THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 266
High Court Record Number: 2019/191 COS
Court of Appeal Record Number: 2019/367

Haughton J.
Ní Raifeartaigh J.
Collins J.

BETWEEN/

WEE CARE LIMITED

APPELLANT

- AND –

COMPANIES REGISTRATION OFFICE

RESPONDENT

JUDGMENT of Mr. Justice Robert Haughton delivered on the 2nd day of October 2020

Introduction

1. This appeal concerns whether or not the High Court has jurisdiction to direct the Companies Registration Office ("CRO") to replace a set of full financial statements which were filed by a small company in error with a set of abridged financial statements instead, whether pursuant to s.366 of the Companies Act 2014 or pursuant to its inherent jurisdiction. It is an appeal from an order of Mr. Justice Allen dated 2 July 2019 refusing to grant to the appellant the following reliefs sought in the Originating Notice of Motion –

> "1. An order pursuant to section 366 of the Companies Act, 2014 as amended, and/or an order pursuant to the inherent jurisdiction of the [High Court] revising/or correcting and/or rectifying the Statutory Financial Statement made by the Applicant for the Financial Year 2018 ending 30th April, 2018 and filed with the Respondent on 22nd October, 2018, by means of the removal from the Register of certain information currently appended to such original Statutory Financial Statement.
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> 2. If required, an Order for the making effecting [sic] of such intended revision, correction and/or rectification by means of a Supplementary Notice to the said Statutory Financial Statement pursuant to Section 366(3) of the Companies Act, 2014, as amended.
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> 3. If required, an Order giving Directions as to the making of any necessary consequential alterations to the Statutory Financial Statement made by the Applicant for the Financial Year 2018 ending on 20 April 2018 as this Honourable Court deems fit and meet in the circumstances, including the [sic].
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> 4. Such further or other Order as this Honourable Court deems fit and meet."

2. The evidence before the High Court was set forth in a short affidavit of Mr. Mike Nangle sworn on 29 April 2019. Mr. Nangle avers that he is managing director of the firm of accountants with responsibility for submissions to the CRO on behalf of the applicant company, and he simply deposes as follows:

> "4. I say that incorrect financial statements for the Applicant were filed in the Companies Registration Office on the 22nd October, 2018. I say that as a result of this error information was included within the financial statement which was not required as prescribed under Section 352 of the Companies Act, 2014, where certain information for small and medium sized companies are exempt from filing certain information.
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> 5. I say that the Applicant desires removing this information from the Companies Registration Office on the grounds that it is not required or prescribed by the Companies Act, 2014 and is of a commercially sensitive nature."

The financial statement in question and the relevant CRO filing and record were not exhibited, and there was no fuller explanation of the nature or extent of the information the filing of which would have been exempted, or of the error that led to its inclusion in the financial statement and its filing in the CRO.

3. In correspondence in June 2019 Mr. Matthew McDonagh Higher Executive Officer on behalf of the CRO to the applicant's solicitor indicated that the CRO had no objection to the application. However in Mr. McDonagh's letter of 13 June 2019 he stated:

> "Please note that section 366 of the Companies Act 2014 is for voluntary revision of the financial statements and does not provide for the removal of the documents from the register".

4. The appellant then issued the originating notice of motion seeking the reliefs described above. The trial judge (Allen J) heard the application over two days, hearing further submissions on the inherent jurisdiction of the court on the second day. In an *ex tempore* judgment delivered on 2 July 2019 he refused the orders sought firstly because he was not satisfied that s.366 of the Companies Act, 2014 conferred on the court the jurisdiction to make the orders sought, and secondly because he was not satisfied that the court had inherent jurisdiction to make those orders.

5. In the Notice of Appeal the appellant raises four grounds for asserting that the trial judge erred in law –

> 1. In adopting an overly restrictive or literal interpretation of s.366; (Ground 1)
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> 2. Alternatively, in failing to adopt a purposive approach to the interpretation of s.366(1) such as to permit the appellant to revise and/or correct and/or rectify the filing in circumstances where the appellant has "through inadvertence and/or mistake failed to take advantage of the exemptions provided for him in s.352 of the Companies Act, companies" (Ground 2);

3. That in the absence of an express provision allowing revision the learned High Court judge failed to remedy a procedural injustice with which the court had inherent jurisdiction to do, "particularly where the Respondent consents to being bound by an Order" (Ground 3); and

4. that the trial judge erred in failing to invoke the inherent jurisdiction of the Court to correct the procedural injustice (Ground 4).

6. A further 'Letter of No Objection' dated 1 October 2019 was written by Mr. McDonagh on behalf of the CRO in respect of the appeal, "strictly conditional on the basis that no ORDER as to Costs is made against the Registrar of Companies and/or the CRO in this matter".

7. The appellant filed written submissions dated the 5 December 2019 in support of the four grounds of appeal.

8. In response to these Dr. David McFadden, Legal Advisor in the CRO, wrote at some length to the appellant's solicitors. Although the CRO was not formally represented before this court at its first hearing on 27 January 2020 Dr. McFadden appeared as a courtesy to the court and this letter was produced (without objection) because it sets out the CRO attitude to this application and applications of this nature generally. The letter made the following points:

(i) that it was unclear why the CRO was named as respondent;

(ii) that the Registrar did not object to the application in the High Court being of the view that the court "had inherent jurisdiction in matters such as this to order the removal of the financial statements";

(iii) that the Registrar cannot remove documents from the register because the Registrar and the register of companies are creatures of statute and there is no power to do so under the Companies Act, 2014 ("the CA 2014" which abbreviation is used in this judgment to refer to the Companies Act 2014 as amended);

(iv) that there is sound reason why the Registrar cannot remove or alter documents once registered because "inherent in the concept of a register and documents being "registered" is that there should be consistency and continuity on the public register of companies", allowing third parties to have confidence that they can rely on the documents remaining on the register and not disappearing or being replaced.

(v) if the Registrar had the power to remove or alter documents this could encourage companies to make inaccurate filings secure in the knowledge that they could removed or altered without explanation.

(vi) that there may be an error in filing e.g. by filing commercially sensitive information that was not required to be filed. "In these circumstances that Registrar has from time to time received High Court Orders to remove certain documents…" where the

High Court has relied on its inherent jurisdiction to make the order to remove the document and replace it with the correct document.

(v) the Registrar has always accepted the High Court has such inherent jurisdiction but "such powers were always used sparingly", and the Registrar is placed on notice of the application and would deal with each application on its merits, issuing either a letter of objection or a letter of no objection.

(vi) in 2017-2019 some 17 companies obtained such orders from the High Court (detailed in the letter).

(vii) the CRO was concerned about reliance on s.366 of the CA 2014 because the Registrar was of the view the trial judge was correct in its judgment that the section did not confer jurisdiction on the court to remove documents that had been registered, and the letter written by Mr. McDonagh on 13 June 2019 expressed this view. The reason for this is that s.366 deals with rectification by directors of an omission or error in company financial statements that have not necessarily been placed on the public record/delivered for registration, and allows rectification by delivery of an administrative form B1X, without recourse to the court – and it still leaves in place the original documents that were registered. Thus documents can be filed to correct the register, and these are in addition to financial statements already filed. The letter states:

> "The delivery by a company of full financial statements would comply with the Act even where the desire was to file abridged financial statements. Full financial statements are not of themselves defective. Section 366 only allows for the revision of [financial] statements that did not comply with the requirements of the Act….Filing of abridged accounts would not remedy any defect in the financial statements of the company. The Registrar understands that your client, Wee Care Limited, desires to file abridged accounts. However, this action, filing abridged accounts instead of full accounts, is not the same as remedying a defect. It is simply a preferred option that can be exercised by qualifying companies.
>
> One further requirement of section 366(5) is that the following year's financial statements must disclose in detail the difference between the original and amended returns for the current year in which the amendment of the company's financial statements were made. This implies that in the following year an explanation must be provided by the company in its financial statements as to why there is a difference…";

(viii) in preparing the letter a review of the register showed that "unfortunately a small number of Court orders appear to have been made in recent years, where the Court references section 366 or section 173 of the Companies Act when making the order. This is a matter of concern to the Registrar" – and details of three such cases in 2018 are given.

(ix) while the Registrar had no objection to the appeal being made based on the inherent jurisdiction of the court, objection was taken to appeal against the High Court refusal to allow the removal based on s.366.

(x) the Registrar again requested that there be no order as to costs made against the Registrar or CRO.

9. In the course of the first hearing before this court on 27 January 2020 the letter from the CRO was considered, and having heard some argument the court expressed interest in receiving further submissions, particularly addressed to the question of whether the Registrar had an inherent power to remove or alter documents. Accordingly the matter was adjourned with directions as to the filing of further affidavits and submissions.

10. A supplemental affidavit was sworn on 7 February 2020 by Mr. Nangle on behalf of the appellant. This affidavit confirms that the appellant company is a "small company" within the meaning of that term as defined in the CA 2014, and thus entitled to an exemption from filing certain information with the CRO pursuant s.352, as amended, and also entitled to an audit exemption under s.358. I note however that while the exhibited "Unaudited Financial Statements" for the year to 30 April 2018 that were filed in the CRO at page 7 contain statements by the directors that the company that it "is availing itself of the exemption provided for by Chapter 15 of Part 6 of the Companies Act 2014", which is the small company *audit* exemption, based on recitals appearing on that page, there is no statement or recital to the effect that the company is availing itself of the exemption from filing full financial statements and filing abridged financial statements as permitted by s.352. It is not therefore evident on the face of the "Unaudited Financial Statements" that the company was electing for exemption from filing full statutory financial statements.

11. The affidavit helpfully gives more detail as to the error that led to the filing in the CRO on 22 October 2018 of the Financial Statements for the appellant for the financial year ending 30 April 2018. Mr. Nangle avers at para. 5 that "…unfortunately, extraneous and unnecessary additional financial information and material concerning the Appellant…" was filed. This additional information consists of a summary of the appellant's results for the Financial Years 2017 and 2018 and a more detailed Profit and Loss Account for the Financial Year 2018, and it all appears in the filed "Unaudited Financial Statements" after page 13, which page just contains the words "Wee Care Limited" and beneath this "The following pages do not form part of the statutory financial statements". Mr. Nangle avers in para. 7 that "through sheer inadvertence and oversight on the part of the offices of your deponent…it appears that this additional information was included in the filing despite such information being clearly marked on page 13 of such exhibited filing as not being part of the Statutory Financial Statements". In para. 8 he explains that this "…came about through genuine human error, whereby an incorrect file was accidentally uploaded to the www.cro.ie website…". In para. 13 he avers that the Directors of the appellant "…are most anxious to ensure that sensitive financial affairs of the Company, which were not required to be placed in the public domain, are not so disseminated."

12. At para. 11 Mr. Nangle avers:

"11. I say and believe and am advised by the Directors of the Appellant company that the Appellant company considers that such extraneous material as filed has now rendered the Statutory Financial Statement for the financial year 2018 defective, entirely negating the benefits as the Appellant would ordinarily be entitled to as a "small company" under Section 352 and now desires removing same from the Register maintained by the Respondent."

13. Supplemental submissions dated 12 March 2020 were also filed on behalf of the appellant, addressing the issue of whether the Registrar has the incidental or consequential power to amend or rectify the register.

14. An affidavit was also sworn by Ms. Maureen O'Sullivan, the Registrar of Companies, on 2 March 2020. From this it appears that the Registrar maintains the Register of Companies under Part 15 of the CA 2014, and employs 115 staff who assist in maintaining the Register of Companies, and also the Registers of Business Names, Limited Partnerships, Interest Groupings, Beneficial Ownership and Disqualified/Restricted Persons. Ms. O'Sullivan avers:

"4. The Register is a live register, available on-line through the Respondent's website www.cro.ie. 80% of all CRO documents are filed electronically, with approximately 100,000 documents a year being filed in hard copy. The volume of documentation is substantial. In 2018, there were 223,013 companies on the Register and 505,469 documents were filed with the Registrar that year. Of these documents, 218,067 comprised the Annual Returns. 84,084 of this number would include financial statements being filed.

5. The documents that are filed with the Registrar appear immediately on the website once filed electronically. While there are some pro forma checks for certain types of document, in general this is not part of the Registrar's function and the documents filed are put on the Register in good faith. Such checks are limited to identifying patent or extremely obvious mistakes but do not involve any substantive or qualitative consideration of the documents filed.

6. The website of the Respondent is the access point for those seeking information from the Register as part of due diligence exercises. In 2018, the website was visited 2,296,803 times, with 5,277,565 page views in the same year.

7. Many visitors to the website purchase images of the documents filed from the Register. In 2018, there were 281,115 purchases direct from the website. Of these, 55,753 were Annual Return Financial Statements.

8. The Statutory Financial Statement filed on behalf of the Appellant in these proceedings was one of these Annual Return with Financial Statement documents filed in 2018. Since being filed it has been available on the Register from 7th November 2018. Since being made available on the Register, it has been purchased four times through www.cro.ie; twice by WeeCare UK Ltd, once by ASM Belfast (the accountants to WeeCare Ltd.) and once through the Law Library.

9. The Registrar also sells data to seven third party bulk data providers who take data from the Register electronically and make it available to other third parties. These bulk data providers take the date from the Register by downloading data each day.

10. As noted above, the Registrar does not scrutinise the documents filed. In the case of Statutory Financial Statements, there are some pro forma checks. The CRO checks that the company name and number match the accompanying annual return; that the financial year end on the financial statements matches that of the annual return and that there is no gap since last return; that the directors' report is attached and that an audit exemption statement is included where such exemption is claimed.

11. The responsibility for filing accurate information lies with the company and its agents."

15. Written submissions prepared by counsel were also filed on behalf of the CRO. These take the following positions:

(i) there is no power pursuant to s.366 of the CA 2014 to make the orders sought by the appellant, and the High Court was correct not to make an order on that basis.

(ii) the question whether the Registrar has inherent power to amend revise or expunge documents was never pleaded or argued in the High Court or included in the Notice of Appeal, and is not properly before this court, and the respondent would have to be in a position to fully defend the point "…on a legal basis and on an evidential basis by reference to the very real practical difficulties that this would give rise to and to the many important issues of policy that would be engaged were such a power to be bestowed on the Registrar." (par. 1-5)

(iii) as to the inherent jurisdiction of the High Court, the respondent "did not wish to press the point either for or against the extent of the jurisdiction of the High Court to order the removal of documents from the Register in this case" and made limited submissions only "by way of assistance to the Court" (para. 5-1).

16. The court resumed the hearing of the appeal on 21 April 2020, and counsel also appeared on this occasion on behalf of the Registrar. As to the scope of the appeal, having read the affidavit of Ms. O'Sullivan and the CRO's written submissions, and having listened to counsel on the question of whether the court should determine the question whether the Registrar (as distinct from the High Court) has any inherent power to amend or rectify the register, or to revise or expunge documents, I expressed the view of the court that it was not appropriate to determine this important point, for the reasons set out in the respondent's submissions and summarised above. The court accepted that a determination of this *could* create practical difficulties and have the effect of recasting the role of the CRO, which may indeed more properly be a matter for the legislature. The court was of the view that a decision on this would need to be grounded on pleading at first instance with consideration of all appropriate evidence and full argument in the High Court, with a right of appeal

thereafter, in an appropriate case. The court was nonetheless grateful for counsels' written and oral submissions addressed to this issue.

17. I will therefore address the three issues that do arise:

(a) Has the court the power pursuant to s.366 of the CA 2014 to make the orders sought?

(b) If not, has the court an inherent power to make the orders sought, and if so on what basis should this jurisdiction be exercised?

(c) Should such inherent power (if any) be exercised in the appellant's favour?

18. Before doing so I should add that it is not entirely clear that the first issue arises in light of the fact, adverted to by the trial judge, that on the second day of hearing in the High Court counsel for the applicant appeared to accept that s.366 did not confer the power on the court to make such orders. However that may have been something less than a formal concession, and Counsel advised this court that it arose before s.366 had been considered fully in the context of s.352. Further the issue was expressly raised in Grounds 1 and 2 of the Notice of Appeal and was the subject of extensive written submissions by the appellant. I will therefore address it, but first I want to highlight further concern related to the appellant pursing this issue.

The Letters of No Objection furnished by the CRO were predicated on the appellant relying on an inherent jurisdiction, and *not* s.366, and the clear implication was that if the appellant were to seek to rely on s.366 the CRO would oppose the application. Despite this the appellant argued s.366 in the High Court, where the CRO/Registrar were unrepresented, and again sought to rely on s.366 in written submissions filed in this court. The effect was that the respondent was deprived of the opportunity to address this issue in the High Court, and was forced to address it in reply submissions to this court for the first time. This kind of approach is not acceptable because it undermines the efficacy of public bodies providing letters of consent or no-objection in circumstances where a court application is pursued and a public body is a *legitimus contradictor*.

Regrettably this was compounded by the appellant's written submission to this court which, at para.37, states that "At all material times, the Respondent has consented to all aspects of the Appellant's application and/or appeal save in relation to the issue of costs", and which in para. 36 seeks to rely on the "attitude of the Respondent to the within appeal [being] of extreme evidential value in considering the legislature's intention when adopting a purposive approach to interpretation".

This submission was inaccurate.

While there is a suggestion that the appellant should not be permitted to pursue its claims pursuant to s.366 it seems to me that this court is left with a discretion, and while these matters may bear on the question of costs I would exercise this discretion in the appellant's favour, particularly as the s.366 issue has now been fully argued.

(a) Has the court the power under s.366 of the CA 2014 to make the orders sought?

19. It is first necessary to consider the statutory provisions that entitle small companies to file abridged accounts. Section 280A(3) of the CA 2014 as inserted by s.15 of the Companies (Accounting) Act 2017[1] sets out the relevant qualifying conditions for "a small company". It must satisfy two of the following: (a) have a turnover not exceeding €12 million, (b) have a balance sheet that shows aggregate assets not exceeding €6 million; (c) have an average number of employees not exceeding 50. It was not contested, and indeed is clear from Mr. Nangle's supplemental affidavit and the 2018 Financial Statement at issue, that the appellant is a "small company".

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[1]The Act of 2017 repealed s.350 of the CA 2014 which in subs.(5) had defined "small company" in similar terms but with lower thresholds for turnover (€8.8 million) and assets (€4.4 million). Section 15 of the 2017 Act then inserts in Part 6 of the CA 2014 a new Chapter 1A with sections 280A-H which govern *Qualification of company based on size of company*.

Section 280C of the 2017 Act now provides:

"280C. Where a company qualifies as a small company in accordance with section 280A or 280B, as may be appropriate, then, as provided in this Part, different rules may be applied (in this Act referred to as the 'small companies regime') to the company in respect of the financial statements and reports for a financial year in relation to which that company so qualifies as a small company."

These provisions entitled the appellant, by virtue of s.352(1) of CA 2014[2], to avail of the exemption set out in subs.(2) subject to subs.(3):

"352(1) The exemption in subsection (2) is available for a company that-

(a) qualifies for the small companies regime (or the micro companies regime), and
(b) has not elected to prepare group financial statements in accordance with section 293.

(2) That exemption is an exemption from the requirement in section 347 to annex to the company's annual return the following documents:

(a) the statutory financial statements of the company;
(b) the directors' report (except where that company qualifies for the micro companies regime and has not elected to prepare the directors' report);
(c) the statutory auditors' report on those financial statements and that directors' report.

(3) If a company that qualifies for the small companies regime or the micro companies regime avails itself of the exemption provided by this section, it shall instead annex to its annual return a copy of each of the following documents:

(a) abridged financial statements prepared in accordance with section 353 and which have been approved and signed in accordance with section 355;
(b) a special statutory auditors' report prepared in accordance with section 356"

[2] As amended by substitution by s.51 of the Companies (Accounting) Act 2017.

20. Accordingly the appellant would have been entitled to annex abridged accounts for the year to 30 April 2018 provided they complied with subs.(3) of s.352. Section 353 (as amended) sets out the requirements for abridged accounts, and detailed "Accounting Principles, Form and Content of Entity Financial Statements of a Company Qualifying for the Small Companies Regime" are set out in Schedule 3A to the CA 2014[3]. The precise wording used in s.352(1) is important; the word "available" in relation to the exemption appears in the opening line, and this is reflected in subs.(3) which opens with the phrase "If a company that qualifies for the small companies regime…avails itself…". This wording signifies that for a qualifying small company the use of the exemption is optional. While counsel for the appellant submitted that the later phrase "it shall instead annex" in subs. (3) made this a prescriptive, rather than a discretionary provision, this submission flies in the face of the clear wording to which I have just referred. The wording in subs.(3) only applies to mandate certain minimum requirements in the annual return *if* the small company avails of the exemption. It is therefore clear that s.352 is an empowering provision - the legislature did not make it mandatory for a small company to use the exemption, and the section clearly contemplates the possibility of small companies not availing of the exemption. A small company has the option to file a full statutory financial statement, or an abridged one.

[3] As inserted by Schedule 2 of the Companies (Accounting) Act 2017.

21. That a small company has a choice is confirmed by s.277[4] which appears in Chapter 1 of Part 6 and provides:

"277(1) Subsection (2) is in addition to the provision made by this Part enabling certain elections to be made by a company that qualifies for the small companies regime or the micro companies regime.

(2) Any provision of this Part providing for an exemption from a requirement of this Part does not prevent the company concerned, if it so chooses, from doing the thing that the provision provides it is exempted from doing (the 'specified thing')

(3) If the company concerned chooses to the specified thing-

(a) the provisions required by this Part to be complied with, in relation to the doing of such a thing, and

(b) the provisions specified by this Part to apply, in a case where such a thing is done, as the case may be, shall be complied with or shall apply accordingly, but this does not prejudice any provision of this Part concerning the making of an election referred to in subsection (1) by a company there referred to (or concerning the effect of the company's having so done).

(4) Subsection (2) applies whether the expression 'shall be exempt' or 'need not' or any other form of words is used in the provision concerned"

Accordingly the appellant's argument that abridged financial statements are prescribed or mandatory for a small company is untenable. In fact s. 277(2) would seem to be a complete answer to the appellant's argument as it means that it was expressly permitted to file full financial statements notwithstanding that it was exempt from this requirement by s.352. However in deference to the appellant's arguments based on s.366 I will further consider that section.

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[4] As substituted by s.13 of the Companies (Accounting) Act 2017.

22. Section 366 is the first section in Chapter 17 which is headed *Revision of defective statutory financial statements*, and s.366 is accompanied by a shoulder note **Voluntary revision of defective statutory financial statements**. It provides:

" **366.**(1) If it appears to the directors of a company that—

(a) any statutory financial statements of the company (referred to subsequently in this Chapter as the "original statutory financial statements"), or
(b) any directors' report (referred to subsequently in this Chapter as the "original directors' report"),

in respect of a particular financial year, did not comply with the requirements of this Act or, where applicable, of Article 4 of the IAS Regulation, they may prepare revised financial statements or a revised directors' report in respect of that year.

(2) Where copies of the original statutory financial statements or original directors' report have been laid before the company in general meeting or delivered to the Registrar, the revisions shall be confined to—

(a) the correction of those respects in which the original statutory financial statements or original directors' report did not comply with the requirements of this Act or, where applicable, of Article 4 of the IAS Regulation, and
(b) the making of any necessary consequential alterations.

(3) Where the reason for the revision of the statutory financial statements is—

(a) that information that should have been included by way of note to the financial statements was not so included, or
(b) information provided in a note to the financial statements was incorrect or incomplete,

then—

(i) in a case where the amounts and presentation of the profit and loss account, balance sheet or other statements required by the financial reporting framework are not affected by reason thereof — the revision may be effected by supplementary note, and

(ii) in all other cases — revised financial statements shall be prepared.

(4) Where the reason for the revision of the directors' report is—

(a) that information that should have been included in the report was not so included, or

(b) information provided in the report was incorrect or incomplete,

then—

(i) in a case where the additional information to be provided by way of revision does not affect other information included in the report — the revision may be effected by supplementary note, and

(ii) in all other cases — a revised directors' report shall be prepared.

(5) Where the statutory financial statements for any financial year are revised, the next statutory financial statements prepared after the date of revision shall refer to the fact that a previous set of financial statements was revised and provide particulars of the revision, its effect and the reasons for the revision in a note to the financial statements."

23. The appellant first contended that the trial judge adopted an overly restrictive, literal interpretation of s.366 in determining that it was directed only to the correction/revision of *defective* statutory financial statements, as referred to in the subtitle to Chapter 17 and "the shoulder note" to s.366 Voluntary **Revision of defective statutory financial statements**.

24. It was submitted by counsel for the appellant that the reference to "defective statutory statements" should be read in context, and that the words "did not comply with the requirements of this Act" in s.366(1) are such that the Court should adopt a broad definition which encompasses circumstances where a company submits "statutorily inadequate filings", as envisioned by the trial judge, but also encompassing circumstances where the company has inadvertently failed to submit abridged financial statements despite its entitlement to do so.

25. The appellant argued that the word "comply" is defined in the 13th edition of the Chambers Dictionary (2014 edition) as follows: -

> "Comply (complying, complied) to yield to the wishes of another, to agree or consent to; to be ceremoniously (…indistinct) and complaisant or courteous; … to fulfil, to suit, to offer courtesies, …"

26. Counsel argued for a 'proximate textual approach' to the word "comply", relying on the decision in *United States Tobacco International Inc. v. Minister for Health* [1990] 1 IR 394

where Hamilton P. quoted with approval the judgment of Stamp J. in *Bourne v Norwich Crematorium Ltd* [1967] 1 WLR 691 where he stated at p.696:

> "English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which you have assigned to them as separate words…"

- which Hamilton P. noted had been cited with approval by Henchy J. in the course of his judgment in *Dillon v. Minister for Posts and Telegraphs* (Unreported, Supreme Court, 3rd June, 1981).

27. This approach in itself is not controversial, as is the wider proposition that the whole or any part of an Act may be referred to and relied upon in seeking to construe any part of it – see Walsh J. in *East Donegal Co-Operative v. Attorney General* [1970] I.R. 317 at p.341.

28. It was submitted that "defective" in common parlance is synonymous with the state of being imperfect, faulty, lacking or deficient, and in that sense the statutory financial statement submitted by the appellant to the CRO was defective as it failed to take "the prescribed format for the financial statements of small or medium sized companies who wished to avail of the section 352 exemption". It is further submitted that the use of the word "defective" in the introductory descriptor to both Chapter 17 and s.366 "has the clear and unambiguous meaning and defective applying the provisions of s.366 to all defective statutory financial statements, whatever the cause of that particular defect might be."

29. I do not accept these submissions. Firstly, whether the court can have regard to the Chapter 17 heading or the shoulder note must be doubted in the light of s.18 of the Interpretation Act, 2005 which applies certain provisions to the interpretation of enactments, including –

> "(g) Marginal and shoulder notes, etc. Subject to section 7, none of the following shall be taken to be part of the enactment or be construed or judicially noticed in relation to the construction or interpretation of the enactment:
>
> (i) a marginal note placed at the side, or a shoulder note placed at the beginning, of a section or other provision to indicate the subject, contents or effect of the section or provision,
>
> (ii) a heading or cross-line placed in or at the head of or at the beginning of a Part, Chapter, section, or other provision or group of sections or provisions to indicate the subject, contents or effect of the Part, Chapter, section, provision or group;"

30. Aside from that, the ordinary meaning of the words used by the legislature in ss. 352 and 366 is clear. As I have already determined, s.352(1) is an empowering provision that modifies the annual return filing requirements for small companies where such a company "avails itself of the exemption provided by this section" (s.352(3)). It may choose not to do so. Since a company has a choice whether to file full or abridged statements, to call full

statements 'defective' simply because of they were filed in error would make the 'defectiveness' of documents turn upon the subjective intent of the company or its officers. Words such as 'defective' must be judged by an objective standard, not something so subjective as a company's desire. The appellant filed financial statements which did not avail of s.352, but the financial statements which he had filed were not in themselves defective in any way. It could not be said that the financial statements filed were imperfect, faulty, lacking or deficient, to use the terminology suggested by counsel. As the trial judge put it, correctly in my view, the problem in this case is not that the financial statements are defective in any way, but rather that the appellant's accountants "filed complete financial statements". Dr. McFadden put it succinctly in his letter of 24 January 2020 when he observed "Filing of abridged accounts would not remedy any defect in the financial statement of the company…. It is simply a preferred option that can be exercised by qualifying companies." Nor can it be argued that the filing was "defective as it failed to take the prescribed format for the financial statements for small and medium sized companies", because it followed a prescribed format permitted by the CA 2014 for companies generally. Section 347 of the CA 2014 prescribes the documents to be annexed to an annual return in all cases, and these include the statutory financial statements of the company, the directors' report including any group directors' report, the statutory auditors' report on those financial statements and that directors' report, but it does not permit the filing of abridged financial statements save where s. 352(3) (applying to small companies) or s.352(4) (applying to medium companies) applies. Complying with the greater obligation does not render the filing made "defective". Equally it cannot be argued that filing fuller accounts than are required for a small or medium company could ever be regarded as a failure to "comply with the requirements of this Act".

31. It is true that there is no other statutory mechanism within the CA 2014 whereby a company can amend or replace its statutory financial statement; revisions can only take place where permitted by s. 366. The drafters may not have anticipated the possibility that a small or medium sized company would by mistake file fuller accounts than they are required, when they could have filed abridged accounts. Be that as it may, the courts cannot give a strained interpretation to the plain and ordinary meaning of the words in sections 352 and 366 in order to accommodate the difficulty in which the appellant finds itself.

32. The appellant contends in the alternative that the Court should give a purposive interpretation to s.366 on the basis of textual ambiguity, and in reliance on s.5 of the Interpretation Act, 2005. It will be recalled that that section states: -

> "(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—
>
> (a) that is obscure or ambiguous, or
>
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—
>
> (i) in the case of an Act to which *paragraph (a)* of the definition of "Act" in *section 2 (1)* relates, the Oireachtas, or

(ii) in the case of an Act to which *paragraph (b)* of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

33. The appellant repeats his early arguments on the meaning of "comply" in s.366 in the context of the references to "defective financial statements" and submits that the meaning of the phrase "did not comply" in s.366 is sufficiently ambiguous to necessitate a purposive approach. Alternatively, the appellant suggests that a literal interpretation fails to reflect the plain intention of the legislature. The appellant argues that s.366 is an enabling provision, that it serves as a statutory mechanism for amendment or rectification of filings with the CRO, and that the clear purpose of the section is to provide a legislative framework for companies to alter their filings in circumstances where they have been prepared or filed incorrectly or incompletely. It is urged that a narrow interpretation would debar the appellant from availing of its statutory entitlement to an exemption under s.352 "in circumstances where it has through inadvertence, been too candid in its filing, while allowing other large companies to amend filings which are, through inattention or neglect, incomplete or inaccurate." It is suggested this would create a manifest procedural injustice that cannot have been reflective of the true intention of the legislature. The appellant cites, in support of such a broader purposive interpretation, the decision of *Gilligan v Silke* [1960] I.R. 1, at p. 9 where the decision of Viscount Simon L.C. *Nokes v Doncaster Amalgamated Collieries Limited* [1940] AC 1014 is quoted with approval: -

> "Judges are not called upon to apply their opinions of sound policy, so as to modify the plain meaning of statutory words, but where, on construing general words the meaning of which is not entirely plain there are adequate reasons for doubting whether the Legislature could have been intending so wide an interpretation as would disregard fundamental principles, then we may be justified in adopting a narrower construction. At the same time, if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

34. Reliance was also placed on *McCarthy v Walsh* [1965] I.R. 246, where Murnaghan J. considered an unclear provision and concluded that the likelihood of legislative desire for one potential outcome was such as to warrant a harmonious interpretation of the provisions of a: -

> "If the latter was the Legislature's intention, I would have expected that such intention would have been translated into explicit statutory provisions. The fact that this was not done is one reason for thinking that this was not the intention of the Legislature."

The appellant therefore submitted that had the legislature intended to permanently and unalterably prevent small and medium enterprises such as the appellant from amending their financial statements where they failed to submit abridged versions, this could have been achieved through an express provision in either s.366 or s.352.

35. The appellant also relies on *Devlin v Minister for Justice* (4 April, 2001, unreported, High Court) where Morris J. concluded that the use (means?) by which the legislative draughtsman could have brought legislative effect would be of relevance to assessing the evidential value of an omission:-

> "If that had been the intention of the draughtsman it would have been easy enough to say so in the section."

36. These submissions do not satisfy me in that it is permissible for the Court to take a purposive approach in the present case. As I have already stated the wording of s. 366, and in particular the phrase "did not comply with the requirements of this Act" is clear in its meaning. The same applies to the references to "defective" in the two headings under Chapter 17, insofar as they can be relied upon at all. It cannot be said that the meaning of these is "not entirely plain", to adopt the phrase used by Viscount Simon L.C., or that s.366 itself is "obscure" or "ambiguous" such that section 5(1) of the2005 Act is engaged.

37. I also reject the appellant's submission that "had the legislature intended to permanently and unalterably prevent SME's of the appellant's kind from amending their financial statements when they have failed to submit abridged versions, this could easily have been achieved through an express provision in either s.366 or s.352. While it is true that the filing of fuller and more "candid" accounts does mean that they remain in the CRO, assuming the company remains a small or medium company then abridged accounts can be filed in subsequent years.

38. There are two further reasons which are raised in the CRO's submissions, and which are not answered by the appellant, that reinforce my view that the learned trial judge was correct in his conclusion that s.366 cannot be interpreted as permitting the appellant to remove the financial statements from the CRO, and to replace them with an abridged version.

39. Firstly and fundamentally the courts have no role or function under s.366 – there is no jurisdiction conferred on the courts and there is no mention of the courts. Rather s.366(1) provides that the directors may prepare revised statutory financial statements or a revised directors' report, or under subs.(3) or (4) the revision may be addressed by a supplementary note to the financial statements or directors' report as the case may be where those subsections apply.

40. Secondly, s.366(5) requires that the following year's financial statements must contain a note disclosing the fact of the previous revision, and must particularise the revision and its effect, and the reason for it. This means that, as Dr. McFadden describes, the first non-compliant set of financial statements continue to be on the register, and to be visible, along

with the additional documents filed with the form B1X. The statutory scheme under s.366 is not therefore designed to permit the withdrawal or expunging of statutory financial statements or parts of them, even if they are not compliant with the requirements of the CA Act, and therefore it could never accommodate the primary relief sought by the appellant namely the removal of certain information from the 2018 Statutory Financial Statements filed with the CRO.

41. It follows from this that the three cases in 2018 referred to by Dr. McFadden where s.366 is referenced in body of the court order, and other cases where s.366 is referenced in the title, are not good precedents insofar as the orders made rely on that section. The appellant's arguments based on s.366 are in my view unstateable and must fail.

(b) Has the court inherent jurisdiction to make the orders sought, and if so on what basis should it be exercised?

42. The second basis upon which the appellant argues its case is that the High Court, and this Court, have an inherent jurisdiction to remedy the "procedural injustice which a strict literalist approach brings about". As will be apparent from the discussion and conclusions on ss.352 and 366 earlier in this judgment the court has adopted an ordinary and plain meaning interpretation which cannot fairly be characterised as "a strict literalist approach", but it is an interpretation which, by excluding the sought-for power, requires the Court to consider whether there is inherent jurisdiction to do what the applicant wishes it to do.

43. The appellant's submission takes as its starting point Article 34.3.1 of the Constitution which vests the High Court "with full and original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal." The circumstances in which the Court will exercise inherent jurisdiction, and the means by which it interacts with Statute, were considered by Murray C.J. in *McG v D.W. (no.2)* [2000] 4 I.R. 1:-

> "The concept of inherent jurisdiction necessarily depends on a distinction between jurisdiction that is explicitly attributed to the courts by law and those that a court possesses implicitly whether owing to the very nature of its judicial function or its constitutional role in the administration of justice. The interaction between the express jurisdiction of the courts and their inherent jurisdiction will depend in each case according to the scope of the express jurisdiction, whether its source is common law, legislative or constitutional, and the ambit of the inherent jurisdiction which is being invoked. Inherent jurisdiction by its nature only arises in the absence of the express." (p. 26)

In the context of the Companies Act, 2014 the appellant submits that while the Act is "undoubtedly extensive it is not exhaustive", and it therefore remains open to the Court to exercise its inherent jurisdiction to remedy injustice. Counsel argued that there "must be" some mechanism for removing the additional material annexed to account, and pointed to the 17 cases in 2017-2019 detailed in the CRO's letter of 24 January 2020 where the High Court exercised an inherent jurisdiction.

44. No written judgments on this issue are available. However the appellant relies particularly on the unreported decision of Laffoy J on 30 April 2007, in a matter of *Air France Aircraft*

Leasing Limited v Registrar of Companies. From what is known of that application it arose in circumstances where Air France had filed a number of Forms B5 which incorrectly overstated the share capital of the company. The amount was correctly stated on the annual returns but as the CRO at the time had a policy of not registering documents which would record a reduction of share capital, the company brought the application seeking to have three Forms B5 taken off the register. A Practice Note on Business Law published by the Law Society on 7 July 2008 mentions this decision and states:

> "In the Air France case, Judge Laffoy invoked the inherent jurisdiction of the High Court to correct an error in three forms B5 that had been registered in 2001. She made an order reciting that the forms B5 registered in 2001 contained erroneous information and that the court was satisfied that the creditors of the company in question were on notice of the application and none of them objected to the making of the orders sought. She directed that the register of companies be rectified by removing the three forms B5 and allowing new forms B5 to be substituted containing the correct information. She further directed that an attested copy of her order be placed on the CRO file".

The same article then refers to another similar case:

> "In a more recent case heard by Laffoy J on 28 January 2008, *3V Transaction Services Limited v the Registrar of Companies* (unreported), she ordered that the register of companies be rectified by the removal therefrom of a form B5 containing erroneous information and the substitution of a new form B5 containing correct information. She directed that a copy of her order be placed on the CRO file in relation to the company. Judge Laffoy allowed the company to dispense with the requirement to give notice to creditors and was satisfied that the mistake could not have had a material adverse effect on creditors."

The article then concludes:

> "Thus, where a registered B5 overstates the amount of a company's issued share capital, the mistake cannot be corrected by a simple administrative act of the CRO. The mistake can only be corrected by order of the High Court."

In the CRO's written submission the details of the *Air France* case, so far as they are known, are set out in 5-2, and at paras. 5-3 and 5-4 it is stated:

"5.3 It is noteworthy that Laffoy J. declined to give a written judgment and reportedly stated that her decision was specific to the fact[s] of the case and that each case would have to be dealt with on its merits.

5-4 Further, the particular facts of *Air France* were such that the ruling was of substantial benefit to the applicant company in circumstances where the erroneous entry on the Register would give rise to large stamp duty liability".

Unfortunately source for this information is not given.

45. Counsel for the appellant argued that what is relevant to the exercise of this inherent jurisdiction is the prejudicial effect of the filing rather than the nature of error. In response to questioning from the court as to what would justify the court exercising such an inherent jurisdiction, Counsel suggested, that sensitive personal information, defamatory material or scandalous material would justify it. He asserted that in the present case the mistake in uploading the additional material was "not inconsequential" as it could lead to "serious or significant commercial prejudice". He argued that the additional material was "self-evidently commercially sensitive" in the contexts of market competition and public relations.

46. In replying submissions, Counsel for the CRO/Registrar did not argue that the High Court had no inherent jurisdiction to rectify the Register. In oral submissions Counsel suggested that it could only arise in "extreme circumstances", and gave as examples the inclusion of defamatory material or breach of privacy, or, as asserted to the be the reason in the *Air France* case, substantial additional Stamp Duty liability arising from a mistake in the document filed. Counsel observed that the in seeking to have the inadvertently filed documents expunged/removed the appellant was going much further than what was contemplated in *Air France*.

47. Counsel also relied on its written submission at para.5-7:

> "5-7 In that regard it might be observed that one of the very real oddities of the position adopted by the Appellant is that it seeks to achieve this by way of a court application in public and in circumstances where the papers grounding the application, which include full financial statements, may well be available for public inspection. Absent the sort of dramatic circumstances identified in *Gilchrist and Rogers v. Sunday Newspapers* [2017] 2 I.R. 284 there would not appear to be any obvious basis for restricting the public nature of the proceedings."

Counsel added to this in oral submissions by observing that if the court had inherent jurisdiction it could also make ancillary orders to protect the appellant in the court process, but the appellant had never sought ancillary protection such as in camera hearings or sealed affidavits.

48. In reply Counsel for the appellant argued that in the present case the rectification could only be achieved by removing pages 14-18 of the financial statements, or block redaction of these pages. He referred the court to the "historic practice" of the Registrar allowing a handwritten note to be put on file, which he submitted could be used to signpost the change to anyone inspecting the register, and in particular anyone who had inspected before the change.

Discussion

49. While it is true that the CA of 2014 in Chapter 17 has specifically addressed what recourse companies/directors may have for revising defective financial statements where there are mistakes or omissions in filings of financial statements and directors' reports in the CRO, there is no provision that explicitly deals with what powers, if any, the court may have in

such circumstances. It is also correct to say that there is no provision in the CA 2014 dealing with the specific situation where a small company *mistakenly* files fuller financial statements than are required of it, instead of abridged statements. Extensive though the CA 2014 Act is, it can be argued that it is not comprehensive. It is therefore at least arguable that, owing to the nature of its judicial function and constitutional role, the High Court has an inherent jurisdiction to intervene. I am influenced in this by the fact the Laffoy J. appears to have availed of an inherent jurisdiction to make corrective orders in *Air France* in 2007 and again *3V Transaction Services Limited* in 2008. I am also influenced by the fact that the High Court, in at least the 17 cases detailed by the CRO in 2017-2019, appears to have rectified the register since the CA 2014 came into force.

50. On the other side of the argument it is possible in my view to discern from the CA 2014 a legislative policy in relation to the Register which is to allow rectification in quite limited circumstances and in a limited way. In s.366 the pre-condition for correction/alteration is that the statutory financial statements or directors' report do not comply with the requirements of the CA 2014, either because information was omitted, or was incorrect or incomplete. The revision must comply with subs.(4) and (5).

51. Complementary to the filing requirements of companies is s.898 which empowers the Registrar "on receipt of a non-complying document" to serve a notice to that effect setting out in what respects the document is not compliant. This presumably is to give the non-compliant company an opportunity to comply by availing of s.366. The underlying policy is to ensure that companies comply with their filing requirements. The legislature has not gone further – as it might have done - by extending the ambit of s.366 and/or s.898 to other or even all errors in filing. In my view therefore if there is any inherent jurisdiction to rectify it is one to be exercised cautiously and only in compelling circumstances.

52. Even if we assume, for the purposes of the discussion, that such an inherent jurisdiction exists, and consider the circumstances that might justify its exercise in favour of an applicant, it is difficult to see how this assists the appellant. The facts in *Air France* and *3V Transaction Services Limited* would seem to demonstrate its use where (a) the B5 forms filed erroneously misstated the issued share capital, and (b) there was prejudice in that the error exposed the applicant company additional tax. Significantly the filings in those cases were erroneous or resulted in contradictory information being placed on the Register. They also may have resulted, if left unrectified, in the sort of 'serious or significant commercial prejudice' that counsel for the appellant suggested justifies intervention. There is a clear policy rationale for permitting the correction of materially inaccurate statements on the register, not simply in the interests of the company but in the interests of the public in having accurate information available to them. However no such rationale applies to the facts in the present appeal as there was no inaccuracy in the information filed by the appellant.

53. It is unfortunate that there is no detail available as to the reason for the application in each of the cases listed by the CRO, because this might give some insight into the circumstances that have arisen and which have persuaded the High Court to intervene in aid of applicants.

An example given by counsel which recommends itself is scandalous filings, although the phrases 'frivolous and vexatious' or 'abuse of the process' which are well understood by lawyers and the subject of extensive jurisprudence might be more apposite. A serious breach of privacy rights might also justify intervention. Common to these examples is that the rights of third parties are engaged and they may be entitled to vindication or protection. The filing of defamatory information is probably not a case where the court would be called upon to exercise an inherent jurisdiction as the Defamation Act 2009 expressly provides for applications to court to limit or restrain publication of defamatory material.

54. Counsel for the CRO suggested that it is a jurisdiction that should only be available in "extreme circumstances". While I am not sure that such a high threshold is warranted it does seem to me that *if* there is an inherent jurisdiction to correct erroneous information it is one to be used sparingly and limited to remedying manifest injustice.

55. For reasons that will become clear in addressing the third issue, I do not consider that any inherent jurisdiction that might exist could possibly extend to the granting of the relief sought by the appellant. Accordingly it is not necessary to decide definitively whether there is an inherent jurisdiction to rectify, or the parameters within which it might be exercised. In my view that is a decision best left over to a case with appropriate facts.

(c) Should such inherent power (if any) be exercised in the appellant's favour?

56. The only error in this instance was in filing complete statutory financial statements when the appellant would have been entitled to filed abridged accounts. There was nothing wrong *per se* with the financial statements filed, including the additional material at pages 13-18, and it was expressly permitted by virtue of s.277(2) which allows a company to do things that it is exempted from doing by another provision of the Act. The accounts were unaudited, but the director statements on page 7 laid the ground for exemption from audit under the small company regime; that is where I would have expected to see additional recitals/statements if the company intended to avail of the facility to file abridged accounts. There was no error in the documents filed, and that is the first ground upon which the appellant fails to satisfy me that the court should exercise any inherent jurisdiction to intervene.

57. Even if I am wrong in this, and the inadvertent uploading of the additional material is to be regarded as an error, I am far from satisfied that such error resulted in serious or significant commercial prejudice to the appellant, or that the appellant can otherwise meet the threshold for intervention by the court, even assuming an inherent jurisdiction to do so exists. Mr. Nangle's sworn concern relates to the commercially sensitive nature of the information, and in his second affidavit he refers to the appellant being anxious to ensure that "sensitive financial affairs of the Company" are not disseminated by being placed in the public domain. Mr. Nangle is an accountant in the accountancy firm engaged by the appellant. There is no affidavit from a company director or other officer deposing to the commercial sensitivity or other concerns. Nor was any application made to the High Court or this court for the affidavits to be sealed or for there to be hearings otherwise than in public on account of commercial sensitivity.

58. Moreover, the filing in the CRO took place on 22 October 2018, and relates to accounts in the 12 months ending on 30 April 2018. Mr. Nangle's second affidavit was sworn by leave of this court on 7 January 2020. Despite the intervening period of some 14 months the filing has only been viewed four times through www.cro.ie – twice by WeeCare UK Ltd, once by ASM Belfast (the appellant's accountants) and once through Law Library. If the financial affairs of the appellant for the relevant financial period were so sensitive further interest might reasonably have been expected. Admittedly the CRO also sells data to several bulk data providers, but there is no evidence as to whether over this 14 months the information said to be sensitive has been accessed by the appellant's competitors, or used to their competitive advantage. Had this occurred, or if the appellant had suffered or was at real risk of suffering financial or other loss by reason of the public access to the additional information, I have no doubt that this would have been deposed to on affidavit.

59. Accordingly if there is an inherent jurisdiction in the court to rectify the register, the appellant's case does not meet the threshold that might reasonably be said to apply, and this appeal must be dismissed. It is not therefore necessary on this appeal to be definitive on the second question, and it may be that the learned trial judge was correct in his reasoning and his conclusion that there is no inherent power in the court to rectify a mistaken filing, and that *if* there is a lacuna in the CA 2014 it is a matter for the Oireachtas, not the High Court.

Costs

60. As this appeal was heard remotely I will follow the practice of indicating what costs order I would propose the court make, subject to considering submissions from the parties if they seek a different order.

61. The High Court order says nothing about costs, and this is no surprise as the CRO did not participate and in advance had indicated that it had not objection to the orders sought if made pursuant to the inherent jurisdiction of the court. I propose no change to that order.

62. As to the costs of this appeal, under s.169(1) of the Legal Service Regulation Act, 2015 where a party is entirely successful in civil proceedings that party is entitled to its costs against the unsuccessful party unless "having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties including" the matters set out at (a)- (g) the court decides otherwise – in which case s. 169(2) requires the court to give reasons. Under (a) the court can consider "conduct before and during the proceedings".

63. The CRO provided a Letter of No Objection dated 1st October 2019 in advance of the appeal, on the basis that there would be no order as to costs made against it or the Registrar. The appellant's written submissions argued that this court could make the orders sought under s.366, and this prompted the letter of 24 January 2020 from Dr. McFadden on behalf of the respondent emphasising that the 'no objection' applied only if the appellant relied on inherent jurisdiction (in which case the only condition was that there be no costs order against the CRO or Registrar), and did not apply if s.366 was relied on. I have earlier in this judgment expressed concern that that condition was not respected by the appellant,

and in my view that CRO is not now bound by the position taken in those letters. However the position is further complicated by the fact that at the first hearing, at which the CRO was not represented by counsel or solicitor (although Dr. McFadden appeared out of courtesy to the court), the court itself raised the issue of whether the Registrar has an inherent power to rectify the register, and this led to an adjournment, a round of affidavits, the filing of written submissions on both sides, and a second hearing at which the CRO was represented by solicitor and counsel and participated. I note that both in its written and oral submissions counsel for the CRO addressed the s.366 issue, which arguably it should not have been required to do, and on that issue the appellant was entirely unsuccessful.

64. In these circumstances the costs order that I propose to make is that the appellant pay 50% of the costs and expenses of the respondent, to be agreed or in default of agreement to be adjudicated by a Legal Costs Adjudicator. If either party wishes to contend that some different costs order should be made it may, within 28 days of this judgment, make a written submission to that effect, not to exceed 1,000 words. Any such submissions should be sent to the other party's solicitors at the same time as being sent to the Court of Appeal Office and the other party will then have a period of 28 days to respond, again subject to a 1,000 word limit. In the absence of any submissions within the time indicated, the Court will proceed to make an order in the terms indicated. If the issue of costs is contested, the Court will issue its ruling electronically after considering the submissions made to it.

In circumstances where this judgment is being delivered electronically, Ní Raifeartaigh J and Collins J have indicated their agreement with it.