Davy v Pickering [2017]: *what now for claimants?*[1]

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Published April 2017

Court of Appeal considers whether limitation period ceased to run against a claimant when company was struck off the register.

Davy v Pickering [2017] EWCA Civ 30

The Court of Appeal has allowed an appeal against a direction, given under section 1032(3) of the Companies Act 2006, that the period during which the company in question had been struck off was not to count for limitation purposes. In so doing, it has provided welcome clarity as to the test to be applied in making directions when restoring a company to the register of companies.

The facts

The case concerned a company which carried on business as an independent financial advisor. Until 2010, the first and second appellants, Mr and Mrs Pickering, were the company's only directors. They, together with the corporate trustee of their pension fund, were its only shareholders. The respondent, Mr Davy, took advice from the company, which he subsequently alleged had been negligent. In June 2010, before any intimation of a claim by Mr Davy, Mr and Mrs Pickering caused the company to cease business. Soon after, the company transferred its freehold property to Mr and Mrs Pickering and their pension trustee. Mr Pickering resigned as a director in July 2010. In July 2011, Mr Davy made a complaint to the Financial Ombudsman Service ("the FOS"). In November 2011, Mrs Pickering applied for the company to be struck off the register of companies, pursuant to section 1003 of the Companies Act 2006 ("CA 2006"). No notice was given to Mr Davy. The company was struck off the register and dissolved in March 2012. Subsequently, Mr Davy submitted a claim to the Financial Services Compensation Scheme.

In November 2013, Mr Davy applied to restore the company to the register and sought directions under section 1032(3) CA 2006, which provides that: *"The court may give such*

[1] I would like to acknowledge the assistance of a pupil, Emma Price, in the preparation of this article

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." Mr Davy sought the directions because he claimed to have lost the opportunity to bring a claim during the period from dissolution to restoration, which would have been less liable to be defeated by a limitation direction, and to present a winding up petition in the period from March to June 2012 so as to enable a liquidator to recover assets of the company under sections 238 and 239 Insolvency Act 1986.

The judgment below

An order was made for the restoration of the company to the register. Two directions were subsequently given, one of which was that the period between 20 March 2012 (when the company was struck off) and 1 July 2014 (the date of the Restoration Order) was not to count for limitation purposes. It was held that there was a window of opportunity, if only a small one, in which Mr Davy might have established the merits of his claim to the satisfaction of the FOS and been able to present a winding up petition and bring a claim that would underpin such a petition ([2015] 2 BCLC 116).

The appeal

The appellants submitted, among other things, that the judge was wrong to hold that the relevant question was whether the applicant had been deprived of the opportunity of bringing proceedings or presenting a winding-up petition, but, rather, whether the applicant had changed his position by reasonably abstaining from taking such steps as a result of the company's dissolution. The direction should not put the applicant in a substantially different position than he would have been in if the company had not been struck off the register.

The Court held that the judge had correctly emphasised that the discretion conferred by section 1032(3) CA 2006 was not unlimited, but must be exercised only for its stated purpose and, assuming a direction would meet that purpose, only if such direction "seems just". In the context of an application for a limitation direction, the issue is the requisite degree of likelihood that a claimant would, in fact, have issued proceedings if the company had not been struck off the register. ***County Leasing Asset Management Ltd v Hawkes*** [2015] EWCA Civ 1251 (decided after the order had been made in the present case) established that the discretion to make a limitation direction required a causative link between the dissolution of the company and the failure to commence the proceedings in question. This flowed from the express purpose of a direction. The purpose to be served by a direction is the same, whether it is in favour of the company or a third party. However, this did not mean that, if the necessary condition for the making of a direction was established, directions would be made as readily in favour of the company as in favour of third parties, but this arises from whether it "seems just" to make a direction.

In the instant case, the bar had been set too low. A window of opportunity in which a step might have been taken was an insufficient basis for a direction under section 1032(3) CA 2006. It was not possible to conclude that Mr Davy might well have either established a claim, issued proceedings or presented a winding-up petition against the company by 21 June 2012.

There are two further interesting aspects of the judgement. First, the court rejected the contention that the requirement established in ***Regent Leisuretime Ltd v NatWest Finance Ltd*** [2003] BCC 587 of an exceptional case for a limitation direction in favour of the company applied also to a direction in favour of a third party claimant against the company. There were particular factors relevant to the exercise of the discretion in favour of the company, the most obvious one being that it was the company itself that brought about its dissolution and so disabled itself from bringing proceedings within the limitation period. Such issues went not to the purpose test, but to the consideration of what was just.

Secondly, the Court did not accept the submission that Mr Davy could have either issued proceedings with the company named as the defendant, which would be validated by a subsequent order restoring it to the register, or presented a petition seeking orders to restore the company to the register and to wind it up, and it was, therefore, inappropriate to make the directions sought. It was inconsistent with the way in which the courts have approached limitation directions since 1952 and it would threaten to penalise the practically sensible and legally commendable course of not commencing invalid proceedings.

Comment

The judgement provides welcome clarification on the circumstances in which a limitation direction should be made in favour of a third party, as opposed to in favour of the company itself. As the Court observed, at the time of the hearing before the judge, there had been little authoritative guidance on the matter. Applicants for such directions will need to provide evidence to demonstrate a clear causal link between the dissolution of the company and their failure to bring proceedings within the applicable limitation period, and the test to be applied is one of probability.

The judgement has also helpfully clarified the relevance of exceptional circumstances: they will be relevant in the consideration of what is just, rather than in relation to whether there is jurisdiction to make the directions sought. Finally, the Court's approach to whether or not a winding-up petition can be presented against an unregistered company and/or proceedings brought against an unregistered company is of interest. It appears that, even if such courses of action may, in principle, be open, a party will not be penalised for not following them.

Previous authority and the relevant statutory provisions provide that a company that has been struck off can be wound up as an unregistered company. Further, ***Re Cambridge Coffee Room Associated Ltd*** [1952] 1 All ER 112 suggests that it is sensible to petition for both restoration and winding-up at the same time, but that does not stop the winding-up petition being presented. As such, there would be no need for a direction backdating the proceedings. Equally the effect of the restoration of a company is to retrospectively validate any proceedings taken against the company during the period between its dissolution and restoration - ***Joddrell v Peaktone*** [2013] 1 WLR 874. Again the practical effect would be that there would be no need for a limitation direction in these circumstances.

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April 2017