THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 290

[2016 No. 129]

The President
Irvine J.
Faherty J.

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

BETWEEN

NATIONAL ASSET LOAN MANAGEMENT LIMITED

PETITIONER/APPELLANT

AND

MIDDLEVIEW LIMITED

RESPONDENT/NOTICE PARTY

GARRETT KELLEHER

NOTICE PARTY/RESPONDENT

JUDGMENT of the President delivered on 26th October 2017

Introduction

1. This appeal is concerned with the jurisdiction of the High Court when making an order for the restoration of a company that has been struck off the Register of Companies. If the High Court is satisfied it is just, it may order that the company be restored to the register and may by the order give directions and make provisions to put the company in the same position as if it had not been struck off and to put all other persons in the same position as if the company had not been struck off. The judgment of Cregan J. that is the primary subject of appeal in this case opens with a succinct statement of the issue that the Court had to address as follows:

> "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. Middleview Ltd. was an investment company with large borrowings from Anglo Irish Bank which were taken over under the National Asset Management Agency Act 2009 and then acquired by National Asset Loan Management ("NALM"). The company was struck off the Register of Companies on 28th March 2014 for failing to file returns. NALM applied to the High Court to have it restored, giving notice to parties specified by company law and also to Mr. Garrett Kelleher, a director of the company. On 2nd March 2015, Cregan J. made the order sought and left over for further consideration a claim by the notice party, Mr. Kelleher, for a direction that NALM pay the accountancy fees of preparing the company's audited accounts. When that matter was heard, the Court found in favour of the notice party, ordering NALM to pay for the accounts for 2010 and 2011 in full and to cover 50% of the cost of years 2012 and 2013. In his judgment on the issue, Cregan J. made observations about the affidavit evidence furnished by a senior official of NALM, Mr. Peter Malbasha, and that body's lawyers returned to court to request reconsideration by the judge, not of his decision but of the perceived personal criticisms. Cregan J. delivered a second judgment on 29th January 2016 addressing his previous comments, rejecting the complaints made by NALM and confirming what he had said in the previous judgment. In the result, the issues in this appeal are first the original orders as to the payment of accountancy costs and, secondly, the justifiability of the judge's criticisms of Mr. Malbasha.

3. It is convenient to consider the arguments about the substantive issue of statutory interpretation and application separately from the judicial comments on the affidavit evidence proffered by NALM. The decision of the High Court under that primary head did not depend on the judge's observations or conclusions on the affidavits.

Background

4. Following failure by the company to meet a demand for repayment of money due on 28th March 2014, NALM appointed receivers

over Middleview. As it happened, earlier on the same day, Middleview had been struck off the Register of Companies for failing to file annual returns with the Companies Registration Office. NALM applied to the High Court on 6th February 2016 to have Middleview restored to the Register for the purpose of realising the company's assets and recovering some of the loans. The CRO did not object to the application on condition that an order under be sought under the Companies Acts providing for delivery of the outstanding returns. Mr. Garrett Kelleher, one of Middleview's directors, did not object to the application, but raised an issue concerning payment of the cost of preparing the returns and the Court put the matter back for later consideration. In an affidavit dated 13th March 2015, Mr. Kelleher complained that the company or the directors should not have to pay for preparation of the returns. He argued that sole responsibility lay with NALM for the company's being struck off because they would not pay the auditors, KPMG, despite promising to do so and having the benefit of all the company's income. He sought an order pursuant to section 12(B)(3) for payment of the cost by NALM.

5. In response, Mr. Peter Malbasha swore a replying affidavit dated 9th April 2015 on NALM's behalf. He said that it was the responsibility of the directors to discharge their duties under the Companies Acts notwithstanding any receivership process. Nevertheless, NALM had attempted to release funds to discharge the audit fees but that was done in contemplation of cooperation from the directors which was not forthcoming. The approval of such funding was done for the purpose of preserving the value of its security. NALM argued that it was the lack of co-operation from the directors that caused Middleview to be struck off for having failed to file its annual returns, rather than any default on its part. Mr. Malbasha also claimed that the receivers had only been validly appointed in April 2015 following the restoration of Middleview to the register.

6. In a replying affidavit dated 24th April 2015, Mr. Kelleher insisted that bringing the accounts up to date was a company expense and as such, it was a cost to be discharged with the company's income. NALM had sole control over Middleview's income and that it was not disputed that it was their intention to discharge the necessary auditing frees prior to a strike off. Mr. Malbasha responded in a replying affidavit sworn on 7th May 2015, acknowledged that NALM made funding available to the company to pay the accountancy fees of KPMG despite, from its perspective, there being no legal obligation to do so. The agreement was to pay the auditors and a Mr. Wayne O'Dwyer whatever costs were necessary to bring the accounts up to date.

The Statutory Provision

7. On the substantive matter, the High Court held that section 12(B)(3) of the Companies (Amendment) Act 1982, as inserted by section 46 of the Companies (Amendment) (No.2) Act 1999 permitted the making of the orders and that it was just in the circumstances to do so. The subsection as inserted into the 1982 Act is as follows:

> "(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')."

8. The court said that the key provision for the decision is the second part above, which I have highlighted in italics. The subsection means that if the High Court is satisfied that it is just to do so, it may order that the name of the company be restored to the register, and may by the order give directions and make provisions to put the company in the same position as if it had not been struck off and to put all other persons in the same position as if the company had not been struck off.

High Court Decision and Reasoning

9. NALM argued that s. 12(B)(3) did not apply in the circumstances of the issue between the parties as to who should bear the costs of auditing the company's accounts for the years 2010 to 2013. They submitted that it was only if the dissolution of the company had altered Mr. Kelleher's position in a manner which was not remedied by the general restoration order made by the Court that the jurisdiction arose. The Court rejected that as a matter of principle and held that there was nothing in the words of the provision to support such a restriction.

10. Having decided that the subsection was available, the court considered what provisions or directions were just in order to place the company and all other persons including NALM, the directors and Mr. Kelleher in the same position as nearly as may be as if the company had not been struck off. NALM had agreed to pay KPMG to prepare audited accounts for years ended March 2010 and March 2011 and so they should bear the cost for those years. Such an order placed the company and all other persons in the same position as nearly as may be as if the company had not been struck off.

11. In respect of the years ended 2012 and 2013, the court held that "the position was slightly different". While there was no agreement to pay for auditing those years, the court held that it was "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". The underlying commercial logic for agreeing to pay for the earlier two years applied equally to the later period. But that might not have happened and the directors had some legal responsibility to pay auditors' fees and so it was fair and just to split these costs equally between NALM and Mr. Kelleher.

12. The court also dismissed the argument by NALM that the effect of the order sought by Mr. Kelleher would be to grant specific performance of a disputed agreement. The decision was putting the parties back into the position they were in by agreement prior to striking off in regard to 2010 and 2011. As for the latter two years, the court had ascertained "the counterfactual situation of what might have occurred had the company not been struck off".

13. As to the submission that Mr. Kelleher was able to pursue his claim on the funding agreement by separate proceedings in the ordinary way, the court held that the manner in which the application came before the court suggested that it would be "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".

The Order

14. On 5th February 2016, the court ordered that Mr. Kelleher, as director of Middleview, was to deliver all outstanding annual returns in line with his statutory duties within three months. NALM was to bear the costs of preparing Middleview's accounts for years ended

2010 and 2011. Mr. Kelleher and NALM were to bear the costs of preparing the audited accounts for Middleview for the years ended 2012 and 2013 on a 50/50 basis. Mr. Kelleher was awarded 75% of his costs in the application. The Order was stayed pending the final determination of the appeal.

The Appeal

15. There are 14 grounds of appeal:

(i) The learned High Court judge erred in law as to the proper ambit and extent of the jurisdiction and discretion conferred on the Court by the "final words" provided by s.12(B)(3);

(ii) the learned High Court judge erred in law in concluding that the "final words" were not a "complementary", limited jurisdiction confined to situations where a party's position has been altered by the dissolution and has not been otherwise remedied by the general restoration order;

(iii) the learned High Court judge erred in considering that the "final words" offered a broad discretion on the Court to grant a substantive remedy to a party where it considers it fair and just to do so;

(iv) the learned High Court judge erred in granting relief that would have been available in separately issued court proceedings;

(v) the learned High Court judge erred in law and in fact by granting an order that did not return the parties to their previous positions, but rather improved the Respondents to the disadvantage of the Appellant;

(vi) the learned High Court judge erred in fact and in law in concluding that the evidence established an agreement to pay the accounting fees of KPMG for the years ended 2010 and 2011;

(vii) the learned High Court judge exceed his jurisdiction under s.12(B)(3) in determining disputed issues as to fact without any cross-examination;

(viii) the learned High Court judge erred in fact and in law in granting an order without having due regard to the disputed nature of the agreement, the failure of the Respondent to explain why no returns were made despite the Appellant having made funding available, and the tendency of the Order to devalue the strike of mechanism as a deterrent against the abdication of statutory duties;

(ix) the learned High Court judge erred in fact and law in engaging in "counterfactuals" as to what might have happened if Middleview had not been struck off the register in relation to the payment of accounting fees for years ended March 2012 and 2013;

(x) the learned High Court judge erred in fact in exercising its s.12(B(3) jurisdiction in circumstances where there was no agreement to pay the outstanding accounting fees for years ended March 2012 and 2013;

(xi) in the alternative, the learned High Court judge erred in using his discretion where their was disputed and unsatisfactory evidence along with a failure on the part of Mr. Kelleher to fulfil his statutory duties;

(xii) the learned High Court judge erred in law and fact in finding parts of Mr. Malbasha's affidavit as being misleading;

(xiii) the learned High Court judge further erred in refusing to revise his judgment to reflect the fact that Mr. Malbasha's affidavit was factually correct and not misleading as to Middleview being struck off before receivers were appointed and

(xiv) the learned High Court judge further erred in law in directing that the Respondent pay 75% of the Appellant's costs.

Issues

16. Issues for determination on the appeal:

(i) Did s. 12 (B) (3) give the High Court jurisdiction in the circumstances of the case to order NALM to pay the costs of auditing the company?

(ii) If there was jurisdiction, was the trial judge entitled on the evidence in the affidavits and particularly having regard to the matters disputed in the affidavits of Mr Garrett Kelleher and Mr Peter Malbasha to make the order that he did regarding the audit costs for 2010 and 2011?

(iii) If so, was the judge entitled to make an order for NALM to pay 100% of the audit costs for 2010 and 2011 and 50% of the costs for 2012 and 2013?

17. For later consideration:

(iv) In the second judgment, which followed submissions by NALM that the trial judge was in error as a matter of fact in regard to the conclusions he reached on the affidavit of Mr. Peter Malbasha, did the trial judge err as a matter of law in a manner that is open to this court to correct?

(v) If the answer to this question is yes, is it nevertheless appropriate or prudent to embark on a review of this second judgment?

Jurisdiction under the Section12(B)(3) (Grounds (i) to (vi))

Summary of Appellant's Submissions
18. NALM submits that the jurisdiction under s. 12(B)(3) is "largely, if not exclusively" procedural in nature. The general effect of a restoration order is to validate retrospectively acts done by the company between its dissolution and restoration to the Register. Citing the decision of O'Neill J. in *Re Amantiss Enterprises Ltd* [2000] 2 ILRM 177, they argue that the final words of the subsection provide the Court with a complementary jurisdiction to make an order to create the "as you were" position of the company prior to dissolution. They also referred to similar passages from the judgments of Lord Evershed M.R. and Lord Hodson in *Tymans Limited v. Craven* [1952] 2 QB 100.

19. As recognised by Finnegan P. in *Richmond Building Products Ltd v. Soundgables Ltd* [2005] 3 IR 321, the final words of s. 12(B)(3) cannot serve to undo the statutory fiction that the company was considered never to have been struck off. In that case, a claim against the directors was held to no longer be sustainable upon restoration. The purpose of the relevant part of s. 12(B)(3) is to address specific consequences of the dissolution that would not otherwise be addressed by the restoration order's retrospective application.

20. NALM submits that *Davy v. Pickering & Ors* [2015] EWHC 380 shows that the court's admittedly broad discretion to grant an order to bring about the "as you were" position cannot be wholly separated from the underlying statutory purpose. The fact that some loss or injustice has occurred does not, of itself, give the court jurisdiction to right it through s. 12(B)(3). It must not only be just, but justifiable having regard to the Act.

21. In this case, the relief granted by the High Court was substantive in nature and went beyond the limited jurisdiction under s. 12(B)(3). Mr. Kelleher was placed in a better position than he was at the time of dissolution. Consequently, It was for Mr Kelleher and his company to make a claim against NAMA/ NAML for payment of the accountancy fees in separate proceedings

Summary of the Respondent's Submission
22. From 1st November 2010, NALM were in control of the Middleview's assets and income. Middleview only had access to whatever income NALM allowed, supporting it so as to protect its security. Statutory returns are generally considered company expenses paid for out of company funds. It is argued that this would have been the position had Middleview not been struck off. As to NALM's suggestion that the funding agreement was no longer effective as Mr. Kelleher had ceased co-operating. He submits that there was no evidence before the Court that cooperation had ceased. The question of his co-operation is the subject of separate Commercial Court proceedings. Mr. Kelleher submits that NALM has opted to focus on a number of technical arguments rather than the substantive commercial situation. The court's role is to determine the "as you were" position of the parties when Middleview was dissolved. It is argued that at that time, NALM was supporting Middleview to protect its security. NALM purported to appoint receivers, and even if they failed to do so, the receivers acted in that capacity and Mr. Kelleher was never informed of such failure.

23. The wording of the subsection does not suggest that it is limited to circumstances in which the dissolution alters a party's position in a way that is not remedied by the general restoration. Secondly, to suggest, as NALM does, that the jurisdiction is merely procedural is to imply additional wording into the subsection. The explicit wording of the subsection is inconsistent with NALM's interpretation.

24. It is further submitted that NALM's reliance on authority is misguided. Both parties accept the applicability of Re Amentiss Enterprises and Tyman as to the purpose and intent of the subsection. In that latter case, Lord Evershed M.R. noted:

> "Where justice requires [the subsection]…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 the ordinary sense of those general words, is prima facie their consequence."

25. In Re Amentiss Enterprises, O'Neill J. cited with approval the judgment of Hodson J. in holding that the subsections exists "in order to clarify an obscure position or give back to the company an opportunity which it might otherwise have lost". Mr. Kelleher submits that this is such an obscure position wherein a creditor will not allow a company to use its funds to discharge statutory obligations, having promised to do so prior to dissolution. He further rejects that the subsection's broad jurisdiction is limited beyond what is necessary to maintain the statutory fiction.

26. Mr. Kelleher claims that this case is one of exceptional circumstances as referred to in the authorities wherein he, as director, allowed one of its creditors control over all of Middleview's income on the basis that they would fund the statutory accounts. The subsection allows for orders or directions necessary to ensure justice between the parties. It is also argued that the cases of *Re Lindsay Bowman* [1969] WLR 1443 and *Richmond Building Projects Ltd v. Sound Gables Ltd* [2005] 3 IR 321 cited by NALM are of limited relevance. They merely highlight that any order made under the subsection cannot undermine the statutory fiction that the company was never struck off.

27. Mr. Kelleher rejects NALM's argument that Davy v. Pickering and Ors is precedent for claiming that the jurisdiction of s. 12(B)(3) is merely procedural. In that case, the striking off had prevented the applicant from proceeding with a claim and issuing a winding up petition. As such, the court considered his position to have been issued three years prior to the restoration order date provided it was issued within 14 days of said order. Judge Keyser QC recognised that determining the "as you were" position can involve the "unavoidable element of the counterfactual". More importantly, the court noted:

> "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 [the Act]"

28. Finally, it was submitted that the court does not require an assessment of the "counterfactual" in order to do justice in the case. Mr. Malbasha's evidence showed that NALM agreed to pay the audit fees: "However, the strike off and separate proceedings between the parties led to them deciding not to uphold the agreement. They elected to pay legal fees, rather than audit fees".

Discussion
29. Finnegan P. in *Richmond Building Products Ltd v. Soundgables Ltd* [2005] 3 I.R. 321 and O'Neill J. in *Re Amantiss Enterprises Ltd.* [2000] 2 I.L.R.M. 177 adopted the view of the corresponding English provision taken by Lord Evershed MR in his judgment for the majority in *Tyman's Ltd. v. Craven* [1952] 2 Q.B. 100 in a passage at p. 111. The Court of Appeal in that case held that the words of the relevant part are a complement to the deemed continued uninterrupted existence that is expressed in the general words and that their purpose was "to enable the Court (consistently with justice) to achieve the "as-you-were" position to the fullest extent". The restored company's existence has in fact been interrupted, but restoration is deemed to remove the suspension; the subsection

enables the court to fulfil the statutory purpose by making complementary provisions.

30. Cregan J. cited *Re Lindsay Bowman Ltd* [1969] 1 WLR 1443, in which Megarry J. explained the similar provision:

> "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 . . . 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."

31. The trial judge also considered Davy v. Pickering and Others [2015] EWHC 380 Ch. in which Judge Keyser Q.C. sitting as a judge of the High Court ordered restoration of a company and gave a series of directions under the statutory jurisdiction in complex proceedings where alleged wrongdoers had dissolved a company which the plaintiff applicant sought to have restored for liquidation and further pursuit of his funds. The judge held that:

> "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)." [At para. 43]

32. It is clearly established on these authorities that the provisions and directions that may be made with the restoration order are complementary to the order and not freestanding. There is not a general jurisdiction to make orders as seem just to the court but only as are required for effectuating the statutory purpose. The power to give directions and make provisions as seems just is conditional, contingent and dependent on the specific statutory purpose.

33. If the High Court is satisfied it is just to do so, it may order that the company be restored to the Register and may by the order give directions and make provisions as seem just to put the company in the same position as if it had not been struck off and to put all other persons in the same position as if the company had not been struck off. The relevant cases establish the point that arises as a matter of interpretation of the subsection, which is that the court is empowered to make an order in conjunction with the putting back of the company onto the Register. The order of the court is that the company be restored to the Register, and by that same order it is entitled under the subsection to make further provisions as seem just. There is not a freestanding power given to the court to make provisions according to what seems to be just; justice is exercised in this regard for the purpose of putting the company and other persons back into place as if the striking off had not happened. This point is made clear in the authorities and explicitly demonstrated by Megarry J.

34. The High Court found that as a matter of principle the subsection was applicable to the auditing costs dispute, but I do not think that can be correct. It seems to me that the section was intended to do something different, namely, to provide for circumstances or conditions that would not otherwise represent the same situation as if the company had not been removed. It could not provide a means for dealing with a matter outside the specified statutory objective.

35. Prior to being struck off, the company had an obligation to file audited annual returns, which subsisted whether or not it was the subject of receivership. NAMA was willing to pay the costs of auditing for the years ending March 2010 and 2011, subject to certain conditions that it required to be satisfied. The order made by the High Court that the company should be restored actually changed the situation by providing also that NAMA pay the costs as described. The appellant is accordingly correct in saying that the Court resolved a dispute and in effect ordered specific performance of the agreement. The situation of the company and other persons concerned was therefore different and did not reflect putting the company back in the situation as if it had not been struck off. The Court's order produced this different situation and that was not authorised by the subsection.

36. If Mr. Kelleher and his company chose to do so they could make their claim against NALM/NAMA for payment of the accountancy costs in separate proceedings. Essentially, it is a question of agreement: did NALM/NAMA agree to pay the accountancy costs for 2010 and 2011 unconditionally or subject to conditions that were fulfilled? If so, the Court would no doubt find a liability to discharge the costs. If it is a matter of agreement, then I do not see how it comes in under subsection (3).

37. The first conclusion therefore is that the interpretation placed on the subsection by the High Court whereby it held that the dispute about auditing costs could be resolved by the order restoring the company was incorrect. The court actually appears to have made the error identified by Megarry J. in the brief citation above.

The Auditing Fees (Grounds (vii)to (xi))

Summary of Appellant's Submissions

38. NALM submits that Cregan J's mistake stems from an interpretation of the "as you were" position as allowing him to engage in a counterfactual scenario. The High Court misunderstood that Davy v. Pickering dealt with directions that were purely procedural in nature as the company's dissolution prevented the applicant from bringing proceedings to have the company wound up. Cregan J. went beyond that jurisdiction in finding that NALM would have likely provided funding to cover the auditing fees for the 2012 and 2013 accounts. The disputed nature of any such purported agreement prevents any order enforcing it from being simply procedural. As such, it acted ultra vires its jurisdiction. It is also argued that the High Court should not have determined disputed issues surrounding the 2012 and 2013 accounts without cross-examining the deponents. Moreover, NALM considers that the judgment is unclear on the High Court's basis for rejecting Mr. Malbasha's outlining of the parties' positions upon dissolution which they claim went unchallenged. They highlight that Mr. Kelleher's application would not have succeeded if advanced on a summary judgment basis. NALM further submits that it is insufficient for the High Court to brush off the suggestion of separate proceedings as being "wasteful of costs and court time". In the alternative, if the High Court acted intra vires in exercising its jurisdiction under s. 12(B)(3) then Mr. Kelleher's failure to comply with his statutory duties as a director should have led to a different result.

Summary of the Respondent's Submissions

39. Mr. Kelleher argues that s. 12(B)(6) does not require that a director pay for the preparation and delivery of the returns themselves, just that they deliver them to the CRO. It is not punitive in nature requiring the director to pay for the audit out of pocket. The High Court Order does not undermine the statutory framework as regards the duties of a director. Mr. Kelleher accepts that it is his duty to deliver the accounts; his argument is that NALM's refusal to pay KPMG's fees as promise prevents him from doing so. It is emphasised that the agreement to give NALM control over Middleview's income was voluntary in nature, conditioned on their

commitment to release funds to pay for the statutory accounts. Mr. Kelleher recognised that the extent of their debt made is "right and proper" to do so, but argues so too holding NALM to their side of the agreement. Without such agreement, Mr. Kelleher would have been forced to wind up the company and a liquidator could have been appointed.

40. Mr. Kelleher submits that evidence upon which NALM claims that the agreement was disputed is unsatisfactory. Mr. Malbasha's affidavits do not suggest that the agreement was disputed in terms of its contents. The first suggestion of a dispute sufficient to require cross-examination came about in submissions made to this Court. It is noted that NALM never served notice to cross-examine Mr. Kelleher in the High Court. As such, if the court was of the opinion that cross-examination was necessary then Mr. Kelleher accepts that the matter should be remitted, but argues that the costs for the appeal should be paid by NALM for having failed to demand a cross-examination at an earlier stage.

Discussion

41. The question is whether the judge was correct in holding that that there was an agreement by NAMA/NALM to pay for the auditing costs for 2010/2011. It is clear, as Mr. Malbasha acknowledged that his principals were prepared to pay for the auditing of the company's accounts for 2010 and 2011, in each case y/e March. But he maintained that it was not an unconditional agreement. Mr. Malbasha's affidavits make clear that NAMA/NALM was prepared to pay for these audits on certain conditions which were basically that the company and an employee of that company and associated companies were actively pursuing the matter and cooperating with NAMA/NALM. That does not amount to an agreement that is freestanding and available to be invoked in all circumstances. Rightly or wrongly, there was a dispute in which NAMA/NALM said one thing, through Mr. Malbasha, and Mr. Kelleher and the company said something else. I do not think that the judge was entitled to resolve that dispute that arose on the affidavits simply by working things out for himself as to what was agreed. The height of the matter as far as NAMA/NALM was concerned is that they were indeed prepared to pay for the audit but on condition. The question, therefore, was whether the condition or conditions were met. The judge does not appear to have addressed the question whether there were conditions attached to the offer or willingness to pay for the audits.

42. As for the finding in respect of 2012 and 2013, I think this is even clearer. The judge engaged in what he called a counterfactual consideration. Having held that it would be in NAMA/NALM's interest to pay for the auditing, he decided that NAMA/NALM might not after all have done so, and so he made liability for those two years be divided evenly between Mr. Kelleher and NAMA/NALM. There is not, as the judge acknowledged, an agreement of any kind by NAMA/NALM to pay for the accounts. The judge, however, decided that they should pay for the accounts, but there is no question of putting the company back in the position that it was in as if it had not been struck off the Register.

43. If there was dispute about the matter, then my view is that it was not open to the court to resolve a dispute as to yes or no to an agreement to pay the accountancy fees when the only material before the court was on affidavit. The fact is that for whatever reason NALM had not actually discharged the accountancy/auditing payments and the order of the court altered the pre-existing position. Any dispute about an agreement to pay for the costs of auditing the company that existed prior to the striking off was not a matter that could be disposed of by an order made at the same time as the company was being restored even if the subsection permitted such jurisdiction to be exercised.

44. The objections of the appellants in regard to the costs of auditing years 2012 and 2013 apply with greater force. There was no agreement. The court held that it was probable that the appellants would discharge the accountancy fees for those later years but that conclusion, whether sound or otherwise, did not give rise to a legal liability, still less to one that could be attached to the restoration order. Neither can I find justification for the 50/50 split of the charges.

The Second Judgment of the High Court

45. On 15th January 2016, NALM made an application to Cregan J. requesting that he review and revise his judgment in regard to comments he had made at para. 23 that Mr. Kelleher's averments that the company was in receivership at the time of strike off were correct and that Mr. Malbasha's averments were "not only incorrect but positively misleading". They submitted that this was not an accurate understanding of the situation and that it had caused Mr. Malbasha "reputational damage".

46. The judge heard submissions and delivered a further judgment on this issue on 29th January 2015. The judge reviewed the affidavit evidence that had led him to reach his conclusion, noting errors that appeared in NALM affidavits sworn by Mr. Malbasha and Ms. Magee and also in Mr. Kelleher's deposition. A particular matter of concern to Cregan J. was the temporal relationship between the striking off and the appointment of receivers by NALM, both of which occurred on 28th March 2014, the former at the start of the day and the latter at 18:00 hours, and the affidavit evidence in relation thereto. He outlined the facts and circumstances that brought him to his conclusions, including at paragraph 24 of this judgment a tabular chronology of relevant events as follows.

> "Thus, the situation before Mr. Malbasha swore his affidavit was:
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> (1) The company was struck off on 28th March, 2014 (at the start of the day);
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> (2) The Petitioner appointed receivers to the company on 28th March, 2014 at 6.00pm;
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> (3) As is clear from later averments, the receivers wrote to the directors of the company on 31st March, 2014 saying that they had been appointed as receivers, relieving the directors of their powers over the assets of the company and asking the directors to transmit to them all the books and records of the company;
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> (4) The CRO published its Gazette on 2nd April, 2014 and the company was dissolved as and from that date;
>
> (5) As is clear from later averments, this fact only became known to the receivers when they sought to lodge their notification of appointment as receivers in the CRO and the CRO drew their attention to the fact that the company had been dissolved on the 2nd April, 2014 and struck off on 28th March, 2014."
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> In the next paragraph, he concludes: "[a]ll of these facts were or ought to have been known to Mr. Malbasha when he swore his affidavit".

47. After further consideration Cregan J. completed his judgment:

> "Conclusion
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> 41. Having considered again the Petition and all of the affidavit evidence in this matter, having considered the relevant

paragraphs of my judgment and the submissions of counsel for the Petitioner, I remain of the view that paragraphs 8 and 10 of Mr. Malbasha's first affidavit (particularly in the light of the errors in the Petition and Ms. Magee's affidavit) all combined to leave the Court with a misleading impression of what had happened. Whilst I accept that Mr. Malbasha did not intend to mislead, nevertheless a misleading impression was given to the Court by his affidavit evidence in the light of the Petition and the affidavit evidence of Ms. Magee.

42. In the circumstances I do not believe it is necessary or appropriate for me to review this part of the judgment as requested by the Petitioner."

48. Thus, in his second judgment, Cregan J. restated his criticisms of Mr. Malbasha's depositions but in significantly moderated terms. The errors he complained about had, the judge said, left the court with a misleading impression and he accepted that Mr. Malbasha did not intend to mislead.

Discussion

49. There is a fundamental distinction between the approach of this Court to the substance of appeal and to the complaints by the appellants in respect of the second judgment. It is understandable that the appellants would wish to have the adverse comments that the judge made about Mr. Malbasha set aside. However, the hearing at which the trial judge permitted his original judgment to be revisited was not as I understand in any sense a re-hearing. It was an application at the request of a party to the judge that he would reconsider a particular section of his judgment. The present appellants did make clear that they were not seeking to secure a different outcome to the case, but merely to apply for a reconsideration of the comments about Mr. Malbasha. The judge was free to entertain the application or to refuse to do so, in his discretion. He was satisfied to revisit the matter and he then delivered a further judgment. I think that a wide margin of appreciation has to be allowed to the court of trial in such circumstances. The judge is entitled to express views about the evidence in the case before him. When matters come before the court on affidavit and it transpires that errors are made, many judges will think it appropriate to comment and criticise and even to make severe criticisms. In regard to comments that are not necessary for the appeal, I think that the Court of Appeal should be slow to embark on an evaluation of the validity of observations and comments made by the judge in the course of a judgment unless there is some apparent error of law or fact or that there is some otherwise exceptional circumstance where justice seems to require it. Even if the court might take a different view on written material including affidavits, there is a zone in which the trial judge is free to express his or her view and that will sometimes include expressions of irritation or exasperation about things the judge thinks are wrong or should have been done differently or better. Appeal courts would be full with cases in which the decision was not being challenged, but rather something that the judge said or did would be the matter of debate. So, it seems to me that this Court should be careful to ensure that we spend our time on matters that are in dispute between the parties at affecting liability of one or the other in respect of legal wrongs. My approach, therefore, to this part of the appeal is reluctant and hesitant. That is not because I do not appreciate Mr. Malbasha's concern that his reputation might be impaired by things that the judge in the High Court said about him. It is simply that my conception of the function of this Court reflects a severe limitation on our capacity to endeavour to put right what he may consider to be erroneous in what the judge said.

50. For my part, I believe that these recast determinations by the trial judge represent a careful, measured response to the issues raised by the appellants in respect of Mr. Malbasha. Although I said at the outset of this section that I did not consider it the function of this Court to exercise an appellate function on this matter, I think that the conclusions in the later judgment are grounded in the affidavits in the case.

51. It may also be worthwhile to mention that the High Court's new conclusions reflect the care that is necessary when a court endeavours to resolve disputed issues on affidavit evidence and to reach conclusions as to the motivations of deponents in complex factual conflicts.

Conclusion

52. I would accordingly allow the appeal in respect of the substance of judgment on the order under s. 12B (3) of the Companies (Amendment) Act 1982 as inserted by s. 46 of the Companies Amendment (No. 2) Act 1999 for the payment of the accountancy fees. I would not interfere with the conclusions or order made in respect of the judge's comments on the affidavit evidence.