Neutral Citation: [2016] IEHC 524

THE HIGH COURT

[2016 No. 313 COS]

IN THE MATTER OF JJ RED HOLDINGS LIMITED

AND IN THE MATTER OF SECTION 509 OF THE COMPANIES ACT, 2014

JUDGMENT of Ms. Justice Baker delivered on the 15th day of September, 2016.

1. This judgment is given in an application to confirm the appointment of an examiner to the petitioning company, which is opposed by a substantial creditor.

2. Tom Murray was appointed interim examiner of JJ Red Holdings Limited ("the Company") by order of Costello J. on 18th August, 2016. The application to confirm his appointment as examiner is opposed by Henciti Limited, a limited liability company which owns the landlord's interests in the occupational lease under which the Company occupies the hotel and bar premises from which it conducts the entire of its business. I will refer to the creditor who opposes the petition as "the landlord". The petition is supported by all of the employees who have signalled their approval in writing, and by the trade creditors. Revenue is neutral.

3. The petitioner argues that it has a very strong core business, which is now in profit and this argument is supported by the report of the independent expert, and his supplemental report in response to a report adduced by the landlord.

The Company

4. The Company was incorporated on 28th April, 2006 for the purpose *inter alia* of the management of a hotel and ancillary hospitality services. The directors and shareholders of the Company are two brothers, Emmet McDermott and Donie McDermott, both of whom reside in Ireland. The Company is the trading operator of a hotel named Dublin Citi Hotel and Bar, trading from premises at 46 to 49 Dame Street, Dublin 2, a 27 bedroom hotel with licensed bar, a dance area and restaurant. The Company occupies the hotel premises on foot of a lease made on 31st December, 2006 with the predecessors in title of the landlord for the term of 35 years from 1st January, 2007 at a rent subject to five-year rent reviews. The Company has 54 employees of whom 40 are full time. In addition, the directors and the child of one of the directors are also employees of the Company.

5. It is fair to say that the Company entered the hospitality sector at what was possibly the worst time to commence such a business, and during the recession that began soon after the business opened, the Company made losses for a number of years. In the first year the losses were a quarter of a million euro and the quantum of losses increased up to 2010 and declined thereafter. The Company returned to profit, albeit a small profit, in 2013, and in 2015 showed a before tax profit of €403,000. It anticipates a greater profit for the calendar year 2016, as profits of €312,000 are shown for the first six months of this year.

6. In the course of the recession the directors made substantial loans to the Company *inter alia*, to discharge staff wages, and during that the time the directors themselves took no remuneration as directors. Some of these loans have been repaid.

The current balance sheet shows net shareholder total liabilities of €1,836,435, of which €387,195 represents directors' loans. The statement of affairs contained in the IER shows that the Company has a surplus of liabilities over assets in the sum of €1,451,385. A statement of affairs prepared on a winding up basis shows a deficit of €1,744,605.

7. The up-to-date balance sheet shows creditors standing at €836,435, in addition to €1.1 m owed to the landlord for rent, full particulars of which will appear below.

8. It is not disputed that the Company is insolvent.

The landlord

9. The landlord is a limited liability company incorporated in Ireland, owned by Paul Hennebry and his brother, Denis Hennebry, who identify themselves as having upwards of 25 years experience in owning and operating hotels and licensed premises. The primary basis on which the landlord opposes the petition is that the examinership process is said to be "designed to frustrate and evade" a settlement entered into between the landlord and the Company three weeks before the petition was presented.

10. The landlord purchased the reversionary interest from a receiver appointed by Bank of Ireland by agreement made on 31st August, 2015 which was closed on 1st October, 2015. The arrears of rent were said then to be in the region of €1m, and the landlord took the benefit of these arrears by separate assignment. The landlord has frankly said on affidavit that it was anticipated at the time of purchase that it would rely on the forfeiture clause in the lease to take possession of the premises from which it was intended to continue the hospitality business.

11. The purchase of the premises was funded by a loan from a US/Irish hedge fund, and the landlord's indebtedness is in the region of 111% of the purchase price, the landlord having borrowed an additional €500,000 for the purposes of providing it with working capital in anticipation of taking over the business.

12. Almost immediately after closing the sale, and after correspondence with the solicitors then acting for the Company had failed to achieve an agreement regarding the arrears, the landlord served a forfeiture notice on 21st October, 2015, in reliance on the arrears of rent, and sought to re-enter the premises on foot of the notice. The Company then commenced proceedings seeking declaratory and injunctive relief on the pleaded grounds that the Company had a *bona fide* belief that the landlord, and later the receiver appointed to the landlord, had agreed a permanent reduction in rent, (from €520,000 to €260,000 per annum) and that, as the reduced rent was not in arrears, forfeiture did not lie. The Company obtained an *ex parte* injunction restraining the landlord from taking possession on foot of the forfeiture notice, and the landlord opted to pursue the approach of seeking to bring the proceedings on for hearing through the fast track process available in the Commercial Court.

13. The proceedings came on for hearing before Barrett J. on 19th July, 2016 when the case was called on for hearing for several days. Negotiations led to a written compromise being entered into between the parties at the end of the first day.

The settlement agreement

14. The settlement agreement entered into between the parties was made on 19th July, 2016 and, insofar as it was possible to do so, the terms thereof were made an order of the court by Barrett J.

15. The agreement contained an acknowledgement by the Company that the passing rent was the annual amount of €520,000, the figure claimed by the landlord, and also provided for the payment of an agreed figure for arrears of rent totalling €850,000, an immediate payment of €115,000 by way of the balance of rent for the current quarter, €100,000 by way of security deposit and €150,000 as a contribution to the costs of the landlord.

16. The settlement agreement also contained detailed provisions for enforcement, including a provision that the landlord could immediately obtain an order for possession and a declaration that the lease was validly forfeited on the happening of any event of default. Also included was a provision that the landlord could forthwith, upon the happening of any default, enter judgment against the directors of the Company in the amount of €730,000.

17. The primary argument advanced by the landlord in opposition to the application to confirm the appointment of the examiner is that the presentation of the petition was an abuse of process in that it is an attempt by the Company and/or its directors to avoid the obligations arising under the settlement entered into only three weeks prior to presentation of the petition. The argument is that no other problem or litigation is apparent from the operation of the Company or from the matters outlined in the petition save the dispute between the Company and its landlord, and the settlement of that dispute in July, 2016. It is argued that the petition is a collateral attack on a concluded agreement and court order, and that the effect of the examinership will be a write-down of that agreement and the reduction of the liabilities of the Company and the arrears of rent agreed to be paid thereby.

18. The landlord also points to the history of the Company and to the fact that a petition was presented to wind up the Company in 2012 by a receiver appointed to the landlord in the context of substantial arrears of rent. It was only after the receiver presented a winding up petition that the arrears of rent were paid on 23rd October, 2012. The landlord says that the Company has been historically in default of its obligation to discharge rents pursuant to the lease. The landlord asserts that the Company has been in profit only because it did not pay the full amount of the reserved rent under the lease for any of the relevant years.

The report of the independent accountant
19. For the purposes of the presentation of the petition an independent report was prepared pursuant to s. 511 of the Companies Act 2014 ("the Act") by Neal Morrison, partner in McInerney Saunders, ("the IER"). The IER shows the view of the expert that the Company has a reasonable prospect of survival as a going concern, the threshold test under the Act. But that view is conditional.

20. Several conditions are identified as essential to ensure the survival of the Company as a going concern as follows:

a. "An immediate renegotiation of repayment basis of the settlement arrangement with the landlord"

b. "Securing of additional finance to meet the cash flow requirements of the Company in meeting the renegotiated schedule"

c. "The acceptance of an appropriate scheme of arrangement by creditors in the approval of the High Court"

21. A key to the prospects of success is a requirement to renegotiate the agreement with the landlord and the securing of additional finance. The independent expert also reports that the interests of the creditors as a whole, and the members, are best served by avoiding a winding up.

22. It is suggested that additional rooms are hoped to be opened in late 2016 and that no additional capital requirement will arise as these rooms are in an adjoining premises and are already suitably furnished. The view of the independent expert is that the Company does have a reasonable prospect of survival as a going concern having regard to demand in the hospitality industry in Dublin generally, but provided what is called the "cash flow demands arising from the historic overhang on rental levels in the lease and the upward only rent clause" are dealt with.

23. The IER proposes a business plan with indicative write down to c. 80% of unsecured debts with the main body of creditors and an "achievable arrangement being made with the landlord", as well as a commercial loan to provide cash flow to meet the obligations arising from the settlement.

24. The IER identifies what must be presumed to have been the instructions received by Mr. Morrison that the directors had "hoped to meet their obligations on payment of arrears through the raising of a commercial loan from a financial institution", but that the result of the settlement had been to "crystallise an additional €1 million debt" on the balance sheet and that the payment plan demands of the terms of settlement "would have had a severe impact on the cash flow of the business". The IER suggests that the directors had "commenced an application with their financial institution" for funds to meet the settlement but that the funds were not secured "in time".

25. It is quite clear that the Company cannot meet the obligations under the settlement without a loan or cash injection from some source as well as an achievable arrangement to reschedule at least the time frame for discharge of the obligations in the settlement, if not a write-down on quantum.

26. I consider below whether the evidence in the IER is credible with regard to the prospect of obtaining finance, and whether the Company has any reasonable prospect of securing finance.

Evidence of the landlord's expert
27. The landlord engaged Neil Hughes of Baker Tilly Hughes Blake to review the IER and he has furnished an affidavit and a report and supplemental report to the Court for the purposes of the hearing. He expresses the view that the landlord is unlikely to compromise having regard to the closeness of the settlement and that the settlement represented a fairly considerable concession on the rent claimed by the landlord in the Commercial Court proceedings. He also points to the obvious fact that the proposed payment to unsecured creditors of €669,148, representing 80% of the €836,435 said to be owed to unsecured creditors on the last balance sheet, will have to be funded from additional borrowings or cash investments.

28. Mr. Hughes expressed the view that the condition requiring funding cannot be met and that the figure required to be raised of €1.7 million is far outside the capacity of the Company in all the circumstances.

29. The cash flow projections in the IER are criticised by Mr. Hughes on a number of grounds, the most important one for my decision being that the cash flow projections, which are described as somewhat optimistic even by the independent expert, make no provision for the payment of the settlement amount, or the payment of the 80% dividend in respect of past creditors, and as Mr. Hughes points out, the net results of a scheme of arrangement which provided for a mere 20% write down, would have the effect that the Company

would be exiting the examinership process insolvent on a balance sheet basis.

30. The IER suggests that the projected cash flow figures have been stress tested over the projections for twelve months, and so tested, the opinion of the independent expert is that the Company would remain cash positive in 2017, albeit only if 2016 sales levels were achieved.

31. I accept the argument of Mr. Hughes that cash flow projections are a key element in the considerations of the court under its examinership jurisdiction, a key indicator that the company has a reasonable prospect of survival. The suggestion that insurance was omitted from the figures has been partly explained in the supplemental IER, that the insurance is met under general expenses. Be that as it may, the cash flow projections contain no provision for the payment of the historic liabilities of €1.7m, or thereabouts, nor any provision for interest on any loan that might be secured to deal with these liabilities.

32. In response, Mr. Morrison in his supplemental IER, points to the fact that his projections included a contingent provision of €20,000 per month, that his projections are based on an improbable scenario that there would be no increase in turnover from the 2016 figures, and do not include the anticipated revenue from the additional fifteen rooms. He says he does not envisage all three of these negative scenarios arising, and is now even more of the view in his second report that the cash flow projections do include the higher rent. Taking all anticipated elements into account he expects the cash holding of the company at the end of the twelve month period to December 2017, to be €140,000, €84,000 less than what he projected in his first report. He says he is satisfied the Company could meet an additional €130,000 increase in rent, or even more.

Possible investors

33. Counsel for the petitioner points to the fact that two private persons have written letters expressing interest in investing in the Company in consideration of the transfer of shares. These expressions of interest are couched in the usual terms one would expect, and are made subject to the usual due diligence and other conditions. There is nothing in these letters that points to the amount of information the investors had when they wrote the letters, and whether they knew of the historic debt of almost €2m, including the €1.1m to the landlord which the Company now carries. Having regard however to the fact that these potential investors did know about the examinership process, it can be expected that they knew there was some historic debts and that the company is currently insolvent.

34. With regard to the possibility of securing additional finance to meet cash flow requirements, the supplemental IER says that the writer was "advised that funding is available in the form of investor funding in the amount of €500,000 which was made available immediately and that a further €250k is to be made available during the period of protection". Mr. Morrison was told that a letter and evidence of funding would be available to the court, and while evidence of funds was available from the potential investors and each of them provided a letter, the letters from each were no more than indicative, contingent and conditional letters of support and of a general interest to invest in the company in consideration of the transfer of shares. While Mr. Morrison is correct that funding to meet the cash flow problems of the Company can come from sources other than formal lending institutions, the best that the company can provide at this stage is evidence of possible funding for €500,000, less than a third of what would be required to meet all creditors, and broadly speaking a third of what would be required to meet the full payment to the landlord and the 80% payment to unsecured creditors.

35. The total funding that would be required to achieve the proposed payment to the unsecured creditors and the full payment to the landlord, even if the dates for payment to the landlord are extended is €1.7 million, and this does not include the costs of the examinership.

36. I accept the evidence of Mr Hughes that the absence of evidence to support the likelihood that commercial finance would be available is somewhat remarkable in an application of this type. Furthermore, it is apparent on the figures presented to the Court that the possible available investment of €500,000, together with the rather elusively described €250,000 said to be "available during the examinership process", is nowhere near sufficient to meet the cash flow demands and the payments under the terms of settlement.

37. In all of the circumstances I consider that there is no real prospect that funding will be available to meet an arrangement with creditors that would protect the quantum of the arrears and other payments agreed to be made to the landlord. The evidence does not in the circumstances suggest that the Company has a reasonable prospect of survival unless the quantum of the arrears and a variation on the due dates are both achieved.

38. The threshold test to be met by a petitioner under the Act is that a company has a reasonable prospect of survival following the approval of a rescue plan. The evidence in the present case is that any scheme of rescue will require substantial funding, either by investors or commercial lenders. The standard of proof may be said to be relatively low, and all that is required is evidence of a reasonable prospect of survival, not a probability that a company will exit the protection with some or all of its undertaking intact. As I noted in *In re Claremorris Tourism Limited* [2015] IEHC 796:

> "*The test is whether a reasonable prospect of success of the company is shown, not whether all factors that might lead to that success have been established*". (para. 26)

39. In the circumstances and having regard to the standard to be met, I consider that the IER does point me to the Company having a reasonable chance of survival, but conditional upon the Company being *inter alia* in a position to renegotiate and fund the payment to the landlords. The Company and its directors say that it is their intention to meet all of the obligations of the settlement agreement, but that more time is needed. This seems to me to be a misunderstanding of the role of the examiner in the process to which I now briefly turn.

The role of the examiner

40. The directors of the Company and the independent expert both predicate their arguments on an assertion that it is the intention of the Company to discharge the full amount due to the landlord, albeit some rescheduling of the €1.1m owed to the landlord is essential for the company to survive. However, while the IER is a fundamental document for the purpose of an examinership, it is for the examiner to determine a fair and reasonable means by which the liabilities of the company can be met so that it can survive as a going concern. The preliminary report of Mr. Murray sets out his view that the "repayment basis" of the terms of settlement must be agreed. He says he has engaged Messrs. Morrissey's, auctioneers and valuers, to "prepare a report". The landlord points to this fact as indicative of a view on the part of the examiner that the quantum is to be reviewed, or at least that a review must be considered. While no further evidence was available, counsel for the interim examiner suggested that the reason why Messrs. Morrissey's was engaged was to advise on the likely result of a rent review, but having regard to the fact that the rent review is not due until October, 2016, and that it is clear that the review provision is a "upwards only" provision, it is difficult to see why a formal report would have been obtained at this juncture by the examiner, mainly to deal with the likely additional rent post examinership.

41. Further, Mr. Murray does not say in his report that it is his view at this stage that payment of the full amount of the arrears agreed to be paid to the landlord would result in a fair and accurate basis on which the creditors could be expected to agree a scheme of arrangement.

42. It is not to be forgotten that while the directors in the Company may hope and intend that the examiner would achieve the result by which the landlord would receive all monies due under the settlement agreement, the examiner, as an independent person, charged with the interests of the creditors as a whole, is not bound by such an assumption or even agreement, and having regard to the fact that €1.7m in accrued liabilities had to be dealt with in a scheme of arrangement, a very substantial cash injection would be required to achieve that end. Mr. Morrison fairly points this out in his supplement report at p. 6, where he points to the fact that: -

> "It is not for the landlord to determine that there will be no agreement with the examiner in relation to the terms of the scheme of arrangement yet to be drafted. A scheme would be prepared and considered by all creditors in accordance with their particular classifications within the scheme. The Companies Act provides for a relatively mapped voting on a Scheme and the landlord would be entitled to vote in accordance with the practice and procedures set out in the Companies Act."

43. This accurately states the legal position and neither the Company, its directors, it shareholders nor the landlord may determine the course of the examinership and it is for the examiner to prepare a scheme which is fair and equitable to all creditors, and to present an appropriate funding for a scheme to the creditors.

44. Counsel for the Company also points to the fact that the interest of the secured or large creditor cannot be the governing or single factor which guides the court in considering whether to appoint an examiner. Counsel relies on para. 26 of my judgment in *In re Claremorris Tourism Limited*: -

> *"The position of a large creditor, while it cannot be ignored, and while the argument it makes must be met, cannot be allowed to be the single or governing factor in the court's considerations."*

45. Thus the effect of the process cannot be directed or preordained by the Company, its directors or shareholders. The process is to be independently carried out in the interest of all creditors. As Denham J. noted, quoting from the judgment of Cooke J. in the High Court, in *In re Vantive Holdings* [2010] 2 I.R. 198, the legislation has the effect that a scheme devised by an examiner may radically alter the structure and ownership of a company, and the future interest not merely of those persons but also of distant creditors.

46. The confirmation of the appointment of the examiner engages the exercise of discretion. If the result of the process intended to be, or is likely to be, a variation of the settlement agreement, I turn now to consider whether it can be said that the petition is presented for a collateral and improper purpose.

The motivation in presenting the petition

47. The landlord argues that the petition ought to be dismissed in the exercise of my discretion. It is argued that the petition was presented for an ulterior motive and without good faith, that the settlement was a sham and that the petition is an attempt to renegotiate or avoid its terms. Counsel for the petitioner argues that the only relevant motivation for the purposes of the hearing before me is the motivation of the Company in bringing the petition for examinership.

48. Irvine J. in *O'Flynn & Anor. v. Carbon Finance & Ors*. [2014] IEHC 458, identified an improper motive in the presentation of the petition, and both counsel rely on her judgment, and her decision to refuse to confirm the interim protection.

49. It is argued that the settlement was not a sham or device in order to buy time, and that had that been so, the Company would have no useful purpose in making the first payment, and the *bona fides* of the Company is further borne out by the fact that no proposal is made by it to reduce the quantum of its liability to the landlord, and that what is proposed is a variation in the timeframe.

The law

50. The Supreme Court decision in *In re Gallium Limited* [2009] IESC 8, [2009] 2 I.L.R.M. 11 is the starting point for the analysis of the jurisdiction of the court to appoint an examiner to an insolvent company, and the statement at para. 46 of the judgment of Fennelly J. remains the key proposition with regard to the discretionary nature of the remedy. A petitioner must show that the company has a reasonable prospect of survival if examinership is to be granted, but

> *"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 the survival merely triggers the power, which remains discretionary."*

51. The landlord relies in particular on the judgment of the Supreme Court in the second judgment in *In re Vantive Holdings*. An application to appoint an examiner to Vantive had been rejected by Kelly J. in the High Court and his decision was upheld on appeal. The same petitioners sought to present a second petition to the High Court founded on factual material, expert opinion and evidence either available to or obtained by it at the time of the hearing of the first petition which the Court held was consciously, deliberately, and contrary to legal advice withheld from the Court. The Supreme Court allowed the appeal from the decision of Cooke J., who had allowed the presentation of the second petition, on the basis that the presentation of the second petition was an abuse of process. While the Supreme Court accepted that the then relevant Act of 1990 did not prohibit the presentation of the second petition for the appointment of an examiner, the Court considered that special circumstances and explanation would be required. Of relevance for the subject application was the proposition stated by the Court, that a petitioner must present all relevant information to the Court and the fact that the Supreme Court rejected the second petition in its inherent jurisdiction to protect the integrity of the due process and of the administration of justice.

52. Of critical importance to the decision of the Supreme Court was the proposition that, while the interests of those who might benefit in the examination process must be taken into account under the legislation, the legislative considerations and the interests of those persons could not of themselves override the obligations on the petitioner not to abuse the process of the Court.

53. Murray C.J. said the following at para. 29 of his judgment:

> "*[29] The appointment of an examiner on foot of a petition has laudable objectives which in general terms are designed to facilitate the survival of a company as a going concern notwithstanding its insolvency if it demonstrates that it has a reasonable prospect of survival. Once the petition is lodged the company is entitled to the protection of the court which may be to the serious detriment of its creditors and that protection continues while the matter is pending before the*

court. It comes to an end once the application is refused (subject to any stay which keeps alive the petition pending an appeal) or, if successful continues for up to 70 to 100 days. The protection of the court could be artificially obtained if it were possible for a petitioner, after its first petition had failed, to proceed (even though such a step was not envisaged at the time of the first petition) with one or more successive petitions on the basis of additional evidence, notwithstanding it had been available and deliberately withheld, at the first petition, and thus extend further the protection of the court from its creditors pending at least a hearing which resulted in its refusal. Again, to permit a party to make the same application on foot of withheld evidence by way of petition, without excusing exceptional circumstances, would undermine the principle of finality, which the courts have always considered essential to the integrity of the administration of justice. As Hamilton C.J. observed in In re Greendale Developments Ltd. (No. 3) *[2000] 2 I.R. 514 at p. 528 '… the finality of proceedings both at the level of trial and possibly more particularly at the level of ultimate appeal is of fundamental importance to the certainty of the administration of law, and should not lightly be breached'*".

54. While the judgment in the second petition in *In re Vantive Holdings* was concerned primarily with the finding of the Court that the presentation of a second petition was an abuse of process, the judgment of Murray C.J. made it clear that he considered it wrong in principle that the protection of the court could be "*artificially obtained*".

55. Denham J. in her judgment stressed that, while Cooke J. was correct that the statutory test did require the Court to consider whether the Company could survive, it was not the "*overriding consideration*", the statutory test was one factor to be weighed in the balance of all other relevant factors and principles which included the finality of litigation and the actions of the petitioner. The interests of creditors are not the determinative overriding considerations (para. 83). A court would not reject a petition and examinership merely for the purposes of disapproval of misjudgement, past mistakes or even misconduct on the part of directors, but it was a factor to be weighed.

56. The Supreme Court relied to a considerable extent on the principle from *Henderson v. Henderson* [1843] 3 Hare 100, that there be finality in litigation.

57. While one could argue that the judgment in *In re Vantive Holdings* is confined to the particular facts of that case, where the litigation in respect of which finality was thought to be desirable was the presentation of a petition for examinership, the approach of Denham J. was more far-reaching and does not confine itself to repeat or successive applications for examinership which ought not to be permitted to drag on or be prolonged. At. para. 87 she said the following:

> *"The court has an inherent power to prevent the misuse of its procedures which would be unfair to a party to litigation or which would bring the administration of justice into disrepute."*

58. The emphasis therefore, was not merely on the desire to have finality in the individual type of process contemplated, but also to ensure that the administration of justice was not brought into disrepute, and as she put it later in her judgment, that there be "*closure on an issue*".

59. I consider that *In re Vantive Holdings* is authority, not merely for the propositions that there not be successive unexplained and unjustified petitions seeking the protection of the court in respect of the same company, but also that if the presentation of the petition has the effect of re-opening an issue between parties which had already been determined that it may be an abuse of process to permit that to happen. This is consistent with the approach of the court in the other cases to which I turn.

60. In *In re Traffic Group Ltd.* [2007] IEHC 445, [2008] 3 I.R. 253 Clarke J. did confirm the appointment of an examiner, notwithstanding what he found to be wrongful actions or lack of candour on the part of the petitioners in the immediate run-up to the presentation of the petition, because there was, in his view, a high chance of successfully preserving the enterprise and most of the jobs concerned, and because he considered it possible for him to make the order, if the petitioners gave an undertaking not to have any role in respect of the company for the period of 18 months, which was given. However, Clarke J. regarded lack of candour as a relevant factor to be weighed with other factors.

61. Counsel relied also on my judgment in *In re Step One Permanent Solutions Limited* [2015] IEHC 284, where the failure to disclose relevant material facts was regarded as one factor which engaged my discretion to decline the petition and refuse to make the appointment, and where I considered that an obligation of utmost good faith arose at all stages of the process.

62. The landlord also relies on a judgment of Kelly J. in *In re Missford Limited* [2010] IEHC 11 in which he accepted that the company had met the threshold that there was a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern, but refused in the exercise of his discretion to confirm the appointment of an interim examiner.

63. In refusing the application Kelly J. was in particular influenced by the egregious breaches of company law, revenue law and the obligations that the company owed to its employees and the likely "beneficial effect for delinquent directors". The analysis of Kelly J. involved him considering the interests of the various creditors and the employees and weighing those against the egregious behaviour that he found.

64. Clarke J. delivered judgment in *In re McSweeney Dispensers Ltd*. [2011] IEHC 494 and did appoint an examiner notwithstanding an argument by a substantial creditor, AIB, that the principal purpose behind the petition was to enable the existing shareholders to retain control of the company by means of a significant reduction in bad debt but where the business had been badly run and significant capital extracted.

65. At para. 4.5 of his judgment, having considered the judgments of the Supreme Court in *In re Gallium Ltd*. and *In re Vantive Holdings Ltd*., and his own judgment in *In re Traffic Group Ltd*., he pointed to the fact that the "*purpose of examinership is not to absolve shareholders from the consequences of a failed venture*" and that the Court must 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*." Clarke J. considered that as his concern was to assess whether there was a reasonable prospect of survival and as he was not satisfied that the only possible outcome of examinership was the one for which AIB contended, that the appointment should be confirmed.

66. While Clarke J. in *In re McSweeney Dispensers Ltd*. was dealing with the argument of AIB that the interests of shareholders were those which were sought to be protected, not much difference is evident with regard to the interests of the shareholders and those in a small privately owned company such as the one in issue in these proceedings which is jointly owned by two brothers. If the sole purpose of the examinership process is to protect the company for their benefit as opposed to the interests of the company and its

undertaking, a court might have cause for concern. If, as is argued by the landlord, the sole purpose of this petition is to protect the Company from being required to perform obligations freely, and it says irresponsibly, entered into only three weeks before the petition was presented, then the motive for the presentation of the petition could be seen as one by which the Company seeks to avoid those obligations and is less focused on the protection of the enterprise than on a desire to reschedule or renegotiate that agreement.

67. The exercise of examining the "motive" in presenting the petition does not in my view involve the court considering the subjective intention or conscious purpose of the petition, but can involve looking at the probable outcome of the petition and whether that might have as a collateral effect the mischief to which Denham J. referred. It is not necessary for the court to rest its discretionary approach on a finding of actual subjective motive in the true sense. If the effect of the appointment of an examiner is to set at naught a court order or compromise of court proceedings recently entered into, there is a real risk that the process would in its practical effect fail to further the administration of justice, and amount to a collateral attack on previous judgments, orders or compromise.

The presentation of the petition: good faith?
68. After describing the terms of settlement entered into on 19th July, 2016, the petition identifies what is described as "the sources of the present difficulties of the company" as follows:

> 22. The directors had intended that the Company was to meet its obligations in the Terms of Settlement through raising a commercial loan from a financial institution. The result of this legal action by Henciti was to crystallise an additional €1 million debt on the Company's balance sheet and the payment plan has had a severe impact on the cash flow of the business.
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> 23. While the directors of the Company progressed an application with their financial institution the Company could not draw down funds in time and the payment due on 9 August 2016 was not made. As a result by letter dated 10 August 2016 the solicitors for Henciti wrote to indicate that they intended to re-enter the matter in the Commercial List of this Honourable Court and to seek the orders set out in Clause 2 of the Terms of Settlement. By further letter dated 12 August 2016 the solicitors for Henciti wrote to indicate that the matter had been re-entered and listed before Costello J. on 19 August 2016."

The correspondence I refer to below was fully exhibited.

69. In his first replying affidavit on behalf of the Company, Emmet McDermott says that it was "the immediacy of threatened actions by the landlord", and not an attempt to "frustrate and evade the Settlement Agreement", that precipitated the presentation of the petition, and that Costello J. was fully appraised of the terms of settlement, of the default and the immediacy of the threat that the lease would be forfeit.

70. The affidavit also avers that at the hearing of the application before Costello J., it was stated that it was not the intention of the Company that the amounts due to the landlord on foot of the terms of settlement be reduced, and that the approach of the Company to the settlement is that it will require a rescheduling of payments rather than a reduction in quantum.

71. At para. 10 of this affidavit, Mr. McDermott continues:

> "The reason for the Company not complying with the terms of the settlement were not foreseen at the date of entering into the agreement and the examinership process was not considered as an option at the time that the terms of settlement were concluded nor was it subsequently embraced as a mechanism for frustrating the rights of the Landlord to the sums payable on foot of the terms of settlement".

72. Counsel for the landlord argues that an inevitable conclusion to be drawn from these averments is that at the time the settlement was entered into the Company did not have funding from a bank or other source to meet the substantial obligations which it undertook, and which involved the payment of half a million euro within weeks of its date.

73. To assess this proposition I need to examine the events that occurred after the settlement was agreed on 19th July, 2016. The first tranche of payment in respect of current rent was paid by the due date, 29th July, 2016, in the sum of €115,000, and that brought the rent up to date to the end of September, 2016. At the date of the presentation of the petition the sum of €425,000 being half of the agreed arrears of rent of €850,000 was not paid. At the date of the hearing of the application before me the payment of €100,000 by way of security deposit then due was also not paid, and there remains now owing to the landlord by the company the sum of €1.1 million euro (€850,000 in respect of the agreed sum for arrears of rent, €150,000 in respect of costs, and €100,0000 by way of security deposit).

74. The landlord places particular emphasis on the letter of 9th August, 2016 from Moran & Ryan Solicitors, then acting for the Company, sent on the day when the first of the two payments of €425,000 was to be met. I quote the letter in full:

> "Dear Sirs,
>
> We have been instructed by our client that while the funds of €425,000 in respect of the payment due today are in place, their bank is unable to transfer the funds today.
>
> Accordingly, the Bank has informed our client that payment will leave our client's account shortly.
>
> In the light of the above, our client would ask that your client please grant a short extension of time in order to allow for the funds to be transferred to your client account."

75. The solicitors for the landlord rejected the application for an extension and indicated that the matter would be re-entered in the Commercial Court and that orders for judgment in accordance with the default provisions in the settlement would be sought. A date of 19th August, 2016 was notified the following day as being the date when the matter was to be heard by the Commercial Court.

76. In trenchant terms counsel for the landlord argues that the letter contained a number of untruths, and that evidence points clearly to the fact that the money was not "in place" and that at best false instructions were given to Messrs. Moran & Ryan by their client.

Finding on funding

77. I find on the evidence that funds to pay the first tranche of the arrears were not in place, there was no facility available from a bank or any other person on 9th August, 2016, payment of which had been delayed by administrative matters. The letter did contain untruths.

78. The tone of the IER suggests that the "crystallisation" of the debt to the landlord caused an immediate cash flow difficulty it is hoped to resolve, but I consider that the evidence on affidavit points me to a different view. Assuming that the directors have put their best foot forward in their replying affidavit to the opposition of the landlords, at best the Company can say that it negotiated with the bank before the settlement was reached and before the landlord and tenant case came on for hearing. One must assume that the negotiations with the bank happened at a time when the directors were hopeful of succeeding in the litigation and thus putting the Company in a position where no arrears of rent had accrued, and where its cash flow or insolvency problems were much less than they now are.

79. I agree with counsel for the landlord that the company was reckless in entering into the settlement agreement and was equally reckless in instructing its solicitor to write to the landlord's solicitor saying that the money was "in place". This is for the following reasons.

80. The evidence points to the directors having met with their bank in June, but no formal loan sanction, or even conditional loan sanction, had issued. The directors have identified on affidavit a bank official with whom they were dealing and, this evidence not having been cross-examined, the uncontested evidence is that the company was dealing with an identified bank official in an identified bank. The directors met with their bank in June before the landlord and tenant case came on for hearing in the Commercial Court and before it was compromised. The evidence does not show engagement in regard to the performance of the settlement.

81. Mr. McDermott's evidence is that in June, 2016 he and his brother met with an identified official of Bank of Ireland to "discuss finance for the Company" and that this bank official "seemed confident that the bank would be in a position to provide finance". Documentation was furnished to the bank between the end of June and early July. He goes on to say that "however the finance did not ultimately become available although we were firmly of the view that it would".

82. No correspondence with the bank, or no correspondence or memoranda of meetings or resolutions of the company are exhibited. Nothing is said of what precisely the Company said to its bank, and the reason it said it required funding, or the amount sought. I have accordingly no means by which I can ascertain the nature of the discussions, the amount of funding sought, or the reasons given. I consider it relevant that the engagement with the bank continued only up to early July, i.e. before the case came on for hearing in the Commercial Court, and extrapolate that the Company at that stage was confident it would succeed in obtaining the declarations that it sought in those proceedings and would therefore be in a position to continue to trade from the premises at the reduced rent for which it contended, one half of the rent expressly provided in the lease. No engagement with the bank close to the time of the settlement, or thereafter, is said to have occurred.

83. The affidavit evidence points in my view to the Company not being in a position to meet the terms of settlement negotiated on 19th July, 2016, and while I can do no more than extrapolate from the facts, the engagement with the bank was in June and early July, and did not continue up to the date of the settlement, when the agreement to pay over a million euro was formulated and made. I find it remarkable, for example, that there is no averment in the affidavit that in the course of the lengthy negotiations leading up to the settlement, the brothers made contact with the Company's bank or other possible investors to discuss whether funds would be available to meet the payments which were agreed in the settlement.

84. I conclude that the engagement with the bank did not include a proposal or request that the bank would provide funding for the settlement, and accordingly that the averments in the second affidavit of Mr. McDermott that he believed the finances would become available is not based on a realistic view of the options and that it is unlikely in the circumstances that finances to meet the settlement would now become available, or were reasonably believed to be available on 9th august 2016 when the letter seeking indulgence was sent to the landlord.

85. It is clear that when Mr. McDermott went to negotiate with his bank the company was already insolvent, and the context of the negotiations appears to me to more probably have been the insolvency and general financial needs of the Company in that context where it had liabilities excluding rent in almost a million euro, and the perceived need to operate and control rooms in an adjoining premises, rather than a perceived need to deal with the arrears of rent which that stage the Company appears to be confident that it would not be required to pay.

86. A fundamental element of the undertaking of the Company also is the fact that it has little asset value, and the occupational lease that it enjoys contains a standard upward only rent review clause in respect of which it is common case that the rent is likely to increase by a substantial amount, and an increase of €160,000 per annum was mentioned in the course of the hearing albeit this was no more than an indicative figure. I accept the evidence of Mr. Hughes that the possibility of raising finance on this leasehold interest is limited in the light also of the historic losses of the Company and because the Company was unable to meet the terms of the settlement in the last month. The Company has little to offer in the way of fixed security. This makes it less likely that commercial funding will be available.

87. The Company did discharge the first payment due under the settlement agreement on time, and the payment of the sum of €115,000 offered no benefit to the directors personally as the amount they agreed to pay under the settlement agreement was agreed not to be reducible by any amount paid under that clause. In circumstances where there was no useful purpose to be served in making the first payment as a matter of objectively ascertainable fact, it is argued that the Company did have an intention at the time of the settlement agreement to perform the obligations. I disagree, as the amount of the payment was small enough to have been readily payable from current account, and had the first payment been missed the landlord could have re-entered the matter in the court before the Long Vacation. A longer delay was inevitable once the Vacation had started. I do not for that reason take much comfort in the fact that the first payment was made.

88. I consider that the language used in the petition wrongly gives the impression that the funding was expected and unforeseen circumstances led to the cash flow problems identified. The funding was not in place, no reasonable prospect existed that it would be obtained, and the petition was an attempt to buy more time to meet the obligations of the settlement agreement.

89. For the reasons explained above I consider it probable that the examiner will not be in a position to raise funding to meet the settlement terms and that the result of the process is likely to be the variation to the detriment of the landlord of its terms.

90. Thus the collateral effect of the examinership will in my view be to allow the Company to avoid a recently negotiated and complex settlement of proceedings, and would fail to respect the principle of finality of litigation, or the solemnity of the entering into a

compromise and having its terms ruled by a court.

The employees
91. Unusually perhaps, in this examinership, the evidence points to the fact that the permanent employees are unlikely to loose their jobs even were an examiner not to be appointed. The directors of the landlord have indicated in their affidavit that they intend to continue the employment of all permanent employees other than the directors and the son or child of one of them. They are prepared to give an undertaking under oath to the court that this would be so. Some time was taken in the course of submissions to me as to whether the employees would have the benefit of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003, S.I. 131 of 2003, but having regard to the clear position being adopted by the landlord, I consider that the position of the employees is secure irrespective of the result of this application. Indeed, some of the supporting letters from unsecured creditors points to the high calibre of staff in the business and in maintaining a very high level of service.

92. I am satisfied that the interests of the employees will not be adversely impacted by the refusal to confirm the appointment.

Conclusion
93. The majority of cases in which examinership is sought are where a company has historic unsustainable liabilities that are required to be met if the company is to continue as a going concern. This was the position in *In re Claremorris Tourism Limited* and recent applications have emerged in the context of significant historic debt arising from the banking and property price collapse. However, examinership is a broad remedy and the mere fact that a debt or liability is recent does not of itself mean that the protection of the court may not be given. It is the purpose or effect of the appointment that raises issue of improper motive in the instant case, not the recent nature of the liability giving rise to the need to call for protection. However, it can readily be seen that to seek protection in regard to a threat arising from a very recent debt may require the court to be satisfied that its process is being fairly and properly engaged.

94. I am satisfied that the effect of the appointment of an examiner in the present case is that a very recent settlement of contentious litigation is likely to be avoided or varied, and that the true purpose of the petition is to avoid the onerous terms of that settlement. I consider that the petition was an attempt to buy time but that time has run out for this company.

95. I reject the suggestion that the approach of Clarke J. in *In re Traffic Group Ltd.*, where arrangements were put in place to neutralise the wrongdoing of the directors is appropriate in the present case. The court has a power in the course of the examinership process to direct an inquiry into the behaviour of a director, to make certain orders or provisions with regard to the ongoing engagement by the directors with the company, the payment of directors remuneration *etc*. I consider that the motive was that of the Company and not merely a personal motive or purpose of its directors, and that no process or order I might make would avoid the consequences in respect of which I have concern.

96. The petition is to be dismissed in the exercise of my discretion. I am not satisfied that it was presented in good faith.