Neutral Citation: [2014] IEHC 544

THE HIGH COURT

Record No. 2014. NO. 427 COS.

IN THE MATTER OF THE COMPANIES (AMENDMENT) ACT, 1990 (AS AMENDED)

AND IN THE MATTER OF

JP TRANSPEED EXPRESS PORTLAOISE LIMITED (In Examinership)

Judgment of Mr. Justice Max Barrett delivered on 24th November, 2014

Key issue arising

1. The key issue arising in these proceedings is whether the prescribed period within which an examiner is to make report to the court under s.18 of the Companies (Amendment) Act 1990 ought now to be extended at the request of the examiner.

Background

2. JP Transpeed Express Portlaoise Limited was incorporated on 8th May, 2000. It initially operated a courier service before making the decision to invest gradually in a fleet of trucks that was acquired with the benefit of leasing finance. Over time the company has grown to operate a full suite of services in relation to the freight, courier and haulage business for domestic, European and international parcel and pallet delivery. It specialises in the transport of dry goods and hazardous substances. It appears that for a variety of reasons the company has encountered trading difficulties in recent years. These reasons include but may not be limited to: weak financial control/management; competitive pressures from legitimate and, it is alleged, non-legitimate competitors; a general tightening of the credit market; cash-flow issues; and the non-payment of creditors, including the Revenue Commissioners. Transpeed's present examiner was appointed by this Court on 25th September, 2014. Since then he has diligently set about his tasks as examiner, including the making of a comprehensive report to the court on the work done by him from 25th September to 28th October, 2014. At this time, the examiner comes to the court seeking more time to complete all the work that is demanded of him. In an affidavit of 28th October, 2014, he avers, *inter alia*, that:

> *"I say and believe that while I have made progress to date, I am not yet in a position to put my Proposals for a compromise and scheme of arrangement to the Company's members or creditors. I am unable to file my report on the outcome thereof in accordance with (s)18(1) of the Companies (Amendment) Act (the "Act") and I am therefore seeking an extension of time to so do in accordance with (s)18 of the Act."*

Statutory basis for examiner's application

3. Under s.18(1) of the Companies (Amendment) Act 1990, an examiner must *"as soon as practicable after he is appointed, formulate proposals for a compromise or scheme of arrangement in relation to the company concerned'*. Under s.18(2) of that Act:

> *"the examiner shall convene and preside at such meetings of members and creditors as he thinks proper, for the purpose of section 23 and shall report on those proposals to the court, within 35 days of his appointment or such longer period as the court may allow, in accordance with section 19."*

4. Under s.18(h) of the Interpretation Act 2005, *"[w]here a period of time is expressed to begin on or be reckoned from a particular day, that day shall be deemed to be included in the period ...".* So when calculating the period of 35 days referred to in s.18(2) of the Act of 1990 one starts from and includes 25th September, the date of the examiner's appointment, as a day in that period. By this reckoning, the 35th day from the examiner's date of appointment was 29th October, 2014. In his report dated 28th October, the examiner indicates to the court that he will be seeking an extension of the time necessary to put his proposals to Transpeed's members/creditors and filing his subsequent report to the court. He makes mention of 27th November as the outside limit of the extension that he will seek, noting that *"I would intend concluding matters earlier than this date".* However, in his affidavits of 28th October, 6th November, and 17th November, his optimism seems to have waned somewhat and he refers solely to seeking an "*extension of time ...to 27 November 2014*".

Objection of Revenue Commissioners.

5. The application made by the examiner in these proceedings has not gone unopposed. The Revenue Commissioners have objected to the extension of time that is being sought. They point in this regard to the significant under-estimation by Transpeed of its tax liabilities in its petition for examinership of 19th September. Para.22 of that petition indicated that Transpeed was indebted to the Revenue Commissioners "*in the sum of at least £147,454.31. The breakdown of this tax is set out in tabular form below paragraph 1.33 of the independent accountant's report*." Under the relevant table in the independent accountant's report, the petitioning company states that there "*may*" be further liabilities owing to the Revenue Commissioners, the relevant amount being estimated at €100,000. The report states that "*These estimated figures will require further investigation during the protection period, if granted*." On 22nd October, 2014, the Revenue Commissioners received correspondence from the examiner which indicated that an audit undertaken by a member of the examiner's firm had revealed that Transpeed's additional liability to the Revenue Commissioners would be significantly greater than the initially estimated €100,000. On 28th October, the Revenue Commissioners received further correspondence from the examiner suggesting that the true amount of additional tax outstanding was in the region of €412,000, exclusive, it appears, of any interest and penalties owing. An ongoing Revenue audit of Transpeed suggests that there may be even more additional tax outstanding. The court can and does appreciate the apparent vexation of the Revenue Commissioners at these ever-rising tax liabilities on the part of Transpeed. However, does the increasing scale of the revenue liabilities that have been and are being identified justify the refusal of the extension of time that is being sought by the examiner in this application?

Section 4A of the Act of 1990.

6. In support of their objection, the Revenue Commissioners have sought to rely on s.4A of the Act of 1990. This provides that:

> *"The court may decline to hear a petition presented under section 2 or, as the case may be, may decline to continue hearing such a petition if it appears to the court that, in the preparation or presentation of the petition or on the preparation of the report of the independent accountant, the petitioner or independent accountant -*
>
> *(a) has failed to disclose any information available to him which is material to the exercise by the court of its powers under this Act, or*

(b) has in any other way failed to exercise utmost good faith."

7. Notably, s.4A is not mandatory in nature. It states that the court "*may decline to hear a petition ...or ...may decline to continue hearing such a petition".* [Emphasis added]. It does not require that the court so decline. This is a fact that was previously noted by McCracken J. in *Re Tuskar Resources plc* [2001] 1 I.R. 668. It is also a fact to which the court attaches some significance, as it involves an acknowledgement by the Oireachtas that there may be instances in which there could be a failure by a petitioner or independent accountant to exercise the "*utmost good faith*", yet in which it would be properly within the jurisdiction of the court to hear or continue hearing a petition to appoint an examiner and thereafter, if and as appropriate, to appoint an examiner.

8. The Revenue Commissioners have contended that if a petitioner fails to put objectively material information before the court when seeking the appointment of an examiner, this is a breach of the petitioner's obligations under s.4A of the Act of 1990 and has the consequence that (a) the protection which the court has granted is effectively tainted by illegality and (b) the court's jurisdiction to make further orders in the examinership is undermined. It appears to the court that there is no basis for these contentions in the wording of s.4A itself. That provision expressly confers a discretionary power on the court to decide whether or not to hear or continue with the hearing of a petition to appoint an examiner, even in the face of a failure by a petitioner or independent accountant to exercise the "*utmost good faith*". Clearly, if the court has a statutorily-conferred discretion to so proceed, there can be no question that when it does so proceed any resulting examinership is tainted by illegality and/or the court's jurisdiction to make further orders in the examinership is undermined. Such a reading would in practice render nugatory the discretionary power that the Oireachtas has seen fit to endow upon the court by way of s.4A.

Acting in the "utmost good faith"

9. The requirement referred to in s.4A of the Act of 1990, whereby in the preparation or presentation of the petition to appoint an examiner or in the preparation of the report of the independent accountant, the petitioner or independent accountant must exercise the "*utmost good faith*", does not have the effect that the relevant actions of a petitioner or independent accountant cannot admit of any or much imperfection. *Lex non cogit ad impossibilia*. 'The law does not compel the impossible'. Humans are flawed, human processes are flawed, and it is therefore to be expected that any applications made to the court will to a greater or lesser extent be marred by flaws. A person can act in the utmost good faith and still make the utmost of mistakes. To expect otherwise is to expect too much. This is a point that the court has previously touched upon, albeit in different contexts, in its judgments in *Izundu v. Judge Nolan & Anor* [2014] IEHC 361, at para. 8, and *Báinne Álainn Limited and Anor v. Glanbia plc* (Unreported, High Court, Barrett J., 24th October, 2014), at paras.16-18. In the present case, Transpeed got its estimated tax liabilities not just wrong but badly wrong. However, Transpeed indicated from the very outset that the figures it was providing were estimated figures that would require adjustment. Moreover, there has been no suggestion that the court in this matter is presented with facts akin to those that arose, for example, in *Re O'Flynn* where the petitioner deliberately concealed relevant information and documentation from the court. Instead the court is presented with a petitioner that has significantly under-estimated its tax liabilities and whose directors have been the subject of unproven allegations as to their commercial acuity and probity. Those facts by themselves are not enough for the court to conclude as a matter of probability that there has been any breach of the duty to exercise the "*utmost good faith*" applicable to both Transpeed and the independent accountant under s.4A. Moreover, the court has not seen any evidence or heard any argument that it considers to require an alternative conclusion.

The decision in Re O'Flvnn Construction Co.

10. In support of their objection to the examiner's application, the Revenue Commissioners point to the recent decision of Irvine J. in *Re O'Flynn Construction Co* [2014] IEHC 458. That is a case in which, *inter alia*, the court exercised its discretion under s.4A not to continue hearing an examinership in circumstances where the petitioner had deliberately concealed relevant information and documentation from the court. It is not authority for the contention that the court may not exercise its discretion differently in another case. It is not authority for the contention that a breach of the petitioner's and/or independent accountant's duty of "*utmost good faith"* arising pursuant to s.4A of the Act of 1990 has the consequence that the protection which the court has granted is effectively tainted by illegality. It is not authority for the contention that where an examinership is granted despite a breach of that duty of "*utmost good faith*" referred to in s.4A(b), the court's jurisdiction to make further orders in that examinership is undermined.

11. It is true, as the Revenue Commissioners observe, that Irvine J., at para. 113 of her judgment in *Re O'Flynn*, notes that:

> *"Suitability for examinership is a separate issue to the standard of disclosure required both by the nature of an order granted ex parte and the specific statutory requirements under s.4A of the 1990 Act. If the companies are suitable ones for examinership then a petition complying with the good faith obligations of the 1990 Act should be brought so that the Court may consider the appointment of an examiner to the companies at the hearing of the inter partes hearing of that petition."*

However, what Irvine J. does not state is that if a petition is brought in circumstances of non compliance with that duty of "*utmost good faith*" to which reference is made in s.4A of the Act of 1990, this has the necessary consequence that any related examinership which the court orders is effectively tainted by illegality and the court's jurisdiction to make further orders in such examinership is thereafter undermined. Again, such a conclusion, which Irvine J. did not reach, would in practice render nugatory the discretionary power that the Oireachtas has conferred upon the court, by way of s.4A, to hear or continue hearing a petition to appoint an examiner, even in the face of a breach by a petitioner and/or independent accountant of the duty of "*utmost good faith*". In this regard it is perhaps worth noting that judgments are ultimately but essays on the margins of the law. It is not for an unelected court to supplant the elected assembly as lawmaker. What the Oireachtas has put together in s.4A, the court cannot elect, of its own volition and without lawful reason, to put apart, nor has it ever manifested any intention so to do. Just as it is not the role of the court to make law, neither is it proper for the court to accept the contentions made by the Revenue Commissioners in these proceedings and thereby unmake what the law expressly and unequivocally provides in s.4A of the Act of 1990.

The decision in Re Belohn Limited

12. The Revenue Commissioners have sought to rely on the decision of Hogan J. in *Re Belohn Limited* [2013] IEHC 157 as authority for the proposition that a failure to make disclosure of all material facts in a petition under the Act of 1990 requires that any grant of the petition be set aside once those facts are known. They refer in this regard to the fact that despite Hogan J. being satisfied in *Re Belohn* that a particular non-disclosure had come about as a result of an innocent error, he considered the law to require that the appointment of an interim examiner in that case be set aside. It is worth quoting exactly what Hogan J. concluded in this regard. At p.30 of his judgment he states:

> *"While I am perfectly satisfied that the failure to make disclosure came about by reason of bona fide error, caused in part by the hurried nature of the application ...the failure to disclose was nonetheless objectively relevant and highly material to the exercise of my discretion under s.3A." [Emphasis added].*

13. *'Failure to disclose'*. The court does not consider that there has been any failure to make disclosure in these proceedings. On the contrary, Transpeed was entirely transparent as to its tax position in its petition for examinership. In paras. 22 to 25 of that petition, Transpeed stated that:

> *"22 ...[T]he Company is currently indebted to the Revenue Commissioners in the sum of at least £147,454.31 ...*
>
> *23. Furthermore the directors believe that an additional sum of money may be due and owing to the Revenue Commissioners. Over the course of the last number of years a small number of full time employees were incorrectly recorded as self employed contractors. As is referred to above work to input transactions for 2013 and 2014 into the new accounts management system is ongoing and as part of this process the total sum due to the Revenue Commissioners has yet to be quantified. The directors estimate that a further sum of approximately £100,000 will be due to the Revenue Commissioners. All of these staff have now been correctly registered on the payroll. These figures will obviously require further investigation during the protection period if granted.*
>
> *24. The directors fully acknowledge that the buildup of this level of Revenue debt is completely unacceptable. The directors unreservedly apologize for this failure on their part.*
>
> *25. A revenue audit began on the Company on 17 September 2014."*

14. It does not appear to the court that there is anything before it which adds to the facts as outlined by Transpeed in the above-quoted text, beyond the fact that Transpeed's outstanding tax liabilities, which it expressly stated might be owing and larger than stated, are now known as a matter of certainty to be owing and larger than anticipated. It does not seem to the court that an apparently honest prediction of events which proves to have anticipated correctly, albeit not precisely, the actual course of subsequent events, can be described properly, if at all, as involving a material non-disclosure. On the contrary, such a prediction seems to entail optimal transparency within the context of that necessary allowance which must always be made for human frailty.

15. *Nature of discretion arising under s.3A*. Section 3A allows for the swift grant of court protection in the absence of an independent accountant's report. Thus it provides, inter alia, that:

> *"(1) If a petition presented under section 2 shows, and the court is satisfied-*
>
> *(a) that by reason of exceptional circumstances outside the control of the petitioner, the report of the independent accountant is not available in time to accompany the petition, and*
>
> *(b) that the petitioner could not reasonably have anticipated the circumstances referred to in paragraph (a), and, accordingly, the court is unable to consider the making of an order under that section, the court may make an order under this section placing the company concerned under the protection of the court for such period as the court thinks appropriate in order to allow for the submission of the independent accountant's report ..."*

16. In a nutshell, s.3A provides for accelerated protection in the presence of a heightened risk of deficient information. To counter the obvious potential for abuse which such a provision necessarily entails, it is inevitable that the courts will apply the most rigorous standards of disclosure, if only to ensure that the scales of justice are not hopelessly weighed in favour of the petitioning company and against affected creditors. It does not seem to the court that the same degree of concern arises in the context of an 'ordinary' examinership petition that is made under s.2 of the Act of 1990 and accompanied by an independent accountant's report and thus which does not present with the same risk of deficient information and consequent potential for unfairness to creditors. The life of the law is not logic, it is experience, and experience informs and supports the logical observation that the same duty can fall to be applied differently when viewed through the prism of context. The duty of "*utmost good faith*", albeit of general applicability to all petitions for examinership, is capable of being applied with different rigour in different contexts. The heightened rigour with which that duty was applied by Hogan J. in the high-risk circumstances of an examinership petition that featured a s.3A dimension, is not appropriate to an examinership petition in which s.3A is not invoked, such as the petition brought by Transpeed. Consequently the court does not consider that the decision in *Re Belohn* can properly be construed as authority for the general proposition that a failure to make disclosure of all material facts in any petition brought under the Act of 1990, even one that does not feature a s.3A dimension, requires that any grant of the relevant petition be set aside once those facts become known.

Employment as an issue in examinerships

17. In his affidavit of 17th November, Transpeed's examiner has indicated that one of the factors supporting the continuation of Transpeed's examinership is the potential risk of unemployment that arises for Transpeed's employees. In this regard the examiner avers as follows:

> *"12. The consequences of an unsuccessful examinership will be particularly harsh for the employees of the Company:*
>
> *• In a winding up scenario, these employees will inevitably lose their jobs and based on the employment profile of Portlaoise, they are likely to find it difficult to source new employment in the short term.*
>
> *• The directors of the Company have advised me that in many cases, their employees are the sole income providers for their respective families. The loss of these jobs would therefore have a much greater, more far-reaching consequences over and above the 15 employees referenced in the Independent Accountant's Report...*
>
> *• Moreover in the event of a winding up, the Company will not be in a position to support statutory redundancy or minimum notice payments ...*
>
> *13. Similarly, I say and believe that the position for the unsecured creditors would be worse of in a winding up situation ..."*

18. We are fortunate to live in a republic which, to quote Lincoln when speaking of the United States, enjoys "*government of the people, by the people, for the people*." So, it is perhaps not surprising that the people's representatives in the Oireachtas should have established a system of examinership that has at its heart a consideration, amongst other matters, of the fate of so called 'ordinary' people, in particular those workers whose continuing employment prospects have been rendered uncertain by the fact that their employer has gone into examinership and may yet enter into liquidation. There is relatively recent case-law which supports the conclusion that the future employment prospects of such workers is an issue of real importance when it comes to examinership-related applications. Thus in *Re Traffic Group Limited* [2007] IEHC 445, Clarke J., writing of the system of examinership, states, at

para 5.5 that:

> *"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." [Emphasis added].*

19. The centrality of employment as a consideration in examinership proceedings was also a feature of *Re Missford Limited* [2010] IEHC 11. In that case, Kelly J. stated, at p.20, that:

> *"There must come a time when companies that have flouted the obligations of company law, revenue law, and their obligations to employees should not be allowed to call in aid the very legislation that they have ignored so as to save the enterprise. Still less should it be allowed when it has or is likely to have the beneficial effect for delinquent directors that I have referred to earlier in this part of the judgment. This is such a case.*
>
> *I am, of course, extremely mindful of the position of the employees. From what I was told they are employed for the most part, if not entirely so, under contracts of employment that are terminable on a short period of notice. Nonetheless they do have jobs and I am anxious to ensure, as far as I can, that they will not be jeopardised I believe that my refusal to appoint an examiner will not in the circumstances give rise to any greater jeopardy to their jobs than would be the case if an examiner were to be appointed."*

20. This Court, respectfully, does not agree with the entirety of the last-quoted text. First, when it comes to "*delinquent directors*", the court considers that there is ample provision, separate from the examinership regime, for sanctioning them under the Companies Acts. Given this fact, it appears to the court that the issue of director delinquency ought not to weigh heavily in the context of an examinership-related application and is of secondary importance to the issue of worker protection. Second, neither does it appear to the court that the form of employment that workers may enjoy, be it short-term or long-term, is a relevant consideration in the context of whether or not to countenance or continue an examinership. All workers will doubtless hold their own employment as being of equal importance to that of other workers; it seems to this Court that they are right in this and that generally there is no ground in the Act of 1990 or otherwise for distinguishing workers or distinguishing between workers on this basis: the focus of the Act of 1990 is to seek the save the enterprise that is in examination and to preserve the jobs of as many workers as is consistent with the task of rescuing that enterprise from its threatened collapse. All that said, the court notes Kelly J.'s concluding observation in the above-quoted extract that "*I believe that my refusal to appoint an examiner will not in the circumstances give rise to any greater jeopardy to their jobs than would be the case if an examiner were to be appointed*." There is a whiff of a suggestion in this remark that had such refusal posed the "*greater jeopardy*" to which Kelly J. refers, he would not have refused the petition to appoint an examiner. To the extent that this is so, it seems to the court that in its essence, albeit not its entirety, the decision in *Missford* accords that "*equal, or indeed greater*" importance to job protection as one of the dual objectives of the examinership regime to which Clarke J. makes reference in *Re Traffic Group*.

21. A related issue that arises, though not one arising for consideration in the instant application is that creditors too may have employees and as part of its considerations, for example under s.24 of the Act of 1990, a court may be placed in the challenging predicament of having to weigh in balance the job prospects of employees in a company in examinership against the job prospects of an affected creditor's employees. No issue as to employment in creditor companies has been raised before the court in the instant proceedings. All that is required of the court in this application is that, in its consideration as to whether or not to grant the extension of time that has been sought by the examiner, it consider the employment prospects of Transpeed's employees. Case-law, including the decision in *Re Traffic Group*, suggests this to be appropriate. Statute is also of relevance in this context; as mentioned above, there is in s.4A of the Act of 1990 an express recognition by the Oireachtas that there may be instances in which, for example, a petitioner and/or independent accountant, fails to exercise the "*utmost good faith*", yet in which the court would be justified in allowing an examinership to commence or continue. In determining how to exercise its discretion in this regard it seems to the court that any issues raised as to employment are highly relevant, and may be critical. In the present case, even if Transpeed had acted in breach of its duty of "*utmost good faith*", and the court has found on the facts available to it at this time that it did not, the employment prospects of Transpeed's employees, as detailed to the court by the examiner, greatly strengthen the case that the present application for an extension of time should succeed.

The decision in Re Tivway Limited

22. It will be recalled that the Revenue Commissioners have contended that if a petitioner fails to put objectively material information before the court when seeking the appointment of an examiner, this involves a breach of the petitioner's obligations under s.4A of the Act of 1990 and has the consequence that (a) the protection which the court has granted is effectively tainted by illegality and (b) the court's jurisdiction to make further orders in the examinership is undermined. The court has already rejected these contentions above. However, for the sake of completeness, the court notes that when it comes to the issue of jurisdiction, the Revenue Commissioners have invoked the decision of the Supreme Court in *Re Tivway Limited* [2010] 3 I.R.49 to support the contention that the issue of employment is not a factor that could cure a want of jurisdiction. The court does not see that the decision in T*ivway* can be considered relevant to the instant proceedings. The particular difficulty that arose in *Tivway* was that schemes of arrangement were presented under s.24 of the Act of 1990 in circumstances where there had been a failure to satisfy the requirement of s.2(2) of the Act of 1990, whereunder, in respect of each of the companies in respect of which the schemes of arrangement were proposed, the High Court had to be "*satisfied 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*." As the Supreme Court found that the just-quoted pre-condition established by s.2(2) had not been satisfied, no jurisdiction to approve a scheme of arrangement arose. As there was no jurisdiction to approve the scheme, it simply could not lawfully be approved, notwithstanding that it was urged upon the Supreme Court that the consequence of non-approval would be the creation of direct and indirect unemployment in West Cork. In short, while the proposed schemes may have been commercially sensible, it was not, on the Supreme Court's (binding) reading of the applicable law, legally possible to approve them. There has been no suggestion by any of the parties to the present proceedings that the pre-condition established by s.2(2) of the Act of 1990 is not satisfied in Transpeed's case. Moreover, while Transpeed is authority for the proposition that the issue of employment is not a factor that could cure a want of jurisdiction to appoint an examiner, the court does not consider that it is authority for any wider proposition; the proposition for which it is authority is of no relevance to this case.

Protim Abrasives Limited (in liquidation)

23. The Revenue Commissioners are not Transpeed's only creditor. The court has been presented with a comprehensive affidavit sworn by the official liquidator of Protim Abrasives Limited (in liquidation), another creditor of Transpeed, in which the official liquidator makes various allegations about Transpeed and its directors. The official liquidator of Protim is hereafter referred to as the "Protim

Liquidator". Ultimately, despite the litany of allegations that he makes, the Protim Liquidator concludes his affidavit with an indication that, subject to certain conditions, "*On the basis that the Examiner has identified an unconnected third party willing to invest or acquire the Company I am willing not to object to the Examiner's application for an extension of time*." In short, the Protim Liquidator is willing to bide his time or, as it was more colourfully put at the hearing of this application, he has elected for now to 'keep his powder dry'. Even so, the allegations that the Protim Liquidator raises are so many, so detailed and so serious that the court has no option but to consider them in some detail.

24. The Protim Liquidator's affidavit can perhaps be summarised as follows. First, he has from the outset of the examinership harboured serious concerns as to whether the application for examinership was done in good faith; he considers that his concerns have been substantiated by the information disclosed since Transpeed's examiner was appointed. Second, the Protim Liquidator considers that the sole motivation behind Transpeed's filing for examinership was a "*blatant attempt*" to 'cram down' existing creditors of the company in order to enhance Transpeed's financial position and to secure a credit facility. The term 'cram down' is a colloquial one and refers to the involuntary imposition by a court of a reorganisation plan over the objection of some classes of creditors. Third, the Protim Liquidator does "*not believe that there was any imminent threat to Transpeed's survival which required court protection*". Fourth, the Protim Liquidator considers that upon notification from the Revenue Commissioners that it was due to be audited and "*in the knowledge of its under-declaration of tax and illegal categorisation of employees as self employed contractors*" Transpeed made a decision to go into examinership so as to enable it to continue trading notwithstanding what the Protim Liquidator alleges was its tax avoidance. Fifth, the Protim Liquidator has commenced litigation against Transpeed concerning its alleged wrongful exercise of a lien over certain goods of Protim, which it has since been claimed by Transpeed were stolen during the period that they were detained by it pursuant to its purported lien. As the Protim Liquidator notes in his affidavit, Transpeed made reference to this pending litigation in its petition for examinership and expressed the view that the Protim Liquidator might be successful in same. The Protim Liquidator also notes in this regard that Transpeed's insurers have declined to provide cover against his claim. Sixth, the Protim Liquidator expresses various concerns as to the accuracy and reliability of the independent accountant's report and urges on the court that it is "*very telling*" that the accountant who authored that report included a caveat in same to the effect that "*I recognise ...that this report has been prepared within a short time scale and it may be that the Examiner may become aware of other factors, which may require to be brought to the attention of the Court*." Seventh, the Protim Liquidator refers to the fact that Transpeed has apparently found a lender that is satisfied to enter into an invoice discounting facility with Transpeed but requires as a pre-condition to same that a scheme of arrangement be entered into between Transpeed and its creditors and suggests that the examinership process is being utilised inappropriately to reach this end. Eighth, the Protim Liquidator contends that it would have been more appropriate for Transpeed to seek a third party investor, rather than embark upon what he alleges is a contrived examinership, the end-result of which is to place Transpeed in a position where it can satisfy the requirements of the proposed lending facility. Ninth, the Protim Liquidator makes various contentions regarding Transpeed's directors and shareholders and voices a concern that existing management might continue to retain control of the company and that existing shareholders might escape with little or no consequence to them. The court now turns to consider each of the various averments/contentions made by the Protim Liquidator.

25. (1) *Concerns as to whether the application for examinership was done in good faith*. The issue of "*utmost good faith*" has been considered elsewhere above. Suffice it to note at this point that the court does not accept that a party that under-estimates its tax liabilities is necessarily guilty of bad faith. Something more by way of evidence would be required for the court to conclude that such an under-estimation went beyond mere error and constituted a breach of the duty of "*utmost good faith*"; that 'something more' does not present on the facts of this case as outlined to the court.

26. (2) *Sole motivation behind examinership is a "blatant attempt" to 'cram down' existing creditors of Transpeed in order to enhance its financial position and secure a credit facility*. As mentioned above, the term 'cram down' is a colloquial one and refers to the involuntary imposition by a court of a reorganisation plan over the objection of some classes of creditors. The court does not understand the Protim Liquidator to be objecting to 'cram downs' *per se*. If he is, his objections come 24 years too late: s.24 of the Act of 1990 clearly contemplates that 'cram downs' ultimately may be sanctioned by the court provided the various criteria referred to in that provision are satisfied; the relevant scheme must also be fair and reasonable. All this is the fruit of a policy decision by the Oireachtas that, despite the losses which individual creditors may sometimes have to suffer as a result of an examinership, it is better for society as a whole that, when possible, and subject to all the legislative constraints and checks arising, ailing companies be nursed to recovery by way of examinership. That a company in difficulty would enter into examinership to enhance its financial position is to be expected. That it might, as part of its pre-examinership considerations, have consulted with a lender who would be willing to lend if there was some level of debt write-down is hardly earth-shattering; certainly it need not lead necessarily to the conclusion that its petition for examinership is tainted by a breach of the duty of "*utmost good faith*". As the court indicates hereafter, it considers that Transpeed had and has genuine motivations for seeking examinership.

27. (3) No "*imminent threat to Transpeed's survival which required court protection*". The Protim Liquidator does "*not believe that there was any imminent threat to Transpeed's survival which required court protection*". However, Transpeed has identified various and, in the court's view, persuasive reasons for seeking protection by way of examinership. It has pointed in its petition to: weak financial control/management; competitive pressures from legitimate and, it is alleged, non-legitimate competitors; a general tightening of the credit market; cash-flow issues; and the non-payment of creditors, including the Revenue Commissioners. In passing, the court notes that the power of the court under s.2 of the Act of 1990 is a discretionary one. Under s.2(1) the court "*may*", subject to the satisfaction of certain criteria, appoint an examiner, *i.e*. the placing of a company into examinership is never "*required*" as a matter of law.

28. (4) *Given a pending tax audit, Transpeed entered into examinership so as to enable it to continue trading notwithstanding alleged previous tax avoidance*. As mentioned above, the court considers that Transpeed, in its references to its tax position in its petition for examinership, was entirely transparent as to its tax position as it then knew it to be. It does not appear to the court that there is anything before it which adds to the facts as outlined by Transpeed on that date, beyond the fact that its outstanding tax liabilities are greater than originally anticipated. The Protim Liquidator refers in this context to Transpeed's "*significant and illegal tax avoidance".* He is entitled to his view as to Transpeed's actions but it appears to the court that it is early days yet to reach any conclusion as to whether Transpeed engaged in tax avoidance. At this time all that is known is that Transpeed did not pay its taxes in full and underestimated the fullness of its tax liabilities, no more.

29. (5) *Litigation concerning alleged wrongful exercise of lien and related thefi and insurance issues*. The fact that the hearing of Protim's claim against Transpeed is imminent was disclosed by Transpeed in its petition for examinership and thus was known, and made known by Transpeed, to the court when the petition for examinership was made. No doubt many companies that enter into, and proceed through, examinership will be engaged in litigation of some sort. No doubt too, many companies confronted by a potential bad debtor may purport to exercise a lien over goods in order to recover payment of a debt, as Transpeed appears to claim happened here. The exercise of this purported lien seems to the court to be part of the 'rough and tumble' of commercial life; if it did not rightly fall to be exercised or was improperly exercised, that can and will be resolved in court. As to the absence of insurance coverage, having considered the relevant correspondence put before the court, it appears that all that has happened in this regard is that

Transpeed's insurer has denied coverage in circumstances that it considers not to come within the terms of the applicable policy. That an insurer would deny coverage on this basis is hardly unusual. Neither in the honest exercise by a company of a purported lien, nor in the denial to that company of insurance coverage on what is a fairly standard basis, does the court consider that there is anything that would require that such company, or indeed its directors, ought necessarily to be treated as fully qualified candidates for admission to Dante's eighth circle. As to the validity of the particular (contested) lien that Transpeed sought to exercise against Protim's property and any related issues arising, these are issues for the pending litigation between those parties and the court makes no finding or comment in this regard, nor should this judgment be construed as so doing. As to the purported theft of the goods over which the lien was exercised, this is an odd and potentially troubling episode, though one in which it appears from a letter of 9th March, 2011, issued by An Garda Síochána to the Protim Liquidator, that there is no longer any criminal investigation of any nature. Be that as it may, the court is not in a position to reach any conclusion as to what happened in this regard.

30. (6) *Independent accountant's report*. The court does not consider that it has been misled or ill-served by the independent accountant's report. As to the inclusion of the caveat in the independent accountant's report being "*very telling*", the court considers that all this caveat tells is that the independent accountant in this case is a serious and competent professional who wishes expressly to draw the court's attention to the fact that the report has been prepared within a short timeframe and thus may, for example, be based upon and/or express erroneous representations, statements or understandings of facts. It could perhaps be contended that it would have been remiss of the independent accountant not to draw the court's attention to this fact. Whether or not this last contention is accepted, the court suspects that the weakness to which the independent accountant in these proceedings refers is a weakness that may attach to a greater or lesser extent to many reports of independent accountants, given the short timeframes within which they can be required to be prepared. That is not to say that optimal accuracy in an independent accountant's report is not always to be strived for. Rather, it is merely an acknowledgement that in the possibly hurried circumstances of a particular case it may not always be attainable. That it is not attained in a particular case need not necessarily give rise to any negative conclusion as regards the relevant petitioner or independent accountant. When an independent accountant considers that there is a particular risk of inaccuracy arising it would seem prudent for him or her to state this fact, if only so that the independent accountant can avoid later embarrassment or criticism. However, even if he or she does not include such a caveat, the court will likely never approach an independent accountant's report on the basis that it is in every detail and conclusion completely and unfailingly accurate. That is a standard which, as the case-reports of appeals cases show, not even the judges of the High Court have managed historically to attain, and it is not a standard that the court can reasonably or rightly demand or expect of independent accountants in the discharge of their professional responsibilities.

31. (7) *Write-down requirements of proposed lender*. As mentioned above, the court considers it unsurprising that, as part of its pre-examinership considerations, Transpeed would have consulted with a lender, or that this lender would have indicated a willingness to lend if there was some level of debt write-down by Transpeed's existing creditors. That Transpeed did so need not lead necessarily to the conclusion that its petition for examinership is tainted by bad faith. For the reasons stated elsewhere above, this Court considers that Transpeed had and has genuine motivations for seeking examinership.

32. (8) *Third-party investor*. The Protim Liquidator contends that it would have been more appropriate for Transpeed to seek a third party investor, rather than embark upon what he alleges is a contrived examinership. He is of course entitled to this view. However, Transpeed is entitled to take an entirely different view on exactly the same facts and has clearly concluded that examinership represents the best option for it to take. As mentioned above, the court considers the various reasons offered by Transpeed for seeking protection by way of examinership to be valid and persuasive.

33. (9) *Management, director and shareholder concerns*. The Protim Liquidator expresses concerns that, for example, existing management might continue to retain control of Transpeed and that existing shareholders might escape with little or no consequence to them. It was made clear to the court at the hearings of the application that Transpeed's existing management accept that they will not have a future role in the executive operation of the company. This may to some extent allay the Protim Liquidator's concerns as to the management and direction of Transpeed. It is not clear to the court why it would be considered that the shareholders in a private company that enters into examinership should necessarily be exposed to any additional risks or responsibilities beyond those that typically attach to shareholders in private companies. However, the court notes that the examiner has averred in his most recent affidavit to the court that there will likely be a dilution of existing shareholder holdings in Transpeed. This too may allay the relevant concerns of the Protim Liquidator.

Conclusion

34. For the reasons outlined above, the court considers that, having regard to all the circumstances arising, in particular, the interests of the creditors of Transpeed and also the importance of protecting the jobs of Transpeed's employees to the extent that this is commercially practicable, it is appropriate that, pursuant to and in accordance with s.18(2) of the Act of 1990, the court accede to the examiner's application for an extension of time to 27th November next to facilitate the discharge by the examiner of the obligations contemplated by and/or referred to in that provision.

35. For the avoidance of doubt, the court notes that the conclusions reached by it in this judgment are not intended to, and do not, qualify the protections enjoyed by the Revenue Commissioners and other creditors of Transpeed under s.24 of the Act of 1990. Section 24 effectively requires that such proposals as are eventually settled upon by an examiner must ultimately be approved by the court before they can become operative. Section 24(2) provides that the court "*cannot*" confirm any such proposals, *inter alia*, where "*the sole or primary purpose of the proposals is the avoidance of payment of tax due*" and also "*unless the court is satisfied that ...the proposals are not unfairly prejudicial to the interests of any interested party*". There is nothing to prevent the Revenue Commissioners or any other interested party from contending, when and if the proposals of Transpeed's examiner eventually come before the court for approval pursuant to s.24, that "*the sole or primary purpose of the proposals is the avoidance of payment of tax due*" and/or that such proposals are "*unfairly prejudicial*" to the interests of the Revenue Commissioners or such other party. The court does not consider that the decisions reached by it on the facts as presented to it at this time would prevent it, if appropriate, from favouring any such future application as might be made by the Revenue Commissioners or any other interested party in the context of s.24, whether on the facts as they pertain at that time and/or as they might then be realised, on the basis of such further or other evidence as might then be furnished, to have pertained at an earlier time.