Neutral Citation Number: [2012] IEHC 107

THE HIGH COURT

[2012 No. 175 COS]

IN THE MATTER OF EIRCOM LIMITED AND IN THE MATTER OF METEOR MOBILE COMMUNICATIONS LIMITED AND IRISH TELECOMMUNICATIONS INVESTMENTS LIMITED AS RELATED COMPANIES WITHIN THE MEANING OF SECTION 4(5) OF THE COMPANIES (AMENDMENT) ACT 1990 (AS AMENDED) AND IN THE MATTER OF THE COMPANIES (AMENDMENT) ACT 1990, AS AMENDED

JUDGMENT of Mr. Justice Kelly delivered on the 30th day of March, 2012

1. The Irish telecommunications network was until the early 1980s owned and operated by the Department of Post and Telegraphs. In 1984, Bord Telecom Éireann took over that network. In 1999, the then government decided to privatise that board. Its name was changed to Eircom and it was floated on the Dublin, London and New York Stock Exchanges with a market capitalisation of €8.5b. At that time, the net debt was less that €500m.

2. Given Eircom's strategic importance, what has happened since then makes sad reading for this State and its citizens. Over the following years the company changed hands on a regular basis. One could be forgiven for thinking that it became the subject of a game of corporate *"pass the parcel"*. But this was a game with a difference. On each occasion that it was played, the players won (on occasions handsomely) and it was the parcel, namely the company, that lost.

3. In 2001 the mobile phone business was demerged and Vodafone acquired the business. In November that year, Eircom was acquired by Valentia Consortium. At the end of that episode, its bank debt stood at €2.1b.

4. Each change of ownership thereafter, with the exception of the last, has given rise to dramatic increases in the debt burden of the company. The last such takeover was an exception in that there was no huge increase in debt but nonetheless, the debt has risen to its current crippling level. It now is €4.08b owed to financial creditors.

5. The petition, which has been presented on behalf of Eircom and its two related companies, Meteor Mobile Communications Limited and Irish Telecommunications Investments Limited spells out the unhappy position in some detail. It is as follows: while Eircom is trading profitably its revenues and profits have been declining due to significant operational and trading challenges. It has significant capital expenditure requirements over the next five years and a significant proportion of those relate to next generation access fibre, which is described as being key to Eircom's future competitiveness and viability.

6. The group of companies owes €4.08b to financial creditors. Of that amount €2.659b is first lien debt which is fully secured. The second lien debt amounts to €350m. It is secured but is subordinated to the first lien debt. A further €350m is owed to holders of Floating Rate Notes (FRNs) which is secured on shares in ERC Ireland Holdings Limited. A further €699m is owed to holders of payment in kind or PIK notes. In addition to all of those liabilities there are significant trade and other debts. The companies are guarantors of the group's debts in respect of the first and second lien lenders and FRNs involving a total exposure of in excess of €3.4b.

7. The group cannot generate sufficient revenues to service what it owes to its financial creditors nor are the companies in a position to service the debt which they have guaranteed.

8. The group is at this stage in breach of its covenants under its financing arrangements. That is a position which has obtained for a little time. As a result of that, repayment of the first and second lien debt has now been demanded as of 29th of this month. The group does not have funds to make that repayment. As a result, the group and the companies are insolvent.

9. It is now said that in order to deal with the situation the following must occur:-

> *"The financial debt will have to be restructured, thus giving the companies the opportunity to address the operational and trading issues which they face and enabling Eircom to implement its business plan."*

10. This is an application for the appointment of an interim examiner to the company pursuant to the provisions of s. 2 of the Companies (Amendment) Act 1990. The companies also seek the protection of the court during the period of examinership. I am told that if an examiner is not appointed then the only alternative for the group of companies will be receivership and/or liquidation.

11. None of this can be good news for the company and it is particularly bad news for the company's employees. As of 31st January, 2012, the group had 5,758 staff members. 5,566 of these were employed by Eircom and related companies. The group employs a further 192 people whose positions are dependent on the survival of Eircom and the related companies. The vast majority of jobs in the group, some 5,465, are permanent positions, with the remaining 293 being fixed term contract employees. In addition, as of 31st January, 2012, the group provided employment for a further 170 contractors.

12. Eircom is of great strategic importance to the State. The evidence before me is to the effect that this key strategic importance arises because of its ownership and control of the primary infrastructure platform that provides the vast majority of access to fixed lined telecommunication services throughout the State. A number of Eircom competitors have begun to invest in their own infrastructural access platforms but this has been confined to urban centres. Virtually all Eircom's competitors continue to avail themselves of its wholesale fixed services. Accordingly, Eircom is described as being the key provider of fixed line services throughout the country.

13. In order to qualify for the protection of the court and for the appointment of an interim examiner, a number of evidential hurdles have to be surmounted. The first is that the petitioning companies have to be insolvent. That hurdle has been surmounted in a very substantial way. Whilst Eircom has total assets of €2.348b and liabilities of €975m, giving a surplus of €1.373b, that surplus is wiped out and overtaken by contingent liabilities which it and the other petitioners have. It is clear on the evidence that its cash flow is not enough to meet the debt repayments. It is insolvent.

14. Under subs. (2) of s. 2 of the Act, I am prohibited from making an order unless I am 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. The independent accountants who were retained in order to conduct a study of the company, namely Price Waterhouse Cooper, have expressed themselves of the

following opinion:-

> *"In our opinion the company and the whole of its undertaking has a reasonable prospect of survival as a going concern subject to the following conditions:*
>
> *1. Decline in retail business does not accelerate due to the insolvency of the company.*
>
> *2. The successful restructuring of group borrowings and guarantees would have to be brought about.*
>
> *3. The acceptance of an appropriate scheme of arrangement by the creditors of the company and the approval of such a scheme by the High Court.*
>
> *4. The successful roll out of fibre network and sale customers.*
>
> *5. The successful implementation of the current cost reduction plan mainly through incentivised exits."*

15. That is an opinion which has been formed after examination by the independent accountants of the company's affairs and an analysis of its circumstances.

16. There is an unusual feature to this case. It is that proposals to restructure have already been the subject of intense discussions. Not merely that, but such proposals have been voted upon by various classes of creditors. What has been proposed and what has been accepted is that the first lien debt will be reduced by €407m. The second lien debt will be reduced by 90%. The FRN liability will be completely wiped out. In addition, a lockup agreement has been entered into, which should make the formulation of a scheme of arrangement easier.

17. On the evidence before me, an examinership will give a better outcome for creditors than either a receivership or a winding up. Whilst following examinership it is likely that a thousand employees will lose their jobs over the next five years that, on the evidence, is a better outcome than might be expected if the companies were to go into receivership or a winding up order were to be made. The evidence satisfies me that there is a reasonable prospect of survival of the companies or the whole or any part of their undertaking a going concern.

18. That, however, is not the end of the matter. The order which I am empowered to make under s. 2 of the Act is a discretionary one. Even if the two preceding criteria are met, there is nonetheless an overriding discretion in the court either to grant or refuse the order. That is clear both from the wording of the Act and the jurisprudence that has been built up on it. The discretion is one which falls to be exercised judicially and judiciously. In this case, I am satisfied that there are no circumstances which would warrant me refusing the order as a matter of discretion. Accordingly, I propose to afford to the companies the protection of the court and to direct that the petition for the appointment of an examiner proceed to a hearing on a date which I will fix presently.

19. The next matter that I have to consider is whether or not an interim examiner should be appointed between now and the hearing of the petition. It is said that if an interim examiner is appointed, he will be able to engage in immediate negotiations with the senior lenders and all other stakeholders so as to ensure the preparation of a scheme of arrangement in respect of the companies as soon as possible. It is also said that the related companies require the protection of the court and there is a debate as to whether they would have that under s. 4 of the Act unless an interim examiner were to be appointed. It is also urged that the appointment of an interim examiner would result in greater confidence among the companies third party suppliers, customers and creditors as a whole thereby leading to the continuing stability of the group, related companies and their undertakings.

20. The appointment of an interim examiner ought to be the exception rather than the rule. Most cases of examinership do not require the appointment of such an officer. However, I am satisfied that having regard to the advanced state of negotiations with the creditors here and the fact that there have already been proposals put and voted upon by certain of their classes, the appointment of an interim examiner will accelerate the process as a whole. Therefore I will appoint an interim examiner as requested.

21. I have also had put before me a list of proposed notice parties who are likely to need to meet and to understand the interim examiner's position as early as possible. I, therefore, direct that the following be notice parties to the hearing of the petition: Messrs. A&L Goodbody and Kirkland and Ellis on behalf of the first lien committee of creditors; Maples and Calder and Allen and Overy on behalf of the second lien committee; J.P. Morgan as SFA Trustee; Bank of New York as FRN Trustee; the Revenue Commissioners; Singapore Technologies Telemedia and Eircom ESOP as ultimate shareholders; the swap counterparties who are Rabo Bank International and J.P. Morgan Chase Bank NA; and Dresdner Bank AG and Deutsche Bank AG. They will all be notice parties to the hearing of the petition.

22. Finally, I am asked to deal with the position of pre-petition liabilities. I accept that the business of the companies has to proceed. Persons doing business with it need to be assured that they can continue to deal with the companies on a day-to-day basis and in particular during the examinership. I am also satisfied that unless pre-petition liabilities are discharged, there is a likelihood of suppliers refusing to continue to supply with a consequent increase in the companies liabilities and perhaps even an inability to continue to trade. The pre-petition liabilities are dealt with at para. 12.8 of the independent accountant's report as follows:-

> *"This is a financial restructuring of group borrowings where the company is a guarantor as opposed to a borrower. The payment of pre-petition creditors is critical to the continuation of the business and the provision of uninterrupted services to customers. The payment of pre-petition creditors is essential to maintain the enterprise value of the business.*
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> *Approximately €32.8m of pre-petition accruals are employee related. To maximise the enterprise value of the business, full cooperation of employees is required to ensure the stability of the network during the examinership process. Many suppliers of Eircom are also customers and could claim a right of set off in relation to amounts owing to and by the company. The company is in any event projected to generate net cash of €39.7m during the protection period after allowing for the payment of pre-petition liabilities.*
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> *During the normal business cycle, as creditors are paid for past goods and services and they extend fresh credit to the company for new goods and services, the overall quantum of unsecured creditors will not fluctuate greatly. In the event that no scheme of agreement can be put together by the examiner, the risk of prejudice to the secured creditors or other parties is minimised as there should be no substantial reduction in trade creditors over the period.*

23. I accept this view and am satisfied that the pre-petition liabilities which have been identified should be paid notwithstanding the

examinership process which is now underway.

24. The order will be that the protection of the court is afforded to the companies. The interim examiner will be appointed and as I have had put before me an affidavit of suitability I appoint Mr. Michael McAteer of Grant Thornton as interim examiner pending the hearing of the petition. I am satisfied that the companies should be allowed to discharge pre-petition liabilities notwithstanding the examinership for the reasons which I have given and which were dealt with in the relevant paragraphs of the independent accountant's report.

25. I fix Wednesday, 18th April at 11.00am for the hearing of the petition and I add one further notice party for that hearing namely ComReg which is the regulator of this sector.

Approved: Kelly J.