THE HIGH COURT

[2015 No. 59 COS]

IN THE MATTER OF MIDDLEVIEW LIMITED (DISSOLVED)

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2013

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 12 (B) OF THE COMPANIES (AMENDMENT) ACT 1982 AS INSERTED BY SECTION 46 OF THE COMPANIES AMENDMENT (NO. 2) ACT 1999

JUDGMENT of Mr Justice Cregan delivered on 21st day of December, 2015

Introduction

1. The issue which arises in this case is who should bear the costs of preparing and finalising company accounts to bring them up to date when an order has been made restoring a company to the register. It raises a question of interpretation, and application, of section 12B (3) of the Companies (Amendment) Act 1982 as inserted by section 46 of the Companies Amendment (No. 2) Act 1999.

2. In order to understand the context to this application it is necessary to set out the background facts leading to this application.

Background

3. The company, Middleview Ltd, was incorporated on 14th October, 1993. It was an investment property company. As part of its business the company purchased certain lands and properties, and entered into loan agreements with Anglo Irish Bank Corporation, under which the bank agreed to advance loans totalling approximately €300,000,000 to the company. As security for its obligations the company executed a debenture dated 19th December, 2007 granting fixed and floating charges over its properties.

4. On 1st November, 2010 pursuant to Part 6 of the NAMA Act 2009 (the "2009 Act") NAMA acquired all of the rights of the bank in the loan agreements and the debenture.

5. By letter dated 27th March, 2014 the Petitioner in this case (a NAMA group entity within the meaning of the 2009 Act), informed the company that an event of default had taken place and demanded repayment of the monies then due. Despite that demand, the company failed to discharge its liability.

6. NALM then appointed Simon Coyle and Tom O'Brien of Mazars as joint receivers over the assets and property of the company on 28th March, 2014.

7. The company was struck off the Register of Companies on 28th March, 2014 for its failure to file annual returns in the Companies Registration Office.

8. NALM wanted the company to be restored to the Register of Companies so that its receivers could take steps to realise the company's assets, in order to recover amounts due by the company under the agreement.

9. In the circumstances, on 6th February, 2015 NALM brought an application before the High Court seeking an order that the company should be restored to the Register of Companies. This order was in fact made on the 2nd day of March, 2015.

Application to restore

10. The application to restore the company came before the court on 2nd March, 2015. The application was grounded upon an affidavit of Margaret Magee of NALM who set out all the above matters.

11. On 13th March, 2015 Garrett Kelleher, one of the directors of Middleview, and a notice party in the application to restore the company to the register, swore an affidavit, stating that he had no objection to the company being restored to the Register of Companies. He also indicated that he had no objection to cooperating in any way or executing such documents as might be required to bring the returns up to date. However he stated:

> *"However it is entirely and solely the fault of the petitioner that the company was struck off the register and I believe that they should pay all of the costs associated with having a company restored to the register".*
>
> *4. As is set out below, for the years concerned the entire income and revenue of the company was appropriated by the petitioner who had instructed KPMG to prepare the returns. The petitioner ultimately did not pay KPMG and the returns did not get filed. This occurred when they had sole control of the income of the company and, following the appointment of Simon Coyle of Mazars as the receiver and manager on the 27th of March 2014, (sic) they had control of the books and records of the company.*
>
> *5. I am resident in the U.S. and I do not have the records of the company since the petitioner assumed full control.*
>
> *6. The company is part of a group of companies and there are a number of other companies which I suspect are now in the same position. I am concerned about the costs of this application and the costs of restoring companies to the register in circumstances where I have very limited funds.*
>
> *7. Insofar as the petitioner had the benefit of all of the company's income it was incumbent upon them to fund the filing of the returns which they did in respect of some of the other companies in the group.*
>
> *8. The background to this matter is that on 8th November 2010 NAMA took over my loans under the heading of the "Shelbourne connection". I cooperated with them from that date and indeed had met them in advance of that date in 2009. There was an interim support letter issued in 2011 and a further forbearance letter issued 5th February 2013. I*

cooperated fully for a number of years and as is the subject of the Commercial Court proceedings, NAMA simply dispensed with that cooperation and moved to enforcement once most of the assets for which they required me had been disposed of.

9. During the course of this period NAMA took the income from all of the companies including Middleview Ltd. Rental income went into dedicated bank accounts and NAMA made withdrawals. Insofar as there were any expenses which we required to be discharged, we sought to have same discharged by way of a 'Form A' request to NAMA. That included the accountancy fees and everything down to the wages of people working for the companies. In this regard I beg to refer to the Form As sent in in respect of the accountancy returns for the group of companies upon which I have marked with the letters 'GK1F I have signed my name prior to the swearing hereof.

10. As is evident therefrom we had asked NALM to allow KPMG update the accounts of the group of companies. This had been agreed and the work was underway until March of 2014. My understanding is that a lot of the work had been done by KPMG and that NALM simply pulled the plug and declined to pay them to complete it. However once the receivers and managers took control of the company in March 2014 I did not know what happened subsequently or why returns were not filed."

12. Mr. Kelleher also stated at para. 11 that he believed that prior to the dissolution of the company, NALM had been in contact with the CRO in order to ensure that the companies were not dissolved; he also stated that he believed the residential rental income which accrued to Middleview is approximately €40,000 per annum and that there were therefore ample funds for the company to discharge its obligations under the Companies Acts.

13. Mr. Peter Malbasha swore a replying affidavit on behalf of NALM. Mr. Malbasha disagreed with the assertion that it was entirely the fault of the Petitioner that the company was struck off the register; he stated that it was and remained the duty of the directors, including Mr. Kelleher, to comply with the statutory duties to file all outstanding returns; He also stated that it was incorrect to say that the petitioner NALM instructed KPMG to prepare the outstanding returns. He said the preparation of the outstanding returns was entirely a matter for the directors and this responsibility was never taken on by NALM and that NALM never had any direct dealings with KPMG in relation to this matter. However he accepted that an employee of Shelbourne Developments Group, (of which the company was a member), Mr. Wayne O'Dwyer, was responsible for any instruction to KPMG and Mr. O'Dwyer provided updates to NALM in relation to its dealings with KPMG and the progression of the preparation of the outstanding returns. Mr. Malbasha also stated that although the rental income which accrued to the company was paid to the Petitioner that was because of the security in the Petitioner's favour and the existence of such a security could not create an obligation on the part of the Petitioner to fund an auditor's costs.

14. However significantly Mr. Malbasha stated at para. 9 of his affidavit:

"Notwithstanding and without prejudice to the foregoing, I say that contrary to the averments in Mr. Kelleher's affidavit, the Petitioner did in fact approve the company's request to making of substantial monies available to fund both the company's costs of preparing the accounts and KPMG's fees for the sole purpose of preserving the Petitioner's security position. This funding was made available on the basis of the director's cooperation with the petitioner which cooperation has since ceased."

15. Even more significantly Mr. Malbasha stated at para. 10:

"At para. 10 of Mr. Kelleher's affidavit he states that 'we had asked NALM to allow KPMG update the accounts of the group of companies."

I have already referred to this in passing above. The true position is that the Petitioner had no objection to the accounts being brought up to date and in fact repeatedly requested that the group bring its accounts up to date and even approved the necessary funding for this to be done for the sole purpose of preserving the value of its security. The accounts of the company were ultimately never brought up to date and the company was struck off the register of companies for failure to file its annual returns for the period 2010 - 2013 arising from the failure by the directors to comply with their statutory obligations."

16. Mr. Malbasha also exhibits a chain of emails between Mr. Wayne O'Dwyer and NALM in respect of Mr. O'Dwyer's attempts to finalise the statutory accounts with KPMG. On 16th February 2014 Wayne O'Dwyer sent an email to Claire Harding of NAMA stating that the statutory accounts were with KPMG for signing, that he (Mr. O'Dwyer) had called them last week with a view to getting the various audit reports signed off and that they had reverted with some additional queries. It appears that although KPMG had prepared draft statutory accounts they were unwilling to sign off on the accounts pending the resolution of a VAT issue which still had not been resolved with the Revenue Commissioners.

17. I also note in this chain of emails an email from Peter Malbasha dated 9th October, 2013 to Wayne O'Dwyer stated as follows

"Wayne,

I'm not sure what we can do to assist. We note that we approved €20,000 additional fees for you last September 2012 with a condition that the accounts are submitted within four months. We stated at our last meeting that there was one item remaining to be sorted which related to Cratloe VAT and how it is to be disclosed in the accounts. Can you please advise that this is now sorted and if so when the accounts will be submitted.

Thanks, regards, Peter."

18. There is one issue about Mr. Malbasha's affidavit which is of concern to me. In the grounding affidavit of Ms. Margaret Magee sworn on behalf of NALM, she refers to para. 12 of the petition. Paragraph 12 of the petition states that

"the Petitioner is desirous of taking steps to recover the amounts due and to this end by deed of appointment dated [22nd March 2014] [sic] the petitioner appointed Mr. Simon Coyle and Mr. Tom O'Brien of Mazars, Block 3, Harcourt Centre, Harcourt Road, Dublin 2 as joint receivers" ("the receivers") over the assets of inter alia the company.

13. The company was struck off the Register of Companies on 2nd April 2014 for its failure to file annual returns in the Companies Registration Office."

19. In her affidavit Ms. Magee exhibits the deed of appointment of the receivers. This deed is dated 28th March, 2014. Moreover this deed of appointment is signed by Mr. Coyle and by Mr. O'Brien as receivers and dated 28th March, 2014.

20. However Mr. Malbasha in his affidavit stated:

> *"At para. 4 of Mr. Kelleher's affidavit Mr. Kelleher avers that the company was in receivership at the time of strike off. Again this is simply incorrect. The Petitioner attempted to appoint receivers to the company in March 2014. However the company was stuck off the Register of Companies immediately before it could do so and the appointment could not proceed. In that regard Mr. Kelleher's averments in relation to any purported action or inaction taken on the part of receivers are entirely mistaken. The Petitioner only appointed receivers to the company when it was recently restored pursuant to a deed of appointment dated 12th March 2015."*

21. Again at para. 10 of his affidavit he states:

> *"As explained at para. 7 above receivers were not appointed to the company before it was struck off."*

22. These averments are simply incorrect. It is clear on any view of the matter that NALM appointed receivers on 28th March, 2014. NALM itself exhibited the deed of appointment of the two receivers. The deed of appointment is signed by both receivers and dated. It is also witnessed. The deed is also stated to be given under the common seal of National Asset Loan Management Ltd and delivered as a deed in the presence of certain persons and those persons have signed their signatures as authorised signatories.

23. Thus it appears that Mr. Kelleher's averments that the company was in receivership at the time of strike off are correct and that Mr. Malbasha's averments are not only incorrect but positively misleading. The true position, insofar as I can ascertain from the documents, is that the receivers were appointed on 28th March, 2014.

24. Mr. Garrett Kelleher swore a replying affidavit on 24th April, 2015. He stated that in his view it would be entirely unjust and unequitable for the Petitioner to be able to visit the costs of bringing the company accounts up to date on him personally. It was, he said, obviously a company expense and the company had income, but that the Petitioner would not now allow that income to be used to bring the accounts up to date. Moreover he stated it was not disputed that NAMA had sole control of the income of the company at all times. Moreover he stated:

> *"Furthermore Mr. Malbasha does not dispute that it was intended that they would discharge the fees of KPMG in making up the accounts before the strike off."*

25. In relation to the appointment of the receivers, Mr. Kelleher exhibited an email dated 31st March, 2014 which had been sent to him by Tom O'Brien, one of the receivers, confirming that he had been appointed as receiver and requesting that Mr. Kelleher take no further action in relation to the assets of the companies. Given this email, it is surprising that Mr. Malbasha should have made the averments he did.

26. Moreover Mr. Kelleher stated at para. 4 of his affidavit:

> *"As is set out below, for the years concerned the entire income and remedy of the company was appropriated by the Petitioner who had instructed KPMG to prepare the returns. The Petitioner ultimately did not pay KPMG and the returns did not get filed. This occurred when they had sole control of the income of the company and following the appointment of Simon Coyle of Mazars as the receiver and manager on 27th March 2014 they have had control of the books and records of the company."*

27. Again, significantly, Mr. Malbasha in his replying affidavit sworn on 7th May 2015 states at para. 4:

> *"As I outlined in my affidavit sworn 9th April 2015 the Petitioner repeatedly requested that the company bring their accounts up to date and even agreed to provide funding to facilitate this. The funding was made available notwithstanding that no legal obligation arose on the part of the Petitioner to fund such costs and the sole motivation for doing so was to preserve its security position and to facilitate a sale of the underlying securities. I beg to refer to the Petitioner's notification of decision form upon which marked PM1 I have signed my name prior to the swearing hereof which illustrates that substantial funds in the amount of €346,000 were made available to cover the group's auditing and CRO filing costs. This document shows that NAMA made a decision to approve payment of KPMG's fees amounting to €34,000. It also shows that NAMA made a decision to approve total fees required to their audit and CRO filing fees of €232,000 on or about 20th August 2012 and that this was to cover audit fees for 2010 and 2011. It also showed that NAMA made a decision to approve the payment of Wayne O'Dwyer to complete the 2010 and 2011 accounts for all NAMA group entities in relation to the borrower Shelbourne Properties Ltd. It also stated that Wayne O'Dwyer was to confirm once all the accounts have been signed off and if there were any issues with same. On 19th October 2012 NAMA made a decision to approve payment of KPMG tax compliance fees of €30,000 in connection with corporation tax deadlines of 21st December 2012. Likewise on 20th November 2013 NAMA made a decision to approve the payment of KPMG tax fees of €30,000 in connection with the forthcoming corporation tax deadline of 20th December 2013.*

28. Therefore it is clear, even on NAMA's own evidence, that NAMA or NALM made funding available to the company to pay the accountancy fees of KPMG to bring the company accounts up to date. It did this of course to preserve its security position and to facilitate the sale of the underlying security. It is however clear that there was an arrangement in place at the time – before the company was struck off - whereby NAMA/NALM agreed to pay Wayne O'Dwyer's costs and to ensure that he did the underlying work to assist KPMG in bringing the company's accounts up to date and also that they agreed to pay KPMG's costs of bringing the accounts up to date.

29. Mr. Malbasha sought to clarify what happened in relation to the receivers by saying that the receivers were appointed on 28th March, 2014 but that the company was struck off the Register of Companies on 29th March, 2014 with a notice of this appearing in the CRO Gazette on 2nd April, 2014. He also said that the email dated 31st March, 2014 was sent by Mr. O'Brien before he became aware that the company had been struck off. That may be so. However it is clear from the emails which have been exhibited in the various affidavits that there was a real risk that the company might be struck off and that this was a live issue in people's minds. Therefore it did not come as a bolt out of the blue.

30. Mr. Malbasha and indeed counsel for NALM in submissions strongly rejected any proposition that NAMA should be responsible for the costs of paying for the company's accountancy bills to bring the outstanding returns up to date in circumstances where it had

already incurred substantial losses arising from the company's indebtedness.

31. That may well be so but that is not the issue I have to address. The issue I have to address is how "the court may by the order give such directions and make such provisions as seem just replacing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off".

32. I have also had regard to the further affidavit of Peter Malbasha sworn on the 19th May, 2015. Mr. Malbasha stated at para. 4 of his affidavit that he does not accept that there was any agreement whereby NAMA/NALM would fund all costs arising in relation to the preparation audit and filing of the companies statutory accounts. He does accept however, at para. 4.3, that the Form A which was submitted by the group seeking consent for payment of KPMG in respect of audit and late filing fees for the accounts for the group to include the company for the years ended 31st March, 2010 and 2011 was approved by NAMA on 20th August, 2012 (subject to a number of conditions.)

33. In my view this again shows that NAMA/NALM had made an arrangement whereby they were prepared to agree to the payment of KPMG fees in respect of audit fees for the accounts for the group which included the Middleview company.

34. It is clear therefore that the position which existed before the company was struck off was that NAMA had approved the payment of KPMG fees in respect of the preparation of accounts for the company for the years ended 31st March, 2010 and 2011.

35. I also note that Mr. Malbasha in this affidavit at 4.7 stated:

> *"The relevance of these matters is that NAMA/the petitioner, acting in good faith approved specific requests for the release of charged funds to pay for the preparation of statutory accounts for 2010 and 2011. In granting such approval, NAMA/the petitioner relied on the company's representations (in particular those of Mr. Wayne O'Dwyer) that the accounts were being prepared (indeed the sum of €20,000 was specifically authorised in order to pay Mr. O'Dwyer to prepare the accounts) and that they were with KPMG."*

36. I note that Mr. Malbasha seeks to contend that the petitioner was misled because Mr. Wayne O'Dwyer states that "the stat [sic] accounts are with KPMG for signing". However in my view the evidence does not go that far and as there is no affidavit from Mr. Wayne O'Dwyer before the Court, it is not entirely clear what the exact position is. However in my view that is not entirely necessary for me to decide the net question in this matter.

37. Mr. Malbasha also states that the position at the date of dissolution is that the audit accounts for 2010, 2011, 2012 and 2013 are outstanding.

38. I have also considered the affidavit of Tom O'Brien dated 17th May, 2015. At para. 2 of this affidavit Mr. O'Brien states that Simon Coyle and he were appointed as joint receivers and managers of the assets of the company by deed of appointment dated 12th March 2015. Extraordinarily, he makes no reference to the fact that he was also appointed as receiver and manager to the assets of Middleview Ltd on the 28th of March, 2014. This is a troubling omission from his affidavit. He also makes no attempt to explain what happened after his appointment on 28th March, 2014 which is less than satisfactory.

The legal issues

The statutory section

39. Section 12B of the Companies (Amendment) Act 1982 (as inserted by s. 46 of the Companies Amendment (No. 2) Act 1999) provides as follows:

> *"12B. (1) The liability, if any, of every director, officer and member of a company the name of which has been struck off the register under section 12(3) or 12A(3) of this Act shall continue and may be enforced as if the company had not been dissolved.*
>
> *(2) Nothing in subsection (1) of this section or section 12(3) or 12A(3) of this Act shall affect the power of the court to wind up a company the name of which has been struck off the register.*
>
> *(3) If any member, officer or creditor of a company is aggrieved by the fact of the company's having been struck off the register under section 12(3) or 12A(3) of this Act, the court, on an application made (on notice to the registrar of companies, the Revenue Commissioners and the Minister for Finance) by the member, officer or creditor, before the expiration of 20 years from the publication in Iris Oifigiúil of the notice referred to in section 12(3) or, as the case may be, 12A(3) of this Act, may, if satisfied that it is just that the company be restored to the register, order that the name of the company be restored to the register, and, subject to subsection (4) of this section, upon an office copy of the order being delivered to the registrar for registration, the company shall be deemed to have continued in existence as if its name had not been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off or make such other order as seems just (and such other order is referred to in subsection (4) of this section as an 'alternative order').*
>
> *(4) An alternative order may, if the court considers it appropriate that it should do so, include a provision that, as respects a debt or liability incurred by, or on behalf of, the company during the period when it stood struck off the register, the officers of the company or such one or more of them as is or are specified in the order shall be liable for the whole or a part (as the court thinks just) of the debt or liability.*
>
> *(5) The court shall, unless cause is shown to the contrary, include in an order under subsection (3) of this section, being an order made on the application of a member or officer of the company, a provision that the order shall not have effect unless, within 1 month from the date of the court's order—*
>
> > *(a) if the order relates to a company that has been struck off the register under section 12(3) of this Act, all outstanding annual returns required by section 125 or 126 of the Principal Act are delivered to the registrar of companies,*
> >
> > *(b) if the order relates to a company that has been struck off the register under section 12A(3) of this Act, all*

outstanding statements required by section 882 of the Taxes Consolidation Act, 1997 , are delivered to the Revenue Commissioners.

(6) The court shall, in making an order under subsection (3) of this section, being an order that is made on the application of a creditor of the company, direct that one or more specified members or officers of the company shall, within a specified period—

(a) if the order relates to a company that has been struck off the register under section 12(3) of this Act, deliver all outstanding annual returns required by section 125 or 126 of the Principal Act to the registrar of companies,

(b) if the order relates to a company that has been struck off the register under section 12A(3) of this Act, deliver all outstanding statements required by section 882 of the Taxes Consolidation Act, 1997 , to the Revenue Commissioners."

40. The key provision of this statutory section which applies to the fact of this case is the second part of s. 12B:

"and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off or make such other order as seems just (and such other order is referred to in subsection (4) of this section as an 'alternative order')."

(Emphasis added).

Case Law

41. A number of cases have been opened by the parties in this matter. *In Richmond Building Products Ltd v. Soundgables Ltd* [2005] 3 I.R. 321 the plaintiffs sought judgment against the defendants of a sum in respect of goods sold to the first defendant, a limited company, in a period during which it was struck off the Register of Companies. The High Court (Finnegan P.) held in refusing the order sought by the plaintiff that the effect of the restoration of the company to the register was that the personal liability which might otherwise have been attached to the directors was extinguished.

42. In the course of his judgment Finnegan P. considered the meaning of s. 12B(3) of the Act and also considered the judgment of O'Neill J. in respect of this section in *Re Amantiss Enterprises Ltd* [2000] 2 ILRM 177.

43. As Finnegan P. stated at page 324 of his judgment:

"The effect of such an order pursuant to the Companies (Amendment) Act 1982 was considered in re Amantiss Enterprises Ltd. [2000] 2 I.L.R.M. 177. For the petitioner in that case it was argued that the effect of the statutory provision was to validate all acts done by the company between its dissolution and its restoration. For the notice parties, it was submitted that the effect of the section was merely to restore the status of incorporation to the company as to its identity but did not have the effect of validating retrospectively acts done between dissolution and restoration to the register. The court held in favour of the petitioner. In his judgment O'Neill J. relied upon Tyman's Ltd. v. Craven [1952] 2 Q.B. 100, the majority decision in which was relied upon by the petitioner. He cited with approval a passage from the judgment of Lord Evershed M.R. at p. 111:-

'In my judgment, the final words of the subsection can properly and usefully be regarded as intended to give to the court, where justice requires and the general words would or might not themselves suffice, the power to put both company and third parties in the same position as they would have occupied in such cases if the dissolution of the company had not intervened. More generally the final words of the section seem to me designed, not by way of exposition, to qualify the generality of that which precedes them but rather as a complement to the general words so as to enable the court (consistently with justice) to achieve to the fullest extent the "as-you-were" position which, according to the ordinary sense of those general words, is prima facie their consequence'." (Emphasis added.)

44. In *Re Lindsay Bowman Ltd* [1969] 1 WLR 1443 Megarry J. considered a similar provision in the UK companies legislation. In that case a creditor claiming one debt incurred before the dissolution and another incurred afterwards supported the petition to restore the company to the register on condition that the court order should be expressed to be without prejudice to any remedy which a creditor who became such after dissolution might otherwise have against anyone prior to the date of the order. (the so called "Rugby Auto Electric clause"). Megarry J. however rejected this claim holding that the power of the court was available only to give effect to the statutory fiction that the company had not been struck off whereas the effect of granting the plaintiff his order would be to negative that statutory provision. As he stated at page 1446:

"In the present case the position seems to me to be very different. What is sought is a provision that will preserve to the creditor the rights that he acquired while the company was defunct. The statutory fiction that results from an order under the subsection is that the company continued in existence throughout; and this, with all that flows from it, is the necessary consequence of the order. One of the consequences is that any liabilities properly incurred by a director in the name of the company would be liabilities of the company and not of the director. What the concluding limb of the subsection empowers me to do is to give directions or make provisions for placing the company and others in the same position as nearly as may be as if the name of the company had not been struck off. What Mr. Hamilton seeks is a direction or provision putting him in the same position as if the company had been struck off, as in fact it was. In other words he seeks a direction or provision which will negative the statutory fiction whereas all that the subsection empowers me to do is to give a direction or make a provision which supports or carries out the statutory fiction as nearly as may be. I do not see what power I have to include such a direction or provision in the order."

"In saying this, I am conscious of differing from a judge of great experience. Unfortunately In Re Rugby Auto Electric Services Ltd was not reported and there is nothing in the file of that case which has suggested to me the reasoning which Roxburgh J. may have had in mind when inserting the clause. In those circumstances all that I can do is to apply the language of the statute to the best of my ability. I cannot see any escape from the conclusion that the power of

the court is limited to giving directions and making provisions for the sole purpose of effectuating the statutory fiction, namely that the name of the company has not been struck off. Such a power cannot in my judgment be used for the purpose of negativing the statutory fiction. The words governing the exercise of the power are "for placing the company and all other persons in the same position as nearly as may be as if" and it is for this purpose and this alone that the court may give such directions and make such provisions "as seem just". If the section had ended with the words "as seem just" thus omitting the purpose of words "replacing …" and all that follow or if the final "not" had been omitted the position might have been very different. Again the subsection might have been qualified by authorising the order to be made "subject to such modifications as the court thinks fit". But I must take the subsection as I find it and not as it might have been; and in my judgment it does not authorise the insertion of the Rugby Auto Electric clause in the order. It may be that there are grounds for widening the discretionary powers of the court under the subsection but that is for the legislature and not for me.

45. I have also considered *Davy v. Pickering and Others* a decision of the UK High Court Chancery Division dated 19th February 2015 of Judge Keyser Q.C. sitting as a judge of the High Court.

46. As he stated at para. 43 of his judgment:

> *"Consideration of what is required to place persons in the same position, as nearly as may be, as if the Company had not been dissolved or struck off the register is made more difficult, particularly in a case such as the present, by the unavoidable element of the counterfactual that is involved. It does seem to me, however, that Mr Oram is correct to say 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[Financial Ombudsman Service] and been able to present the petition that he now seeks to present and bring the claim that would underpin such a petition. It is quite impossible to know whether he would have achieved those steps; that impossibility, however, arises out of the conduct of Mr and Mrs Pickering in bringing about the dissolution of the Company. If justice requires that the effects of the striking-off of the Company be undone by restoring to Mr Davy his lost opportunity, the risk that his position will be improved over what it might have been—perhaps because he is better able to take advantage of the opportunity—seems to me to be the price of seeking the best attainable equation of positions under section 1032(3)."*

Assessment

47. The issue which therefore arises in this application is what directions or what provisions should be made which seem just in order to place the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

48. In my view the court can not avail of the second option (i.e. to make such other order as seem just) because such order is referred to in subsection 4 as an alternative order and under subsection 4 an "alternative order" only appears to deal with debts or liabilities incurred by or on behalf of the company during the period when it was struck off the register. However the debts and liabilities which arise in this case were not incurred by or on behalf of the company during the period when it was struck off the register but are instead liabilities which arose before the company was struck off.

49. Therefore the issue which the court has to consider is what provisions or directions are just in order to place the company and all other persons in the same position as nearly as may be as if the company had not been struck off.

50. It should be noted that the statutory subsection refers to "all other persons". On the facts of this case that refers to both NAMA/NALM and indeed the directors and Mr. Kelleher.

51. I would also observe that the statutory section only provides that the court should make such provision as seem "just" to place all other persons in the same position "as nearly as may be". In other words, it does not say in "exactly the same position as they were" before the company had been struck off.

52. It is clear from the affidavit evidence that the issue between the parties is who should bear the costs of carrying out the company audit for the years 2010, 2011, 2012 and 2013.

53. I am satisfied that the affidavit evidence establishes that NAMA/NALM had agreed to pay the accounting fees of KPMG to carry out the preparation of audited accounts for the company for the year ended March 2010 and the year ended March 2011. There is ample evidence to show that this is so and indeed this matter is explicitly accepted in the affidavits of Mr. Malbasha. I would therefore conclude that the costs of preparing the audited accounts for the year ended 2010 and the year ended 2011 should be borne by NAMA/NALM. Such an order places the company and all other persons in the same position as nearly as may be as if the company had not been struck off.

54. However the position is slightly different for the costs of preparing the audited accounts for the following two years. Counsel for NAMA/NALM argued that, whatever about the position for the first two years, there was absolutely no agreement and no evidence of any agreement that NAMA would pay the costs of the audited accounts. Whilst that is true, the issue which then arises is what would have been a more likely outcome if that question had arisen. One possibility is that NAMA would have said to the directors that it was no longer going to pay for the accountancy costs of preparing the accounts for the company; a second possibility is that NAMA would have agreed to continue funding the accountancy costs for preparing the accounts for the company. Having considered the affidavit evidence in this matter and having considered the underlying commercial logic as to why NAMA agreed to pay for the accountancy costs for the first two years of accounts (i.e. that NAMA wished to ensure that the company continued to be maintained on the Register of Companies in order to protect its security) – I am of the view that it is more likely than not that NAMA would have continued the arrangement of funding the KPMG fees to prepare the accounts for the final two years.

55. However given that this might not have turned out to be the situation, in my view it would not be entirely just and fair to impose the full financial obligation on NAMA for this and the directors and Mr. Kelleher certainly have some legal responsibility for ensuring the company has the means by which it should discharge its auditor's fees to prepare the audited accounts of the company.

56. I am of the view therefore that a fair and just order in this case would be to direct that NAMA and Mr. Kelleher/the directors should bear the costs of preparing the last two sets of accounts equally. This does not mean that Mr. Kelleher should bear the costs of one year and NAMA should bear the costs of another year. Instead NAMA and Mr. Kelleher should each bear the costs of both years on a 50/50 basis.

57. The Petitioner sought to argue that the jurisdiction of the court under s. 12 (B) (3) is not engaged. The essence of its argument was that it was only if the dissolution of the company had altered Mr Kelleher's position in a manner which is not remedied by the general restoration order made by the court that the jurisdiction is engaged. In my view that argument is not correct as a matter of principle. Moreover I can find no language in the statutory section to limit the operation of s. 12 (B) (3) in this way.

58. It is also argued by the Petitioner that the effect of the order sought by Mr Kelleher is to obtain an order for specific performance of a disputed agreement. However in my view, that is an overstatement. Firstly, the effect of the order which I am proposing to make is to put the parties back "as nearly as may be" into the position they were (as far as I can glean from the evidence) for the 2010 and 2011 accounts; secondly I am not proposing to make any order for specific performance of any agreement for the 2011 and 2012 accounts but rather to consider the counterfactual situation of what might have occurred had the company not been struck off.

59. The Petitioner also sought to argue that a refusal to make the order sought by Mr Kelleher does not preclude Mr Kelleher from pursuing the funding agreement with the Petitioner by separate proceedings in the ordinary way. However that is to ignore the manner in which this application came before the court. NAMA appointed receivers the day before the company was struck off the register; NAMA brought the application to restore the company to the register so that it could protect its security and recover part of its debt; the company was restored to the register by order of the Court but this issue of dispute was held over for further argument. It would, in my view, be entirely wasteful of costs and court time that separate proceedings should be issued to resolve this very net issue in circumstances where the legislation specifically grants a jurisdiction to the High Court to decide such matters as part of a restoration application.

Conclusion

60. I would therefore conclude:

1. That NAMA/NALM should bear the costs of preparing the audit of accounts for the year ended 2010 and 2011.

2. That NAMA/NALM and the directors/Mr. Kelleher should bear the costs of preparing the accounts for the year ended 2012 and 2013 on a 50/50 basis.