanation for that conduct’ but this had ‘nothing to do with whether or not the application for the Restoration Order was flawed in some material way’ or should be revoked.

What difference did the assignment make to the Welsh Minister’s rights?

The Master of the Rolls endorsed the approach on divorce consent orders in *Livesey* noting that the ‘fact that the assignment was not disclosed’ by Mr Price’s evidence was ‘not a significant omission’. He went on to say that the ‘fact that the assignment transferred to PMS the right to sue other entities could not possibly have been a material reason for refusing to restore PSL to the register’. He added that ‘failure to disclose that the Restoration Order would retrospectively validate the assignment is also not a significant omission’ and that it was ‘inconceivable’ even if it was disclosed that either the Registrar of Companies or the Companies Court would have refused to make the restoration order.

Etherton MR ruled that it was ‘elementary that the usual sanction for a breach of undertakings by an individual is an application for a penalty such as a fine or imprisonment for contempt’ and that ‘no authority or principle has been cited to us to suggest that the sanction for breach of an undertaking in an order restoring a company to the register could be a revocation of the Restoration Order itself’.

Concluding on this issue he ruled that there was ‘simply no reason to believe that that the Variation Order would not have been made if he had made it clear that the assignment had been made before and was validated by the Variation Order’ and also that he could not ‘see that it would have made the slightest difference if Mr Price had made clear on the application for the Variation Order’ that it was PMS and not PSL which ‘had the right to sue for past infringements of the copyright’.

What matters did the Court of Appeal feel were not necessary to address on this appeal?

The Court of Appeal did not need to deal with Mr Price’s cross-appeal in his Respondent’s Notice that the joinder application should have been dismissed in any event on the grounds of delay. The Master of the Rolls in an *obiter* observation said he ‘would not have dismissed the appeal on that ground’ and that he saw ‘no error of principle by either Registrar Barber or Judge Behrens in deciding that the delay by the Welsh Ministers was not fatal to the application for joinder’. It also declined to deal with Mr Price’s submission that it would be contrary to EU law to either revoke or set aside the restoration order.

What warning did the Court of Appeal give to other litigants?

The Master of the Rolls said this:

‘Finally, I would emphasize that nothing in this judgment should detract from the importance of full and frank disclosure to the court of all material facts on applications for restoration of a company to the register and any subsequent variations to the restoration order where, as here, they are effectively ex parte applications in view of the limited involvement of the Registrar of Companies. As I have made clear, in an appropriate case, where it is desirable for the purposes of CPR 19.2(2) and consistent with the Overriding Objective, there is jurisdiction to permit a third party to be joined to bring such matters before the court’.

What order was made at the handing down hearing?

At the hand down, it was ordered that the Welsh Minister’s appeal be dismissed and that they were to pay Mr Price’s costs of the appeal summarily assessed at £4,657 within 14 days. The Registrar of Companies was ordered to bear its own costs. 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.

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David Bowden is a solicitor-advocate and runs [David Bowden Law](http://DavidBowdenLaw.com) 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.