



Court's discretion in company restoration applications clarified

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Court of Appeal overturns order requiring National Asset Loan Management Limited ("NALM") to pay accountancy fees associated with restoring struck off company to the register.

It was previously thought that the court had wide discretion to make ancillary orders when making an order under the Companies Acts to restore a company to the register. In the case of [National Asset Loan Management Limited v Middleview Limited and Garrett Kelleher](#) [2017] IECA 290 the Court of Appeal has clarified the ancillary orders that can be made in restoration applications.

Background

Middleview Limited ("the Company") had been struck off by the Companies Registration Office for failing to file annual returns. On the same day, following default by the Company in repayment of money due, NALM appointed receivers over certain assets of the Company. NALM subsequently applied to the High Court to restore the Company to the register so that it could realise the Company's assets. Evidence was presented to the court that there was an agreement between the Company and NALM that NALM would pay the accountancy fees associated with bringing the Company's accounts up to date in order to protect its security. The scope of this agreement was in dispute between the parties.

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High Court

In restoring the Company, the court referred to section 12(B)(3) of the Companies (Amendment) Act 1982 (“the 1982 Act”) which allowed the court to give directions and to make provisions when restoring a struck off company so that the company would be in the same position as if it had not been struck off. As NALM had agreed to bear the costs of the accountancy fees for 2010 and 2011 the court decided that it was “more likely than not” that NALM would have again covered these fees for 2012 and 2013 and ordered that these costs should be split 50/50 between NALM and Garrett Kelleher (who was a director of the Company and who had been joined as a Notice Party to the application).

NALM argued that this, in effect, granted specific performance of a disputed agreement and that Mr Kelleher could pursue a claim on foot of the funding agreement in separate proceedings. The court was of the view that the suggestion of separate proceedings was “wasteful of costs and court time” where the court had jurisdiction to deal with this matter as part of the restoration application.

Court of Appeal

The President held that it was clearly established on the authorities that any directions or provisions included in a restoration order were complementary to the main order restoring a company and that they were not freestanding. The court’s objective is to give effect to the statutory purpose and to put the parties back in as close a position as possible as if the company had not been struck off. By dealing with the costs dispute, the High Court had gone beyond that objective. The Court of Appeal agreed that the High Court had in effect ordered specific performance of the agreement. The President found that resolution of the costs dispute did not come within section 12(B)(3) of the 1982 Act and, if the Company chose to do so, separate proceedings could have been issued.

Restoration of Companies

Companies are commonly struck off involuntarily for failing to deliver annual returns. Conversely, there are times when a company consciously decides to dissolve. This can often prejudice a third party e.g. a creditor. The restoration process is a valuable tool to an aggrieved creditor. The process is invoked frequently in litigation where, for example, an impecunious company voluntarily dissolves to avoid a credit institution calling in a loan or to avoid an order in a personal injuries claim.

To restore a company to the register, an application on notice must be made within 20 years of dissolution. This application can be made to the court or, in certain circumstances, to the Registrar of Companies. This process requires specific steps to be followed to ensure the application to restore is successful.

Comment

This decision emphasises that in making restoration orders, the court is restricted in its discretion. While the corresponding section in the Companies Act 2014 (section 742) states that the court may give such directions as it thinks fit, this is limited to making directions that complement the restoration order. Any directions ordered cannot go beyond the statutory purpose of returning the parties to the situation in which it was at the time the company was struck off. Any orders which go further, and in effect put a party in a better or worse position, are open to legal challenge.

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