THE COURT OF APPEAL

Neutral Citation [2023] IECA 308
Record Number: 2022/279

Donnelly J.
Noonan J.
Binchy J.

IN THE MATTER OF LODGE GAVEN LIMITED

AND

IN THE MATTER OF SECTION 738 OF THE COMPANIES ACT 2014 (AS AMENDED)

AND

IN THE MATTER OF AN APPLICATION BY EVERYDAY FINANCE DAC TO RESTORE LODGE GAVEN LIMITED TO THE REGISTER OF COMPANIES

BETWEEN/

DECLAN O'DONOGHUE AND DAMIEN O'DONOGHUE

APPELLANTS

- AND –

EVERYDAY FINANCE DAC

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 12th day of December, 2023

1. Lodge Gaven Limited (the "Company") was incorporated on 20th August 2003 pursuant to the provisions of the Companies Acts 1963- 2001. The Company fell into arrears in filing its annual returns, and its last annual return was filed on 3rd July 2009. As a result,

the Company was struck off the Register of Companies (involuntarily) on 13th January 2012. At the date of its dissolution, the appellants herein, Damien O'Donoghue and Declan O'Donoghue, were directors of the Company.

2. The Company had loan facilities with Allied Irish Banks Plc (AIB) and as security for its indebtedness to AIB, the Company executed a deed of mortgage debenture in favour of AIB over all of the undertaking of the Company and all of its property and assets, on 13th January 2006. By deed of transfer dated 14th June 2019, AIB transferred to Everyday Finance DAC ("Everyday") all of its interest in the loan facilities of the Company, together with the benefit of the security granted by the Company to AIB i.e. the deed of mortgage debenture.

3. By notice of motion dated 18th August 2022, Everyday sought an order pursuant to s.738 of the Companies Act 2014 (the "2014 Act"), restoring the Company to the Register of Companies, as well as related orders under s.740 of the 2014 Act requiring the directors to bring the annual returns of the Company up to date, and to deliver to the Revenue Commissioners all outstanding statements in relation to the Company as required by s.882 of the Taxes Consolidation Act, 1997, as well as the costs of the application. The application was grounded upon the affidavit of Adrienne Fitzgibbon, senior manager of Everyday.

4. In her affidavit, Ms. Fitzgibbon deposes as to the factual background outlined above. She also deposes that as of 3rd August 2022, the sum due and owing by the Company pursuant to the loan facility sold by AIB to Everyday was €2,877,901.29. She avers that the Company has failed to make its required repayments pursuant to the loan facilities and at para. 14 of her affidavit, Ms. Fitzgibbon avers that *"the applicant wishes to enforce the mortgage debenture against the Company with a view to realising the assets secured thereby. In order to ensure that a receiver can be validly appointed pursuant to the mortgage*

debenture, the applicant wishes to ensure that a notice of demand has been validity served on the company in respect of its liabilities under the facility letters."

5. Ms. Fitzgibbon also refers to and exhibits a copy of a guarantee dated 10th February 2009, provided by Mr. Declan O'Donoghue, in favour of AIB, in respect of the obligations of the Company to AIB pursuant to its loan facilities (the "Guarantee"). The Guarantee is capped at €1,541,000.

6. The application for restoration of the Company to the Register is supported by the Revenue Commissioners, on whose behalf a supporting affidavit was sworn by a Mr. Joseph Hughes on 29th September 2022.

7. The application was opposed by the appellants. Mr. Declan O'Donoghue, swore an affidavit in opposition on behalf of both appellants on 10th November 2022. While Mr. O'Donoghue says that it is not accepted that the loan facilities have been validly transferred by AIB to Everyday, that is not an issue for determination in this appeal, which proceeded on the basis that Everyday has acquired ownership of the loan facilities of the Company from AIB, together with the security provided by the Company to AIB in respect of those loan facilities, and that Everyday is a creditor of the Company within the meaning of s.738 of the 2014 Act. While the Company maintains that any claim that Everyday may have against the Company in respect of the loan facilities is statute barred, it was accepted at the commencement of the hearing of this appeal that it could not maintain that argument, not having raised it in the Court below.

8. In his affidavit, Mr. O'Donoghue refers to summary judgment proceedings issued by AIB against him pursuant to the Guarantee, and a judgment of the High Court (MacGrath J.) of 8th February 2019, referring those proceedings to plenary hearing. Mr. O'Donoghue refers to para. 7 of the judgment of MacGrath J. in which he found that:

"On 2nd February, 2011, a sum of €1,642,461.16 was due and owing by Lodge Gaven Limited. The plaintiff demanded payment from the company. This was not paid and on 16th October, 2013, the plaintiff demanded payment of the sum of €1,541,000 on foot of the guarantee."

9. Accordingly, Mr. O'Donoghue maintains, the application for restoration of the company is frivolous, because as a matter of fact, demands have been made of both the Company and Mr. O'Donoghue as guarantor and, therefore, a cause of action accrued in favour of AIB as of the date of those demands, and that cause of action inures for the benefit of Everyday (as successor in title to AIB) from the date of demand made by AIB.

10. Mr. O'Donoghue avers that neither the loan facility letters issued by AIB to the Company nor the deed of mortgage debenture of 13th January 2006 contain any provision requiring a demand to be made in the event of default of payment, in order that a receiver may be appointed over the assets of the Company. In any case however, a letter of demand was issued by AIB in this case and Mr. O'Donoghue claims therefore it is unnecessary to restore the Company to the Register for the purposes of ensuring *"that a receiver can be validly appointed"* as averred to by Ms. Fitzgibbon.

11. Mr. O'Donoghue avers that as at the date of the swearing of his affidavit – 10th November 2022 – there were fourteen outstanding annual returns, in respect of which he says that the late filing fees amount to €16,800.

S.738 of the Companies Act, 2014.

12. Section 738 (1) of the Companies Act 2014 provides**:**

738.(1) On an application in accordance with section 739 by a person specified in subsection (2), the court may order that a company that has been struck off the register be restored to the register if –

(a) the striking off of the company has disadvantaged the applicant,

(b) the application is made within the period of 20 years after the date of dissolution of the company; and

(c) it is just and equitable to do so.

13. S.738(2) provides that such applications may be brought by the company, a creditor of the company, a person who was a member or an officer of the company at the time of its dissolution, or any person who was entitled to be a member of the company at the date of its dissolution.

14. The application came before the High Court (Roberts J.) on 12th November 2022. She delivered a brief *ex tempore* judgment granting the application and making an order in the terms of paras. 2 and 3 of the motion, requiring the directors to file all outstanding annual returns and to deliver all outstanding statements in relation to the company to the Revenue Commissioners.

15. While the appellants asked the judge to award costs on the Circuit Court scale , in view of the fact that the 2014 Act makes provision for such applications to be brought in either the High Court or the Circuit Court, the judge declined and ordered that the costs of the application should be paid by the Company, to be adjudicated at whatever level is appropriate for such applications in the High Court.

16. By notice of appeal dated 12th December 2022, the appellants appeal the decision of the High Court on five grounds. These are:

(1) That the High Court judge erred in fact and in law in concluding that the applicant [Everyday] had been "disadvantaged" in accordance with the meaning of that term pursuant to the provisions of s.738 of the Companies Act 2014.

(2) That the High Court judge erred in fact and in principle in concluding that the letter of demand served on the Company by AIB was of no relevance on the basis that the defendant in the proceedings before MacGrath J. was not the Company.

(3) The High Court judge erred in principle and in law in accepting submissions regarding the intention of Everyday to appoint a receiver, in the absence of any corresponding averment evidencing disadvantage on the part of Everyday.

(4) The trial judge erred in fact and in law in concluding that the restoration of the Company was necessary to protect and preserve the interests of the applicant and,

(5) The High Court judge erred in awarding the applicant High Court costs.

Submissions

17. For the purpose of this appeal, the appellants accept that Everyday is a creditor of the Company within the meaning of s.738 of the 2014 Act. However, it is the appellants' contention that the fundamental issue in the appeal is whether or not Everyday has been disadvantaged for the purposes of s.738. The appellants refer to the decision of Sanfey J. in *Derbar Developments (Westport) Limited* [2022] IEHC 709, a case in which Everyday was also an applicant for restoration of a company, in which Sanfey J. said at para. 49:

"For Everyday to succeed in its application, it must satisfy the criteria in s.738 relevant to its situation. It must establish that it is 'a creditor of the company' [s.738(2)(b)]; the striking off of the company must have 'disadvantaged' the applicant;

and it must satisfy the court that it is 'just and equitable' to restore the company to the Register."

18. The appellants submit that the deed of mortgage debenture does not require the service of any notice or demand in order for Everyday to exercise the powers of appointment of a receiver and/or sale, but even if such demand is required, the requirement has already been satisfied by the demand made by AIB. The appellants rely in this regard upon a decision of the High Court, in *Ffrench O'Carroll v Permanent TSB plc and ors* [2018] IEHC 74. While that case did not concern an application under s.738 of the 2014 Act, Ní Raifeartaigh J. was required to consider whether or not the lending bank in that case was entitled to appoint a receiver over mortgaged property. In the course of her judgment, Ní Raifeartaigh J. said:

"It seems to me in light of the above authorities that in deciding whether or not a demand letter is required before principal monies fall due, the Court must look carefully at the relevant provisions within the charge or mortgage in question. There is no 'yes or no' answer to the question; 'Is a demand letter required before the principal monies fall due'? The only correct answer to that question is the answer: 'that depends upon the terms of the mortgage/charge' ".

19. Clause 9 of the deed of mortgage debenture provides, in material part:

"*At any time after the principal monies hereby secured have become payable the Bank made by deed poll appoint a person to be receiver of the property charged by this Mortgage Debenture*…."

20. Moreover, the appellants submit that Everyday has not suggested or submitted that the demand for payment already served by AIB on the Company is inadequate for its purposes.

21. Referring to s.738(1)(c) of the Act, the appellants submit that the burden of establishing that it is "equitable" to make an order restoring the Company to the Register

falls upon the applicant, and the appellants rely upon the decision of Butler J. in the High Court in *Re Allenton Properties Ltd.* [2021] IEHC 720. In that case, Butler J. held that:

> *"The threshold to be met by the applicant [who applies to restore a company to the Register] is now more onerous than was previously the case and there is a positive obligation on an applicant to satisfy the court that the order it seeks is fair and proportionate to all whose rights and interests may be affected by the restoration."*

22. In *Allenton*, Butler J. refused an application for restoration of a company to the register – because on the very unusual facts of that case, she found that a third party – who was not a notice party to the application in that case – would be very severely prejudiced by the restoration of the company concerned to the Register in circumstances where that third party had, *bona fide,* bought and developed property of the company, but had not received title. The purpose of the application to restore was so that the company, if restored, could then bring proceedings for recovery of this property in circumstances where that third party had actually paid the consideration for the property to her solicitors, but for reasons unknown to all the parties, the transaction had not concluded and title had not been transferred to the third party. Moreover, the third party remained able, ready and willing to complete that transaction, which had been sanctioned by the creditor bank at the outset.

23. In this case, it is submitted that the appellants will be prejudiced if the order of the High Court stands, because of the expense associated in bringing the statutory returns up to date. While acknowledging that the Act allows for a period of 20 years for the advancing of an application for restoration to the Register, it is submitted that Everyday has delayed approximately 10 years since the date of strike off, thereby increasing the expenses that will be incurred by the directors in having the Company restored to the Register. So therefore, it is submitted, that on the one hand, the applicant is not prejudiced for the reasons referred to

above, if the application to restore is refused, while the directors will be prejudiced by an order requiring the restoration of the Company.

24. Finally, in the interests of completeness, I should mention that the appellant had purported to argue that it is open to the respondent to sell the lands of the Company as mortgagee in possession. This argument was not pursued in circumstances where it was brought to the attention of counsel for the appellant at the hearing of this appeal that no specific properties of the Company are identified in the mortgage debenture.

25. The respondent, on the other hand, submits that it is plain from the affidavit of Ms. Fitzgibbon that the purpose in having the Company restored to the Register is so that Everyday may, through the appointment of a receiver, realise the assets secured by the Company pursuant to the mortgage debenture executed in favour of AIB, the benefit of which now belongs to Everyday. In practical terms, it is submitted, this will involve the sale of two properties of the Company in Kenmare known as Muckera and Ashgrove. While neither of these properties is expressly secured by the mortgage debenture, it is submitted that Everyday has a proprietary interest in those properties as a result of the execution by the Company of the deed of mortgage debenture over all of the assets of the Company.

26. Even if, as the appellants submit, a fresh letter of demand is unnecessary, Everyday submits that it needs to have the Company restored to the Register in order to enable it to realise the secured assets. If Everyday does appoint a receiver, then the receiver must be able to pass marketable title to a prospective purchaser, and this can only be done if the Company is live. This is an essential feature in any conveyance of the property by a receiver.

27. Everyday submits that existing jurisprudence suggests that the appellants, as directors, may not have a right to object to the restoration at all. In this regard Everyday relies upon the decision of the Supreme Court in *Re Bloomberg Developments Limited* [2002] IESC 56 [2002] IR 613 in which case Murphy J., speaking for the Supreme Court stated:

"Restoration is primarily a matter between the petitioner on the one part and the Regulatory Authority – who has the duty to ensure compliance with the relevant provisions of the Companies Acts – and the Minister for Finance – in whom would vest the assets of the company as bona vacantia – of the other part".

28. Everyday also refers to *Courtney*, The Law of Companies (4th ed) where the author says at para. 27.061: "*There is, however, a strong bias in favour of making a restoration order where strike off was occasioned by a failure to file annual returns*".

29. It is Everyday's submission that an application for restoration is in the nature of an administrative application, and it is not the proper forum for objections by former directors, and in particular objections of the kind raised by the appellants in these proceedings. Everyday also relies upon a series of decisions of the High Court of England and Wales, in which the Courts in that jurisdiction have held that, once the statutory requirements for restoration there have been satisfied, then, absent special circumstances, restoration should follow; exercising the discretion against restoration should be the exception, not the rule. This was so held by Laddie J. in *Re Priceland Limited* [1997] BCC207-213H) which was approved and applied by Neuberger J .in *Re Blenheim Leisure (Restaurants)Limited (No.2)* [2000] BCC 821.

30. In this case, no unusual circumstances have been demonstrated, such as arose in *Allenton*, and Everyday has demonstrated that it is disadvantaged by the dissolution of the Company. Therefore, Everyday submits, the appeal should be dismissed.

Discussion and Decision

31. First, it is necessary to address briefly the submission of Everyday that the appellants, as directors of the Company, may not have a right to be heard at all, or at least not to raise objections to the application, even though as directors they are notice parties under s.738 of

the 2014 Act. The first point to be made about this submission is that it has not been raised by Everyday by way of cross appeal in its respondent's notice. Secondly, it was not suggested that this submission was made in the court below, where, as I understand it, the appellants were represented and made submissions. Accordingly there is no decision of the trial judge on the issue, which may be an important issue so far as applications of this kind are concerned. All of that being the case, I do not consider that it is open to Everyday to raise the issue now for the first time. In any event, as will become apparent, it is unnecessary to decide the issue for the purpose of this appeal.

32. While Everyday relies upon the general principles as to the exercise by a court of its discretion to restore a company to the register, as identified in the authorities referred to above, it is clear that those principles are only engaged once the statutory criteria prescribed by section 738 of the 2014 Act have been satisfied. The first of these criteria is that Everyday must satisfy the Court that it has been disadvantaged by the striking of the Company from the register. While Everyday has argued that it is necessary to restore that Company to the register in order that it can serve a further, up-to-date, demand for payment on the Company, and thereafter appoint a receiver in default of payment, it has not really engaged with the arguments of the appellants that, firstly, no such demand is required by the mortgage debenture and, secondly, even if such a demand is required, it has already been served by AIB and Everyday is entitled to rely upon that demand.

33. In my view the appellants' arguments under this heading are correct. Firstly, it is clear from the terms of the mortgage debenture that AIB was entitled to appoint a receiver if at any time any of the principal monies secured thereby became payable. The mortgage debenture further provides that the principal monies would become immediately payable in the event that the Company should make default for one calendar month in the payment of any interest secured thereby, or, in the event of AIB serving a demand in writing upon the

Company for payment of all or any part of the monies owing on foot of or secured by the mortgage debenture. Everyday did not dispute that such a demand was served by AIB, and it seems to me that notwithstanding the antiquity of that demand, Everyday could rely upon it for the purposes of exercising the power of appointment of receiver. Moreover, it is apparent that the Company must be in default of making repayments of interest, which in turn automatically triggers the obligation to repay the principal monies and the entitlement to appoint a receiver, without any demand. It cannot therefore be said that the restoration of the Company to the register is necessary just so that Everyday can appoint a receiver. That entitlement subsists as matters stand.

34. However, Everyday's purpose in appointing a receiver is so that it may gather in and realise the assets of the Company, including its real property, in order to satisfy, in whole or in part, the liabilities of the Company pursuant to the loan facilities referred to above. This point can really only be relevant to real property, as it is not suggested that a duly appointed receiver would have any difficulty in gathering in and realising any other assets, and in any case it is not suggested that the Company has any assets other than real property.

35. I pause here now to consider the evidence of the Company's ownership of real property. Clearly, if the Company does not own any real property, then Everyday cannot be disadvantaged by the striking off of the Company from the register. It has to be said that the evidence of ownership of any property is scant. No evidence at all of any title to property, such as a folio, has been made available. Ms Fitzgibbon does not even aver that the Company owns any lands, never mind exhibit any concrete evidence of ownership. She simply avers that Everyday wishes to enforce the mortgage debenture against the Company with a view to realising the assets secured thereby. However, as I have already said, there is no description of any specific property in the mortgage debenture, with the result that as a matter of law it is a floating charge.

36. The only reference to any property in the security documentation exhibited by Ms. Fitzgibbon is in a letter of sanction dated 10th February 2009 from AIB to the Company, which states: *"If extension of Current Account limit is required beyond 10/03/2009 additional security will be required to be in place i.e. all sums mortgage over 60 acres at Muckera, Kenmare, Co. Kerry"*. There is no reference at all in this letter to other lands of the Company at Ashgrove, which are referred to in the written submissions of Everyday to this Court. While there is a reference to both Muckera and Ashgrove in a schedule to the deed of transfer of the loan facilities from AIB to Everyday, and in the same entry the name of the Company appears, these entries do no more than hint that the Company may have an interest in lands at these locations. It does not follow from the references to lands either in the letter of sanction issued by AIB to the Company or in the deed of transfer from AIB to Everyday that the Company is the owner of those lands.

37. All of that said, what is clear from Ms. Fitzgibbon's affidavit is that Everyday wishes to realise whatever lands the Company owns in satisfaction of its debt, and it has not been suggested by evidence or even by submission that the Company does not own any lands, and one would have expected Mr. O'Donoghue to make such an obvious point if it is in fact the case that the Company is not the owner of any real property. Further, I note that in the judgment of MacGrath J. in the summary judgment proceedings brought by AIB against Mr. O'Donoghue, upon which judgment Mr. O'Donoghue himself has relied in this matter, MacGrath J. states at para. 10 that: "*Mr. O' Donoghue avers that Lodge Gaven Ltd expended only €100,000 on property acquisition*". It is apparent therefore that, on that basis alone the Company must have some real property to be realised in satisfaction of the debt owing by the Company. It must be said, however, it would have been far better for the respondent to identify beyond any doubt the lands that are owned by the Company and intended to de realised by Everyday in satisfaction of the Company's indebtedness. However,

notwithstanding these shortcomings, it must be borne in mind that, as has been submitted by the respondent, applications of this kind are administrative, and not adversarial in nature and for the reasons already given, on balance I am satisfied that the Company does own real property and that Everyday wishes to realise this property in satisfaction or part satisfaction of the indebtedness of the Company.

38. I turn then to consider the manner of realisation of that property by the receiver, when appointed by Everyday. The mortgage debenture provides at clause 9(iv) thereof that the receiver shall have power to dispose of all or any of the property and assets of the Company charged by the mortgage debenture and to carry on any such sale or disposition into effect by deed or other assurance in the name and on behalf of the Company, or otherwise to grant, convey or transfer the same to a purchaser. Even if it could be argued that this last clause might empower the receiver to sell the property otherwise than in the name of the Company, this would not be the usual practice, and moreover, as is usual in such deeds, it is stated at clause 9(d) thereof that the receiver so appointed shall be the agent of the Company and the company shall be wholly responsible for the acts or defaults of such receiver. Clearly, the receiver cannot be an agent for a company that no longer exists. In the context of section 738(1)(a) of the 2014 Act, what all of this means is that Everyday has been disadvantaged by the striking off of the Company from the register because it is highly unlikely that it could dispose of any of the real property of the Company secured by the mortgage debenture unless and until the Company is restored to the register. That conclusion meets the first of the criteria of s.738. The second requirement, that the application to restore must be made within 20 years from the date of its dissolution is manifestly satisfied and is not in dispute. The third requirement is that it is just and equitable for the Court to make an order restoring the Company to the register, and I turn now to that issue.

39. The appellants argue that it is neither just nor equitable to restore the Company to the register, as required by s.738(2)(c) of the 2014 Act, in circumstances where to do so would cause the appellants a liability in terms of filing fees in the sum of €16,860. Furthermore, the appellants argue that the sum required to discharge late filing fees has been increased by the delay on the part of Everyday in moving this application. And finally, under this heading, the appellants argue that Everyday advanced this application without disclosing the summary judgment proceedings brought by AIB against Mr. O'Donoghue, and therefore, Everyday has not come to equity with clean hands, and so it cannot be equitable to grant the application. Furthermore, it is submitted that it would be unfair on the appellants to be pursued twice for the same debt. None of these arguments pass muster.

40. Firstly, the liability for late filing fees is a liability generated by the failure on the part of the appellants themselves to fulfil a statutory obligation, which failure is, separately, an offence under the 2014 Act. Secondly, section 738 allows for applications to restore to be made within 20 years after the date of dissolution of a company, and unless some prejudice other than late filing fees is identified, it can hardly be said that an application brought comfortably within the statutory period (indeed, only a little more than mid-way through it) could, on the basis of another provision within the same section of the statute, be considered to be inequitable. Thirdly, according to the grounding affidavit of Ms Fitzgibbon, there was due and owing by the company as of 3 August 2022, the sum of €2,877,901.29 pursuant to the loan facilities. The magnitude of this liability clearly has to be considered and weighed in the balance as against what the appellants contend is a prejudice to them in financial terms of €16,860, if they are required to bring the returns of the Company up to date, and that disparity alone strongly suggests where the equities lie. Finally, the fact that Everyday did not disclose to the court the existence of the summary judgment proceedings initiated by AIB in 2014 against one of the appellants, by way of enforcement of the Guarantee, is neither

here nor there, and is not indicative of any bad faith on the part of Everyday. Apart from anything else, it hardly needs to be said that a creditor is entitled to pursue both a principal debtor and any guarantor of the same debt, until the debt is satisfied, and any monies recovered from the guarantor must be applied in reduction of the liabilities of the principle debtor.

41. For the foregoing reasons, I am satisfied that the statutory requirements for restoration have been met. It seems to me that having reached that conclusion, the authorities relied upon by Everyday as regards the general principles applicable to applications of this kind are of limited, if any, relevance. Having concluded that it is both just and equitable that an application be granted, it is hard to imagine on what basis a court would then to proceed refuse a restoration application for restoration to the register. In *Allenton*, on the very unusual facts of that case, the statutory requirements were not satisfied because Butler J. concluded that the making of an order for restoration would not be just and equitable, and therefore should not be made. However, if I had to decide the point, I would have little difficulty in agreeing with the sentiments expressed by the English authorities relied upon by the respondent i.e. where a strike off has taken place because of the failure to file annual returns, and where the applicant meets the statutory requirements, then, absent special circumstances, restoration should follow, even though the statutory requirements in the neighbouring jurisdiction are now (and were at the time of the decisions relied upon) different to those that apply here. The restoration of a company to the register following upon its having been struck off on account of the failure of its officers to file its annual returns is nothing more than a restoration of what should always have been the status quo.

42. For all of the foregoing reasons I would dismiss the appeal against the order of the High Court ordering the restoration of the company to the register, and the related orders requiring the filing of all outstanding annual returns and the delivery to the Revenue

Commissioners of all outstanding statements in relation to the Company as required by section 882 of the Taxes Consolidation act 1997.

43. I would, however, allow the appeal from the order for costs made by the High Court judge, insofar as she refused to order that the costs incurred by the respondent should be calculated on the "Circuit Court scale". While the respondent was entitled to bring the application in the High Court, it does not follow that the Company - to which the costs order is directed - should be required to pay costs at any higher a level or rate than would apply had the application been brought in the Circuit Court. While I am unaware whether or not there is any difference between the costs associated with such applications in each jurisdiction, I do not think that the respondent should be on the hazard of having to pay any more costs than the application necessitates. It may well be expedient for the respondent and its legal advisers to bring such applications in the High Court, but if the price of that expedience is any greater than is necessary, then the difference is one to be borne by the respondent as moving party and not by the Company.

44. All of that said, the order of the High Court as perfected simply says that "the applicant do recover as against the Company the costs of the within application and order -said costs to be adjudicated in default of agreement." It does not specify any scale, but it is clear that the High Court judge was refusing to order costs on the Circuit Court scale, and I would therefore vary the order of the High Court so that it clearly states that the costs are to be adjudicated on the Circuit Court scale.

45. So far as the costs of this appeal are concerned, the respondent has been almost entirely successful in resisting the appeal. To the extent that any time was taken up in dealing with the costs issue, this was negligible. It seems to me to follow that, in accordance with section 169 (1) of the Legal Services Regulation act 2015, the respondent is entitled to an order for its costs incurred in connection with this appeal. If the appellants wish to contend for a

different order, then they may, within 14 days, make written submissions not to exceed a thousand words and the respondent shall have a further 14 days within which to reply to any submissions made on behalf of the appellants.

46. Since this judgment is being delivered electronically, Donnelly J. and Noonan J. have authorised me to indicate their agreement with it.