THE HIGH COURT

JUDICIAL REVIEW

[2025] IEHC 16

[Record No. 2024/118 JR]

BETWEEN

REGISTRAR OF COMPANIES

APPLICANT

AND

GREENAY LIMITED

RESPONDENT

THE HIGH COURT

JUDICIAL REVIEW

[Record No. 2024/119 JR]

BETWEEN

REGISTRAR OF COMPANIES

APPLICANT

AND

KITCHEN INNOVATIONS LIMITED

RESPONDENT

Judgment of Mr. Justice Heslin delivered on the 15th day of January 2025

Introduction

1. There is significant overlap as regards the facts in both cases and the legal issues which arise are identical. Both matters were heard together on 6 December, 2024 and concern orders made by the District Court extending, for a *second* time, the period in which the relevant company could deliver annual returns to the applicant (otherwise "the Registrar"). The difficulty with a second extension is clear when one refers to the relevant legislation.

The legislative position

2. Section 343 of the Companies Act, 2014 (the '2014 Act') requires a company to make an annual return no later than 56 days after the company's "annual return date" (which is defined in s.345 of the 2014 Act).

S. 343

3. Section 343 (5) states:

"The court, on an application made (on notice to the Registrar) by a company, may, if it is satisfied that it would be just to do so, make an order extending the time for the purposes of subsection (2) or (3) in which the annual return of the company in relation to a particular period may be delivered to the Registrar; only one such order may be made as respects the particular period to which the return concerned of the company relates."
(emphasis added).

4. Section 343 (7) makes clear that:

"…the court for the purposes of subsection (5) shall be the District Court for the District Court district where the registered office of the company is located or the High Court."
(emphasis added).

5. I pause to say that the foregoing makes crystal clear that only *one* order may be made extending time for the delivery to the Registrar of an annual return.

O.93B

6. Order 93B of the District Court Rules ("DCR") provides for an application to Court under s.343 of the 2014 Act, which application must include a statement that no *previous* order has been made by the District Court under s.343(5) in respect of the company as regards the period concerned.

O.39 r.5

7. Order 39 r.5 concerns "enlargement or abridgement of time" and states:

"(1) Subject to sub-rules (3) and (4), the Court may, on any terms it considers reasonable, enlarge or abridge any of the times fixed by these Rules, or by a prior order of the Court, for taking any step or doing any act in any civil proceedings." (Emphasis added).

8. Order 39 r.5 (3) goes on to state:

"(3) Sub-rules (1) and (2) do not apply:

(a) To any period of time fixed by an Act of the Oireachtas…".

9. Given the above, it is clear that O. 39 r (3) DRC cannot be employed to enlarge time pursuant to s. 343. In the manner presently examined, the respondents sought to do just this.

Relevant facts – Greenay Ltd

10. Having touched on the statutory context, it is useful to look at certain relevant facts which emerge from the evidence, beginning with the factual position in relation to Greenay Ltd ("GYL").

11. GYL made an application to the District Court in accordance with s.343(5) of the 2014 Act seeking an order extending the time for the delivery to the Registrar of the company's annual return for the period 01 July 2020 to 30 June 2021. The said application came before the Court on 19 July, 2022.

Order extending time (30 June 2021 returns)

12. The District Court made an order on 19 July, 2022 which, in relevant part, stated that the Court:

"BEING SATISFIED THAT no previous order has been made by the District Court under s.343 (5) of the Act in respect of the company as respects the period concerned.
BEING SATISFIED THAT it would be just to do so
HEREBY ORDERS pursuant to s.343 (4) of the Companies Act, 2014 that the time within which the annual return of the company is relation to the period of 01/07/2020 TO 30/06/2021 may be delivered to the Registrar of Companies be and is hereby extended up to and including 16/08/2022…"

13. It is common case that GYL delivered the annual return in question to the Registrar in accordance with the extended period granted by the District Court's 19 July, 2022 order. In other words, the foregoing is an example of the provisions of s. 343 being invoked and applied appropriately.

14. On 25 May 2023, GYL made an application to the District Court pursuant to s.343 (5) of the 2014 Act for an order extending time for delivery of its annual return for the year to 30 June, 2022.

25 July 2023 - First Order extending time (30 June 2022 returns)

15. On 25 July, 2023, the District Court made an order extending time by up to 28 days, namely, up to and including 22 August, 2023.

16. It is common case that GYL failed to deliver the relevant Return within the said extended period.

22 November 2023 - Second application to extend time (30 June 2022 returns)

17. On 22 November, 2023, GYL made a further application to the District Court in relation to the same annual return. The relevant *ex parte* notice made clear that GYL was seeking:

> *"…an Order pursuant to Order 39 Rule 5 of the District Court Rules enlarging the times made in the Order dated 25 July, 2023 for 3 days or more extending the time for the purpose of s.343(2) of the Companies Act, 2014 in which the annual return of the company in relation to the period 9 November, 2022 together with the accounts for the period 1 July, 2021 to 30 June, 2022 may be delivered to the Registrar of Companies up to 8th December, 2023".*

18. I pause to say that, on any objective analysis, this was a *second* application for an order extending time in relation to the same returns. It was an application made by GYL despite the explicit provisions of s.343(5) which, in relevant part, states that *"only one such order may be made as respects a particular period to which the return concerned of the company relates".*

19. Insofar as this second application purported to rely on O.39 r.5 of the DCR, it will be recalled that O.39, r.5 (3) made clear that the District Court had no power to enlarge *"any period of time fixed by an Act of the Oireachtas".*

20. It is common case that the learned District Court judge made clear on 22 November, 2023 that, if the applicant objected to the application, the Registrar should be represented in Court.

23 November 2023 - Registrar's verbal objections

21. On 23 November 2023 Mr. David McFadden, solicitor for the applicant, attended the District Court and *"…conveyed to the Court the Registrar's objection to the application on the grounds of absence of jurisdiction"* (see para. 37 of Mr. McFadden's affidavit sworn on 23 January 2024).

Error averred to

22. On 4 December 2023, the solicitor of GYL swore an affidavit in the context of seeking a second extension of time pursuant to s. 343 of the 2014 Act, wherein the following averments were made: -

> *"5. Greenay Ltd. is a very small new start-up courier company operating in Rathcoole with a very modest turnover below €80,000 per annum. It is a micro company being a*

subset of the small company and if the court is not minded to grant the order sought here the company will need to appoint statutory auditors for at least 2 years in circumstances that this will be prohibitively expensive and also in circumstances that I personally will in all probability be held liable to discharge for late filing fees arising and statutory auditors fees in excess of €10,000 in circumstances that I personally omitted to afford the company sufficient time to file the outstanding annual returns and failed to ask the court for liberty to apply if I had a difficulty. Unfortunately, it was an error on my part which is most sincerely regret it (sic) but the company is being sanctioned and penalised as a result of my actions as the solicitor engaged in the application and that another solicitor had left the practice at the time and my work load was doubled and this very important issue was missed by way of the timeline.

6. As solicitor for the Applicant Company I take full responsibility and beg the indulgence of the court to grant a very short enlargement of the time to allow the filing of the 2022 annual return which is now ready to be electronically filed directly into the registrar of companies along with the statutory fee of €20 if the court is minded to grant the order sought".

23. In a world of human frailty errors can and frequently do occur. One could have nothing but sympathy, on a personal level, for a hard-working professional who not only acknowledges that an error was made but accepts full responsibility for the consequences. However, and for the purposes of the present applicant, it is important to make clear that nothing in s. 343 of the 2014 Act entitles the Court to grant a *second* extension of time on the basis of an *ad misericordiam* argument, however meritorious.

4 December – Registrar's letter of objection

24. On 4 December, 2023, the applicant sent a detailed letter of objection to the solicitors for GYL in relation to the application which was then listed for 5 December, 2023. The said letter referred *inter alia* to s.343(5); O.39 r.5 of the DCR; and O.93(b) of the DCR, concluding:

"*We are advised that O.39 r.5 cannot avail an applicant such as the company who seeks a second order seeking to extend the time for delivery of an annual return of the Company in relation to a particular period.*

- *Section 343 (5) of the Companies Act, 2014 is clear that only one order extending time for delivery of an annual return of the company in relation to a particular period may be made. An order was made in respect of the First Application. We are advised that the court lacks jurisdiction to make an order in respect of the Second Application.*
- *The position under s.343(5) of the Companies Act, 2014 cannot be qualified or amended by secondary legislation such as the District Court Rules, including O.39 r.5.*
- *Order 39 r.5 makes clear that it is not available to extend a period of time fixed by an Act of the Oireachtas. Equally, and for the same reason, it*

cannot be available to overcome the fact that s.343(5) of the Companies Act, 2014 only allows one order in relation to the Relevant Period.

- *The District Court Rules are themselves clear that only one order may be made in relation to a particular period (Order 93B Rule 2(2)(d).*
- *The civil proceedings under record number 2023/02432 which led to the order of 25 July, 2023 had the sole purpose of seeking an extension of time pursuant to s.343(5) CA 2014. Those civil proceedings concluded (at the latest) when the extended time delimited by the court's order expired.*
- *The relief now sought is not, in reality, an extension of time "for taking any step or doing any act in any civil proceedings". It is an extension of time for taking a step under the Companies Act, 2014 which extension is sought in civil proceedings. On the proper construction of O.39 r.5, we are advised that O.39 r.5 does not cover the Second Application".* (Emphasis in original).

25. The foregoing was then, and remains, a correct analysis of the legal position. Despite this, GYL pressed its application to the District Court on 5 December 2023 and Counsel for the company persuaded the Court to grant a *second* order extending time.

5 December 2023 - Second Order extending time (30 June 2022 returns)

26. The order made by the District Court on 5 December, 2023 stated *inter alia* the following:

"*The matter being on notice to the Registrar of Companies.*

The Registrar of Companies submitting the Court had no jurisdiction to make this Order and advancing no position as regards any prejudice to the Registrar on the facts of this case if the order was to be made and the court was to rescind jurisdiction.

THE COURT HAVING READ THE AFFIDAVIT grounding the application, HAVING HEARD what was offered on behalf of the company and on behalf of the respondent, BEING SATISFIED THAT the court has jurisdiction in this civil proceeding to make an order under Order 39 rule 5 of the District Court Rules in lodging the time for action to be taken on foot of the original order of the court made on the 25th day of July, 2023. And the court having determined jurisdiction to deal with the matter and there being no facts further advanced and that it would be just to do so on the facts of this case.

HEREBY ORDERS pursuant to Order 39 rule 5 of the District Court Rules that the time set out in the original order dated the 25th day of July, 2023 is hereby enlarged to a period of 48 hours up to close of business at 5.30 pm at the office of the Registrar of Companies on the 7th day of December, 2023…" (emphasis added).

Certain facts

27. I pause to say that the particular facts in this case include the following. As of 4 December, 2023, GYL had been furnished with a detailed and entirely correct analysis of the statutory position, in particular, that the District Court lacked jurisdiction to make the order sought. Despite this, GYL insisted on running its application and persuaded the District Court that it enjoyed a

jurisdiction which it does not have. In other words, GYL led the District Court into error. Nothing in this judgment is intended to suggest that GYL or its legal representatives were acting in anything other than in a *bona fide* manner. However, this does not alter the fact that, despite being 'squarely' on notice of the correct legal position, GYL insisted on bringing an application which should not have been brought and convinced the District Court to make an order it lacked jurisdiction to make.

Change of stance by GLY

28. It cannot be denied that the 5 December, 2023 order would not have been made had GYL accepted, at that stage, an analysis of the legal position (furnished in writing by the Registrar on 4 December 2023) which was entirely correct.

29. Furthermore, and in stark contrast to the stance adopted by GYL on 5 December, 2023, the position it adopted during the hearing before me was to *accept* the Registrar's analysis of the legal position.

30. As their Counsel put it in oral submissions, the respondents "*do not to take any different view"* to the applicant as regards s.343 of the 2014 Act. Counsel for the respondents further stated: *"Obviously, the statutory provision takes precedence"* and *"a District Court rule cannot take precedence over the statutory provision".*

Then v. Now

31. At the risk of stating the obvious, had the respondents acknowledged, on 5 December 2023, what they *now* acknowledge:

- the District Court would not have been led into error;
- no order would have been made *ultra vires*; and
- there would have been no submission and registration of annual returns pursuant to an invalid order.

Consequences for failure to comply with s. 343

32. There are consequences for a company's failure to deliver annual returns within the time limits provided for in s. 343 of 2014 Act. In his affidavit sworn on 23 January 2024 on behalf of the applicant, Mr. David McFadden, solicitor of the Companies Registration Office ("CRO") avers *inter alia*: -

> *"There are certain automatic consequences such as the loss of a small or micro company audit exemption for a period of two years."* (see para. 13);
>
> *"Section 352(2) of the 2014 Act provides for an exemption (generally known as the audit exemption) by which a small or micro company is not required under s. 347 of the 2014 Act to annex to its annual return financial statements together with a statutory auditor's report on those financial statements. The audit exemption is lost under s. 363 of the 2014*

Act where a company fails to deliver its annual return in accordance with s. 343 of the 2014 Act." (see para. 23);

"There are certain other consequences which involves the enforcement function of the CRO. The CRO can take certain measures to deal with companies who fail to file their annual returns, including prosecution of the company or directors, or striking the company off the register." (see para. 14).

Triggered

33. It seems uncontroversial to say that the foregoing consequences are 'triggered' by the company's failure to deliver annual returns prior to the expiry of the extension of time which the company sought and was granted in the *first* application made pursuant to s. 343(5) (being, of course, the one and only extension permissible).

Prejudice

34. In my view, an inability on the part of GYL to benefit from an invalid order does not give rise to any *prejudice.* Rather, it simply places the company in the self-same position it was, and ought to have been, prior to the making of the *ultra vires* order. In other words, it places GYL in the same position as any company obliged to comply with s. 343 of the 2014 Act.

Benefit

35. I mention the foregoing at this point because, despite *now* accepting that the District Court's 5 December 2023 order was made without jurisdiction, GLY's opposition to the applicant's claim is very obviously made with the objective of 'holding on' to the *benefit* of the 5 December 2023 order. I will return to this topic presently but, for the moment, it is useful to continue to conclude the analysis of relevant facts, in chronology.

Order valid on its face

36. At all material times since the District Court made its order on 5 December 2023 there has been an order extending time with regard to the returns (to 30 June 2022) which was valid on its face.

6 December 2023 – returns delivered by GYL

37. With the benefit of the District Court's order of 5 December 2023, the company delivered the annual return (for the year ending 30 Jun 2022) to the Registrar on 6 December 2023. The annual return which was delivered on 6 December was *prima facie* in accordance and in compliance with the provisions of the 2014 Act, having regard to the then extant order extending time.

Delivered and registered

38. Under s. 887 of the 2014 Act, the applicant is required by statute to maintain a register in which *"notices or other documents, information or things <u>delivered</u> in pursuance of this Act to the*

Registrar are to be registered or recorded" (emphasis added). Later in this judgment I will look more closely at s. 887, but it is common case that the annual returns delivered by GYL, on 6 December 2023, were subsequently *registered* by the applicant and have been available 'on-line' since 12 January 2024.

39. With respect to the applicant's registration of the annual return in question, Mr. McFadden makes *inter alia* the following averments in his 12 June 2024 affidavit: -

> *"…the Registrar and/or the Companies Registration Office does not regard itself as having a general discretion to refuse to register returns which are ostensibly filed in accordance with law. The only basis on which the Registrar can refuse to register returns, in my view, is that they are not filed in accordance with law. The Registrar had no discretion to refuse to register the return filed on behalf of* [GYL] *on the basis that it was not filed in time, because it was required to comply with the District Court order extending the time for filing, pending the outcome of any challenge to that order"* (emphasis added).

40. As the foregoing makes clear, the Registrar has never acquiesced, be that in relation to (i) the making of the impugned order; or (ii) the registration of the annual returns pursuant to same. This is a topic which I will return to presently. Before doing so, it is appropriate to look at the factual position in the second case.

Kitchen Innovations Limited (KIL)

41. The relevant facts with respect to the extensions of time sought by KIL can be summarised as follows.

42. On 10 November 2022, KIL made an application to the District Court seeking an extension of time in which to deliver annual returns. As originally drafted, the application referred to annual return dates of the 5th November 2020 and 5th November 2021, respectively.

43. The company provided a copy of the application papers to the CRO which noted that if an application was not also made in relation to the 2022 annual return, it would likely be late by the time the Court process was concluded. This is in circumstances where 56 days after 5 November 2022 would expire on 31 December 2022.

44. In light of the foregoing, the company amended its application papers such that the application which proceeded was to extend time for the delivery of annual returns in respect of the years ended 30 April 2020; 30 April 2021; and 30 April 2022 (the annual return date being 5 November in each of those 3 years).

45. On 18 November 2022, the CRO furnished a letter of no objection. As is standard, the Registrar also confirmed that no previous application had been made by KIL for an extension of time under s. 343(5) of the 2014 Act in respect of the periods/annual returns in question.

6 December 2022 - First Order extending time

46. On 6 December 2022, the District Court made an order extending time for the delivery of the aforesaid annual returns, up to and including 5 January 2023. The said order recorded *inter alia,* and correctly, that the Court was satisfied that *"no previous order has been made by the District Court under s. 343(5) of the Act in respect of the company as respects the period concerned"*, going on to hold that *"it be just to do so".*

47. On 4 January 2023, KIL delivered their 2020 and 2021 returns. It is common case that KIL did not file the 2022 annual return by 5 January 2023.

22 September 2023 – second application to extend time (2022 returns)

48. On 22 September 2023, KIL issued a second application to the District Court seeking to extend time for the delivery of the 2022 return. This application purported to rely on O. 39 r. 5 of the District Court Rules.

Constraints / complexities

49. In an affidavit sworn on 15 September 2023 grounding the second application for an extension of time to deliver the 2022 annual return, Mr. Jonathon Hayes, director of KIL averred *inter alia* the following: -

> *"…due to significant operational constraints and exceptional complexities for that accounting period, the company was unable to file its return for 2022. In particular this period encompassed the collating and adjusting of three years financial data, which was a substantial workload that required a thorough and diligent approach. Further, the 2022 accounts, due to the incorporation of the examinership accounting processes, presented an added layer of complexity, over and above a standard set of accounts. In hindsight the allocated time was inadequate to confidently ensure the precision and reliability of the reporting within the scope of these complexities. In addition to this, the extended period encompassed the holiday season of Christmas and New Year, resulting in a reduced number of available working days compared to any regular month. This has further exacerbated the strain on our available resources, hindering our ability to comply with the original deadline.*
>
> *5. I say that if the Court did not grant the application, it would cause inequitable hardship to the company, its directors and employees. The company has fought hard to continue to trade and wishes to do so, and file its returns."* (emphasis added).

***Ad misericordiam* argument**

50. Comments which I made earlier apply equally here. Regardless of the reasons why a statutory deadline was missed, and irrespective of the strength of an *ad misericordiam* argument,

the Oireachtas has not conferred upon the Courts any jurisdiction to grant a *second* extension of time for the delivery of the same annual return.

Registrar's objections

51. The applicant objected to the said application and furnished a detailed letter of objection to the solicitors for KIL, which was also copied to the chief clerk of the relevant District Court office. The said letter stated *inter alia*:-

> *"The court can only make one order for a particular financial period. The court made that order and the order was delivered to the registrar and partially acted on. The order was granted with an extension period up to and including 05/01/2023, it then expired after this date. The order has expired and is spent, it is unclear how the within application can proceed. The power to make an order to extend time comes from an act of the Oireachtas (the Companies Act 2014). Section 343(5) clearly states that "…only one such order may be made as respects the particular period to which the return concerned of the company relates." This clearly means that the court cannot make any further orders in relation to this application once an order has been made and is now spent. The provision in the District Court Rules to which you are referring relates to circumstances where the court is dealing with live proceedings that are before the court. In this case, s. 343(5) of the Companies Act 2014 allows the court to make <u>one</u> order to extend time. That order was made, the order was acted on and the order has expired. The registrar **<u>objects strenuously</u>** to an application for a further order in these circumstances."* (emphasises in original).

52. At para. 41 of the affidavit sworn on 23 January 2024 on behalf of the applicant, Mr. McFadden avers that the CRO was not in a position to have staff attend the District Court on 19 October and, due to oversight, was not on notice of the adjourned date of 7 November 2023. Nothing turns on the foregoing, however. I say this in circumstances where the following is perfectly clear.

53. Despite being 'squarely' on notice of the correct legal position (specifically, that the District Court had no jurisdiction to grant a second extension of time) KIL insisted on moving such an application.

54. Whilst the District Court received a copy of the Registrar's letter of objection, it is clear that the Court was persuaded by the respondent that it enjoyed a jurisdiction which it does not enjoy. In short, KIL lead the District Court into error.

7 November 2023 – Second Order extending time (2022 returns)

55. On 7 November 2023, the District Court made an order *"enlarging the time within which the annual return of the company in relation to the period from 1st May 2021 and the 30th April 2022 may be delivered to the Registrar of companies, to the 16th December 2023".*

56. The said order was made by the Court having read: the motion of 15 September 2023; the grounding affidavit of the director of KIL, Mr. Hayes; the CRO's letter of objection dated 25th September 2023; and *"what was offered by the solicitor for the company"*.

9 November letter by KIL's solicitors

57. By letter dated 9 November 2023, KIL's solicitors wrote to the CRO stating *inter alia* the following:-

> *"When the matter came before the court we advised the judge that you were on notice of the original motion, but not on notice of the adjourned date, due to an oversight in our office. Irrespective of this, the court decided to proceed with the application.*
> *We applied to the court as per the grounding document, and submitted your letter of objection dated the 25th September last for consideration by the court. The judge accepted our position, that we were not seeking a new Order under s. 343 of the Companies Act, or the corresponding District Court Rules, but were seeking to give effect to the order of Judge Gearty and enlarge the time within that order. The judge agreed with our position, and granted the order sought."* (emphasis added).

58. The foregoing gives an insight into the manner in which the District Court was led into error by KIL. Irrespective of how described by KIL, the substance of the application made, and the nature and effect of the order granted, was to extend for a *second* time the period in which the same annual return was to be delivered.

Change of attitude by KIL

59. I pause at this juncture to say that the attitude of KIL when it persuaded the District Court to grant a second extension of time is starkly different to the attitude adopted during the hearing before me. Just as with GYL, there has been a *volte face.*

60. In November 2023, KIL refused to accept that the District Court lacked jurisdiction to grant a second extension of time and lead the District Court into error. At the hearing before me, KIL adopted an entirely different position, accepting that the District Court had and has no jurisdiction to make the 7 November 2023 order.

61. Despite the foregoing, KIL (similar to GYL) seeks to retain the benefit of an *ultra vires* order.

"you must comply"

62. KIL made explicit that the applicant was obliged to comply with the District Court's order of 7 November 2023 extending time. In a letter, dated 29 November 2023, KIL's solicitors wrote to the CRO stating *inter alia*:-

> *"As matters stand, there is an order from the District Court extending the time and you must comply with that order."* (emphasis added).

63. On 13 December 2023, the applicant's solicitor, Mr. McFadden, spoke by telephone with the solicitor for KIL. At para. 7 of Mr. McFadden's 12 June 2024 affidavit he makes the following averments:-

> *7. I recall the telephone conversation which is referred to. I recall that I made the call to Mr. McGann and that the purpose of making this call to Mr. McGann was to inform him that it was very likely that the registrar would, subject to advice from the Attorney General (over which advice I do not waive privilege), be taking judicial review proceedings in the High Court seeking to quash the District Court order made by Judge Fahy in Galway on 7 November 2023. I made absolutely clear to Mr. McGann in the course of the telephone call that the registrar was strongly considering seeking a judicial review of the order of the District Court of 7 November 2023 which is the subject of these proceedings, as well as of the order of Dublin Metropolitan Court in the other case. I did indicate that, on the basis of legal advice taken by the registrar (over which legal advice the registrar does not waive privilege), I agreed with Mr. McGann that the registrar was nonetheless obliged to comply with the District Court order of 7 November 2023 and to register returns, pending the outcome of any judicial review proceedings. This position was articulated by Mr. McGann both in the course of that telephone call and in his letter of 29 November 2023…"*
> (emphasis added).

64. On 18 December 2023, KIL's solicitors wrote to the CRO taking issue with a late penalty notice, stating *inter alia*:-

> *"The CRO can't have it both ways i.e. accept the order but yet keep it open to penalise my client pending the judicial review. The order is either accepted in its entirety or it's not".*

65. At para. 8 of his 12 June 2024 affidavit, Mr. McFadden avers that when he became aware that other staff in the CRO had sought to impose a late filing fee on the respondent when it attempted to file returns on foot of the 7 November 2023 order: *"On my directions, a late filing fee was not then applied as to impose such a fee would have been inconsistent with the District Court order which continued to stand pending the outcome of any judicial review proceeding".*

66. In light of the foregoing, there was never any acquiescence on the part of the Registrar, either as regards (i) the making of the order extending time on a second occasion; or (ii) as regards the registration of the returns which KIL delivered pursuant to the order of 7 November 2023. Not only was the order valid on its face, KIL insisted on compliance.

The respondents' position

67. Having looked at the factual position, it is appropriate to examine the respondents' opposition to the claim. Both respondents object to the grant of the reliefs sought and both advance the same grounds in that regard. The respondents' opposition to relief can be summarised as follows: -

- The applicant is precluded from resiling from the acceptance and registration of the annual returns, by virtue of her actions and/acquiescence in the filing/registration of same;
- The respondents deny that the annual returns were filed pursuant to the District Court's orders, as these only *permitted* the annual returns to be delivered;
- The applicant cannot approbate and reprobate;
- Having accepted delivery of and having registered the annual returns, the applicant is precluded from contending that they were not delivered in pursuance of the 2014 Act;
- Having accepted delivery of and having registered the annual returns, the applicant is precluded from seeking any form of relief as would impugn her own actions;
- The Court in exercise of its discretion should decline to grant any relief;
- The applicant could have, upon receipt of a document (including a return) which she deemed to be non-compliant with the Act, served upon the respondents a notice pursuant to s. 898 of 2014 Act and proceeded pursuant to the terms of the Act;
- The applicant could have declined to act in a manner deemed by her to be inconsistent with the statutory scheme;
- Quashing the District Court orders would be futile and lack utility;
- To grant the relief sought would impugn the integrity of the Register maintained by the applicant and would be contrary to law;
- The High Court lacks jurisdiction;
- If this Court possesses jurisdiction to rectify the Register maintained by the applicant, the facts and circumstances fall short of such as would justify the exercise of such jurisdiction.

68. As I touched on earlier, during the hearing before me Counsel for the respondents took no issue with the applicant's analysis of the legal position. In substance, there was an acknowledgment that the District Court lacked jurisdiction to make the orders impugned in the present proceedings.

69. Despite the foregoing, the respondents contend that the appropriate response to the present application should be to refuse each of the relief sought at paras. (i), (ii) and (iii) of s. (d) of the statement of grounds and, instead*, "to deliver a judgment with respect to the correct interpretation of s. 345 of the 2014 Act and its impact on the jurisdiction of the District Court to extend time more than once".*

70. In the alternative, it is submitted that the Court should confine itself to relief by way of a declaration. As Counsel for the respondents submitted, *"the third option is to grant certiorari and the respondents' concern is the use to which the applicant might wish to make of that, in the context of seeking reliefs (ii) and (iii)"*.

71. In short, the core concern on the part of the respondents is to keep the *benefit* of the impugned orders.

Discussion and decision

72. Only one extension of time was permitted, but the respondents insisted on applying for a second extension in the 'teeth' of objections by the applicant.

73. The respondents now accept what they were previously told by the applicant (but refused to acknowledged when they led the District Court into error), namely, that the District Court had no jurisdiction to make the orders which they persuaded the District Court to grant.

Ultra vires orders

74. In *Pepper and Finance Corporation (Ireland) DAC v Doyle & Ors* [2023] IEHC 662, Mr. Justice Simons stated:-

> *"18. It is a canon of statutory interpretation that except insofar as the contrary intention appears, the general gives way to the specific. This canon is sometimes referred to by the Latin maxim* generalia specialibus non derogant. *Here, the Circuit Court Rules provide, at Order 36, that a decree or judgment shall be in full force and effect for a period of twelve years. This is expressed as a statement of principle. It is not defined by reference to the "doing of any act" by a party and is thus not affected by Order 67.*
>
> *19. The general provisions of Order 67 must yield to the specific provisions of Order 36. A general power to enlarge the time appointed for the "doing of any act" cannot be press-ganged into service to prolong the currency of a decree or judgment beyond the twelve years prescribed. Were it otherwise, the object of Order 36 would be defeated. The object is to delimit the effective period of a decree or judgment."*

75. Employing both the analogy and specific phrase used by the learned judge, O. 39, r. 5 of the District Court Rules simply cannot be 'press-ganged' into overriding and undermining an explicit provision in an act of the Oireachtas, specifically s. 343(5). The provisions of the Act take precedence and, in the present case, the *ultra vires* act is manifest (i.e. making a second order to extend time is explicitly ruled out by s. 343(5) which states that *"only one such order may be made"*).

76. During the course of oral submissions on behalf of the respondents, it was made clear that *"we're not asking this Court to hold that the two orders were properly made"*. In substance, there is an acceptance of the undoubted fact that the orders were made *ultra vires*.

Purpose and effect

77. An analysis of the evidence demonstrates that the *purpose* of each application to the District Court for a second extension was to enable the delivery to and registration by the CRO of annual returns outside the time limit permitted by the Oireachtas.

78. Similarly, the direct consequence or *effect* of the making of both *ultra vires* orders was, in fact, the delivery to and registration by the CRO of annual returns which were not provided within the time limits permitted by s. 343 (i.e. returns which would neither have been provided, nor registered, but for the *ultra vires* orders).

Lack of jurisdiction

79. It is fair to say that much of the respondents' submissions focused on the argument that this Court lacks jurisdiction. The principal authority relied upon by the respondents is the Court of Appeal's decision in *Wee Care Limited v Companies Registration Office* [2020] IECA 266 ("*Wee Care*"). With reliance on *Wee Care,* the respondents submit that the applicant has failed to establish that this Court enjoys a jurisdiction to grant the relief sought at (ii) and (iii) of s. (d) of the statement of the grounds.

80. With respect, the respondents' reliance on *Wee Care* seems to me to be entirely misplaced. The very first paragraph of the judgment (of Haughton J.) illustrates that the Court of Appeal was dealing with a fundamentally different factual position: -

> *"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."*

81. The facts in the present case are entirely different. *Wee Care* was not concerned with filings which were made *out* of time. Rather, the case related to financial statements which were filed *within* time, but which the company sought to replace with alternative statements.

Inherent jurisdiction

82. It was against this very different factual backdrop that, from para. 49 onwards of the judgment, the Court of Appeal analysed arguments for and against the existence of an inherent jurisdiction on the part of this Court in respect of revising defective financial statements filed, within time, in the CRO. For the reasons explained, the Court of Appeal did not find it necessary to determine the question of whether such an inherent jurisdiction exists.

83. The respondents lay particular emphasis on certain passages of the *Wee Care* decision, including para. 54, wherein Mr. Justice Haughton stated:-

> *"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."

84. The gravamen of the respondent's submission is that no jurisdiction to intervene has been established and that, even if this Court does enjoy an inherent jurisdiction to grant the relief sought at (ii) and (iii), the circumstances in the present case do not warrant the exercise of that jurisdiction.

85. What the respondents' submissions ignore is that the facts and circumstances in the present case are utterly different to those in *Wee Care*. Here, the issue is not the correction of "erroneous information" filed within time. Rather, this Court is dealing with annual returns which were delivered by the company and registered by the CRO on foot of orders which were made *ultra vires*. Wholly unlike the position in *Wee Care*, registration of the relevant returns was the 'fruit' of orders made without jurisdiction. The relief sought at (ii) and (iii) concern the undoing of steps which were taken as a direct result of *ultra vires* orders.

Jurisdiction

86. Rather than the issue being whether there exists or not an inherent jurisdiction to direct the CRO to *replace* statements, filed within time, these proceedings concern the undoubted jurisdiction to grant relief where a decision is found to have been made unlawfully.

87. The principles which apply to the exercise of the latter jurisdiction were described in this Court's decision in *Tristor Ltd. v An Bord Pleanála (no. 2)* [2010] IEHC 454 ("*Tristor*") which arose in the context of decision - making in the planning context. Clarke J. (as he then was) stated:-

"*3.1.0. There will, of course, be a whole range of circumstances in which the courts may have to consider the knock-on effect of a finding that a particular decision in the planning process is invalid. Each such case is likely to turn both on its own facts and the precise statutory issue with which the court is concerned. However, it seems to me that the overriding principle ought to be that the court should do its best to ensure that parties do not inappropriately suffer or, indeed gain, by reason of invalid decision making and that, insofar as may be possible so to do both on the facts and within the relevant statutory framework, the situation should be returned to where it would have been had the invalid decision not been taken. The extent to which it may be possible to achieve that overall principle is likely to vary significantly from case to case*." (emphasis added).

Gain

88. Having rejected the correct analysis of the legal position put forward by the CRO, and having persuaded the District Court to make orders, which the applicants now accept were made *ultra vires,* the applicants nevertheless seek to benefit from those orders. If this Court were to refuse the reliefs sought it would be to permit the respondents to *"gain, by reason of invalid decision making",* contrary to the principles articulated in *Tristor.*

89. During the course of oral submissions the phrase *"unscrambling the egg"* was used more than once, with Counsel for the respondents repeatedly submitting that the Court cannot and should not attempt to. Not only does this Court enjoy a jurisdiction to 'unscramble' this particular 'egg', it seems to me that it would run contrary to established principle for the Court *not* to do so.

90. To grant each of the reliefs sought is to return the situation *"to where it would have been had the invalid decision not taken place"* in each case, consistent with the *Tristor* principles. Indeed, I can see no lawful basis for *not* 'unravelling' the direct consequences of invalid orders made at the applicant's insistence. Furthermore, doing so is entirely straightforward.

91. In other words, this is not one of those situations where, consequent upon a decision which was much later found to be invalid, a whole series of steps were taken which it would be impossible or unjust to 'undo', in light of, say, actions taken by third parties in reliance on the impugned order.

92. In the present case, the respondents used *ultra vires* orders as the basis for delivering annual returns which, but for those orders, were out of time and could neither have been delivered nor registered pursuant to the 2014 Act. The relief at (ii) and (iii) simply returns the situation the position to that which pertained *prior* to the making of invalid orders. There is no practical difficulty in achieving this, nor have the respondents furnished any evidence to suggest any difficulty.

Public policy

93. In submissions, the respondents refer to the public policy of allowing third parties to have confidence that they can rely on documents remaining on the register. With respect, that submission fails to engage with the very obvious public policy in legislation being complied with. Both of these applicants induced the District Court to make orders in breach of s. 343(5) and seek, by means of their opposition to these proceedings, to hold on to the benefit. This seems to me to run just as contrary to the public policy in ensuring statutory compliance, as it is contrary to the principles articulated in *Tristor*.

Discretion / Acquiescence

94. A key aspect of the respondents' submissions is to contend that the applicant exercised *discretion* by accepting the annual returns and directing her staff to register same, thereby making the returns available to the public. In oral submissions it was contended that *"whether you characterise the discretion of the applicant as a broad or limited discretion, the applicant took steps on foot of these orders"* and the relief sought is opposed on this basis. Similarly, and under the heading *"the applicant cannot approbate and reprobate"* the following submission is made:-

> *"24. The aforesaid return has been entered into the register kept by the applicant and maintained by the applicant in accordance with the provisions of the Companies Act, 2014 and the applicant having so registered the return has acquiesced in and has in the exercise of a statutory discretion agreed to the said registration.*
>
> *25. In the alternative the applicant is precluded from disputing the acceptance of the aforesaid annual return and the registration of same in the records kept by the applicant*

pursuant to the provisions of the Companies Act, 2014 by virtue of her actions and/or acquiescence in the filing of the said return… and/or their registration… and/or the applicant is precluded from resiling from her acceptance and registration of the said returns…

26. Having accepted the delivery of the said accounts and having registered same, the applicant is precluded from contending that the said return was not delivered in pursuance of the Act". [See written legal submission by GYL].

The Registrar's *function*

95. With regard to the foregoing, the applicants have not pointed to a single authority to support the proposition that the applicant had any discretion to refuse to accept or register the annual returns in question.

96. The applicant is a creation of statute and her very "*function"* is to register documents delivered in pursuance of the 2014 Act. Although touched on earlier in this judgment, it is appropriate to look more closely at s. 887 as it appears in Part 15 of the 2014 Act:-

"PART 15

FUNCTIONS OF REGISTRAR AND OR REGULATORY AND ADVISORY BODIES

CHAPTER 1

REGISTRAR OF COMPANIES

Registration office, "register", officers and CRO Gazette

887. (1) The Minister shall maintain and administer an office or offices in the State at such places as the Minister thinks fit for the purposes of –

(a) the registration of companies under this Act, and

(b) the performance of the other functions under this Act expressed to be performable by the Registrar.

(2) A reference in this Act to the register (where the context is not that of a register to be kept by a company or other body) is a reference to, as appropriate –

(a) the register to be kept by the Registrar (which the Registrar is empowered by this subsection to keep) in which notices or other documents, information or things delivered in pursuance of this Act to the Registrar are to be registered or recorded (and in which, in particular, in the case of a registration of a company, the fact of the company's incorporation is to be disclosed), or

(b) the particular register that a provision of this Act requires the Registrar to keep for a special purpose,

but any such register as is mentioned in *paragraph (b)* shall, for the purposes generally of this Act, be regarded as forming part of the first-mentioned register." (emphasis added).

97. In the foregoing manner, the applicant is required to keep a "*register"* in which, for present purposes, annual returns *"delivered in pursuance of this Act to the registrar are to be registered"*. Section 887 confers no jurisdiction on the registrar *not* to register annual returns delivered in pursuance of the 2014 Act.

98. In the present case, it is a matter of fact that (i) annual returns were delivered by both respondents in pursuance of their obligations under the 2014 Act; (ii) these annual returns were compliant on their face; (iii) at the time of delivery of the annual returns, there were valid and subsisting District Court orders in being which extended time for delivery.

99. In light of these facts, I ask, rhetorically, where was the applicant's discretion to refuse to accept and register the annual returns in these circumstances? I am not satisfied that there was any such discretion. Perhaps more importantly, if there exists any such discretion on the part of the registrar, it was certainly not exercised on the facts of the present case.

100. In the manner examined earlier, the applicant notified each respondent of the correct legal position and urged them not to bring the relevant applications which gave rise to the *ultra vires* orders. In other words, far from acquiescence, the applicant, at all material times, objected to the course which the respondents were set upon. Delivery of returns by the respondents and registration of same by the applicant occurred by reason of the *ultra vires* Court orders.

101. It will also be recalled that the solicitors for KIL wrote to the applicant stating:- *"As matters stand, there is an Order from the District Court extending the time and you must comply with that Order."* Accepting and registering the KIL returns involved neither the exercise of discretion by the applicant, nor acquiescence on her part.

102. The same is true in relation to the GYL returns. Far from exercising discretion or acquiescing, the applicant's view (as averred to at para. 49 of Mr. McFadden's affidavit of 23 January 2024, cited earlier) is that GYL's annual return *"was delivered pursuant to a court order made contrary to the terms of 2014 Act".*

103. In short, the Registrar neither exercised discretion, nor acquiesced. On the facts of this case, registration of the returns delivered by the applicants occurred by virtue of the District Court orders extending time, in the context of the Registrar's function under the 2014 Act. Delivery to, and registration by, the respondent of the relevant returns were consequences of the impugned orders, but did not amount to acquiescence by the applicant. In contrast to the applicants, the respondent's view of the legal position has never varied. It was, and remains, correct.

Ignore

104. The inescapable logic of the respondents' submission is that, upon delivery by each respondent of the annual returns in question, the applicant should have ignored her statutory function to register annual returns delivered *and* the terms of subsisting Court orders extending time for delivery. I cannot agree.

Validity of subsisting orders

105. As the learned authors make clear in *"Administrative Law in Ireland"* (5th Edition, 2019) at 11-24:-"*…until a court sets aside an impugned decision, the decision will enjoy a presumption of validity and the decision will be regarded as binding"*.

106. The applicants also draw this Court's attention to the *dicta* of the House of Lords in *Smith v East Elloe Rural District Council* [1956] AC 736 ("*Smith*") wherein Lord Radcliffe (at 769-770) stated:-

> *"An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."*

107. A decade later, in *Campus Oil v Minister for Industry and Energy (No. 2)* [1983] IR 88 ("*Campus Oil*") O'Higgins C.J. stated (at 107):-

> *"The order which is challenged was made under the provisions of an act of the Oireachtas. It is, therefore, on its face, valid and is to be regarded as a part of the law of the land, unless and until its invalidity is established."*

108. Insofar as the respondents submit that it was open to the applicant to ignore the District Court orders and to decide, unilaterally, not to accept or register the annual returns, I reject that submission which, with respect, does not have support in fact or law.

109. At all material times, the applicant was of the view, correctly, that the Court enjoys no jurisdiction to grant a second extension of time for the delivery of returns. However, consistent with the principles referred to above, the applicant was bound to act in accordance with the District Court orders until such time as they were held to be invalid.

110. In substance, the respondents contend that by acting in accordance with the terms of a subsisting Court order the applicant should be estopped from seeking to 'unwind' the direct consequences of an invalid order. I regard myself as obliged to reject this proposition, which runs contrary to the principle articulated in *Campus Oil* and *Smith*.

Require / direct

111. The respondents also submit that the District Court orders *"extending the time for the delivery of a return… did not require the registrar of companies to register the return in its records and make the contents of the return available to the public"* (emphasis added). The respondents submit that registration of the returns *"was certainly not required or directed by any order of a court"* (emphasis added). [see para. 9 of the written legal submissions in GYL].

112. With respect, the foregoing submission seems to me to lack substance. To begin with, this submission entirely ignores the fact that orders made validly under s. 343 do *not* direct or require

the Registrar to do anything. This is, of course, because the Registrar's functions and duties are set out in the 2014 Act.

113. To illustrate the point, it is useful to compare the wording found in the *valid* orders (granting the *first* extensions) with the wording in the *ultra vires* orders (granting *second* extensions of time): -

- *"the time within which the annual return of the company… may be delivered to the Registrar of Companies be and is hereby extended up to…."*
  [25 July 2023 order made, validly, in relation to GYL]

- *"the time set out in the original order dated the 25th day of July 2023 is hereby enlarged to a period of 48 hours up to close of business at 5:30p.m. at the office of the Registrar of Companies on the 7th day of December 2023"*
- [5 December 2023 *ultra vires* order made in relation to GYL]"

- *"the time within which the annual return of the company… may be delivered to the Registrar of Companies be and is hereby extended up to…"*
  [6 December 2022 order made, validly, in relation to KIL]

- *"an order… enlarging the time within which the annual return of the company… may be delivered to the Registrar of Companies to 16 December 2023"*
  [7 November 2023 *ultra vires* order made in relation to KIL].

114. As can been seen from the foregoing, neither the validly made nor *ultra vires* orders "direct" or "require" the applicant to take any step. However, this takes nothing away from the reality that (i) the sole purpose and effect of the orders was to extend time for the respondents to take the step of delivering annual returns; and (ii) in response to that step, and consistent with the applicant's function, the returns were accepted, registered and made publicly available, against the backdrop of a subsisting order which, on its face, rendered the late delivery of annual returns permissible.

115. Quite apart from the absence of specific words, there is simply no reality to the submission that the impugned orders were not, in substance, directed to the applicant. The (i) *ultra vires* orders and (ii) registered returns seem to me to be 'opposite sides' of the same 'coin', in that the purpose and effect of the former was to facilitate the latter.

116. It was, as a matter of fact, these and only these *ultra vires* orders which enabled the respondents to deliver returns to the applicant, for the one and only purpose of having same registered.

Consequences

117. In opposing the application, the respondents emphasised the consequences for them of the granting of relief at (i) to (iii). This is illustrated by the following extracts from the written legal submissions on behalf of KIL: -

> *"…if the court were to go beyond making a finding as to what the law was… the granting of any further relief such as to direct the alteration of the records held by the Registrar of companies, would lead to a significant loss to the respondent which would thereby lose what is known as the 'audit exemption'".* [para. 17]
>
> *"… if the court were to facilitate the Registrar by means of some order removing the returns which have been registered by the Registrar from the register, that would apparently expose or likely expose the company and/or its directors to criminal prosecution.* [para. 9]
>
> *"… if the form or relief that the applicant is seeking were to be granted, the end result could be that the respondent company is struck off…"* [para. 10].

118. As touched on earlier, these are *not* consequences flowing from the grant of relief. The reliefs at (i) to (iii) simply 'unwinds' steps taken as a direct result of invalid decisions. The consequences, or potential consequences, to which the respondents refer, flow from failure to deliver annual returns within the time limit specified by the Oireachtas, not from the grant of relief by this Court.

119. Put otherwise, the reliefs at (i) to (iii) ensure that the respondents will not *gain* a benefit as a result of *ultra vires* orders and, therefore, puts them in the identical position as every other company subject to the provisions of the 2014 Act.

120. Restoring the respondents to the position which would have applied had *ultra vires* orders not been made ensures that consequences for the respondents are determined by the interplay between (i) their actions or omissions and (ii) the provisions of the Act, just as is the case for all other companies.

Certiorari

121. I accept that "*..the discretionary nature of the remedy of certiorari does not compel a court to quash that order where to do so would be unfair or unjust"* [see *Kelly v Minister for Agriculture* [2023] 1 I.R. 38 ("Kelly") *per* Charleton J. at 55]. In the present case, there is nothing unfair or unjust about quashing *ultra vires* orders and unwinding the consequences of invalid orders which the respondents urged the District Court to make, despite having been put on notice by the applicant that the District Court lacked the relevant jurisdiction (something the respondents now acknowledge).

Delay / commitments by 3rd parties

122. Insofar as the respondents rely on the Supreme Court's decision in the *State (Cussen) v Brennan* [1981] IR 181 (*"State (Cussen)"*), the headnote to the reported judgment illustrates how fundamentally different was the factual position. The Supreme Court held:-

> "*That the respondents had acted* ultra vires *in purporting to introduce a qualification for the office of paediatrician which had not been approved of or directed by the Minister for Health.*
> *That, nevertheless, the prosecutor's claim to the discretionary remedy of certiorari must fail by reason of the delay of four months before he applied in the High Court for that relief, and by reason of the new commitments undertaken by the successful candidate, and by his former and present employers, in reliance upon the validity of the recommendation of the respondent Commissioners."* (emphasis added).

123. This is not a case where the applicant delayed. Nor is it a situation where there is evidence that any third party took on *"new commitments"* or organised their affairs in reliance on the invalid orders. In other words, this is not a situation where an invalid decision begat a series of further decisions, rendering it unjust to quash, or impossible to undo, the consequences. Wholly unlike the situation in the *State (Cussen),* in the present case it is a straightforward matter to undo the consequences of the invalid decisions.

Prospective effect

124. I am also conscious that *"the precedent, that nullification has retrospective effect, is a guide only, and there may be, and indeed have been, cases where it is appropriate for nullification to have prospective effect"* [*per* Charleton J, in *Kelly*, p. 59, para. 36]. In the present case, the interests of justice do not require an alteration in respect of the said precedent. Why? Relief with only prospective effect would (i) facilitate the undermining of statutory obligations; (ii) permit the respondents to gain benefit from *ultra vires* orders; (iii) would not return the situation to that which pertained prior to the making of the invalid decisions; and (iv) would involve doing less than undoing the consequences of *ultra vires* orders made at the respondents' insistence.

Grounds

125. I reject the submission that *"there are no grounds contained in the applicant's statement of grounds which seek to establish an entitlement to the reliefs sought at (ii) or (iii)"* [see para. 12 of the written legal submissions in respect of GYL]. The case made by the applicant is perfectly clear from the contents of each statement of grounds. In each case, the factual position is set out extensively. This is followed by the setting out of the grounds for relief under a heading of *"Absence of jurisdiction"*. There is simply no substance in the proposition that the respondents were in any way unclear as to the case made. In circumstances where the absence of jurisdiction and relevant facts are pleaded in detail, and it is pleaded that annual returns were delivered on foot of District Court orders said to be invalid, I do not accept that there is any deficiency in the grounds advanced for any of the reliefs sought and I reject the submission that the applicant's proceedings failed to comply with O. 84 of the Rules of the Superior Courts.

126. The affidavit sworn on 23 January 2024 by Mr. McFadden, which grounds the Registrar's application for judicial review and verifies the contents of the statement of grounds in the application concerning GYL contains, *inter alia,* the following averments: -

"The register of companies has statutory standing pursuant to s. 888 of the 2014 Act and is intended to constitute an accurate record of "notices or other documents delivered in pursuance of" the 2014 Act… in the registrar's view, the company's annual return for the relevant period… was delivered pursuant to a court order made contrary to the terms of the 2014 Act…";

"… from the registrars view, a potential unfairness arises from the second 2023 order as regards other companies in an identical position which have been required to suffer the serious statutory consequences of having failed to deliver their annual return in accordance with the terms of the 2014 Act, while the company is not required to suffer those consequences" (para. 49 in the grounding affidavit concerning).

127. Similarly, Mr. McFadden's grounding affidavit, sworn on 23 January 2024, in respect of the KIL application contains *inter alia* the following averments:-

"The company's legal representative provided the order of the District Court to the registrar by letter of 9 November 2023… the company's legal representative corresponded with the Companies Registration Office in this regard. On foot of legal advice, the Companies Registration Office subsequently accepted delivery of the annual return in relation to the relevant period…" (para. 44);

"… in the registrar's view, the company's annual return for the relevant period… was delivered pursuant to a court order made contrary to the terms of the 2014 Act." (para. 52).

128. Nor is there any suggestion in the respondents' statements of opposition that either respondent was unclear on the case being made by the applicant. Furthermore, it was at all times obvious that the *quashing* of an order which impermissibly extended time on a second occasion (the relief sought at (i)) would entirely remove the basis upon which the annual returns were *delivered* and *registered* (speaking directly to the relief sought at (ii) and (iii)).

129. In short, the legal grounds underpinning the relief sought at (ii) and (iii) comprise the pleaded grounds that the orders extending time on a second occasion were invalid and ultra vires combined with the facts pleaded, culminating in the delivery of the returns on foot of orders made without jurisdiction.

Alternative remedy

130. I also reject the respondents' submission that the applicant had an alternative remedy in the form of s. 898 of the 2014 Act, which provides: -

"***Registrar's notice that document does not comply***

898. *(1) On receipt of a non-complying document the Registrar <u>may</u>, in his or her discretion –*

(a) serve on the person delivering the document (or, if there is more than one such person, any of them) a notice that the document does not comply, or
(b) neither serve such a notice nor otherwise advise or give notice to any such person that the document does not comply…" (emphasis added).

131. Recalling the principle articulated in *Smith* and in *Campus Oil*, it was simply not open to the Registrar to take the view, unilaterally, that the annual returns submitted in the wake of the granting by the District Court of second extensions of time did *"not comply"*.

132. As examined earlier, the District Court orders were valid on their face and remained so unless and until determined by this Court to be invalid. In other words, the only means by which the applicant could establish that the impugned District Court orders were invalid (and, therefore, the annual returns submitted on foot of same were non-compliant) was by means of the present proceedings.

133. Section 898 is certainly not a methodology which the Registrar could have used for establishing the validity of Court Orders which, in turn, determined the then compliance of the returns (which were delivered pursuant to those orders) with the requirements of the 2014 Act.

Public-facing

134. With respect, the emphasis laid by the respondents on the 'public-facing nature' of the register maintained by the applicant fails to engage with the reality that the only reason the relevant returns are available to the public is because they were delivered by the respondents pursuant to orders which were made without jurisdiction, at the urging of the respondents, who refused to accept the correct legal position.

135. It does not seem unfair to say that the logic of the respondents' argument is that, irrespective of what breaches of statute underpin the registration, once annual returns 'make it' to the register they are sacrosanct. With respect, the foregoing proposition is unsupported by authority and entirely undermined by principles referred to in this judgment.

Didn't have to take and register the returns

136. Whilst it may involve repetition, the submission made on behalf of the respondents that *"Of course, the Registrar didn't have to take and register the returns"* seems to me to ignore the explicit statutory *function* of the applicant (per s. 887 of the 2014 Act) and the legal consequences of a subsisting order which is valid on its face (see again Lord Radcliffe in *Smith*; and O'Higgins C.J. in *Campus Oil*).

Administrative decisions -v- Court orders

137. In my view, the respondents' purported reliance on *Mossell (Jamaica) Limited (trading as Digicell) v Office of Utilities Regulations and Others* [2010] UKPC 1 ("*Mossell*") cannot avail them. *Mossell* concerned the regulation of the telecommunications market in Jamaica and the extent of the powers of the Minister for Industry, Commerce and Technology ("the Minister"), and those of

the Office of Utilities Regulation ("the OUR"), respectively. In essence, the Minister issued a direction which purported to restrict the powers of the OUR, which considered that the Minister had no power to issue the direction in question.

138. During the course of submissions, particular emphasis was laid on the passage of the judgment beginning *"Was the OUR obliged to comply with the Direction even though it was ultra vires?"*. It does not seem to me that the ensuing analysis in *Mossell* is of assistance in determining the questions before this Court. At issue in the present proceedings is not (to quote from para. 43 of *Mossell*) *"…the vexed question of the effect of executive orders and administrative decisions before a final judgment is reached on their validity…"*. Wholly unlike the position in *Mossell*, the present proceedings concern Court orders which fell to be complied with, unless and until set aside. Insofar as the respondents contend, with reliance on *Mossell*, that the applicant was not obliged to comply with the District Court orders in question, I must disagree for the reasons set out in this judgment.

'Spent' orders

139. In opposing relief, the respondents further submit that, following the delivery of the relevant returns and the expiry of the periods specified in the impugned District Court orders, the latter were 'spent' and, it is argued, no relief can or should be granted. I reject this proposition which, in substance, seeks to undermine this Court's established jurisdiction to grant appropriate relief in respect of invalid decision-making, including to undo the consequences unless it would be unjust to do so.

140. The *ultra vires* orders at issue in these proceedings, whether described as "spent" or otherwise, are certainly not beyond the reach of this Court, nor are the consequences of those orders. To say so is not to 'break' any 'new ground', but merely to apply the principles articulated in *Tristor*.

In accordance with law

141. Similarly, there is no validity to the contention that, because returns were delivered on foot of orders which were valid at the time, and these returns currently appear on the register, this Court has no jurisdiction to intervene at this point.

142. Insofar as the respondents submit that the situation which *currently* presents is one where returns were delivered and registered *"in accordance with law"*, and, hence, no relief can or should be granted, there might well be force in such an argument if the facts in the present case mirrored those in *Wee Care* (i.e. if the returns had been submitted in time).

143. However, the facts are very different to those in *Wee Care*. Orders which certainly were valid on their face up to now, but which this Court is now holding to have been made *ultra vires,* enabled the law regarding the delivery of annual returns to be circumvented by the respondents.

Undermining statutory provisions

144. There is no good reason why *certiorari* should *not* be granted, whereas there are very clear reasons for granting this and the balance of the relief sought. The impugned orders were made without jurisdiction and entirely undermine explicit provisions in the 2014 Act. Quite apart from the very obvious imperative that statutory provisions be complied with, the applicant has a particular interest in ensuring compliance with the provisions of the 2014 Act, including, as to deadlines for the delivery by a company to the Registrar of an annual return (*per* s. 343).

145. Far from this being a situation where the grant of relief would impugn the register "*contrary to law*", the grant of relief will ensure that returns are not delivered, and registered on the register, in manner which circumvents statutory obligations.

Futility

146. In *H.A. v The Minister for Justice* [2022] IECA 166 (*H.A.*) the Court of Appeal (Donnelly J.) addressed: *"…the situation where a court is being asked to refuse to make an order by way of judicial review, despite having found that the order actually made was vitiated by legal error".* I pause to say that this is very much the stance adopted by the respondents.

147. At para. 42 of the judgment in *H.A.*, the Court of Appeal stated:-

"…the following principles may be helpful in determining these issues:

(i) The discretion to refuse relief by way of judicial review should be exercised with discernible caution;

(ii) Having already determined that a decision is vitiated by error of law, relief ought not to be refused on the ground of futility unless it is very clear that the granting of relief is futile in the sense of being incapable of benefitting the applicant for judicial review;

(iii) The onus of establishing that it is very clear that the granting of relief is futile remains on the party who made that assertion;

(iv) In deciding upon this issue, the Court should look at the entirely of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;

(v) The Court must be mindful that it is decision-making bodies who have been charged by statute with the particular decision-making function…".

148. In the present case the respondents have certainly not established that it would be futile to grant any of the reliefs sought. Nor have they advanced any good reason for relief to be refused. On the contrary, failure to grant each of the reliefs sought would, as I say, be to facilitate the undermining of explicit statutory provisions.

Undoing the consequences of invalid acts

149. In my view, to grant each of the reliefs sought constitutes both an appropriate and necessary response by this Court in the interests of justice and constitutes the proper exercise of

this Courts discretion in the particular facts and circumstances of these cases. I am fortified in this view by further guidance given by Clarke J. (as then was) in *Tristor,* wherein (at para. 4.1) he stated:-

> *"The overriding principle behind any remedy in civil proceedings should be to attempt, in as clinical a way as is possible, to undo the consequences of any wrongful or invalid act. The court should not seek to do more than that, but equally the court should not seek to do less that that. The extent to which it may be possible to so will, of course, depend on the facts and the legal framework within which any invalid decision may have taken place."* (emphasis added).

150. It seems to me that, were this Court to refuse any of the relief sought, it would be to do *less* than undoing the consequences of orders invalidly made at the insistence of both respondents who, at that time, were on notice of, but rejected, the correct legal position and led the District Court into error. To grant less than the relief sought would also be to countenance a situation where obligations created by the Oireachtas with regard to the filing of annual returns were circumvented and the 'windfall' flowing from invalid orders was retained by the respondents.

In summary

151. Although the following is not intended as a substitute for the analysis set out in this judgment, the outcome of these proceedings can be summarised as follows.

152. Despite the formidable skill and ingenuity with which the respondents' Counsel opposed the granting of relief, I am satisfied that the applicant has establishment an entitlement to each of the reliefs set out at para. (i), (ii) and (iii) of the statement of grounds in each case.

153. Although there is no suggestion that they acted other than *bona fide,* the respondents were 'squarely' on notice that the District Court lacked jurisdiction to make the orders in questions, yet insisted on bringing the applications and led the District Court into error.

154. The impugned orders were made *ultra vires*.

155. The sole basis upon which the relevant returns were (i) delivered; (ii) accepted; and (iii) registered was the presumptive validity of the said orders.

156. Registration of the returns and the making available of same to the public was a direct and inevitable consequence of the making of the *ultra vires* orders.

157. To quash the impugned orders and to unwind the direct consequences of *ultra vires* orders gives rise to no injustice, nor presents any practical difficulties.

158. Having been invalidated, the direct consequence is that the annual returns delivered pursuant to those orders must be treated as not having been validly made.

159. Every case is unique and this Court's task must be to fashion relief in a 'bespoke' manner, having regard to the particular facts and circumstances of the case and the interests of justice.

160. To my mind, the interests of justice require the grant of each of the reliefs sought by the applicant.

161. Failure to grant this relief would be to permit the delivery and registration of annual returns contrary to the will of the Irish people as expressed through legislation enacted by the Oireachtas, specifically, s. 343(5) of the 2014 Act.

Conclusion

162. For reasons set out in this judgment, I am satisfied that the applicant is entitled to the reliefs claimed at (i); (ii); and (iii) in each statement of grounds.

163. On the questions of costs, the applicant has been entirely successful and my *preliminary* view, having regard to s. 168 of the Legal Services Regulation Act 2015, is that the applicant is entitled to their costs.

164. The parties are invited to liaise, forthwith, and to submit an agreed draft order.

165. In the event of any dispute, short written submissions are to be furnished by Friday 31 January 2025.