THE HIGH COURT

[2014 No. 189 COS]

IN THE MATTER OF MOUNT WOLSELEY HOTEL, GOLF AND COUNTRY CLUB AND IN THE MATTER OF THE COMPANIES ACTS 1963-2009 AND IN THE MATTER OF LISMARD PROPERTIESAND IN THE MATTER OF THE COMPANIES ACTS 1963-2009 AND IN THE MATTER OF LISMARD ENTERPRISES AND IN THE MATTER OF THE COMPANIES ACTS 1963-2009 (AS RELATED COMPANIES WITH THE MEANING OF SECTION 4(5) OF THE COMPANIES (AMENDMENT) ACT 1990)

JUDGMENT of Mr. Justice Keane delivered on the 29th April 2014

Introduction

1. Mount Wolseley Hotel Golf and Country Club ("Mount Wolseley") petitions for the appointment, pursuant to the provisions of s. 2 of the Companies (Amendment) Act 1990 ("the Act"), of an Examiner both to that company and to the separate companies Lismard Properties and Lismard Enterprises, as related companies under the provisions of s. 4 of the Act. For the purpose of the present judgment, I shall refer to those three companies together as "the Companies."

2. Bank of Ireland, which is the Companies' largest creditor by a considerable margin, opposes the petition. The Revenue Commissioners have adopted a neutral stance towards it, as have the Companies' other significant creditors.

3. By Order made on the 4th April 2014, Charleton J. appointed an Interim Examiner to the Companies and fixed the 10th April 2014 as the date for the hearing of the petition. On the 10th April 2014, Kelly J. gave further directions and adjourned the hearing to the 16th April 2014, extending the Court's protection of the Companies up to that date. The petition was heard on the 16th and 17th April 2014 and the Court reserved judgment, further extending the protection afforded to the Companies by continuing the appointment of the Interim Examiner to today's date.

Background

4. Mount Wolseley is an unlimited company that was incorporated within the State on the 19th January 1995. It is a trading company that operates the spa, golf and country club at Mount Wolseley, Tullow, County Carlow ("the hotel business"), and which owns the golf course, golf clubhouse and part of the leisure centre and car park there. Lismard Properties is an unlimited company that was incorporated within the State on the 13th September 1988. It owns various properties, including the greater part of the hotel property at Mount Wolseley. Lismard Enterprises is an unlimited company that was incorporated within the State on the 22nd August 1988. It developed the hotel property and owns a portion of it comprising 18 bedrooms and the swimming pool there. In those circumstances, it is asserted that the Companies have conducted their business in such a manner that the separate business of each company, or a substantial part thereof, is not readily identifiable, thus bringing the Companies within the definition of related companies under the terms of s. 4(5)(e) of the Act. That assertion has not been challenged for the purpose of these proceedings.

5. The current directors of each of the Companies are three members of the Morrissey family. A company named Holnet Unlimited owns and controls the Companies through a range of intermediate shareholder companies that it owns and controls. The beneficial owners of Holnet Unlimited are a number of members of the Morrissey family, including each of the current directors of the Companies.

The Issues

6. The Court is satisfied that the petition for the protection of the Companies has been properly presented by Mount Wolseley in accordance with the applicable requirements of s. 3 of the Act. The petition is accompanied by an independent accountant's report ("IAR"), prepared by Mr. Kieran McCarthy and dated the 4th April 2014. Mr. Ian Lawlor, the interim Examiner, has been nominated as Examiner and has furnished a signed consent to act as such, should he be appointed.

7. The hotel business was developed with finance provided to Lismard Properties by Bank of Ireland. That borrowing was the subject of cross-guarantees by the other two companies. The Companies' outstanding debt to Bank of Ireland is circa €28.7 million. The Companies hold other assets subject to borrowings with a number of other financial institutions amounting to circa €32 million in total. The Companies acknowledge that their debt to Bank of Ireland is unsustainable, with the result that each of the Companies is unable, or likely to be unable, to pay its debts. On the 3rd April 2014, at the culmination of extensive and protracted negotiations, Bank of Ireland served 24-hour repayment demands on each of the Companies. On the 4th April 2014, Bank of Ireland appointed Mr. Stephen Tennant as receiver over the Companies' assets. As noted earlier in this judgment, the petition in suit was presented later on the same day with the result that, pursuant to the terms of s. 5(2) of the Act, the receiver is at present unable to act.

8. Bank of Ireland opposes the petition on three grounds, which may be shortly summarised as follows:

> (a) That there is insufficient evidence before the Court to allow it to be satisfied that the Companies have a reasonable prospect of survival as a going concern.
>
> (b) That the petition has been presented at the instigation of the Companies' shareholders with the principal aim of protecting their shareholding and, for that reason, the Court should look upon it with disfavour.
>
> (c) That the key purpose underpinning the Act, namely the preservation of viable enterprise and the protection of jobs, is not engaged on the facts of this case, since Bank of Ireland's intention to conduct a trading receivership of the Companies' assets creates no immediate risk to the enterprise concerned or to the jobs associated with it.

The test

9. The applicable legal principles are not in dispute in this case. S. 2(2) of the Act provides:

> "The Court shall not make an order under this section unless it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern.

10. In *Re Tuskar Resources plc* [2001] 1 I.R. 668, McCracken J., having noted that the sub-section prohibits the court from making an order unless satisfied that the company concerned has a reasonable prospect of survival, went on to state (at 676):

> "If the court is to be "satisfied", it must be satisfied on the evidence before it, which is in the first instance the evidence of the petitioner. If that evidence does not satisfy the court, the order cannot be made, and in my view this is tantamount to saying that there is an onus of proof on the petitioner at the initial stage to satisfy the court that there is a reasonable prospect of survival."

11. In *Re Gallium Limited*, unreported, 3 February 2009, [2009] IESC 8, the Supreme Court (*per* Fennelly J., Geoghegan and Kearns JJ. concurring) expanded further (at para. 46):

> "McCracken J. was undoubtedly correct to say there is an onus of proof on the petitioner. However, the statutory requirement is to show that "*there is a reasonable prospect of the survival of the company…"* A petitioner does not, by getting over that threshold, acquire a right to have an order made. I still think it is fair to say that the section confers a "wide discretion" on the court, or alternatively that the court should take account of all the circumstances. The establishment of *a reasonable prospect of survival* merely triggers the power, which remains discretionary. The view of Lardner J., as expressed In *re Atlantic Magnetics* could be described as pragmatic: he asked whether it "*seems worthwhile to order an investigation by the examiner into the Company's affairs*." The court has the power to appoint an examiner if satisfied that there is a reasonable prospect of survival of the company."

The evidence

12. Don Morrissey, a director of each of the Companies, swore an affidavit on the 4th April 2014, grounding the present petition. At paragraph 67 of that affidavit, Mr. Morrissey avers that, while the directors of the Companies accept that each company is insolvent, they believe that each and its undertaking has a good prospect of survival.

13. Mr. Morrissey avers that the hotel business employs up to 175 persons at any one time, depending on the season, and that is one of the largest private sector employers in County Carlow, if not the largest.

14. The directors of Mount Wolsey have prepared turnover, earnings and profit projections for the next 5 years, which are included in an appendix to the IAR of the 4th April 2014. In the IAR, the independent accountant states that he has discussed with the directors the assumptions upon which those projections have been prepared and that, in his opinion, they appear to be viable given Mount Wolseley's current level of sales, future bookings and performance against budget. Similar projections have been prepared in respect of the other two companies in suit.

15. The IAR includes a table setting out Mount Wolseley's trading results for the six year period from the year ending 31st December 2008 to the year ending 31st December 2013. That table is used to demonstrate that, while turnover fell from €8.8 million to €6.7 million during that period, Mount Wolseley's earnings before interest, tax, depreciation, amortisation and rent ("EBITDAR") have remained consistently positive during that period, thereby suggesting that the business has a reasonable prospect of survival. However, the independent accountant notes that while Mount Wolseley's EBITDAR has remained positive in 2012 and 2013, it cannot afford the rent commitment of €650,000 *per annum* which is ultimately payable to Bank of Ireland through the other two companies to service interest and loan capital due from the Companies to the bank. Accordingly, the earning and profit projections referred to in the preceding paragraph of this judgment presume a rental payment by Mount Wolseley of the lesser sum of €450,000 to those companies and, by extension, an arrangement between those companies and Bank of Ireland, permitting interest and loan capital due to the bank to be serviced at broadly that level.

16. The independent accountant expresses the opinion that each of the Companies has a reasonable prospect of survival as a going concern, subject to the following conditions:

> (a) The securing of an investment in the Companies or the restructuring of their liabilities, or both, in order to facilitate a scheme of arrangement that deals with the debt due to all creditors.
>
> (b) The ability of the directors to maintain, and implement further, efficiencies in the hotel business.
>
> (c) The entry into examinership of all three Companies, given the intrinsic link between them.
>
> (d) The agreement of the owners of Mount Wolseley House to the continued use of that property for certain purposes related to the operation of the hotel business.
>
> (e) The approval of a scheme of arrangement by the High Court.

17. The interim examiner, Mr. Ian Lawlor, swore an affidavit on the 15th April 2014, to which he has exhibited his report for the period from 4 April 2014 to 15 April 2014. In that report, Mr. Lawlor asserts that, since his appointment, he has received a number of expressions of interest in relation to potential investment in the Companies. The Court has been furnished with details of eight separate parties who have indicated such an interest, none of whom is, to the best of the interim examiner's knowledge, a person connected with any director of the Companies, (presumably) as that term is defined under s. 26 of the Companies Act 1990. In his report, Mr. Lawlor notes that turnover in the hotel business increased in 2013 compared to 2012, and that this trend has continued in 2014, with turnover for the first three months of this year being 13% higher than for the equivalent period last year. Mr. Lawlor goes on to note in his report that trading for the hotel business has continued to be strong, with turnover exceeding that which was budgeted for in the week following his appointment. Mr. Lawlor concludes his report by expressing his agreement with the view of the independent accountant that the Companies have a reasonable prospect of survival, subject to the conditions already identified.

18. Bank of Ireland contends that the evidence presented is insufficient to establish that the Companies have a reasonable prospect of survival as a going concern. In doing so, it points to the acknowledgment in the IAR that fresh investment is a condition precedent to any such prospect. Bank of Ireland submits, in essence, that the Court cannot be satisfied that there is any prospect of the Companies securing the level of fresh investment realistically necessary to permit a scheme of arrangement that is fair and equitable to the interests or claims of so large a creditor as Bank of Ireland is in this case.

19. On this point, I do not believe the bank's argument can succeed. The Court is simply not equipped at this point in the process to assess either the level of investment that may be forthcoming in the context of any proposed scheme of arrangement or the extent to which any such arrangement would be fair and equitable to the interests or claims of Bank of Ireland, as the Companies' most significant creditor. Those are quintessentially issues that can only be resolved in the context of a hearing under s. 24 of the Act in respect of any scheme of arrangement actually proposed by the examiner, should he be appointed under s. 2 of the Act.

20. In Re *Vantive Holdings* [2010] 2 I.L.R.M. 156, the Supreme Court (per Murray C.J., Denham and Fennelly JJ. concurring) stated:

> "In order to be satisfied that a company has a reasonable prospect of survival as a going concern the court must have before it sufficient evidence or material which will permit it to arrive at such a conclusion on the basis of an objective appraisal of that evidence or material. Mere assertions on behalf of a petitioner that a company has a reasonable prospect of survival as a going concern cannot be given significant weight unless it is supported by an objective appraisal of the circumstances of the company concerned and an objective rationale as to the manner in which the company can be reasonably expected to overcome the insolvency in which it finds itself and survive as a going concern."

21. Giving due weight to the opinion of the independent accountant, his reasoning and the material upon which his opinion is based, I am satisfied that the petitioner has met the test that the Companies have a reasonable prospect of survival as a going concern.

The Morrissey family and Mount Wolseley House

22. In the affidavit that grounds the present petition, Mr Don Morrissey avers that the Morrissey family play a central and intrinsic role in the running of the hotel business. Mr. Morrissey goes on to aver that the Mount Saint Joseph estate on which the hotel business is located is also home to Mount Wolseley House and private gardens, which is the principal private residence of Donal and Breda Morrissey. Donal and Breda Morrissey were both directors of each of the Companies until they resigned as such on the 24th March 2014. Indeed, the registered office of each of the Companies was Mount Wolseley House until the 4th April 2014, the date upon which a receiver was appointed over the Companies' assets and an interim examiner was appointed to the Companies.

23. Mr. Don Morrissey is at pains to aver that the Companies do not hold any legal or beneficial interest in Mount Wolseley House. The petitioner maintains that the point is significant because it contends that the co-operation of Donal and Breda Morrissey - and their continuing permission to the hotel business to access the gardens of, perimeters around, and access routes to Mount Wolseley House - "is integral and essential to the hotel business both from a revenue generating perspective but also a regulatory point of view." This assertion derives from two propositions that have each given rise to significant controversy between the parties. The first is that the aesthetic attraction of Mount Wolseley House and its gardens is vital to the wedding trade of the hotel business and, thereby, vital to the business itself. The second is that access to the hotel property via the private driveway to, and the curtilage of, Mount Wolseley House is a condition of the fire safety certificate associated with the hotel business, without which that certificate would be void.

24. Mr. Don Morrissey avers on behalf of the petitioner – i.e. Mount Wolseley - that:

> "Donal and Breda Morrissey are committed to continuing their support of the hotel business, provided the hotel business is traded as a going concern with the involvement of the Companies. In the event of a receivership or sale on liquidation of the hotel business properties, the use and benefits of Mount Wolseley House, its access routes and formal gardens will not be available to any operator of the hotel business."

25. The petitioner has procured an independent valuation of the hotel property by reference to the potential difficulty just described, which suggests that its value on the open market may be reduced by as much as €2 million to a figure of €3.8 million if it cannot be overcome. Two earlier valuations of the hotel business are also exhibited to Mr. Morrissey's grounding affidavit, giving a range of values for the property of between €5.5 and €6.3 million, although without attempting to quantify any diminution in value associated with the absence of co-operation from the owners of Mount Wolseley House and gardens.

26. For the sake of completeness, it should be added that Bank of Ireland has set out on affidavit at considerable length the basis upon which it does not accept that the co-operation and consent of the owners of Mount Wolseley House and gardens is necessary to the operation of the hotel business on either of the grounds cited. Bank of Ireland submits that the relevant averments on behalf of the petitioner serve to demonstrate that the present application is "little more than a thinly veiled attempt by the shareholders to preserve value in their shareholding (albeit held indirectly)."

27. Whether it is suggested that Mount Wolseley's petition for the appointment of an examiner is intended primarily to preserve the interests of that company's shareholders, or that Bank of Ireland's opposition to that petition is designed primarily to protect its position as the company's principal secured creditor, the purpose of the legislation remains the same. In *Re Traffic Group Ltd* [2008] 3 I.R. 253, Clarke J. described that purpose in the following terms (at p.260):

> "It is clear that the principal focus of the legislation is to enable, in an appropriate case, an enterprise to continue in existence for the benefit of the economy as a whole and, of equal, or indeed greater, importance to enable as many as possible of the jobs which may be at stake in such enterprise to be maintained for the benefit of the community in which the relevant employment is located. It is important both for the court and, indeed, for examiners, to keep in mind that such is the focus of the legislation. It is not designed to help shareholders whose investment has proved to be unsuccessful. It is to seek to save the enterprise and jobs."

28. *Re McSweeney Dispensers 1 Limited* [2011] IEHC 494, unreported (High Court), 21 December 2011, was also a case in which a creditor bank asserted, *inter alia*, that it was unlikely that a scheme of arrangement could be put in place that did not write down, in some way, the liability of the companies concerned to the bank concerned; and that the principal purpose behind the examinership petition was to enable the existing shareholder to retain control of the business by means of a significant reduction in bank debt.

29. Having considered the relevant jurisprudence, much of which has already been discussed *supra*, Clarke J. concluded (at para. 4.5):

> "The jurisprudence thus appears to make clear that the examinership regime does not have as its purpose the saving of shareholders from their unsuccessful investments; that said, the legislation is equally designed to prevent the interests of any single creditor being advanced above those of the creditors as a whole or indeed those of other interested parties."

30. This is not a case in which there is any alleged lack of candour on the part of the petitioner or any delinquent behaviour on the part of its directors, which would have to be weighed in the balance in the exercise of the Court's discretion. Effectively, the petitioner, which is beneficially owned by the Morrissey family, is perfectly candid in inviting the Court to conclude that an examinership is preferable to a trading receivership because, in the event of the latter occurrence, Donal and Breda Morrissey will withhold the co-operation with the hotel business that the petitioner believes is necessary for its survival, thereby imperilling, if not fatally damaging, that business and jeopardising all of the jobs associated with it.

31. The petitioner's contention both that the active co-operation of Donal and Breda Morrissey is necessary to the continuing viability of the hotel business and that such co-operation is contingent on the continued involvement of the Companies in the business,

certainly does not enhance the prospects of a successful examinership, in circumstances where the hotel business is likely to require fresh investment as part of any scheme of arrangement that may be proposed, but in my view it does not undermine the independent accountant's opinion, or the reasoning and material upon which that opinion is based, to the extent necessary to prevent the Court from being satisfied that the Companies have a reasonable prospect of survival as a going concern.

32. While I am not to be taken as expressing any view on a scheme of arrangement yet to be proposed, in reaching that conclusion I do bear in mind the following passage from the judgment of Clarke J. in *Re McSweeney Dispensers 1 Limited, supra* (at para. 6.1):

> "It was correctly pointed out…that the purpose of examinership is not to absolve shareholders from the consequences of a failed venture. I have, in particular, in a number of recent examinerships emphasised the importance of scrutinising schemes of arrangement where the only additional capital being introduced comes from the existing shareholders or persons or entities connected with them. In such cases it is important for the court to analyse with some care the extent to which the scheme as a whole is fair not only as and between the various categories of creditors but also between the creditors on the one hand and shareholders on the other. Such a scheme may well be unfair if the shareholders get to keep their company (and frequently retain additional financial benefits such as contracts of employment or director's fees which go with it) for the introduction of very limited additional capital in circumstances where the creditors are expected to take huge write downs. If the examiner in this case was to ultimately come up with a scheme of arrangement which was unfair on that basis then there can be little doubt but the scheme would not be confirmed."

Proposed trading receivership

33. A further significant controversy between the parties concerns the extent to which the receivership initiated by Bank of Ireland may itself affect the prospects of the survival of the business as a going concern, as an alternative to examinership.

34. On behalf of Bank of Ireland, David O'Neill, a regional business manager in the bank's Banking Challenged division, swore an affidavit on the 10th April 2014. At para. 3 of that affidavit, Mr. O'Neill avers that at no stage did either Bank of Ireland or the receiver it appointed intend that the hotel business would cease trading. Indeed, on behalf of Bank of Ireland, Mr. O'Neill goes on to express the view that the purpose of the Act, namely the preservation of an undertaking and associated employment, is best fulfilled by the continuation (or commencement) of a trading receivership over the hotel business.

35. On behalf of the petitioner, Don Morrissey swore a replying affidavit on the 14th April 2014. Mr. Morrissey avers to his firm view that a receivership of the hotel business would result in closure and the loss of all employment associated with it. Mr. O'Neill joined issue with that view in a further affidavit sworn on the 15th April 2014.

36. Bank of Ireland argues, in effect, that if the Court is satisfied that the prospects of a trading receivership are better, or certainly no worse, than those of an examinership for the survival of the hotel business as a going concern, then it should not interfere with the former by permitting the latter. The court was presented with just such an argument in the case of *Re McSweeney Dispensers 1 Limited*, to which I have already referred, and addressed it in the following terms (at para. 6.4):

> "The next set of grounds relied on by AIB concerned the contention that there was, in reality, no great difference between, on the one hand, a successful examinership and, on the other hand, the trading receivership which AIB proposed, insofar as both would secure broadly the same survival of enterprise and jobs which, as I pointed out *In re Traffic,* is the principal concern of the legislation. However, as has been pointed out in a number of judgments to which reference has been made, part of the purpose of the examinership legislation is to prevent the single, large and secured creditor being necessarily enabled to arrange events in a way designed solely to suit its own interests. A debenture holder who has a charge over the entire assets of a company cannot, under the examinership legislation, use that fact to trump, in all circumstances, the interests of other creditors or stakeholders (see the comments of McCarthy J. in *In re Atlantic Magnetics Ltd. (in receivership)* [1993] 2 I.R. 561, at 578-579). The problem with a debenture holder who has security over the entire undertaking and who is, thus, able to, in effect, take over the running of all of the business, is that such a creditor is perfectly entitled to take action (within the law) designed primarily to meet its own advantage. While such a party cannot sell at an undervalue (without facing the risk of legal action) it can choose a time of selling best designed to meet its own interest. As pointed out by O'Donnell J. in [*McInerney Homes Ltd v Cos Acts 1990* [2011] IESC 31], part of the benefit which such a debenture holder has is that it retains the flexibility to decide just how to get the maximum repayment of its loan possible. That factor needs, as O'Donnell J. pointed out, to be taken into account in assessing unfair prejudice where it is suggested that the liabilities of the secured creditor in question are to be crammed down."

37. Having referred to the ability of such a secured creditor to determine the time of sale of the business in a way best designed to meet its own interests, Clarke J continued (at para. 6.6):

> "The difference between a trading receivership and a restructured company after the confirmation of a scheme of arrangement arising out of an examinership is that, in the trading receivership, the bank concerned will remain able to make decisions based solely on its own interests and to the exclusion of the interests of other creditors. Under a scheme of arrangement, and provided that the scheme is not unfairly prejudicial, the rights of all creditors are as per the scheme of arrangement. It does not necessarily follow that the rights of other creditors will not, therefore, be impaired in the context of the trading receivership as opposed to the position which those creditors might hope to achieve under a possible scheme of arrangement."

38. Clarke J. concluded on this point (at para. 6.7):

> "It does not, of course, follow that it will be possible to put in place a scheme of arrangement which is fair to the secured bank creditor, but also leaves some or all of the other creditors in a better position than would pertain in the case of a trading receivership. However, that possibility cannot be ruled out. It follows that, while it may well be the case that a trading receivership would provide much the same protection for jobs and enterprise, it might not provide the same benefits to other creditors. In those circumstances, it did not seem to me that the alternative of a trading receivership should be necessarily preferred at this stage to the possibility of a beneficial scheme of arrangement. The time to assess those options is when the detail of a scheme of arrangement (if one can be secured) is available. On that basis, it seemed to me that the appropriate course of action was to appoint an examiner and see whether the examiner can come up with a scheme of arrangement which is beneficial to the other creditors but not unfairly prejudicial to AIB. It seemed to me that there is a reasonable prospect of such a scheme being produced but, of course, it is far from guaranteed. That does not mean that the examiner should not be given a chance to see if such a scheme can be put in place."

39. Applying that analysis to the circumstances of the present application, I have come to the view that the appropriate time to assess the competing benefits of a trading receivership and an examinership is when the detail of a scheme of arrangement (if one is secured) is available. In reaching that conclusion, I am mindful of the following dictum of McGovern J. in *Re Slyne Properties Limited* [2010] IEHC 37, unreported (High Court), 11 February 2010:

> "The Act in no way ignores the rights of debenture holders. Where an Examiner brings before the court a proposal for a scheme of arrangement, a confirmation hearing has to take place soon after the examiner's report is received, and the court cannot confirm the proposals unless they have been accepted by at least one class of creditors whose interest would be impaired by the implementation of the proposals. The court must also be satisfied that the proposals are fair and equitable in relation to any class of member or creditors who have not accepted them and whose interests would be impaired, and that they are not unfairly prejudicial to any interested party."

Conclusion

40. For the reasons set out above, I confirm the appointment of Mr. Ian Lawlor of JPA Brenson Lawlor, chartered accountants, Argyle Square, Morehampton Road, Dublin 4, as Examiner, pursuant to the terms of s. 2 of the Act, and I direct that he furnish his separate reports in respect of each of the Companies in accordance with the terms of s. 18 of the Act.