THE HIGH COURT

[2024] IEHC 591

[2023/201COS]

IN THE MATTER OF IRISH GOLD AND SILVER BULLION LIMITED

AND IN THE MATTER OF THE COMPANIES ACT, 2014

BETWEEN

MYLES KIRBY

APPLICANT

AND

VEALE WASBROUGH VIZARDS LLP

RESPONDENTS

Judgment of Mr. Justice Cregan delivered on the 31st day of July, 2024

Introduction

1. There are two motions before the court. These are:

1. The respondent's application for a declaration pursuant to Order 12 rule 26 of the Rules of the Superior Courts("RSC") (or pursuant to the inherent jurisdiction of the court) that service of the proceedings on the respondent was not properly effected and an order setting aside service of the originating notice of motion on the respondents; and
2. The applicant's motion pursuant to Order 124 of the Rules of the Superior Courts amending the title of these proceedings by deletion of the word "originating";

Background

2. The applicant is the liquidator of Irish Gold and Silver Bullion Ltd. The company was put into liquidation by order of the High Court on 14th June 2021 and Mr. Myles Kirby was

appointed liquidator by the court on that date. Mr. Kirby has carried out the liquidation of this company since that time.

3. In addition, the liquidator has brought disqualification proceedings against Mr. Wickham, one of the directors of the company and in a judgment of the High Court (O'Moore J.), the High Court directed that Mr. Wickham be disqualified for a period of seven years for his conduct in the management of this company. In essence, the High Court found that Mr. Wickham had been running a Ponzi scheme and that this company was operated in an entirely fraudulent manner.

4. What has happened since is that the liquidator has discovered that a firm of English solicitors called Veale Wasbrough Vizards LLP, the respondents, apparently provided legal services to Mr. Wickham personally. However it appears that these services were paid for by the company rather than Mr. Wickham personally. The liquidator has identified at least two specific sums paid by the company in this fashion. One is for the sum of €84,250; the second is for the sum of sterling £66,673.

5. The liquidator has written to the respondents and asked them to repay the said money. The respondents have declined to do so.

6. In addition it appears that there is a gold bar held by the respondents. Mr. Wickham, in his settlement agreement with the liquidator, agreed to instruct the respondents to release the gold bar to the liquidator. The liquidator has called upon the respondents to release the gold bar. They have indicated that they would do (upon payment of certain fees) but apparently have not done so yet.

7. As a result, the liquidator issued a motion pursuant to s.608 of the Companies Act, 2004 seeking an order of the High Court directing the respondents to deliver to the applicant any gold bars in their possession and also an order directing the respondent to pay the sums (a) €84,250.27 and (b) sterling £66,673.00 to the applicant.

The originating notice of motion

8. The liquidator decided to bring proceedings against the respondents by means of an originating notice of motion headed "*In the matter of Irish Gold and Silver Bullion Ltd and in the matter of the Companies Act, 2014"* in which Mr. Myles Kirby was the applicant and Veale Wasborough Vizards LLP (a firm) were the respondents.

9. A copy of the originating notice of motion, the grounding affidavit and exhibits were subsequently served on the respondents, who are a London firm of solicitors, by a process server at their work address in London. The respondents have taken exception to the service of these proceedings by the applicant on them and they have argued that the applicant should first have brought an application before the Irish High Court under Order 11 rule 1 for leave to serve out of the jurisdiction as the respondents are based in the UK and the UK is no longer a part of the EU and/or subject to the Brussels 1 Recast Regulations. Therefore they submit the Order 11 rules on service out of the jurisdiction apply to them.

10. This response by them brought an intense scrutiny by both parties on the proper procedure which should have been followed by the liquidator in instituting these proceedings.

11. The liquidator now accepts that this application should not have been brought by originating notice of motion (which would indicate entirely new proceedings). Instead the liquidator accepts that under Order 74 rule 83 of the Rules of the Superior Courts, any application under s.608 of the Companies Act 2014 should have been brought by motion on notice in the winding up – not by way of an originating notice of motion. The explanation for this error was that this was due to "inadvertence". Hence the reason for the applicant's motion.

The respondents' application to set aside service

12. Order 12 rule 26 RSC provides as follows:

"A defendant before appearing shall be at liberty to serve a notice of motion to set aside the service upon him of the summons or of notice of the summons, or to discharge the order authorising such service."

13. The respondents' application is grounded upon the affidavit of Ms. Clair Ainley, a partner within the respondents. She says she is an English solicitor employed by the respondents as Head of Risk and Compliance. She said the respondents are a firm of solicitors and it is a limited liability partnership registered in England and Wales. The respondents have offices in London, Watford, Bristol, and Birmingham and their registered office is in Bristol. The respondents' main office is in Bristol. They have no offices in the Republic of Ireland and no connection to the Republic of Ireland.

14. She states in her affidavit that the originating notice of motion and grounding affidavit in these proceedings were received at the respondents' London office on 28th November, 2023 having been delivered by courier to that office on that date. She says that the documents ultimately came to her in her capacity as the firm's Head of Risk and Compliance.

15. She says that she believes, and is advised, that a party who seeks to litigate a claim in Ireland and which names an entity which is governed by the laws of England and Wales, as the defendant or respondent to that claim, must first apply to the Irish courts for leave to serve that claim outside the jurisdiction. She states that the liquidator in this case has not done so and therefore that the purported service cannot be valid.

16. The respondents engaged a firm of Irish solicitors to correspond with the solicitors for the liquidator in relation to this point but the liquidator's view is that such leave under Order 11 was not required because these are insolvency proceedings.

17. Mr. Kirby has sworn a replying affidavit contesting this application. He states that whilst in plenary proceedings, an application for leave to issue and serve proceedings out of jurisdiction is required under Order 11 rule 1, the circumstances of this case are different. He

says that the current proceedings under s.608 of the Companies Act, 2014 were not initiated by plenary summons and so the requirement to seek leave does not apply.

Section 608 of the Companies Act, 2014– the issue of jurisdiction

18. In order to consider the nature of the application being made by the liquidator in this case it is necessary to have regard to the provisions of s.608 which provides as follows:

> *"(1) The court has the following power where, on the application of a liquidator, creditor or contributory of a company which is being wound up, it can be shown to the satisfaction of the court that—*
>
> *(a) any property of the company of any kind whatsoever was disposed of either by way of conveyance, transfer, mortgage, security, loan, or in any way whatsoever whether by act or omission, direct or indirect, and*
>
> *(b) the effect of such disposal was to perpetrate a fraud on the company, its creditors or members.*
>
> *(2) That power of the court is to order, if it deems it just and equitable to do so, any person who appears to have—*
>
> *(a) the use, control or possession of the property concerned, or*
>
> *(b) the proceeds of the sale or development of that property,*
>
> *to deliver it or them, or pay a sum in respect thereof, to the liquidator on such terms or conditions as the court thinks fit.*
>
> *(3) This section shall not apply to any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company to which* section 604 *applies.*
>
> *(4) In deciding whether it is just and equitable to make an order under this section, the court shall have regard to the rights of persons who have bona fide and for value acquired an interest in the property the subject of the application.*

(5) This section is in addition to, and not in substitution for, any restitutionary or other relief by way of recovery (including the remedy of tracing) that is available to a liquidator or any other person."

19. It is of fundamental importance to understand the nature of an application under section 608. First, it occurs within a context in which the company in question has been made the subject of a winding up order by the Irish High Court on 14th June, 2021. In addition, the High Court appointed a liquidator to this company on 14th June, 2021. Thereafter the liquidator reported to the High Court in the normal way and brought disqualification proceedings against Mr. Wickham.

20. It is clear therefore that the Irish courts already have jurisdiction over all applications which arise within the winding up of this company.

21. Given that the Irish High Court has jurisdiction over this winding up, and over all applications which might be made in the winding up, it is necessary to consider the nature of s.608 in that context. Section 608 provides that the court may, if it deems it just and equitable to do so, order any person, who appears to have the use, or possession of property of the company to deliver such property to the liquidator on such terms or conditions as the court thinks fit.

22. The court has that power if it can be shown to the satisfaction of the court under s.608(1) that any property of the company was disposed of either by way of conveyance, transfer, mortgage, security, loan or in any way whatsoever and the effect of such disposal is to perpetrate a fraud on the company its creditors or members.

23. Thus the liquidator has a statutory entitlement to bring an application before the court under s.608 of the Companies Act, 2015 for the return of assets which have been improperly and/or fraudulently transferred by the company to other parties. Likewise the court has the power to direct relevant parties to return assets which have been improperly transferred.

24. It is also important to note what a s.608 application is not. It is not a plenary proceeding. It does not mandate a plenary summons or a statement of claim. It has none of the indicia of plenary proceedings or proceedings commenced by summary summons or special summons. It is, like many of the applications which can be made under the Companies Act, 2014, an application under the statute for particular orders from the High Court in a winding up situation. These are insolvency proceedings not plenary proceedings.

25. Thus a s.608 application occurs in a context where the Irish High Court already has jurisdiction to deal with all matters relating to the winding up of the company and all applications brought by the liquidator in the context of that winding up.

26. These proceedings are therefore completely different to a situation in which proceedings are commenced in which the defendants are resident or domiciled outside the jurisdiction and a plaintiff must apply to the High Court on an *ex parte* basis for an order under Order 11 rule 1 permitting service of the proceedings outside the jurisdiction on proposed defendants resident or domiciled outside the jurisdiction. The plaintiff in those circumstances has to show a good arguable case on the *ex parte* application that the proceedings are linked to the Irish jurisdiction.

27. In other words, the plaintiff in an Order 11(1) application has to establish to the satisfaction of the court, where the defendants are resident or domiciled in a foreign jurisdiction such as the UK, that there is a link between the proceedings and the Irish jurisdiction such that there is a good arguable case that the Irish courts have jurisdiction and that it is reasonable for an Irish court to permit service of the proceedings outside the jurisdiction on persons resident or domiciled in another jurisdiction.

28. However in this case, the jurisdiction of the court has already been established and the court has already made orders in the winding up of the company. In an Order 11 situation, a proposed defendant could come in to contest jurisdiction. However, in a winding up case

where a court has already exercised jurisdiction, a proposed respondent to a s.608 application could not seek to set aside the court's jurisdiction over the winding up process.

29. In my view, the error made by the respondents is to assume that every single case in Ireland commenced in the High Court must be initiated by means of a summons and require service out of the jurisdiction, whereas applications by a liquidator to the High Court for certain orders under the Companies Act, 2014 (e.g. for an order under s.608) are motions brought within the winding up and the Irish court already has jurisdiction to hear such applications.

Can s.608 applications be brought against persons outside the jurisdiction? - The meaning of the words "any person in s.608 of the Companies Act, 2014.

30. The next question to be considered is whether the wording of s.608 means that such applications brought by the liquidator (or any other relevant party) can only be brought against persons who are within the Irish jurisdiction or whether they can also be brought against persons outside the jurisdiction.

31. Section 608(2) provides that:

> *"That power of the court is to order, if it deems it just and equitable to do so, any person who appears to have—*
>
> *(a) the use, control or possession of the property concerned, or*
>
> *(b) the proceeds of the sale or development of that property,*
>
> *to deliver it or them, or pay a sum in respect thereof, to the liquidator on such terms or conditions as the court thinks fit."*

32. The question which then arises is what is the meaning of the word "any person" within that statutory subsection. It could mean:

(a) Only persons who are resident within the Irish jurisdiction or domiciled within Ireland or

(a) Any person who also resides and/or are domiciled in another jurisdiction e.g. the UK.

33. In order to consider this matter, it is helpful to have regard to the decision of Ms. Justice Finlay Geoghegan in *Euroking* where she considered a similar application and also the decision of the UK Court of Appeal in *Paramount Airways*.

34. In *Euroking America (Ireland) Ltd* [2003] 3 IR 80, Finlay Geoghegan J. considered whether the Oireachtas, in enacting s.150 of the Act of 1990, intended to confer jurisdiction on the High Court to make declarations in respect of directors resident within and outside the State or whether the intention was to confine the jurisdiction to making declarations in respect of directors within this jurisdiction.

35. The High Court held that the clear intent of the Oireachtas was to confer jurisdiction on the High Court to make declarations in respect of <u>all</u> persons who were directors of companies to whom s.150 9 of the Act of 1990 applied, irrespective of whether such persons were resident within or outside the state. The court held that the use of the phrase "any person" in s. 149(2) of the Act of 1990 underlined what appeared to be the obvious intention of the Oireachtas i.e. that the restrictions provided for in s. 150 of the Act of 1990 should apply <u>to all</u> persons who agreed to act as directors irrespective of where they happened to be resident.

36. The learned High Court judge stated:

> *"It is presumed in Irish law that the operation of a statute is to be confined to the territory of the State unless a contrary intention is evident: Chemical Bank v. McCormack [1983] I.L.R.M 350. <u>It appears to me that the use of the term "any person who was a director" in s. 149(2) coupled with the purpose and nature of the provisions included in Chapter I of Part VII of the Companies Act 1990, including s. 150, is evidence of such a contrary intention</u>".* Emphasis added)

37. She then states at p. 85 of the report:

"Having regard to the frequency within which persons resident outside the State are appointed directors of Irish companies, it would clearly be absurd to suggest that the Oireachtas, in enacting these provisions in the public interest, intended to restrict only directors of insolvent companies who happened to be resident within the State and leave dishonest or irresponsible non-resident directors with unrestricted freedom to be directors of any Irish companies in the future. The use of the phrase 'any person' in s. 149(2) underlines what appears to be the obvious intent of the Oireachtas that the restrictions provided for in s. 150 should apply to all persons who agree to act as directors of Irish companies, irrespective of where they happen to be resident.

I am reinforced in the view which I have reached on the construction of this section by an analogous conclusion reached by the Court of Appeal in England in Re Paramount Airways Limited [1993] Ch. 223. In that case, the court construed the phrase "any person" in s. 238 of the Insolvency Act 1986, which enables the administrator or liquidator of a company to apply for an order reversing a transaction entered into by the company with any person at an undervalue, as including any person wherever resident. They reached this conclusion taking into account at p. 233 what the court considered to be the current rule of construction that:-

> *'Parliament is to be taken to have been legislating only for British subjects or foreigners coming to the United Kingdom, unless the contrary is expressed … or is plainly implicit"*

38. In the same way, in this case, I am of the view that it is presumed in Irish law that the operation of a statute (including s.608 of the Companies Act, 2014) is to be confined to the territory of the State, unless a contrary intention is evident. However I am of the view that the

use of the term "any person" in s.608 is evidence of such a contrary intention. In my view it would be absurd if the Oireachtas intended that this statutory provision would only apply to persons resident within the State, leaving non-resident persons entirely free to engage in such fraudulent behaviour. Section 608 gives the court the power to order return of assets which have been improperly transferred to certain parties and where the effect of such a disposal was to perpetrate a fraud on the company. If such circumstances arise then the court has the power to order any person to deliver up such property to the liquidator on such terms or conditions as the court thinks fit.

39. I am of the view therefore that the words "any person" within s.608 mean, and must be interpreted to mean, any persons who are resident or domiciled within the jurisdiction of Ireland but also any such persons who are resident or domiciled abroad. Given this interpretation, the respondents fall within the meaning of "any persons" who are party to the transactions which are sought to be impugned by the liquidator. They are therefore subject to the jurisdiction of the Irish courts.

The issue of notice to the respondents

40. Having considered the issue of jurisdiction and the proper interpretation of the phrase "any person", I now turn to consider the issue of notice and/or service.

41. It is instructive to consider what would happen if a liquidator brought such an application and did not seek to serve notice of the application on the respondents in this case. The application would then be brought by way of notice of motion; it would be issued in the Central Office and would be given a return date before the High Court judge dealing with insolvency matters. It would follow, as night follows day, that the court would inquire whether the relevant parties against whom the order is sought were on notice of the application or had been served with the application. Section 608 is silent on these matters. However the court in the exercise of the administration of justice and in order to ensure a full

measure of procedural fairness for those parties against whom orders are sought (i.e. the respondents in this case) would certainly direct that the respondents be served with notice of the application (i.e. the notice of motion grounding affidavit and exhibits) and be allowed an opportunity to put in a replying affidavit and to be heard if they wished to be heard.

42. It would be necessary for the High Court to conduct this hearing in accordance with the rules of natural and constitutional justice and to give full weight to the maxim *audi altaram partem*.

43. Section 608(4) of the Companies Act, 2014 provides that

> "*In deciding whether it is just and equitable to make an order under this section, the court shall have regard to the rights of persons who have bona fide and for value acquired an interest in the property the subject of the application."*

44. Thus the court would have to have regard to the rights of such persons whether they appeared to contest the application or not. This is clearly a substantive and procedural safeguard put in by the Oireachtas to ensure that the court would have regard to the rights of persons who have acquired an interest in the property the subject of the application in a *bona fide* manner and for value.

45. I have also considered *Cameron v. Liverpool Victoria Insurance Company Ltd* [2019] 1 WLR 1471 in this context. Lord Sumption giving the judgment for the Supreme Court stated at para. 17 of his judgment:

> *" Justice in legal proceedings must be available to both sides. It is a fundamental principle of justice that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard. The principle is perhaps self-evident. The clearest statements are to be found in the case law about the enforcement of foreign judgments at common law. The English courts will not enforce or recognise a foreign judgment, even if it has been given by a*

court of competent jurisdiction if the judgment debtor had no sufficient notice of the proceedings. The reason is that such a judgment will have been obtained in breach of the rules of natural justice according to English notions. In his celebrated judgment in Jacobson v Frachon (1927) 138 LT 386, 392, Atkin LJ, after referring to the "principles of natural justice" put the point in this way:

> *'Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court.'"*

46. Lord Sumption continued at para. 18 of his judgment to state as follows:

"It would be ironic if the English courts were to disregard in their own proceedings a principle which they regard as fundamental to natural justice as applied to the proceedings of others. In fact, the principle is equally central to domestic litigation procedure. Service of originating process was required by the practice of the common law courts long before statutory rules of procedure were introduced following the Judicature Acts of 1873 and 1875. The first edition of the Rules of the Supreme Court, which was promulgated in 1883, required personal service unless an order was made for what was then called substituted (now alternative) service. Subsequent editions of the rules allowed for certain other modes of service without a special order of the court, notably in the case of corporations, <u>but every mode of service had the common object of bringing the proceedings to the attention of the defendant.</u>" (Emphasis added)

47. In the *Euroking* case, Finlay Geoghegan J. came to a similar conclusion and noted at p. 88 that:

"The Act of 1990, in its express terms, does not require the directors to be made respondents to an application brought under s. 150(4A), nor to be heard prior to the court making a decision on such application."

She then stated:

"However, the section must be construed in accordance with the principles of constitutional justice as set out by the Supreme Court in East Donegal Co-Operative Livestock Mart Ltd. v Attorney General [1970] I.R. 317. This appears to require, insofar as practicable, that the directors be given notice of the application and an opportunity to be heard in relation to same prior to the court reaching its decision. I have concluded that the absence of any rule of court expressly permitting a notice of such application to be given to directors resident outside the jurisdiction could not preclude this court from exercising the jurisdiction expressly conferred on it by the Oireachtas under s. 150 and applying a constitutional construction of such provisions so as to permit directors, the subject matter of an application, to be notified of the application and be given an opportunity to be heard before any decision is made.

48. Likewise, s.608 in its express terms, does not require any specific parties to be made respondents to an application brought under s.608 nor to be heard prior to the court making a decision on such an application. I agree however with Finlay Geoghegan J. that the section must be construed in accordance with the principles of constitutional justice set out in *East Donegal Co-operative Livestock Market v. Attorney General*. This means that, insofar as practicable, any persons who might be affected by the making of such an order under s.608, should be given notice of the application and an opportunity to be heard in relation to the application before the court reaches its decision.

The issue of service out of the jurisdiction

49. There are no Rules of the Superior Courts that appear to deal with the service of proceedings outside the jurisdiction in such applications.

50. The respondents submitted that as there is no rule within the Rules of the Superior Courts dealing with service of a notice of motion on a person outside the jurisdiction in such applications, this means, that the liquidator is unable to serve the proceedings out of jurisdiction and therefore the court is unable to exercise its jurisdiction under s.608. I do not accept this submission. Such a result would render the court's jurisdiction under s.608 sterile in respect of all non-resident persons who might have obtained property pursuant to a fraud, and to render them not amenable to the court's jurisdiction in a winding up.

51. In my view, the absence of any rule of court expressly permitting a notice of such application to be given to persons resident outside the jurisdiction could not preclude the court from exercising the jurisdiction expressly conferred on it by the Oireachtas by s.680. I note that Finlay-Geoghan J. reached a similar conclusion.

52. In *Euroking* Finlay Geoghegan J. concluded that service of the proceedings effected by registered post was sufficient discharge of the High Court's obligation to ensure that s.150 applications were heard and determined in accordance with the principles of constitutional justice.

53. In this case I am satisfied that the respondents were given sufficient notice by the liquidator by serving them by means of a process server with the relevant documents at their office in London.

Liquidator's application to amend his proceedings

54. Order 124 of the Rules of the Superior Courts provides as follows:

> *"1. Non-compliance with these Rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either*

wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit.

2. No application to set aside any proceeding for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.

3. Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the notice of motion."

61. Under Order 124 it is clearly provided that non-compliance with these rules shall not render any proceedings void unless the court so directs. In my view, this is not an appropriate case which to direct that the proceedings should be rendered void. This would be utterly wasteful of legal costs so far and would not serve anybody any good. In my view, the appropriate order is to amend the originating notice of motion so that it now reads "Notice of Motion".

55. The respondents complain that because it was an originating notice of motion it was given a separate record number. That is of course true but that of itself does not cause any prejudice to the respondents. I will also direct therefore that the proceedings be amended in that the record number should be amended so that it is given a record number in the winding up proceedings.

56. I will therefore accede to the application by the liquidator to amend the proceedings in the above manner.

Conclusions

57. I would therefore conclude as follows:

1. The Irish courts already have jurisdiction over the winding up of this company as the Irish High Court has already made orders putting the company into liquidation, appointing a liquidator and making restriction orders against one of its directors;
2. This is an application by the liquidator to seek an order of the court under s.608 of the Companies Act, 2014; Section 608 is an application under the Companies Act in the context of the winding up proceedings by a liquidator. It is a statutory application in which jurisdiction of the Irish High Court has already been established;
3. Order 11 rule 1 has no application to applications under s. 608 of the Companies Act, 2014 and the liquidator does not have to make any application to the High Court for service out of the jurisdiction under Order 11 rule 1;
4. The respondents have been validly served with the liquidator's application and I will hear the parties on what further steps need to be taken to progress the liquidator's application;
5. The application for a declaration that service be deemed ineffective is therefore refused;
6. The application to amend the liquidator's proceedings by the substitution of the words "notice of motion" for the words "originating notice of motion" is granted.

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