THE HIGH COURT

[2020] IEHC 605

[Record No. 2019/424 COS]

IN THE MATTER OF AN POST NATIONAL LOTTERY COMPANY

AND

IN THE MATTER OF SECTION 678 OF THE COMPANIES ACT, 2014

BETWEEN

MARY WALSH

APPLICANT

AND

AN POST NATIONAL LOTTERY COMPANY

RESPONDENT

THE HIGH COURT

[Record No. 2016/11459P]

BETWEEN

MARY WALSH

APPLICANT

AND

AN POST, AN POST NATIONAL LOTTERY COMPANY AND PREMIER LOTTERIES IRELAND DAC

RESPONDENTS

JUDGMENT of Ms. Justice Pilkington delivered on the 19th day of October, 2020

1. By way of originating notice of motion (issued in these proceedings but, for the reasons set out below, relied upon in respect of proceedings 2016/11459P) dated the 13th of November 2019, the applicant seeks the following reliefs: -

   (1) An order pursuant to RSC O. 74, r. 83 and further pursuant to s. 678 of the Companies Act, 2014 for such order, allowing for the taking and continuation of proceedings and the service of a statement of claim on the respondent company, which is in voluntary liquidation.

   (2) An order pursuant to RSC O.28, r. 7 amending the title of the existing proceedings bearing record number 2016/11459 P to include the words "in voluntary liquidation" in respect of the second named defendant, the respondent herein.

   (3) An order pursuant to RSC O. 9, r. 15 declaring the service of the plenary summons as already effected on the second named defendant, the respondent herein as sufficient.

   (4) Further or other order and an application for costs.

2. The background facts and circumstances of this case are certainly unusual.

3. By way of a brief summary: -

   (a) The applicant, Ms. Walsh, was the winner of a lottery ticket drawn on the 22nd day of January, 2011. She won some €3.389 million. Thereafter, matters took a turn for the worse.

(b) Ms. Walsh contends that she was advised by the National Lottery (specifically by a Mr. Hughes) that if she wished to make gift to any members of her family, without them being liable to tax, then she should print the names of the intended recipients on the back of the ticket. She did so prior to its presentation. The plaintiff at all times denied that a syndicate was thereby formed. She contended that she intended to give gifts to certain family members but not to form a syndicate, comprising of herself and five other people, which would thereby entitle each to a one-sixth share.

(c) Following the death of Ms. Walsh's husband, his son (and lately I understand his nephew) have issued High Court proceedings seeking their share of the applicant's lotto winnings.

(d) The first set of proceedings seeking such a share were issued by David Walsh (a step son of Ms. Walsh), on the 20th day of November, 2013 bearing record number 2013/13066 P ('the 2013 proceedings'). Humphreys J. delivered his *ex tempore* decision on the 2nd day of February, 2017 - Walsh v. Walsh [2017] IEHC 181. Mr. Walsh succeeded in the 2013 proceedings.

(e) The matter was then appealed to the Court of Appeal and, on consent of both parties, on the 31st day of July, 2018 Irvine J. (as she then was) made an order in the following terms:

> "That the appeal be allowed and that all prior orders made in this Court and all orders made in the High Court be vacated save for the counterclaim of the defendant do stand dismissed"

The appellant's claim (this applicant) was then struck out with no order as to costs.

4. In the interim, on the 22nd of December, 2016 this applicant issued proceedings bearing record number 2016/11459 P, instructing Beauchamps Solicitors, against three named defendants, An Post, An Post National Lottery Company and Premier Lotteries Ireland Designated Activity Company. These proceedings essentially constitute negligence proceedings in respect of the advices allegedly furnished to her by Mr. Hughes. This was prior to the judgment in the 2013 proceedings on the 2nd day of February, 2017 and the subsequent appeal. I also understand that certain reliefs, arising from an application for a Mareva injunction, attached to the monies thereafter (but I am uncertain as to any terms of such order).

5. In any event, at some point which is at present unclear, within the 2016 proceedings (which I shall term 'the negligence proceedings'), Ms. Walsh's solicitors (Messrs Beauchamps) came off record. Thereafter, Ms. Walsh personally (when she was a lay litigant) served the defendants on the 20th day of December, 2017 and has sworn an affidavit of service to that effect.

6. It appears that, within the 2016 proceedings, appearances have been entered in the usual course – the appearance for the second named defendant is dated the 3rd day of January,

2018 and requests, in the usual form, delivery of a statement of claim. The second named defendant is the relevant defendant to the present application.

7. The applicant's present solicitors filed a notice of change of solicitor on the 13th day of June, 2019, so she was without legal representation from some time in 2017 to this June 2019 date.

8. This motion concerns only the second named defendant to the 2016 proceedings. This issue has arisen due to the fact that the second named defendant was, on the 26th day of October, 2016 by member's special resolution, wound up voluntarily and Mr. Michael Sargent appointed as its liquidator. In the usual form this was entered in the CRO on 1st day of November 2016. The necessity for its winding up arose because, following a competitive tender process, the licence for the operation of the State National Lottery was awarded to the third named defendant and, accordingly, the second named defendant company no longer carries on that business.

9. Therefore, by the time the negligence proceedings issued on the 22nd of December 2016 the second named defendant to those proceedings was in voluntary liquidation and any entity wishing to issue proceedings against it must comply with the requirements of s. 678 of the Companies Act, 2014 ('s. 678'), which is set out below.

10. In such circumstances RSC O.74 r. 83 clearly requires, in an application pursuant to s. 678 in the case of a voluntary winding up, that it is made by way of an originating notice of motion. No originating notice of motion was issued within the 2016 negligence proceedings (a notice of motion was issued but not an originating notice of motion). Thereafter, arising from correspondence between the parties, it was accepted that an originating notice of motion would be issued. That was done and comprises of the present application, which bears the 2019 record number set out above and in respect of which the only defendant named is the company in voluntary liquidation. However, all of the affidavits filed in support of this application are filed within the 2016 negligence proceedings.

11. This originating notice of motion is therefore solely related to the leave application in respect of the second named defendant within the 2016 negligence proceedings. Whilst this is certainly irregular, it was agreed that it would proceed on that basis.

12. Section 678 of the Companies Act, 2014 is clear in its terms. It is headed "Actions against Company staying on Winding Up Order" and states: -

"678.(1) When in relation to a company–

(a) a winding-up order has been made,
(b) a provisional liquidator has been appointed, or
(c) a resolution for voluntary winding up has been passed,

no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose."

13. Its predecessor, s. 222, was in identical terms, save that s. 678 provides for the insertion of a new category at (c) above. In short, the requirement for leave of the court in respect of a voluntary winding up was added. Specifically, no amendments have been made within s. 678 as to whether, in a voluntary winding up, any such application can, if successful, have retrospective effect, or if any other criteria should be considered in respect of that form of winding up

14. In any event, before I can determine that the application can be made retrospective or otherwise, I also have to consider whether leave should be granted.

15. The case relied upon by both parties is that of Finlay Geoghegan J. in *Re MJBCH Ltd (In Liquidation)* [2013] IEHC 256 ('*MJBCH*'). Self-evidently, this decision was prior to the introduction of s. 678.

16. In that case the court had to consider whether it had jurisdiction to make an order granting leave for the commencement of proceedings (concerning an accident at a hotel complex where the occupier of the premises had been the subject of a winding up order) and whether, in such circumstances, the court had jurisdiction to make an order with retrospective effect, pursuant to s. 222 of the Companies Act, 1963. The company's official liquidator stated he was taking a neutral stance on the application (that is not the position here). The court stated: -

> "The primary issue on this application is whether or not the Court has jurisdiction pursuant to s. 222 to make an order granting leave for the commencement of proceedings which has retrospective effect. Put another way, the question is whether or not the Court has jurisdiction to make an order, the effect of which is to validate proceedings commenced after the making of a winding up order but without the prior leave of the Court. If the Court does have jurisdiction, there is the further issue as to whether it should grant the order sought."

17. In considering the issue, the court had to consider whether the issuing of such proceedings against a company, the subject of a winding up order, was merely an irregularity or a nullity.

18. In pointing out that voluntary liquidations were not 'caught' by s. 222, Finlay Geoghegan J. stated that, in her view, its purpose could not simply be the protection of creditors but primarily, as set out by Black L.J. in the Northern Irish case of *Boyd v. Lee Guinness Limited* [1964] NI 49, of placing all proceedings in relation to the company being wound up by the court under its supervision.

19. In such circumstances, the court considered it had jurisdiction. The court stated: -

> "In my judgment, having regard to the purpose of s. 222 as set out above and the above constitutional principles, in the absence of express words which provide that the commencement of proceedings without leave of the court in breach of s. 222 render proceedings a nullity or which preclude the court from granting leave for commencement after the event s. 222 should not be so construed. Whilst s. 222, by its express words provides… it does not provide for the consequences of the commencement of an action without leave of the court."

The court continued: -

> "Further, while the words "except by leave of the court" are open to the construction that leave should be obtained prior to commencement, it does not appear to me that, having regard to the statutory purpose and the necessity to construe the restriction on access to the courts strictly, that these words should be construed as precluding the court granting leave for the commencement of the action after the event. A broader construction of the time at which leave may be sought is in accordance with the statutory purpose of controlling proceedings in a court ordered winding up as the entitlement to pursue the action is still under the control of the court. This construction also avoids the potential adverse consequences of a restriction on access to the courts unnecessary to the statutory purpose of s. 222, such as failing to commence within a limitation period or incurring the unnecessary expenses of two sets of proceedings. If s. 222 is construed as not giving the court jurisdiction to make an order granting leave after commencement, it inevitably creates a situation which requires at a minimum discontinuance of the proceedings and, if leave is then subsequently granted, recommencement and service of identical proceedings, and if a limitation period has expired there would be further potentially severe adverse consequences for a plaintiff."

20. The same or similar might, arguably, be made in respect of the present s. 678 of the Companies Act, 2014. As set out above, the addition of a company in voluntary liquidation is simply a further category and arguably, therefore, the same criteria applies. However, it has also been argued that, by virtue of it being a voluntary winding up, the underlying rationale expressed within *MJBCH* does not apply by virtue of the fact that a voluntary winding up of a company does not require court supervision.

21. I have also considered the comments of Finlay Geoghegan J. with regard to statute of limitations. I appreciate that if this plaintiff had begun her 2016 negligence proceedings at an earlier stage and perhaps, more pertinently, had also served them earlier, that these difficulties could, on a simple timing basis, have been averted. It appears that no steps were taken, within the 2016 negligence proceedings after the plenary summons issued (at that point, the plaintiff had solicitors on record) to seek leave pursuant to s. 678 and service was not affected for almost 12 months.

22. Whilst suggesting that had the plaintiff moved with greater expedition then she would not have needed to seek leave of the court at all is factually correct, but of limited assistance

in dealing with the facts as they now present themselves to this Court. In dealing with the statute of limitations, any other means by which they might have been resolved, for example the respondents argue, by obtaining an undertaking from the defendant not to plead the statute within the defence, is again speculative on the facts of this case. The fact is that for whatever reason, this plaintiff issued proceedings in the 22nd day of December 2016 (one assumes as some form of protective writ with an eye to the potential expiry of the statute of limitations in respect of the proposed negligence proceedings themselves, but that is not entirely clear) in advance of the judgment of Humphreys J. and, thereafter, did nothing whatsoever about them for a period of almost twelve months. The fact that she was then a lay litigant and delayed service cannot totally absolve her from the difficulties she now faces, but it is a factor to which I have had regard. The proceedings were served within the proper time limit for service of the summons (albeit within two days of the expiry period), again perhaps with an eye to her appeal, which was ultimately compromised in July 2018.

23. In *Re Colliers International* [2012] EWHC 2942 (Ch), the issue in that case was whether there is jurisdiction in the court to grant retrospective permission for the commencement of legal proceedings in the context of insolvency proceedings. In the case of *Re Saunders* [1990] Ch 60, the court determined that legal proceedings commenced against a bankrupt or a company in compulsory liquidation were not a nullity, and that the court had jurisdiction to grant retrospective permission for their commencement. The court stated: -

> "In addition to the consequences of holding that proceedings are a nullity, it is clearly relevant to have regard to the purpose of the provisions in the context of insolvency. It is important to note that the requirement for permission for the commencement of proceedings applies to insolvency proceedings under the control of the court: bankruptcy, winding-up by the court and administration. It does not apply to a company in creditors' voluntary winding-up. This suggests that the real purpose of these provisions is not so much the protection of creditors as the purpose identified by Black L.J. in *Boyd v. Lee Guinness Limited*:
>
> > 'This section is one of a series of provisions designed to ensure that when a winding-up order has been made by the court the whole of the task of supervising the collection and distribution of the company's assets should be committed to the winding-up court and, accordingly, that all proceedings having any bearing upon the winding-up of the company should remain under the supervision and control of that court.'
>
> Given that purpose, it is hard to see why the court should not be permitted to grant retrospective permission if in the circumstances it is appropriate to do so."

24. In the context of mental health legislation, the UK House of Lords considered the issue in *Seal v. The Chief Constable of South Wales Police* [2007] UAHL 31.

25. In essence, under the relevant section of the Mental Health Act in the UK, no civil proceedings could be brought against any person in particular circumstances without leave of the High Court. In considering this, the court stated: -

> "What matters is that the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent as to impair the very essence of the right… Mr. Seal's undoing lay not in his failure to obtain leave which he should have had but in his failure to proceed within the generous time limit allowed by the 1980 Act… It is not irrelevant that restrictions similar to those in sections… were and are to be found in corresponding Irish legislation…"

26. In failing to move with greater expedition, this plaintiff has undoubtedly created a difficult situation for herself, exacerbated by the voluntary liquidation of one of the defendants whom she wishes to sue.

27. In the decision of *Wright-Morris v. IBRC* [2013] IEHC 385, the court, quoted from Delaney and McGrath (3rd ed.) in the following terms: -

> "'So, in summary, it would appear that a court does have a discretion to refuse to join a defendant where a cause of action against him is 'clearly' statute-barred because to do so would be 'futile'.'
>
> In an appropriate case, I think it is likely that a court would refuse to give consent to proceedings under… if it was satisfied that the cause of action against IBRC it was proposed to litigate was "clearly" statute-barred, which would probably be a relatively easy task if the court was applying Irish law."

28. On the facts of this case it does appear that the 2016 negligence proceedings themselves were issued within time.

Issue Estoppel/Abuse of Process

29. In the statement of claim that the plaintiff proposes to deliver to the 2016 negligence proceedings, there is no delineation as to the negligence alleged against each of the three named defendants – the pleading is simply directed at them all. The act of negligence (and this was clarified by counsel for the plaintiff) is solely contained within para. 4 (which owing to a duplication of numbering appears to be para. 6) of the proposed and now draft statement of claim in the following terms: -

> "The plaintiff on contacting the National Lottery to confirm her winning on Monday, the 23rd January was advised by Mr. Hughes, on behalf of the National Lottery, at the National Lottery headquarters that if she wished to make gifts to her family members, or indeed to any person, that now was the time to do so and she should have them sign the back of the lottery ticket and additional (sic) have them sign the National Lottery Claim Form, in that by doing so such gifts would be exempt from tax."

30. Counsel for the defendant strongly contends that, on the basis of the comprehensive *ex tempore* judgment of Humphreys J. in February, 2017 his findings render the pleading within the draft statement of claim, subject to the doctrine of issue estoppel. Counsel for the plaintiff contends that the negligence proceedings constitute a separate cause of action; that is correct, but the issue is whether, and to what extent, the oral evidence of Mr. Hughes and the judgment of Humphreys J. in respect of that evidence has determined certain matters.

31. The part of the decision of Humphreys J. referred to above in the 2013 proceedings *Walsh v. Walsh* [2017] IEHC 181, deals with this issue as follows: -

> "39. The third factual issue is whether the defendant was advised by Mr. Eamon Hughes of the National Lottery that if she wished to give any gifts to persons she should have them sign the ticket and claim forms so that such gifts would be exempt from tax. Mr. Hughes was emphatic that he had absolutely no recollection whatsoever of the defendant or of any dealings with her, yet at the same time, very unwisely, he seemed prepared to assume that he had given that advice to the defendant. He was totally unable to back up that assumption or give any reason for it and he resiled from it in cross-examination. Given that he has no recollections at all, his testimony on this matter is totally speculative and is devoid of real evidential value. Maybe he was influenced by the fact that he had been called by the defendant and in that process had had prior exposure to her story, or maybe not – the reason why he foolishly chose to give that evidence without any basis for doing so does not fundamentally matter for present purposes. The most one can say is that sometimes he drew winners' attention to tax implications because he repeatedly said that Capital Acquisitions Tax thresholds were in the public domain. His evidence was however somewhat contradictory in the sense that he also said that the lottery didn't give people advice, and that what they did with their money was their own business.
>
> 40. The most one can take from his evidence is that he might have referred to the tax position in conversation with the defendant but then again, he might not. He was keen to stress the tax thresholds, and their being in the public domain, yet at the same time the defendant claimed to be unaware of them. She would hardly have been unaware of them if Mr. Hughes had drawn attention to them."

At para. 42 the learned judge continues;

> "In the absence of reliable supportive evidence I do not consider that it has been established on the balance of probabilities that Mr. Hughes gave any particular advice to the defendant to the effect that she should put other persons on the back of the ticket to avoid the imposition of tax. As I say, I find her evidence unreliable, both generally and on this issue. But even if I'm wrong about that, it does not follow that that any such advice in any way influenced the intentions of the deceased or the dealings of the plaintiff with other members of the syndicate."

32. The issue is as to whether those matters taken together constitute and can be argued to form the basis of an argument in issue estoppel or abuse of process. Reference has also been made to what is known as the rule in *Henderson v. Henderson* (1834) 3 Hare 100.

33. Counsel for the plaintiff contends that this an action in negligence and that is so. However, on the basis of the matters pleaded within its statement of claim, that claim of negligence is based solely upon the assertion that Mr. Hughes gave advices in the manner contended for within that pleading. I accept that, if the matters within that pleading are accepted, it would then be for this plaintiff and the court to establish whether that constituted negligence. That has to be set against the clear finding of Humphreys J. to the effect that, on the balance of probabilities, no such advice was furnished. The matter before Humpheys J. proceeded by way of plenary hearing and the judge heard oral evidence from Mr. Hughes and Ms. Walsh.

34. It is not, for the purposes of this application, any impression or views that the learned trial judge expressed in respect of Mr. Hughes but whether there were any findings of fact in respect of those advices that, in the view of this Court, might constitute or raise the question of issue estoppel or the other claims of abuse of process or *Henderson v. Henderson.*

35. In one of the iterations of *Bula v. Crowley* [1997] IEHC 72 *('Bula')*, the court states: -

> "1. It is common case that issue estoppel does not arise *per se* in this case and that the status of the findings made by Lynch J. in the judgment relates to whether or not, in the context of Bula II, it would be unjust in all the circumstances and an abuse of the process of the court to allow such findings to be re-visited in this action. However, the principles of law relating to issue estoppel and abuse of process are closely related in their content and application.
>
> 2. The concept of abuse of the process of the court applies irrespective of privity. When an issue has been finally determined by a court of competent jurisdiction it is an abuse of the process of the court to seek to have it relitigated in new proceedings……".

36. In *Harlequin Property (SVG) Limited v. O'Halloran and anor* [2019] IESC 76, the Supreme Court stated: -

> "The first observation must concern findings of fact. The principles governing these findings have been set out in numerous judgments of this Court, including…
>
> Such findings can be seen as falling into two categories: those the answers to which give a factual resolution of conflicting oral testimony, and those the answers to which do not resolve conflicts of such testimony, but are an evaluation of facts found or admitted… Another brief way of describing these two categories is, in the first category, findings of fact, and in the second, inferences from facts. The legal authorities emphasise that an appellate court must proceed on the basis that it did

not enjoy the opportunity of seeing and hearing the witnesses as did the trial judge who heard the substance of the evidence, and was able to observe both the manner in which it was given and the demeanour of the witnesses…".

37. It is contended that had this case before Humphreys J. been heard on appeal then the Court of Appeal would, in their assessment of Mr. Hughes, have been obliged to rely upon the findings of Humphreys J. in respect of his evidence and that the position cannot therefore be any different in a consideration of this application.

38. Complaint was also made that no proper explanation had been furnished by the applicant's present solicitors as to the delay.

Observations and Conclusions

39. With regard to the issue estoppel argument, in my view any suggestion within the affidavits filed on behalf of the plaintiff applicant that Humphreys J. was incorrect in any of his findings, is inappropriate at best. This is not an appeal from his judgment. As set out above, the appeal from that judgment was compromised and this plaintiff was legally represented throughout. Nor in my view does any reliance upon the findings of Humphrey's J. as to the veracity or otherwise of this plaintiff s evidence, assist the arguments advanced by this defendant.

40. In my view, the issue is whether the question of what, if any, advices were furnished by Mr. Hughes has been determined within the 2013 proceedings. If this litigation proceeded, then in my view Mr. Hughes and this plaintiff would be central witnesses. It is clear that, prior to any findings of negligence, there would need to be a finding as to the nature of the advices (if any) furnished to Ms. Walsh by Mr. Hughes.

41. If no advices were found to have been furnished, then it is difficult to see how such advices could constitute negligence. The issue is therefore whether there has already been a determination in respect of the advices furnished and whether, given the manner in which this present case is pleaded in respect of those advices, it constitutes issue estoppel.

42. The facts of this case bring it within the clear purview of s. 678; leave of the court is required in respect of the joinder of the second named defendant to the 2016 negligence proceedings. The means of doing so is by way of an originating notice of motion. On the basis of my decision, I do not consider it necessary to determine whether, in respect of a voluntary liquidation, the considerations or rationale for leave in such circumstances is different from any other designated forms of the winding up of a company within s. 678. I expressly make no finding on that issue. As to whether any such leave, if granted, should be made retrospective, again I do not consider it necessary to make such a finding, as I am declining the reliefs sought for the reasons set out below. I do however note that as the 2016 negligence proceedings were issued within time then it would perhaps be difficult, if leave were to be granted (and in my view it should not) that the matter should not proceed against all three defendants in such circumstances.

43. The plaintiff applicant contends that the issue of negligence has not been determined. But that issue, in my view, can only be determined upon a finding of the advices furnished by Mr. Hughes. I cannot see how that could be determined otherwise than in a de novo hearing where both this plaintiff and Mr. Hughes would be required to give evidence. The pleading within the plaintiff's own pleading within para. 4 or 6 of her statement of claim quoted in full at para. 29 above makes that plain. In *Bula* the court was clear that it is an abuse of process if a court of competent jurisdiction has already determined that issue and it is sought to have it relitigated in new proceedings. As I set out above, I do not see how the 2016 negligence proceedings can proceed against the second named defendant in such circumstances, and I again refer to the pleading within the statement of claim, without adducing evidence from Mr. Hughes as to the advices furnished. In my view, the nature of those advices has already been determined by a court of competent jurisdiction to again echo *Bula*. Accordingly, in my view, it would constitute an abuse of process to permit these proceedings to continue against the second named defendant to the 2016 negligence proceedings (now in voluntary liquidation). Of course, this applicant is at large in respect of the other defendants to that action as this application only concerns one of the defendants to the proceedings. Whilst the issue of negligence or otherwise has not been determined, the issue of the nature, or otherwise, of the advice tendered has. That is where the issue estoppel lies, in seeking to again require Mr. Hughes to give evidence as to the advices given to this applicant. The nature of those advices has been determined and to suggest otherwise would, in my view, necessitate repetitious and unnecessary litigation.

44. For these reasons, in my view, the court cannot grant leave pursuant to s. 678 and the reliefs sought in the notice of motion are refused. I will hear the parties further in respect of any other orders that may be required, including any order as to costs.