Neutral Citation: [2013] IEHC 574

THE HIGH COURT

[2013 No. 146 COS]

IN THE MATTER OF COMMAND FINANCIAL SERVICES LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2013

Judgment of Ms. Justice Laffoy delivered on 10th day of December, 2013.

The second round

1. In essence, this is the second round of an application by AIG Europe Limited (the Petitioner) for an order pursuant to s. 310(1) of the Companies Act 1963 (the Act of 1963) that the dissolution of Command Financial Services Limited (the Company) be declared void. The first round culminated in an order made subsequent to a judgment of this Court delivered on 24th April, 2013 ([2013] IEHC 364) (the April Judgment). At the end of that judgment (para. 16), it was indicated that, subject to the production of a letter of no objection from the Minister for Public Expenditure and Reform (the Minister), which was subsequently furnished to the Court, an order would be made precisely in the terms of s. 310, namely, an order declaring the dissolution of the Company to have been void. The Court left over the broader implications of the order and, in particular, whether, as had been submitted on behalf of the Petitioner, the Registrar of Companies (the Registrar) should be directed to restore the Company to the Register of Companies, the Company having been struck off the register on 24th April, 2011 by the Registrar pursuant to the powers conferred by s. 12(3) of the Companies (Amendment) Act 1982 (the Act of 1982) for failure to file annual returns.

2. The second round was the re-entry of the matter so that the Court could determine what, if any, ancillary order to make to enable the Petitioner to solve its problem and on what terms any such order should be made. The Petitioner's problem, as outlined in the April Judgment (para. 7), arises from the fact that, as the Company's insurer, it indemnified the Company in relation to certain proceedings in the High Court in which it was one of the defendants, engaged legal representatives to act on behalf of the Company and defrayed the costs and expenses of such legal representatives. Subsequently, by order of the High Court (Peart J.) made in those proceedings on 18th January, 2011, that is to say, before the Company was struck off the register, it was ordered by consent that the proceedings against the Company be struck out and that the Company recover against the plaintiffs its costs up to 23rd January, 2010, such costs to be taxed in default of agreement. The Petitioner's problem is that recovery of the costs from the plaintiffs in those proceedings, which in April 2013 were estimated at €64,381.10, must be pursued in the name of the Company and that cannot be done while the Company remains struck off the register.

3. In the second round of the application, counsel for the Petitioner illustrated the Petitioner's problem by reference to a passage from the decision of O'Connor L.J. in *M.H. Smith (Plant Hire) Limited v. D.L. Mainwaring (t/a Inshore)* [1986] BCLC 342, in which the plaintiff's insurers had sought leave to maintain proceedings in the plaintiff's name subsequent to it being dissolved after a winding up. In delivering judgment in the Court of Appeal, O'Connor L.J. stated (at p. 343):

> "It has long been the law, where insurers have paid a claim, that they stand in the shoes of the assured in order to recover anything which is relevant to that claim. The law has long been that subrogation entitles the insurers to bring an action in the name of the assured against the wrongdoer to recover anything that is recoverable. The reason for that is that the right of action is vested in the assured. The cases show that an action can be brought by the insurer in its own name where it has taken a legal assignment of the cause of action from the assured. That has not been done in the present case. Thus the insurers were entitled to instruct solicitors to bring this action in the name of their assured as long as the assured existed, but in March of 1985 the assured ceased to exist when the company was dissolved. There was no company in whose name any action could be started. In my judgment that has got nothing to do with the right of subrogation. It is a straightforward statement that a nonexistent party cannot be party to an action."

Having regard to the approach adopted on this application, it must be assumed that the Petitioner does not have a legal assignment of the cause of action from the Company and that it is in a similar position to the insurer in that case. Counsel for the Petitioner pointed out that, later in his judgment, O'Connor L.J. (at p. 344) highlighted the fact that the insurers had failed to invoke the procedure open to them under s. 651 of the Companies Act 1985, the provision in force in England at the time which was analogous to s. 310 of the Act of 1963. That observation is of no assistance to the Petitioner, because in that case the company had been dissolved following liquidation.

4. In the April Judgment, two judgments of the High Court of England were referred to in each of which an order restoring a company to the register was made consequential on an order declaring the dissolution of the company void: *In re Belmont & Co. Ltd.* [1952] 1 Ch. 10 (*Belmont*); and *In re Test Holdings (Clifton) Ltd.* [1970] 1 Ch. 285 (*Test Holdings*). What those authorities illustrate is that by 1970 there was a well established practice in the United Kingdom, based on the decision in *Belmont*, that on an application under s. 352 of the Companies Act 1948, which was the provision in force in England at the time which corresponded to s. 310 of the Act of 1963, where dissolution followed the striking of the company off the register under s. 353 of the Companies Act 1948, which was the provision in force in England at the time which corresponded to s. 311 of the Act of 1963, in addition to declaring the dissolution void, the Court, under its inherent jurisdiction, would order the restoration of the company's name to the register.

Re-entry hearing

5. There was no appearance by the directors of the Company, Cliff O'Brien and Cyril Keegan, at the hearing on re-entry. On the documentation presented to the Court, it is clear that Mr. Keegan was aware of the re-entry hearing. However, it is not possible to conclude that Mr. O'Brien was aware of it. At that hearing, the Court heard submissions from counsel for the Petitioner, counsel for the Registrar and counsel for the Revenue Commissioners. The three parties who participated in the re-entry hearing furnished written submissions to the Court, which dealt comprehensively with the relevant jurisprudence and also with practical considerations, which were found to be most helpful. If the submissions of the Registrar and the Revenue Commissioners have not already been filed, they should be filed for the record.

Core issue

6. While, obviously, the Court would wish to be constructive and provide a resolution to the Petitioner's problem, the core issue, in my view, is whether the Court has jurisdiction, inherent or otherwise, to make the order sought by the Petitioner ancillary to the order already made declaring the dissolution of the Company to be void on the application under s. 310. Accordingly, the core issue is

whether the Court has jurisdiction to direct the Registrar to restore the name of the Company to the register, it having been struck off pursuant to s. 12(3) of the Act of 1982, on an application under s. 310.

7. In order to determine whether the Court has any such jurisdiction, it is necessary to consider the existing legislation on the voidance of dissolution of a company and on the power of the Registrar to strike the name of a company off the register coupled with the circumstances in which a company may be restored to the register following such strike-off. The relevant provisions are:

> (a) s. 310 of the Act of 1963;
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> (b) s. 311 of the Act of 1963, as amended by the Companies (Amendment) Act 1982 (the Act of 1982) and the Companies (Amendment) (No. 2) Act 1999 (the Act of 1999); and
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> (c) s. 12 (substituted by the Act of 1999) and s. 12B (inserted by the Act of 1999) of the Act of 1982.

Section 310 of the Act of 1963
8. Sub-section (1) of s. 310, which is of relevance for present purposes, provides as follows:

> "Where a company has been dissolved, the court may at any time within 2 years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the court to be interested, make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved."

That was the provision invoked by the Petitioner on this application in April 2013. On the application, which had to be dealt with expeditiously because the two year limitation period was about to expire, the Court found that the Petitioner was an "interested" person and made an order in the terms of the wording of that provision, that is to say, declaring the dissolution to have been void.

9. Section 310(1) is a verbatim replication of s. 223 of the Companies (Consolidation) Act 1908 (the Act of 1908), as was s. 352(1) of the Companies Act 1948, which was under consideration in *Belmont* and *Test Holdings*.

Section 311
10. Section 311 confers power on the Registrar to strike a defunct company off the register. In broad term, the process leading to the strike-off involves the Registrar, if she has a reasonable cause to believe that the company is not carrying on business, making inquiries by post of, and serving notices by post and by publication in the Companies Registration Office Gazette on, the company. Sub-section (5) of s. 311 now provides that at the end of the prescribed process, the Registrar may –

> "unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in Companies Registration Office Gazette and on the publication . . . of this notice, the company shall be dissolved."

11. Sub-section (8) of s. 311, which was amended by the Act of 1999, provides that a company or any member or creditor thereof which feels aggrieved by the company having been struck off the register may make an application to court before the expiration of twenty years from publication of the notice of strike-off and, if the court is satisfied that the company was at the time of the striking off carrying on business or otherwise that it is just that the company be restored to the register, order that the name of the company be restored to the register. Sub-section (8) also provides that upon an office copy of the court 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 order as seems just . . .."

12. The removal of a defunct company from the register was originally addressed in s. 242 of the Act of 1908. In broad terms, that section provided for a process similar to the process now provided for in s. 311. Sub-section (5) of s. 242 provided for the striking off and the dissolution of the company in a manner similar to that provided for in subs. (5) of s. 311. Subject to some procedural changes in subs. (8) of s. 311 (for example, that the application under the sub-section should be on notice to the registrar and that the restoration order would become effective on delivery of an office copy of the court order to the registrar), subs. (8) in its original and unamended form was in similar terms to subs. (6) of s. 242.

13. The provision of the English Companies Act 1948 under which the company in *Belmont* was struck off the register and became dissolved was s. 353 thereof. Sub-section (6) of s. 353 was in similar terms to subs. (8) of s. 311 of the Act of 1963 in its original unamended form.

Sections 12 and 12B of the Act of 1982
14. Section 12 of the Act of 1982, as substituted by the Act of 1999, confers power on the Registrar to strike off the register companies who fail to make annual returns as required by the Act of 1963 for one or more years. Following a process, which involves notice by post to, and by publication on, the company, by virtue of subs. (3), the Registrar –

> ". . . may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof . . . and on publication in the Companies Registration Office Gazette of this notice, the company shall be dissolved."

It was pursuant to the power conferred by s. 12(3) that the Company was struck off the register on 24th April, 2011 and that it subsequently became dissolved on the publication of the relevant notice on 29th April, 2011.

15. By virtue of subs. (3) of s. 12B, on an application made by any member, officer or creditor of a company aggrieved by the fact of the company having been struck off the register under section 12(3) or 12A(3) which is made before the expiration of 20 years from the publication of the relevant notice which gave effect to the dissolution, the court –

> ". . . 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 . . . 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 . . .."

An application under 12B(3) must be on notice to the Registrar, the Revenue Commissioners and the Minister.

16. Sub-section (6) of s. 12B mandates that the Court, in making an order under subs. (3) on the application of a creditor of the company, shall direct one or more specified members or officers of the company within a specified time to deliver all outstanding annual returns as required by the Act of 1963. By virtue of subs. (5), there is a more stringent inclusion in the order, where the application is made by a member or officer of the company.

17. It was acknowledged on behalf of the Petitioner that the Petitioner did not have *locus standi* to bring an application to restore the Company under s. 12B(3), because it is not a creditor of the Company. However, counsel for the Registrar pointed out that there is an alternative remedy available in this case to resolve the Petitioner's problem. Sub-section (7) of s. 12B confers on the court power to make an order similar to the order it is empowered to make under subs. (3) (although without being mandated to include the requirements set out in subs. (6)) on an application by the Registrar within the relevant twenty year period and on notice to each person who is to the knowledge of the Registrar an officer of the company. Counsel for the Registrar submitted that this provision has been included to cater for the eventuality that a third party, who does not have standing under subs. (3), may be negatively affected by the striking off and dissolution of a company. It was made clear to the Court that, in this case, the Registrar is willing to bring such an application as a means of resolving the Petitioner's problem. The Registrar's position is that it is open to the Registrar to apply to the Circuit Court, Dublin Circuit for such an order. Of course, while that is so, it is settled that the jurisdiction of the Circuit Court is not exclusive and it is open to the Registrar to apply to the High Court instead (*per* the Supreme Court in *Re Deauville Communications Worldwide Limited* [2002] 2 I.R. 32).

18. For completeness, it should be made clear that, in outlining the provisions of s. 12B(3), the focus has been on its application to a situation where the Company has been struck off in accordance with s. 12(3) of the Act of 1982. However, that sub-section also applies where a company has been struck off and become dissolved by virtue of subs. (3) of

s. 12A of the Act of 1982 for failure to comply with the notice given by the Revenue Commissioners under s. 882 of the Taxes Consolidation Act 1997 (the Act of 1997). In such a case, subs. (6) of s. 12B mandates the court, in making the restoration order, to direct delivery of all outstanding statements to the Revenue Commissioners by one or more specified members or officers of the company within a specified period.

19. Finally, it is worth noting two provisions highlighted by counsel for the Revenue Commissioners, namely:

> (a) Section 311A of the Act of 1963, which was inserted by the Companies Act 1990, makes provision for the registrar, on an application made before the expiration of twelve months after the publication of the notice of strike-off by a company which feels aggrieved by having been struck off, to restore the name of the company to the register, provided the registrar has received "all annual returns outstanding". The effect of such restoration is that the company shall be deemed to have continued in existence as if its name had not been struck off.
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> (b) Section 12C of the Act of 1982, as inserted by the Act of 1999, provides that, where a company has been struck off the register under s. 12A(3) of the Act of 1982, the registrar, on an application of a member or officer of the company who is aggrieved by the fact of the company having been struck off made within twelve months from the publication of the strike-off, may restore the name of the company to the register provided the registrar "has received confirmation from the Revenue Commissioners that all outstanding, if any, statements required by s. 882 of the Taxes Consolidation Act 1997 have been delivered to the Revenue Commissioners".

Each of those sections provides for an administrative remedy, rather than a judicial remedy, but each does so on an application by an applicant who is in a position to put matters right by delivering the relevant outstanding annual returns or tax statements to rectify the default which gave rise to the strike-off, that is to say, by the company, or a member or officer of the company. Those provisions underline the fundamental objective of the strike-off sanction. It is to incentivise compliance with the law in relation to companies and, in particular, with the statutory requirements in relation to filing annual returns in relation to companies and making statements for the purposes of taxation. Making it a condition of the administrative remedies provided under those sections that the default in relation to the filing of annual returns and returns and statements in relation to taxation be fully rectified is clearly designed to achieve that objective.

Position of Registrar in relation to making an ancillary order under s. 310

20. It was recognised in the Registrar's submissions that, by virtue of the relevant statutory provisions, a company can continue in existence even if its name has been struck off the register, this being reflected in –

> (a) the two-step process enacted in s. 311(5) of the Act of 1963 and s. 12(3) of the Act of 1982, which culminates in dissolution; and
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> (b) s. 311(7) of the Act of 1963 and s. 12B(2) of the Act of 1982, each of which contains a proviso preserving the power of the court to wind up a company the name of which has been struck off the register.

Counsel for the Registrar pointed to the fact that the relevant provisions which govern the process *en route* to ultimate dissolution tend not to carry any practical consequences because the company will inevitably be dissolved, whereas, where the process is reversed, as has happened in relation to the Company by virtue of the order made in April 2013, and the applicant, like the Petitioner, is confined to moving under s. 310(1) of the Act of 1963, the company can find itself in statutory limbo.

21. Following a careful comparative analysis of s. 310 of the Act of 1963 and the statutory provisions which govern the making of a restoration order, in the context of the relevant authorities, counsel for the Registrar did not urge the Court to find that it has no jurisdiction to make an order restoring the Company to the register under s. 310(1) of the Act of 1963 following the making of a declaration that the dissolution was void. The furthest counsel went was to submit that the Court probably has such jurisdiction, while adding the caveat that there is uncertainty around the issue, because the Oireachtas could easily have expressly authorised the Court to make a restoration order under s. 310(1) where necessary and, in any event, there is limited and unsatisfactory authority in support of the proposition that the Court has jurisdiction. Counsel for the Registrar pointed to the impracticalities inherent

in the outcome, if the Court does not have such jurisdiction under s. 310 to reverse the striking of the company's name off the register on the application of a disadvantaged third party who does not have standing to invoke the statutory provisions in relation to making restoration orders. It was suggested that the power to make the declaration voiding the dissolution "on such terms as the Court thinks fit", if taken in isolation and given its ordinary meaning, is probably broad enough to allow the Court to make a restoration order ancillary to the principal relief. That suggestion raises the question whether that phrase may be considered in isolation, the answer to which must be that it cannot. The Court's task is to construe s. 310 in the context of the Act of 1963 as it is now enacted as a whole so as to ascertain the intention of the Oireachtas.

22. However, counsel for the Registrar advanced the following matters, which are undoubtedly pertinent, for the Court's consideration, namely:

> (a) that in circumstances where a company has been struck off for ceasing to trade or defaulting in the filing of annual returns or tax returns, the intention of the Oireachtas in enacting the relevant legislation was that any party with standing applying to the Court for a restoration order would make the application under s. 311(8) of the Act of 1963 or s. 12B(3) of the Act of 1982;
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> (b) that, given that s. 311(8) and s. 12B(3) are expressly tailored to address the issues that arise on such applications, it would be undesirable if s. 310(1) could be invoked except in cases where the applicant is not constrained to do so for lack of standing, because otherwise applicants might seek to use s. 310(1) as a mechanism for circumventing the conditions imposed by the Court on the making of an order under s. 311(8) or s. 12B(3);
>
> (c) that, if the Court has jurisdiction to restore a company to the register by way of ancillary order under s. 310(1), the jurisdiction is clearly discretionary and should only be exercised where the applicant does not have the option of proceeding under s. 311(8) or s. 12B(3), as the case may be;
>
> (d) that, if the Court has jurisdiction to make a restoration order under s. 310(1), it must also have jurisdiction to direct the filing of outstanding annual returns and should do so, unless cause is shown to the contrary; and
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> (e) that although s. 310 does not stipulate the registrar as a notice party, it is desirable that the registrar should be put on notice of applications made thereunder where the dissolution follows a strike-off under s. 311 of the Act of 1963 or s. 12 of the Act of 1982.

23. Counsel for the Registrar reminded the Court that, whereas s. 311(8) of the Act of 1963 and s. 12B(3) of the Act of 1982 provide that the company, following restoration under those provisions, shall be deemed to have continued in existence as if its name had not been struck off, the judgment of this Court in *In the matter of Walsh Maguire and O'Shea Limited* [2011] IEHC 457 suggests that the same result is not achieved under s. 310.

The position of the Revenue Commissioners in relation to making an ancillary order under s. 310

24. As was recorded in the April Judgment, on the April application there was before the Court an affidavit sworn by an officer of the Revenue Commissioners which exhibited a letter dated 10th April, 2013 to each of the directors of the Company requiring the filing of outstanding tax returns in relation to the Company. From the perspective of the Revenue Commissioners, the important factor is that, if a company has been struck off the register either pursuant to s. 12(3) or s. 12A(3) of the Act of 1982 and consequently dissolved, and the Court accedes to the application of a person "interested" under s. 310(1) to declare the dissolution void, there would be an undesirable anomaly if the Court were also to restore the company to the register without including in the order a direction on the lines of the direction provided for in s. 12B(6).

25. It was submitted on behalf of the Revenue Commissioners that there is a broad definition of "company" in s. 4 of the Act of 1997 and that it is sufficiently broad to include a company which has been struck off the register but remains otherwise in existence, for example, by reason of a declaration made by a court under s. 310(1) voiding a dissolution.

26. The Revenue Commissioners recognise that *locus standi* to seek relief under s. 310 goes beyond former liquidators of the dissolved company but it was submitted that, where the jurisdiction created by that provision is relied on by persons other than former liquidators, the court's discretion in dealing with ancillary matters must also be broad. In particular, it was submitted that where s. 310 is relied on to void the dissolution of a company, where that dissolution ultimately came about following a failure to submit statutory returns or statutory taxation statements, then it is a necessary corollary of the court's power to void the dissolution that such statutory returns be made. The Revenue Commissioners sought clarification from the Court on a consistent approach to orders consequential on a declaration voiding dissolution pursuant to s. 310.

Do Belmont and Test Holdings constitute persuasive authorities?

27. In *Belmont*, the applicants were the Commissioners of Inland Revenue, who were arguably not creditors of the company because at the date of dissolution the tax assessments which had been made were under appeal. In his judgment, Wynn-Parry J. expressed the view that there was clear provision in the language of s. 352 of the Companies Act 1948 (the analogue of s. 310 of the Act of 1963) which would entitle him to accede to the application to restore the company to the register and the question he considered was whether there was anything in s. 353 (the analogue of s. 311 of the Act of 1963), which was the only other section to be considered, which would operate to limit in any way the wide discretion of the court under s. 352. He stated (at p. 15):

> "In my judgment there is not to be found in section 353 any sufficient ground for saying by the force of the language of that section that the jurisdiction of the court under section 352 is circumscribed: indeed, there is if anything a pointer the other way to be found in the proviso to subsection (5) of section 353 . . .. That postulates that the court can bring the company sufficiently to life in order to wind it up, and that can be done without any reference to subsection (6). In my view section 352 is unaffected by section 353, and the effect of declaring a dissolution void under that section where a company has been struck off the register under section 353 is to bring about the same position as obtained before the dissolution took place, and that therefore under section 352 there is inherent in the court jurisdiction to order restoration to the register in the name of a company struck off under section 353."

By way of explanation, subs. (7) of s. 311 contains a provision similar to the proviso in subs. (5) referred of s. 353 referred to in that passage. However, it must be emphasised that s. 311 in its current form differs from s. 353 under consideration in that passage, in that subs. (8) of s. 311 was expanded and subs. (8A) was inserted by the Act of 1999. A further distinction is that in this case the Company was struck off not under s. 311 but under s. 12 of the Act of 1982.

28. That distinction also applies to *Test Holdings*, in which Megarry J. was dealing with two cases. In each case the company was

dissolved under s. 353 (the analogue of s. 311) following a strike-off, but in each case the applicant had proceeded under s. 352(1) (the analogue of s. 310(1)) rather than under the procedure for restoring the name of the company to the register under s. 353(6) (the analogue of s. 311(8)). In one of the cases, the applicant did have standing to bring the application under s. 353(6), whereas in the other case Megarry J. stated that the applicant may or may not have been a creditor. For present purposes, the interesting feature of the judgment of Megarry J. is that he contrasted the English provisions analogous to s. 310(1) and s. 311(8) to each other. The conclusion he came to was that it was possible to contend that *Belmont* was a decision which ought not to be followed. However, he stated (at p. 291) that counsel for the Registrar of Companies had not urged upon him that he ought to refuse to follow the decision, partly because the case had by then been relied on in many cases. He also remarked that the court "ought to be slow to resort to fine points of construction in order to prevent an applicant from exercising a choice which the legislature appears to have conferred upon him, particularly when the two provisions exhibit considerable variation in their scope and application". He stated that, if *Belmont* had not been decided, it might have been "a close question whether or not to decide the matter as it was decided in that case". But the decision was there and he concluded, on the whole, that the right course for a judge at first instance to take was to follow. He went on to consider whether the Registrar of Companies should be a notice party on an application under the corresponding provision to s. 310(1) in a case in which the company had been struck off under the provision corresponding to s. 311 but was still carrying on business. He held that the normal rule should be that the Registrar of Companies ought to made a respondent to the notice of motion and he went on to consider whether the Registrar of Companies "should confine himself to the economy of a letter as contrasted with the comfort of counsel", stating that he did not think it possible to say that he should. However, he continued (at p. 293):

> "I would only add that after spending some time in the comparison of sections 352(1) and 353(6) I remain uncertain how far the differences and the similarities (and I have not attempted to deal with all of them) fully reflect a coherent policy. When a revision of the Companies Acts is next in view, consideration might with advantage be given to this point."

29. If one was considering the approach adopted in *Belmont* and in *Test Holdings* in, say, 1970 when s. 311 of the Act of 1963 was substantially the same as s. 353 of the Companies Act 1948 then in force in England, both of which provisions were re-enactments of s. 242 of the Act of 1908, one might have regarded them as persuasive on an application to restore under s. 311(8). However, whether it would be appropriate to regard them as persuasive since s. 311 was amended is a question which this Court does not have to address on this application, because the Company was not struck off under s. 311(3), but was struck off under s. 12(3) of the Act of 1982, which does not have provenance in the Act of 1908.

Conclusion on the core issue

30. In 1982 the Oireachtas enacted s. 12 of the Act of 1982, which was innovative. It conferred on the Registrar for the first time power to strike off the register companies which failed to make the annual returns required by the Act of 1963 for three consecutive years. Sub-section (6) of s. 12, as it was originally enacted, strangely was in similar terms to subs. (8) of s. 311 in its original form.

31. What is of particular significance for present purposes, however, is that in 1999 the Oireachtas substituted a new provision (s. 12) for s. 12, as originally enacted and amended by the Act of 1990, and it enacted four additional provisions, sections 12A, 12B, 12C and 12D, as set out in s. 46 of the Act of 1999. In dealing with the type of situation like the situation which arose in the case of the Company, where there had been default by the Company in complying with its statutory obligation to make annual returns for one or more years, the effect of the enactment of those provisions may be summarised as follows:

> (a) Under s. 12, subject to compliance with subss. (1) and (2) thereof, the Registrar may impose a sanction on the defaulting company, in that she may strike its name off the register and, following the publication of notice of the strike-off in Companies Registration Office Gazette, the company is automatically dissolved.
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> (b) Specific measures which have been included in the new provisions for lifting that sanction by the restoration of the name of the company to the register may be invoked, namely:
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> > (i) an application by a member or an officer of the company to the Registrar within the twelve month limitation period stipulated in s. 12C, or
> >
> > (ii) an application by a member, officer or creditor of the company to the court within the twenty year limitation period provided for in s. 12B(3), or
> >
> > (iii) an application to the court by the Registrar under s. 12B(7).
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> (c) On an application other than by a member or officer of the company under subs. (3) of s. 12B which, in reality, is an application by a creditor of the company, the court, unless cause is shown to the contrary, must direct that the default in making the annual returns be rectified by directing a specified member or officer of the company to deliver the outstanding returns within a specified period as provided in subs. (6) of s. 12B. However, where the application is by the Registrar under subs. (7) of s. 12B, there is no corresponding obligation on the court.

32. The foregoing analysis raises a number of questions in relation to the jurisdiction of this Court to make a restoration order in relation to the Company, which was struck off under s. 12B(3) before dissolution, ancillary to the declaration voiding the dissolution already made under s. 310(1). First, given that the strike-off sanction which the Registrar imposed on the Company under s. 12(3) did not exist when s. 310(1) was enacted in 1963, how could one conclude that the Court has jurisdiction to lift the sanction under s. 310(1)? Secondly, given that the Oireachtas post 1963 expressly provided for three mechanisms for procuring the lifting of the sanction (s. 12B(3) s. 12B(7) and s. 12C), how could one conclude that the court has an inherent jurisdiction to lift the sanction under s. 310 at the behest of a party to whom the Oireachtas did not give standing to seek a restoration order when creating the sanction? It is difficult to see how the conclusions pointed to in the first and second questions could be properly reached. Thirdly, how could one conclude that the court has inherent jurisdiction to make an order which includes a direction to one or more specified members or officers of the company requiring them to make good the default which has given rise to the strike-off within a specified period, in the absence of an express provision to that effect? The objective of a direction of that type, which the court is obligated to give when it is making an order to restore the company on the application of a creditor under s. 12B(3), is clearly intended to ensure rectification of the default which gave rise to the strike-off. The risk of attachment and committal for failure to comply with the direction of the Court in most cases will ensure that the direction is complied with. However, it must be highly questionable whether, in the absence of an express statutory provision, the Court has jurisdiction to make a direction which carries that risk in the event of non-compliance. Finally, in the absence of an express statutory provision that, on the making of an order under subs. (7) of s. 12B, the Court must, or may, include in the order a direction in the terms of subs. (6) of s. 12B, with the objective of ensuring that

the default which gave rise to the strike-off is rectified, that the Court has inherent power to give such a direction must also be questionable. However, as there is no application under subs. (7) before the Court, it is not necessary to make any determination on that last point.

33. Recalling the observations of Megarry J. in *Test Holdings* quoted at para. 28 above, the dilemma here is not whether s. 310(1) and s. 311(8), which have a similar provenance, reflect a coherent policy. The problem here arises from a strike-off and consequential dissolution in the context of a statutory framework which was introduced long after the enactment of s. 310(1) and, in my view, must be regarded primarily as a discrete statutory scheme designed to ensure compliance with certain provisions of the Companies Acts and the taxation code, albeit that it does not lessen the effect of other similar statutory schemes, for example, s. 311, which is designed to address defunct companies. It may be that there is a lacuna in the statutory scheme embodied in s. 12 and the succeeding sections of the Act of 1982, as amended, in that it does not provide for a remedy for a person disadvantaged by a strike-off in the manner in which the Petitioner has been disadvantaged. However, it is for the Oireachtas, not the court, to supply that lacuna, if it exists, and if it is considered appropriate to give a third party in the position of the Petitioner such a remedy.

34. Accordingly, I have come to the conclusion that the Court does not have jurisdiction to make a consequential order restoring the Company to the register on this application under s. 310(1).

35. When the Companies Bill currently before the Oireachtas (the Companies Bill 2012 as initiated) is being considered by the Oireachtas, to use the words of Megarry J., "consideration might with advantage be given" to the point raised by the Petitioner on this application. While, in Part 12 of the Bill, which deals with "Strike Off and Restoration", a revision of the existing provisions in a manner which does reflect a coherent policy is proposed, nonetheless, subs. (2) of s. 739, which deals with restoration on application to court, does not envisage such an application being made by a disadvantaged third party who is not a creditor of the company, such as the Petitioner in this case. Whether such a third party should be given a remedy of the type proposed is a matter of policy.

Costs of the application

36. Normally one does not address the issues of costs when delivering the substantive judgment. However, I consider it appropriate to do so in this case because the issue was raised on behalf of the Petitioner in the written submissions of its counsel. It was submitted that it would be invidious to visit upon the Petitioner any costs of the application by any party on notice of the same, where the Petitioner has invoked the only available legislative avenue open to it. It was submitted that orders for costs, including the Petitioner's costs should, if at all, be visited upon the directors of the Company. Apart from the fact that the directors did not appear on the re-entry hearing and that I am not satisfied that Mr. O'Brien was aware of it, I am not satisfied that the Court has any jurisdiction to visit the costs of the Petitioner or the notice parties on the directors of the Company, notwithstanding that this whole process is attributable to default by the directors in compliance with their statutory requirements and the failure on their part to take the remedial steps which were open to them. My inclination would be to make no order for costs in this matter. However, I will hear further submissions on the point, if necessary.

Alternative solution

37. Finally, it was suggested by counsel for the Petitioner that the Court might consider an alternative solution to the problem and order that the money, which I understand to mean the costs incurred by the Petitioner on behalf of the Company in the High Court proceedings referred to in para. 2 above, be paid by the plaintiffs in those proceedings, who are liable for such costs under the order of Peart J. to the Petitioner. That would undoubtedly be a just and fair solution. However, I am not satisfied that the Court has any jurisdiction to make such an order, and, in any event, those plaintiffs are not before the Court. By way of general observation, as the passage from the judgment of O'Connor L.J. relied on by counsel for the Petitioner and quoted at paragraph 3 above indicates, an insurer can obviate the type of problem which has arisen in this case by taking a legal assignment of the cause of action from the assured.