

THE HIGH COURT

[2015 No. 59 COS]

IN THE MATTER OF MIDDLEVIEW LIMITED

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

(NO. 2)

JUDGMENT (No. 2) of Mr Justice Cregan delivered on 29th day of January, 2016.

Introduction

1. On 21st December, 2015, I delivered my judgment in the above matter and I adjourned the matter on that date until 15th January, 2016 to permit the parties to consider the judgment.

2. On 15th January, 2016, counsel on behalf of the Petitioner – NAMA/NALM - made an application to me to review and revise my judgment in one particular matter.

Issue in this Application

3. The issue in this application is that in certain parts of my first judgment, I found that certain paragraphs of Mr. Malbasha's affidavit were incorrect and misleading. (Mr. Malbasha is an asset recovery manager within NAMA/NALM.) It was submitted by counsel for NAMA/NALM that these findings by the court were based on an erroneous understanding of the situation and that Mr. Malbasha had suffered some "reputational damage" as a result of these findings. The court was invited to reconsider this issue.

4. The issue which arose is that which is set out at paras. 18-23 of my judgment. For ease of reference, I set these out below:

"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. (Emphasis added.)

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 struck 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.

Jurisdiction

5. A number of authorities have been opened to me by counsel for the Petitioner and I have considered these. They include

Silverstone Designs Ltd. v. Ryan (Unrep. High Court, 28th February 2000, Smyth J.) *Bellville Holdings v. Revenue Commissioners* [1984] 1 IRLM 29 (Supreme Court) and *Re: L and B* [2013] UKSC 8 (a decision of the UK Supreme Court). These decisions establish that a judge is entitled to reverse his decision at any time before his order is drawn up and perfected if he believes he is wrong.

6. I should indicate that although I am of the view that courts should be reluctant to engage in such a process, it is more important that justice be done (and be seen to be done) and it was to ensure that no injustice had been done to Mr. Malbasha that I have considered again the Petition and the affidavit evidence in its totality.

Submissions of NAMA/NALM

7. Paragraph 4 of the written submissions made by NAMA/NALM in respect of this issue states as follows:

"In the present case, and as already indicated above, the Petitioner does not ask the Court to revisit the decision ultimately reached by the Court and referred to at para. 60 of the written judgment viz. that NAMA/NALM should bear the costs of preparing the audit of accounts for the year ended 2010 and 2011 and 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. Rather what is proposed is that the court be asked to consider paras. 18-23 of the written judgment on the basis that the conclusions reached by the court at para. 23 are premised on an error as to the evidence actually before the Court. The issue is also touched upon in paras. 25, 38 and 59 of the judgment."

The correct position about the dissolution and strike off of the company

8. This submission by counsel in turn is based on the situation of when exactly the company was struck off and when it was dissolved. The CRO published in its Gazette a notice on Wednesday 2nd April, 2014. This notice stated as follows:

"Notice is hereby given pursuant to s. 12(3) of the Companies (Amendment) Act, 1982 as amended by section 46 of the Companies Amendment (No. 2) Act, 1999 that the names of the following companies were struck off the register on the date set out on the attached list and the companies are hereby dissolved."

9. The company Middleview Ltd. was stated to be struck off on 28th March, 2014.

10. The company Middleview Ltd. is deemed to be dissolved on the date of the publication i.e. 2nd April, 2014 (see section 12(3) of the Companies Amendment Act 1982).

11. Counsel for NAMA/NALM submits therefore that, as a matter of fact, the company was struck off on 28th March, 2014 and was, in fact, dissolved on 2nd April, 2014. In my view, this is correct.

The Petition and Affidavit Evidence before the Court

12. I turn now to consider the Petition and affidavit evidence before the Court. The Petition of NAMA/NALM grounding the application to restore the company to the register stated as follows:

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." (Emphasis added).

13. It is clear in the light of the above facts that this statement in the Petition is incorrect. The company was in fact struck off the Register of Companies on 28th March, 2014 and it was dissolved on 2nd April, 2014. This was the first error.

14. In addition the Petition states at para. 12:

"In circumstances where the monies due and owing by the company under the Modillion Agreement have not been repaid in accordance with its terms, the Petitioner is desirous of taking steps to recover the amounts due and to this end by Deed of Appointment dated 22nd March, 2014, the Petitioner appointed Mr. Simon Coyle and Mr. Tom O'Brien of Mazars as joint receivers over the assets of, inter alia, the company."

15. The Petitioner accepts that this date is incorrect and the Deed of Appointment is in fact dated 28th March, 2014. This was a second error in the Petition.

Affidavit of Margaret Magee

16. Ms. Margaret Magee, an employee of NAMA, swore the grounding affidavit for the Petition to restore the company to the register. At para. 2 of her affidavit she states as follows:

"I beg to refer to the Petition presented herein and confirm that I have read same and I believe the matters set out therein are true and accurate."

She makes this averment, even though paragraphs 12 and 13 of the Petition are inaccurate. This is a third error.

17. At para. 6 of her affidavit Ms. Magee states as follows:

"I say that the company was dissolved on 3rd April, 2014 having been struck off involuntarily pursuant to section 12 of the Companies Amendment Act 1982 for failure to file the necessary annual returns to the CRO in respect of the years 2010 to 2013. I beg to refer to the Companies Office search dated 4th February, 2015 upon which marked with the letters MM3 I have signed my name prior to the swearing hereof."

18. This is clearly a fourth error as the company was not dissolved on 3rd April, 2014. It was in fact dissolved on 2nd April, 2014 (and the exhibit refers to 2nd April, 2014).

19. At para. 11 of Ms. Magee's affidavit she exhibits a copy of the Deed of Appointment executed by the Petitioner appointing the receivers. As I pointed out in my first judgment, this Deed of Appointment is dated 28th March, 2014. It is signed by the receivers and by persons on behalf of the Petitioner. This Deed of Appointment is clearly dated the 28th March, 2014 and not the 22nd March, 2014 as stated by Ms. Magee earlier in her affidavit.

20. At Paragraph 12 of her affidavit she says:

"In relation to para. 13 of the petition I beg to refer to:

'12.1 A photocopy of a notice upon which marked with the letters MM9, I have signed my name prior to the swearing hereof from the Companies Registration Office dated 2nd April, 2014 giving notice inter alia that the company is struck off the Register of Companies and dissolved.'

21. Thus there are a number of errors in Ms. Magee's affidavit which gives varying dates for the Deed of Appointment of the receivers and the date of strike off/and dissolution of the company.

Affidavit of Gareth Kelleher

22. The first affidavit of Gareth Kelleher sworn on the 13th March, 2015 states at para. 4:

"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 [sic]."

23. This date - 27th March, 2014 - as the date of appointment of receivers is also not correct. The deed of appointment of the receivers is 28th March, 2014.

24. Thus, the situation before Mr. Malbasha swore his affidavit was:

(1) The company was struck off on 28th March, 2014 (at the start of the day);

(2) The Petitioner appointed receivers to the company on 28th March, 2014 at 6.00pm;

(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;

(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.

25. All of these facts were or ought to have been known to Mr. Malbasha when he swore his affidavit.

First Affidavit of Mr. Malbasha

26. At para. 8 of Mr. Malbasha's affidavit he states as follows:

"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 struck 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."

27. This is the central paragraph which was the subject of my comments in paras. 18 to 23 of my first judgment.

28. However, Mr. Malbasha's affidavit at para. 8 must be read in the light of the Petition at para. 13 which states that:

"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."

29. This paragraph was set out by me at para. 18 of my judgment. Moreover as stated above, Ms. Magee in her affidavit at para. 2 expressly confirmed the accuracy of all matters set out in the Petition (including the fact that the company was struck off the Register of Companies on 2nd April, 2014). Ms. Magee also exhibited the Deed of Appointment which is clearly dated 28th March, 2014.

30. There was no attempt by Mr. Malbasha to clarify that in fact the company was struck off on 28th March, 2014 and dissolved on 2nd April, 2014. Moreover there was no attempt by Mr. Malbasha in his affidavit to correct the error in the Petition at para. 13 or indeed any of the other errors in Ms. Magee's affidavit including the date of appointment of the receivers.

31. In particular, at para. 8 of Mr. Malbasha's affidavit he states:

"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"

In my view this is not just "simply incorrect". A full and proper explanation of all these events should have been put before the court on this issue at this time if Mr. Malbasha wished to do so.

32. Mr. Malbasha then stated:

"The Petitioner attempted to appoint receivers to the company in March 2014. However the company was struck off the Register of Companies immediately before it could do so and the appointment could not proceed."

In my view that sentence is misleading. It is misleading to say that the Petitioner "attempted" to appoint receivers to the company in March 2014. The Petitioner did in fact appoint receivers to the company on 28th March, 2014. Moreover these receivers acted on foot of their appointment and wrote to the directors some days later on 31st March, 2014. It was only after the receivers became aware that the company was struck off that they realised they could not proceed. In my view, the tenor of paragraph 8, when taken as a whole, in the light of the Petition and the affidavit evidence of Ms. Magee, can only be described as inaccurate and misleading.

33. In my view, para. 8 is a misleading averment because it conveys the impression that NAMA intended to appoint a receiver to the company but that, before it could actually do so, it discovered that the company had been struck off and was dissolved. In fact, the true position is that NAMA did appoint receivers on 28th March, 2014, these receivers acted on foot of this appointment from the 28th March, 2014 until some subsequent date (which date is not given) and then they realised that they could no longer proceed because the company had been struck off and dissolved. Thus there is a significant difference between the true situation and the situation as set out by Mr. Malbasha at paragraph 8 of his affidavit. This discrepancy between these two situations is, in my view, misleading.

34. Moreover the misleading nature of paragraph 8 was reinforced by the final sentence of para. 10 of Mr. Malbasha's affidavit wherein he states:

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

35. However, in my view, receivers were in fact appointed to the company by the Petitioner on the same day that the company was struck off - although the Petitioner itself did not become aware of this fact until some time later.

36. The key point in my judgment at paragraph 22 was that it seemed clear from the documents and affidavit evidence which were before me that NAMA appointed receivers on 28th March, 2014 and that NAMA itself could only have become aware of the date of dissolution and date of strike off at the earliest on 2nd April, 2014. It is clear therefore that NAMA did appoint receivers to the company on 28th March, 2014. It is also clear that the receivers took steps in the receivership to communicate with the directors on 31st March, 2014. The fact is that the receivership could not proceed because at some subsequent date (which date is not provided) the receivers were informed by the CRO (when they sought to notify the CRO of their appointment) that the company had been dissolved and had been struck off. The fact remains however that, in my view, the statements made at paragraph 8 of Mr. Malbasha's first affidavit are incorrect and misleading. Whilst I accept that Mr. Malbasha may not have intended to mislead the court, nevertheless the combination of errors in the Petition, Ms. Magee's affidavit and paragraph 8 of Mr. Malbasha's affidavit meant that the court could not but be misled as to the true state of affairs.

Mr. Kelleher's Second Affidavit

37. It is also instructive that Mr. Kelleher in his second affidavit dated 24th April, 2015 states at para. 6:

"6. Mr. Malbasha now resiles from the appointment of Simon Coyle and Tom O'Brien of Mazars as receivers and managers in March 2014. Mr. O'Brien wrote to us stating that he had been appointed and former employees and I cooperated with him in respect of the group companies and gave him control of the books and records of the companies including Middleview Ltd. and were of assistance where we could be. I beg to refer to a true copy of the letter received from the Receiver upon which marked with the letters GK1 I have signed my name prior to the swearing hereof."

7. Nobody suggested they had not been appointed as receivers over all of Middleview's assets and were not acting as receiver for nearly a year. The first I heard of this suggestion was Mr. Malbasha's replying affidavit on 9th April, 2015. We received no notice of the alleged 2015 appointment save by way of the replying affidavit."

38. Mr. Kelleher also exhibits a letter from Tom O'Brien of Mazars one of the receivers to Middleview, dated 31st March, 2014 which states as follows:

"Dear Garrett,

Further to our telephone conversation earlier this morning I confirm that by Deed of Appointment dated 28th March, 2015 Simon Coyle and I were Appointed by NAMA as receivers and managers to the following companies

- Middleview Ltd.

... I understand that you are a director of each of the above companies. Please note that your powers over the assets which are the subject of our appointment have ceased as of the day of our appointment and you should take no further action in relation to the assets without our prior consent.

I would be obliged if you would forward to us any records, documents or property of the company you may have in your possessions."

Regards

Tom O'Brien, Mazars"

Mr. Malbasha's Second Affidavit

39. It was only after these documents had been revealed that Mr. Malbasha then sought to clarify the position in his second affidavit sworn on 7th May, 2015. In this affidavit he states:

"5. I beg to refer to paras. 6 and 7 of Mr. Kelleher's affidavit. By way of clarification, the Petitioner attempted to appoint receivers to the company on 28th March, 2014 and a deed of appointment was executed in this regard. However, the company was struck off the Register of Companies on 29th March, 2014 with notice of this appearing in the CRO Gazette for 2nd April, 2014, immediately after that deed of appointment was executed but prior to the filing of the statutory notification of the appointment of a receiver in the Companies Registration Office. As such the appointment could not proceed. The Petitioner only became aware that the appointment could not proceed when an attempt was made to lodge the statutory notification in the CRO at which point CRO informed the Petitioner that the appointment was void as the company had been struck off prior to the filing of the statutory notification. The email dated 31st March, 2014 was sent by Mr. Tom O'Brien of Mazars prior to this and no steps were taken in the purported receivership. The Petitioner only appointed receivers to the company when it was recently restored pursuant to a deed of appointment dated 12th March, 2015." (Emphasis added).

40. Again I note that there is an error in paragraph 5 of this affidavit in that it states that the company was struck off the Register on 29th March, 2014 when in fact it was the 28th March, 2014. I also note that Mr. Malbasha does not provide any date as to when

an attempt was made to lodge the statutory notification of the receivership in the CRO which is a critical date as to when the Petitioner became aware that the receivership could not proceed. However, more importantly, this belated clarification only came after Mr. Kelleher had taken issue with Mr. Malbasha's earlier affidavit and had in fact exhibited correspondence which established that the receivers were not only appointed but confirmed their appointment by writing to the directors relieving the directors of their responsibilities over the assets of the companies.

Conclusion

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.