Neutral Citation: [2015] IEHC 284

THE HIGH COURT

[2015 No. 126 COS]

IN THE MATTER OF STEP ONE PERMANENT SOLUTIONS LIMITED AND IN THE MATTER OF THE COMPANIES ACTS 1963 - 2012

JUDGMENT of Ms. Justice Baker delivered on the 6th day of May, 2015

1. Application was made pursuant to s. 2(1) of the Companies (Amendment) Act 1990 by Petition presented on 20th April, 1015, for the appointment of an Examiner to this company which is opposed by the Revenue Commissioners. Following the initial *ex parte* application to me, at which the appointment of a provisional examiner was not sought, directions were given in regard to service and advertisements and Revenue is the sole creditor having an interest in the matter which has voiced opposition to the appointment. The matter proceeded on affidavit evidence on Thursday 30th April 2015 and a number of affidavits have been served on behalf of each party.

Background facts

2. The company is a recruitment company and specialises in the provision of temporary skilled and unskilled employees to a number of sectors, primarily the industrial and catering sectors in a number of spheres including State and private hospitals and other institutional customers. The company was incorporated on the 14th February, 2011 and some time later in October 2011 it took over the business of AGC Temps Ireland Limited, a company was then in liquidation, and avers it gave valuable consideration for that purchase.

3. The company employs 16 permanent members of staff, and up to 400 persons on a temporary basis, and while the company is the employer of those persons it does not directly engage them to work but offers their services to its clients in the hospitality and other service industries. Of significance to the matter before me is that it is the company that is responsible for collecting PAYE and PRSI from its temporary employees, and for passing this onto Revenue. The company takes payment from its clients in respect of each of the persons made available by it for the business of those clients, and the company accordingly charges VAT on invoices to these clients.

4. The company has incurred very substantial revenue debts, both in the form of the VAT that it itself has levied, and the PAYE and PRSI deducted from and payable on behalf of its temporary and permanent employees.

5. The company has its registered office at Unit 1, Block 2, Tallaght Retail Centre, Belgard Road, Tallaght, Dublin 24, described in the Petition as a deprived area of Dublin and the Petition asserts that the loss to that local economy were the company to be wound up would be detrimental to the area.

6. The company is owned as to 99.55% by Julian Smith, who swore three affidavits in the Petition, his grounding affidavit of the 24th March, 2015, a replying affidavit of the 22nd April, 2015 and his second replying affidavit of the 29th April, 2015. The balance of the shareholding is held by the other director Douglas Memery, a young man who is full time student and who plays little or no role in the company. The undisputed evidence of Revenue would suggest that in the course of a Revenue audit Mr Memery showed little or no knowledge of the operation of the company or of its day to day trading or financial status.

7. The company was profitable in the years ended 31st December, 2011, and 31st December, 2012, but it became loss making thereafter and made significant losses in the year ended 31st December, 2014. The affidavit evidence suggests that the company has been profitable for the first three months of this financial year. The company had a turnover of €2.05 million in 2011, and €8.19 million in the 2014.

8. The company is insolvent. The amount of its current liabilities is somewhat less than clear, and for present purposes I note that the estimated statement of affairs prepared as an appendix to the independent accountant's report (the "IAR") of Terry Noone shows liabilities of €2.84 million, net assets of €1.7 million, showing a net deficit of €1.14 million. The main asset of the company is its debtor's book with a value of over €2 million, representing the amount due by its clients in respect of the temporary employees placed through the recruitment process. Its main funding is provided through a company Close Brothers which provides a finance facility on an invoice discount basis, and it has a floating charge over these book debts. In broad terms, one reason identified for the cash flow pressures that the company experiences arises from the time its takes for its clients to pay, an average of 92 days, and the fact that the invoice discounting is available only in respect of 75% of those invoices, subject to a maximum of €1 million.

9. The company has significant historic and ongoing Revenue liabilities, the historic liabilities at 31st October, 2014 being approximately €934,574 which was reduced by €502,247 as a result of an agreed monthly instalment arrangement. However the company has continued to fall into arrears of current Revenue liabilities, and Revenue has in recent weeks sought the repayment of current taxes in full together with payment of the historic debt. Total Revenue liability is stated in the Petition to be €1,312,575 as at 31st December, 2014. The amount of Revenue liability was in dispute at the hearing but it is not doubted that the Revenue liability is considerable and comprises both current and historic elements.

10. The company is acknowledged to be significantly under funded in capital terms, and it is asserted that the absence of a stable financial base is the reason for its current insolvent state. The company also blames the general downturn in the economy, particularly with regard to the cuts in funding of the HSE and other State bodies, which has resulted in significant downward price pressure and the consequent drop in margins. The company also accepts that there has been a deficit in the management of the company, but says that this has been rectified in particular by the putting in place of an arrangement for the preparation of monthly management accounts.

11. Finally, the company asserts that it has a dependable and blue chip client base including the HSE, most Dublin hospitals, and other large commercial companies. Trading projections up to the 31st December, 2015 contained in the IAR suggest that the company will trade profitably in the current financial year and particular emphasis is placed on the fact that the HSE in particular has in place a freeze on the increase in persons employed full time by that organisation which has the direct effect that that body has a need for temporary part time and full time staff which can be provided by the company.

The IAR

12. Mr Noone has expressed a view, having assessed the likely return from creditors and the other factors mentioned in his report, including the position of employees, that an attempt to continue in whole or in part the undertaking of the company is likely to be more advantageous to the members and the creditors of the company and those employees. He has concluded that the company

taken as a whole or in part has a reasonable prospect of survival as a going concern and he makes this assessment based on the happening of certain conditions or events as follows:-

> a) A restructuring of the invoice finance, in particular to provide more than €1 million in such finance which is the limit of the current facility.
>
> b) Control of the company by implementing more stringent management requirements.
>
> c) The acceptance of a scheme of arrangement by creditors and members to be approved by the High Court

13. Mr Smith in his affidavit is confident these conditions can be met and deposes to the fact that negotiations are ongoing with Close Brothers and with other possible interested parties with a view to making additional or further capital provision and/or direct equity investment.

The attitude of Revenue
14. Revenue opposes the appointment of an Examiner for the following reasons:-

> a) That the company does not have a reasonable prospect of survival, and in particular it points to the fact that the company has used its Revenue liability as a form of bank, or "bank of last resort" and that no concrete proposal has been put in place to change its business model
>
> b) That pursuant to s. 4A of the Companies Amendment Act 1990 the court should decline to hear the Petition, as it is asserted that the petitioner has failed to disclose material information and failed to exercise utmost good faith
>
> c) That the court should in the alternative refuse to exercise its wide discretion to grant relief on the grounds that the principals of the company have carried on the existing business of the company with scant regard for their obligations at law, whether under company law, to the Revenue Commissioners under Revenue law and/or to their employees.
>
> d) The Revenue also make a specific argument that the company is a de facto phoenix company, and that the same persons own or have an interest in the undertaking of the company as was previously owned or operated by the company AGC Temps which went into liquidation in 2001 with Revenue debts of over €1.3 million.

The legislative context
15. Section 2(1) of the Companies (Amendment) Act 1990 (as amended) provides for application to the court for the appointment of an examiner in the case of an insolvent company where on application the Petitioner can satisfy the court that there is a reasonable prospect of survival, either in whole or in part. The purpose of the examinership process is to create a period of court protection for such an insolvent company within which the prospects of rescue can be explored and suitable adjustments made, or capital raised, to facilitate its survival.

16. This application to appoint an examiner was made on notice, and the petition was grounded on an affidavit which exhibited an independent accountant's report (IAR) prepared on the 24th March, 2015 by Terry Noone. Mr Noone's qualifications and experience in the field are not in doubt. The company by resolution of the 24th March, 2014 at which both of its two members attended and voted resolved by way of special resolution to petition the High Court for the appointment of an examiner, and that Martin Ferris be asked to act as Examiner of the company. The signed consent of Mr Ferris to so act dated 23rd March, 2015 is annexed to the IAR.

17. While Revenue has argued in the course of the hearing of the petition that this company has no reasonable prospect of survival, its counsel has accepted that *prima facie* at least it is difficult for the court to so conclude at this stage, as offers of investment have no yet crystallised and the various restructuring and adjustment proposals suggested in the IAR have not yet been fully examined in the context of a survival model. Counsel in essence accepts that while the statutory test requires a petitioner to show that a company has a reasonable prospect of survival, that the scheme of the legislation envisages cases where an adjustment might offer prospects for the survival of the company whether in whole or in part.

18. Both counsel accept that the law is as stated by Fennelly J. in *re Gallium Limited* [2009] IESC 8, namely that the question of whether a company has reasonable prospect of survival is a threshold question, but a petitioner *"does not by getting over that threshold, require a right to have an order made"*. Fennelly J. made it clear that the section confers a wide discretion on the court, or as he put it in the alternative, that the court should take account of all of the circumstances.

> *"The establishment of a reasonable prospect of the survival merely triggers the power, which remains discretionary."*

19. The IAR asserts at para. 1.38 the general proposition that the problems of the company are largely as a result of the long term capital financing or equity. The IAR expressed a view that the company has a "robust business model" and expects an increase in turnover arising from what is perceived to be improved market conditions Trading in the first three months of this year have confirmed a projected increase in turnover of 18% when compared with that of last year. It is also suggested that the HSE is likely to continue its freeze on taking on permanent full time staff and that the company is hopeful of succeeding in tendering for HSE work this year. Somewhat elusively the IAR suggests at para. 1.64 that "management" is confident that an increase in turnover and future expansion is achievable.

20. Notwithstanding what I perceive to be some degree of perhaps misplaced optimism, and noting as I do that the prospect of survival is based on a hope that the company will be successful in future tender processes and also noting the fact that the percentage of the company's business which is attributable to the HSE has fallen from 30% in 2013 to 16% in 2014, I note that a company has been in discussion with a prospective equity investor, and that its current provider of invoice discounting finance is supportive of the process and has said that the invoice finance facility will remain in place in favour of a restructured company, I am satisfied, and take some guidance from this in the approach of counsel for Revenue, that the contents of the IAR suggests that this company has a reasonable prospect of survival.

Discretion
21. It is accepted by counsel for the company that the court has a wide discretion in considering the petition once the initial threshold is crossed, and it is thus established that the company has a reasonable prospect of survival. The broad nature of this discretion was explained by Fennelly J. in *re Gallium Limited* where at para. 48 he pointed to the fact that the court had to take

account "of all relevant interests", that the range of interests to be taken into account is not limited and that these interests include the members as a whole, the creditors as a whole and the interests of employees.

22. Revenue opposition to this petition is primarily focused on an argument that the court should exercise its discretion under the legislation and refuse to appoint an examiner. The source of discretion is twofold: that the court has a wide discretion is identified by Fennelly J. in *re Gallium Limited* (noted above) and highlighted in a number of cases. By way of example Murray C.J. in *re Vantive Holdings* [2009] IESC 68 made the following comment:-

> *"The fact, if established, that there is a reasonable prospect of survival of the company does not lead automatically to the appointment of the Examiner. It merely triggers the power. The court retains a broad discretion. The court may consider whether one or more creditors will suffer prejudice as a result of the appointment of an Examiner. The interests of the employees of the company and of employment generally may also be relevant….. It is not possible to envisage every circumstance which may bear on the exercise of the court's discretion. The above are but a number of examples."*

23. The other source of discretion is contained in s. 4A of the Act of 1990 as inserted by s. 13 of the Companies (Amendment) (No. 2) Act 1999.

24. While some overlap may be found in the individual application of these discretionary elements I will deal with the arguments advanced in respect of each heading separately.

Broad discretion of the court

25. As noted, the discretion of the court allows it to take into account the interests of the members, the creditors and the employees. This court has two members only, one of whom, Mr Smith, is the petitioning member and has the bulk of the shareholding comprising 99.55%. The other member has not taken any part. The company is hopelessly insolvent. These members have made relatively little investment in the company, and the only identified investment is a sum of approximately €110,000 advanced by way of a director's loan by Mr Smith to the company and subsequently converted to equity. The other director has made no financial input.

26. The primary creditors of the company are the Revenue Commissioners and Close Brothers, its finance provider. Close Brothers is secured fully against the book debts of the company and is not likely to suffer any loss on an examinership or indeed on a liquidation. The precise nature of the finance arrangement with Close has not been identified nor has any documentation evidencing that relationship been exhibited. However I have been informed that Close has the power to appoint a receiver over the book debts, as one would expect it to have, and it also has the contractual entitlement to a termination payment of a figure in the region of €100,000. Revenue is the creditor which will lose substantially either in a liquidation or examinership and its interests must be taken into account.

27. The other body the interest of which must be taken into account are the employees. The company employs sixteen full time employees and their positions are directly at risk. The other employees who might be described as being "on the books" of the company "number up to 400" at any one time and these are the persons whose services are provided to the clients of the company. It is their interests which have been the main focus of the argument before me.

28. Counsel for the Revenue relies on the judgment of Kelly J. in *re Missford Limited* [2010] IEHC 1414 and seeks to characterise the directors of the company as "delinquent directors", the term coined by Kelly J. in that case. She points to the fact that the directors of this company have failed both historically and currently to meet their Revenue liabilities, and that these liabilities are of a significant scale. The IAR acknowledged that the company has been using Revenue as "a banker of last resort", and as a consequence Revenue will account for 95% of the creditors likely to be impaired in examinership. I note that the IAR at para. 1.44 points to the fact that a typical invoice raised by the company will usually include 34% payable to the Revenue Commissioners. The company admits wrongdoing and admits that its increased turnover has meant a corresponding increase in Revenue liabilities which necessitated two separate instalment arrangements, the second of which has now failed.

29. I accept the argument by counsel for the Revenue that in the light of the dicta from Fennelly J. in *Gallium* that "it is natural that the creditors will have the greatest interest in the future if any of the company" does mandate me to give particular weight to the objections of Revenue in this application. I accept what is said by counsel for the company, however, that Revenue is not entirely correct in suggesting that no company law enforcement mechanism is available or can be directed to be considered by the court in an examinership and he points me to the power of the court contained in s. 19 that an examiner may be required to prepare a report for the court in relation to alleged irregularities in the management of the company, and that an examiner may have vested in him by the court the a power under s. 9(4) to make a report to the ODCE. I reject his suggestion however that I should at this stage take account of the fact that any attempt by the ODCE, or indeed by a liquidator should the examinership process fail, is likely not to result in any substantial improvement in the cash position of the company as the two directors are not a "mark". I also pause to note the apology contained in para. 12 of the affidavit of Julian Smith sworn on 22nd day of April, 2015, and to comment that an apology while welcome, does not take from what seems to me to be considerable mismanagement of this company's finances, and a considerable disregard on the obligations on the part of the company to make Revenue returns.

30. I note too that application under s. 297 of the Companies Act is one that may be brought by a liquidator and not by an examiner, and overall I am of the view that the enforcement powers or powers to call directors to account are more robust in the case of a liquidation than in examinership.

31. Both counsel rely on the judgment in the case of *Star Elm Frames Limited*, the Revenue points me to the *ex tempore* judgment of Charlton J. of the 4th November, 2013 where he refused the appointment of an Examiner in the exercise of his discretion in the case of a company which had not returned to Revenue VAT which it had collected in a period of approximately one year. That judgment was appealed to the Supreme Court, and the evidence before the court had changed somewhat before the judgment of Laffoy J. was delivered on the 10th December, 2013, [2013] IESC 57. She accepted that the case was a "borderline" case but that an examiner should be appointed. She did so on the basis of a different factual picture than that presented to the High Court and made no remark critical of the decision of Charlton J., which was made on the evidence before him. The Supreme Court in the exercise of its discretion, and having taken the view that it was reasonable to conclude that *"an examinership would be more advantageous to the creditors as a whole than a winding up of the company which is the only alternative"*, and noting that no creditor had opposed the appointment of an examiner, and that Revenue in particular was not opposing the appointment, although it had expressed "significant concerns in relation to the evidence".

32. I note the factors while influenced Laffoy J. in this decision and summarise them as follows:-

a) The "particular relevance" that no creditor had opposed the appointment of an examiner.

b) The major creditors had signified support for the petition.

c) It was reasonable to conclude that an examinership would be more advantageous than a winding up.

d) The interests of the company's 31 employees favoured continuing the protection of the court.

e) The interim examinership had been in place for two months and a considerable amount of work had been done in examining the affairs of the company in that time

f) The overall picture indicated the continuance of the protection as least prejudicial to the interested parties.

33. This clear statement of the discretionary factors operating in that case informs me in my decision. In essence the only relevant creditor opposes this petition and I must give weight to that opposition. The IAR, and the report furnished by Revenue from Baker Tilly by way of analysis, suggests that the company may survive if restructuring and further finance and capitalisation is available. The evidence before me suggests that the company has virtually for the entire of its existence failed to make VAT returns or returns of its employees, PAYE and PRSI. The failure of the directors has, it seems to me, amounted to gross misconduct and that factor must weigh in my discretion, and the elements found by Laffoy J., and noted at (a) and (b) above are not found.

34. However, one factor, namely the position of the permanent and temporary employees of the company bears further comment and I turn now to consider whether and to what extent the position of the employees guides my discretion, and whether documents of the company which seeks to protect some or all of these jobs displaces the concerns now identified by me and which would suggest that I ought to exercise my discretion against the appointment of an examiner.

35. The company as stated employs 16 permanent employees and up to 400 temporary employees who while they are directly employed by the company from the point of view of the payment of their wages, and the collection of PAYE and PRSI on their behalf, actually work in the service industries already identified. The position of employees in the context of an application for examinership has been examined in a number of cases. Clarke J. in re *Traffic Group Limited* [2008] 3 I.R. 253 points to the wider context of examinership as follows:-

> *"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."*

36. A similar approach is found in *Irish Car Rentals Limited* [2000] IEHC 235, an *ex tempore* judgment of Clarke J., where he noted that there were a significant number of jobs at stake and that it would be "disproportionate to take a risk with those jobs" when in the balancing of those jobs and the fact that an enterprise appeared to be viable, tipped any balance against any potential wrongdoing. He took the view that the report prepared by the Examiner should be submitted to the ODCE and that:-

> *"It seems to me any possible wrongdoing can best be dealt with through that means rather than using same as a basis for declining to approve which action would have the necessary consequence of costing a significant amount of jobs."*

37. Both *Irish Car Rentals Limited* and *re Traffic Group Limited* arose in the context of an application to approve a scheme of arrangement which in each case was approved. In each case the evidence was clear-cut that the company had a real prospect of survival in the light of the scheme. Notwithstanding that the considerations of Clarke J. in both of these cases arose at a different stage in the process, and when the court was seeking to balance certain discretionary factors, including the position of employees, against a known prospect of survival, it seems to me that my discretion must properly be exercised by taking into account the concerns of employees as identified by him in these judgments.

38. I accept then that the interests of the employees is a factor which must guide by my discretion, and in that regard I note the large number of employees involved, if one takes in to account both the full time permanent staff and the temporary agency staff on the books of the company. For the purpose of the exercise I accept that the 16 permanent employees are likely to lose their jobs, but I note in passing that even at this early stage in the process the IAR suggests that some of these permanent employees are likely to lose their jobs, and one identified "strategic direction" contained at appendix F of that Report suggested the need to "control the size and cost of the sales in customer teams associated with the business leading to a reduction in overheads". That sentence it seems to me is suggestive of an anticipated loss of some of the permanent jobs in any survival plan, as is the suggestion at part 2 of that appendix that running costs could be reduced by automation which would "reduce the need for many of the admin staff in the areas of recruitment support, finance and accommodation software". I regard the IAR as suggestive of some pessimism with regard to the possibility of retaining all of the 16 full time jobs even if the company survives the examinership process in whole or in part.

39. I note too the particular context in which the 400 agency staff are employed by the company, namely that the clients of the company are either not prepared to, nor in a financial position to, employee full time staff and those clients seek to employ agency staff for reasons of flexibility if the service is seasonal, and it is not desired to incur the financial and other costs of taking on full time staff. If the assumption that the IAR is correct that there has been some upturn in the economy, and that demand for the services of the agency recruitment sector is likely to increase, then, it seems to me that the temporary employees of the company are likely to find a place on the books of another recruitment company. I accept what counsel for the company says that there may not be a smooth transition by some or all of these employees onto the books of another company and that some of the employees will struggle to get jobs. It must be recalled however that while the company is the employer of these agency staff these persons *de facto* work in another company and probably, although this has not been clearly stated, in another part of Dublin, the suggestion therefore that the loss of employment will be felt particularly in Tallaght where the registered office of the company is situate may not be realistic or accurate in fact, and the employees may live in any part of Dublin, or indeed outside of Dublin.

40. I am of the view that because the company does not directly engage the actual services offered by the individual temporary employees that the factor identified by Clarke J. in *Traffic Group Limited*, namely that these jobs be preserved for the benefit of the community, is not a true concern in this case, and if there is demand for these service workers, whether skilled or unskilled, in the industries which they now serve, then that demand will be met either by the direct temporary employment of those staff in those enterprises or through other recruitment agencies. This is borne out, to my mind, by the fact that this company acquired the

recruitment business of the company AGC Limited when that company, with the same or similar business model, took over and purchased from the liquidator some or all of the client base of that company when it went into liquidation. This it seems to me that the evidence points to the fact that the recruitment business itself is one which is flexible, where considerable turnover is achieved as is shown from the figures of the company in recent years, and where these staff are likely to find a place on the books of other agencies.

41. The position of the 16 permanent employees is different however but I cannot fail to recognise the difficulty created for these employees by the failure of the company to return to Revenue the PAYE and PRSI collected on their behalf. This may, I am told, have consequences for them should they be made redundant, or otherwise lose their jobs, and they will have to prove the deduction of the relevant PRSI in particular in any application for future pension entitlements and/or social protection schemes. In my view the company did not offer a sufficiently robust protection to these employees and, while I accept that I must have their interests in mind in exercising my discretion, the fact of the company's failure to protect their interest arising in their employment is a factor that weighs against the appointment of an Examiner.

42. Thus it seems to me that the factors weighing in my discretion point me to refuse the relief.

Section 4A of the Act of 1990

43. Counsel for the Revenue also points me to the provisions of s. 4A of the Act of 1990 as inserted by the Act of 1999 and contends that I ought not to hear the petition having regard to what she describes as material non disclosure to the court and/or that the petitioner has failed to exercise utmost good faith.

44. Counsel for the company points me to the fact that no case has been identified where the court has refused to hear a petition pursuant to its powers under s. 4A of the Act of 1990. This of course does not mean that a court has not refused to hear a petition on the grounds of non-disclosure and many such judgments might not have come to be reported. I accept his argument however that it is for Revenue to show a failure on the part of the petitioner to disclose material information and/or to act in the utmost good faith. For that reason I turn first to examine the arguments of Revenue with regard to non-disclosure.

45. Revenue argues that the petition fails to disclose the significant overlap between the personnel which owned and operated the company AGC Temps Ireland Limited, now in voluntary liquidation, and in respect of which Garrett McCarthy was appointed Liquidator on the 17th November, 2011. Mr McCarthy has sworn an affidavit on the 17th April, 2015 at the request of Revenue.

46. One particular person with regard to whom Revenue argues I ought to have concern is Sean Finnegan, the Managing Director of AGC from its incorporation until the date of liquidation, and who was involved actively in the day to day operation of the business and a sales representative for that company. AGC was a recruitment agency providing temporary staff placements for a wide range of companies and a variety of business sectors, and its business was broadly speaking the same as that in which the company now engages.

47. I am also asked to note the involvement of Emmett Memery and I will return below to his role in either or both companies.

48. Julian Smith, the main shareholder and one of the two directors of the petitioning company, and who has sworn four affidavits in support of the petition, was a director of AGC from the 16th February, 2010 to the 1st September, 2011, although he remained as an employee of the company until the date of liquidation. He resigned as director some six weeks before the liquidation, but it is pointed out that the B10 was not filed in the CRO until the 26th October, 2011. He was actively involved in the day-to-day operations of the business and in business development.

49. AGC was wound up in the context of significant and ongoing liabilities to Revenue. The liquidator in his report confirms that this comprised PAYE, PRSI of €700,000 and VAT of €600,000, both figures expressed by me here in round figures. The total Revenue liability was €1.3 million at the date of liquidation.

50. Step One was incorporated in February 2011 and its promoters and initial directors and controllers were Sean Finnegan and Laura Finnegan, the directors and shareholders of AGC. They stepped down from that role on the 1st September, 2011 and Julian Smith became a director of Step One, and resigned as a director of AGC, although as noted above the B10 was filed later. All of the employees of AGC were transferred to Step One Permanent, which according to the liquidator "in effect took over the role of AGC as provider of the services". The liquidator confirms in his affidavit that he did not receive payment in the sum of €311,000 identified in the petition as being the amount paid by the company to AGC for its goodwill.

51. Both Sean Finnegan and his wife Laura Finnegan are restricted directors following order of the High Court made on the 23rd June, 2014. On the 3rd November, 2014 the court declined to make a declaration of restriction against Mr Smith.

52. Revenue points me first to the overlap of personnel between AGC and the petitioning company, and describes the petitioning company as a "phoenix company" in the context of the overlap of personnel and the fact that there seems to have been a seamless transfer of the goodwill from the company in liquidation to the petitioning company. As this characterisation is more properly one confined to its strict definition in s.4 of the Companies (Amendment) Act 1990 that characterisation was not continued through the hearing, but Revenue do persist in the contention that the overlap in the "cast of characters" and the failure to disclose the true extent of those who have a beneficial interest in the company is a matter of concern.

53. Paragraph 9 of the petition makes express reference to the acquisition of the goodwill of AGC Temps Ireland and the payment of the sum of €311,000. It is pleaded that Julian Smith resigned as director of AGC Temps in September 2011, when he discovered that "the managing director had not been providing him with accurate information about the creditors of that company" and in particular with regard to ongoing and historic Revenue liabilities. It is pleaded that Mr Smith "was not aware of these hidden debts" when the company acquired the goodwill of AGC. Catherine Shivnan of Revenue in her second affidavit in these proceedings sworn on the 27th April, 2015 exhibits the affidavit and pleadings in High Court proceedings record number 2013/737OP between Julian Smith & Douglas Memery, plaintiffs v. Sean Finnegan and Laura Finnegan, defendants in which injunctive relief was sought by the plaintiffs, *inter alia*, restraining the defendants from holding an EGM of the petitioning company and/or from removing or purporting to remove the plaintiffs therein as directors of that company. Julian Smith in a grounding affidavit in those proceedings on the 17th July, 2013, at para. 4 avers that he spent his time as in his role of employee of AGC Temps "involved in cash collection and dealing with the Revenue Commissioners and the County Sheriff". At para. 9 he identified an agreement between the defendants and the plaintiffs that Step One would take over the staff and goodwill of AGC Temps and in that context Mr and Mrs Finnegan would transfer their interest in the company to him and the other director and shareholder in the percentages agreed. Paragraph 9 of this affidavit has particular a resonance for Revenue and I quote it in full:-

> "It was at all times intended that the first defendant [Sean Finnegan] would continue to act as a consultant to the Company [Step One]. It was therefore further agreed between the parties that 30% of the shares in the company would be held in trust for the defendants on condition that the first defendant secured €100,000 worth of new business for the company per annum."

54. Later in his affidavit at para. 15 he identified what he described as "a serious issue to be tried in these proceedings regarding the ownership of the shares of the company."

55. Revenue points to the fact that Mr Finnegan is a disqualified director and that the affidavit evidence in the exhibited proceedings point to him having a shareholding or a beneficial interest in the petitioning company, and that it can be discerned from this that Mr Finnegan is in effect seeking to avoid the limitations imposed by him by the High Court by indirectly being involved in the petitioning company.

56. Some argument was had in the course of the hearing before me as to the admissibility of the affidavit of Julian Smith sworn in those chancery proceedings, but I see no reason why the discrepancy between the averments contained in one should not be noted for the purposes of consideration of the question of material non-disclosure. It is not sought to rely on the affidavit in the other proceedings by way of proof of certain facts, but more by way of pointing to certain discrepancies to which I might have regard. Accordingly I accept that Revenue have raised a question with regard to non-disclosure of the role of Mr Finnegan, a restricted director, and with regard to the true ownership of the shares in the petitioning company.

57. Mr Smith in his last affidavit sworn on the 29th April, 2015 responds to the suggestion of failure to disclose the true beneficial ownership of the company by saying that: -

> "As far as I am concerned Mr Finnegan failed to secure €100,000 worth of new business for the Company and therefore he is not entitled to any shareholdings."

In other words, he says if Mr Finnegan was not entitled to any shareholding in the Company there was no "beneficial interest" to conceal.

58. I do not consider that the failure to disclose comes down merely to the failure to disclose whether or not Mr Finnegan has a beneficial interest or has a claim to a beneficial interest in the petitioning company. It is not my role to make a determination on that question here. I do however regard it as relevant to my consideration that Mr Finnegan continued to have at least potentially a claim or an equity in the company after AGC was liquidated and that the attempt to wholly distance the new company from Mr Finnegan, and *ipso facto* the old company, in para. 9 of the petition fails to truly identify the connection between the two companies, and the significant, and in my view relevant, overlap in personnel. It matters not to my mind that Mr Finnegan failed to secure new business, and might thereby not have acquired a beneficial interest in the petitioning company, but what does matter is the averment at para. 9 of the affidavit of Julian Smith sworn in the injunction proceedings that it was at all times intended that Mr Finnegan would continue to act as a consultant to the company. Mr Finnegan was a restricted director and in my view Revenue is correct to raise the argument that he may be using the company to engage in the business in which he previously engaged and that the new arrangement could be seen as an arrangement to conceal his role from creditors.

59. I am also concerned about the fact that para. 9 of the petition contains a clear statement on the part of Mr Smith, supported by his grounding affidavit, that he knew nothing of the Revenue debt in the former company of which he was a director and that this had been concealed from him. The averments in his affidavit in the injunction proceedings which I have referred to above suggest that it was he who dealt with Revenue on a day-to-day basis and that he took on this role from April/May 2011 until he resigned in September 2011. It is noteworthy that precisely the same frailty in the making of Revenue returns was found in AGC Temps as is now apparent, and admitted, by the petitioning company in this case.

60. I note also the plea in the petition that the company paid the sum of €311,000 by way of valuable consideration for the acquisition of the goodwill of AGC. The liquidator of that company in his affidavit at para. 33 says he does not understand how that sum has been calculated and that during his time as liquidator he did not receive a payment of €311,000. Indeed he suggests that the petitioning company paid to him the sum of €210,000 arising from the incorrect collection by the petitioning company of payment due on invoices which actually belonged to AGC and that this sum was paid "ultimately" after he engaged in correspondence with the petitioning company and their legal representatives. I accept what is said in the various affidavits that the precise identity of the owner of the invoices was unclear, and that some confusion arose among clients, but I regard it as significant that the petitioner claims to have paid valuable and substantial consideration for the purchase of the goodwill in the former company and that the liquidator of that company deposes on affidavit that the money was not paid to him. It is not my role to determine where the truth lies, but for present purposes I note and consider that the petitioner gives an incorrect impression of the degree of distance between itself and AGC, and whatever the true calculation with regard to the invoices, and whatever the true payment, if any, that was made by the petitioning company for the acquisition of the goodwill in AGC, the petitioner purports to show a transaction at arm's length, and a degree of distance between the two companies, which in my view is not borne out by the evidence. The relationship between Julian Smith and AGC Temps Limited and its directors, whether as director, employee, and the directors and shareholders of AGC is opaque and the concerns expressed by Revenue as to the extent and tone of the disclosure are in my view not misplaced.

61. The other element of non-disclosure alleged by Revenue is the failure by the petitioner to correctly identify the role of Emmett Memery in the company. Mr Memery is the father of the other director of the company, Douglas Memery and the affidavit of John Lyons of the Revenue Commissioners points to the fact that on a Revenue audit when Mr Memery jnr was interviewed he had no knowledge of the company's affairs, of the amount of its turnover, the number of employees, or his responsibilities as a director. He advised that his father had encouraged his involvement with the company. He is a full time student and he is said to be rarely at the business as a result of his college commitments.

62. The Revenue is of the opinion that Emmett Memery is acting as a "shadow director" and that he has received "consultancy fees" which Revenue believes ought to properly be characterised as director's emoluments and thereby subject to tax and PRSI. The role of Emmett Memery in the company has been contentious in the course of the hearing of the petition. It is accepted by Julian Smith in his second affidavit sworn on the 2nd April, 2015 that Mr Memery has "a degree of expertise which the company has sought to avail of" and that he has been in the normal way engaged as a consultant for the purposes of "strategy sales development". Mr Emmett Memery was involved in the management of AGC Temps Limited although he was not a director, and no application could have been made by the liquidator in regard to his involvement. A feature of the case however was that in an affidavit of Mr Emmett Memery, sworn on the 16th July, 2013 in the injunction proceedings affidavit tendered by Julian Smith and Douglas Memery, the plaintiffs in those proceedings, he described himself in para. 1 as a "consultant with and *de facto* director" of Step One. He showed a considerable knowledge of the business of that company. In response to this Julian Smith at para. 3 of his last affidavit in this

application sworn on the 29th April, 2015 states "I do not know why Mr Memery describes himself as a de facto director of the company" and goes onto state that he "never regarded him as a director".

63. Revenue's concern arises from the fact that it is believed that Emmett Memery obscured the nature of his involvement with the company AGC Limited and has similarly done so with the petitioning company which further shows the overlap in personnel which, it is contended, ought to have been disclosed in the petition. The replying affidavit of Sean Finnegan sworn in the injunction proceedings on the 22nd July, 2013 says that Mr Memery was "most insistent that he not appear as a shareholder in the company, nor could he be a director". It is said that he was "concerned to hide his involvement in the company from his creditors". Again I cannot adjudicate on this dispute, nor do I place reliance on any factual conclusion that might be drawn from this affidavit evidence, but the failure on the part of the petitioner to identify the role of Mr Emmett Memery, and it seems to me more especially the failure of the company to regularise his Revenue arrangements following the Revenue audit as conducted in the summer of 2014 is a matter of concern. I appreciate that the audit is ongoing and that para. 6 of the replying affidavit sworn on the 22nd April, 2015 of Julian Smith avers to the fact that he is "surprised" by the suggestion that Mr Memery is an employee and that no notice had been received by the company of this assessment by Revenue, it cannot be doubted that Emmett Memery has played a part in his company, that the liquidator of AGC Temps has engaged with him, in what is described by Garrett McCarthy at para. 28 of his affidavit at a number of "contentious meetings" points to in my view to an obligation on the part of the company to disclose the role of Mr Emmett Memery, and to identify fully that role albeit the true characterisation of it may still be in issue.

64. I consider that there has been a failure to disclose certain material matters, in particular the true involvement of Mr Finnegan and Mr Emmett Memery in the two companies, the true nature of the takeover of the goodwill of AGC by the petitioning company, the true role taken by Emmett Memery, whether as a consultant or director, and the fact that this company is to a large extent, albeit it has a separate legal personality as a matter of law, a continuation of AGC, or there is a sufficient degree of overlap between personnel, to have required full disclosure and the utmost good faith by the company with regard to that involvement and that overlap in the presentation of this petition. The business models of the two companies would seem to be identical, or at least to have thrown up what seems to be an inevitable degree of Revenue liability, and the directors of this company are related by blood to the directors and/or shareholders and/or persons involved in the operation of AGC. In that regard I note that Douglas Memery is the son of Emmett Memery, and that Douglas Memery plays no role in this company, and his role is nominal. Further, Julian Smith the main shareholder who has sworn all of the affidavits is the son of Andrew Smith, who provided funds to AGC in or around November 2009 which were repaid between January 2011 and August 2011 in respect of which proceedings under s. 286 of the Companies Act 1963 were instituted by the liquidator and compromised on consent. The overlap of personnel it seems to me is a significant factor in my consideration of the *bona fides* of the applicant, and of whether the stewardship of this company has been performed in a manner that now warrants the exercise of my discretion in favour of the appointment of an examiner.

The approach of the court if failure to disclose is shown

65. I am conscious of the dicta of Clarke J. in Irish Car Rental Limited at para. 3.5 where notwithstanding what he described as *"wrongdoing potentially disclosed in the Examiner's report"*, he took the view that a degree of proportionality had to be engaged and that in that case he considered it *"disproportionate to take a risk with those jobs and that enterprise in balancing those factors against any potential wrongdoing"*. I do not consider that the failure to disclose in this case could be characterised as arising from flawed human processes regarded as insignificant by Barrett J. in *JD Transpeed Express Portlaois Limited (in examinership)* [2014] IEHC 544, relied on by the company, and I note also that Barrett J's comments were *obiter* and that he did not on the facts available to him find any breach of the duty of good faith by the directors. Further, I do not regard the dicta of Clarke J. as being particularly helpful having regard to the stage of the process in which he came to consider the consequence of non-disclosure and I have already identified that above. The consequence of non-disclosure in that case had to be balanced against the undoubted identified chance of the company surviving and the jobs being preserved, such that the balance of interests at that stage had swung quite clearly towards the approval of the scheme of arrangement. Similar considerations are implicit in the judgment of Laffoy J. in *Star Elm Frames Limited* (mentioned above).

66. I am more persuaded by the judgment of *O'Flynn Construction v. Carbon Finance Limited* [2014] IEHC 458 where Irvine J., albeit she was dealing with an argument of non-disclosure in the context of an *ex parte* application where the obligation of utmost good faith is at its highest, and I am aware that the imperative of utmost good faith must be said to arise in any application *ex parte* having regard to the constitutional guarantee of fair procedure identified as relevant to the initial stages of examinership by Hogan J. in *re Belohn* [2013] IEHC 157. I adopt the dicta of Irvine J. in *O'Flynn* who stressed the statutory requirements of s. 4A as not merely being good faith but utmost good faith and made the following point:-

> *"In this regard the behaviour of the petitioner in relation to disclosures is highly relevant. It is not a defence to a failure to exercise the utmost good faith to say that the companies are suitable for the examinership process in any event. 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."*

67. While noting that her comments were made in the context of an application where an examiner had been appointed *ex parte*, her comments are equally apposite to any application where s. 4A is engaged. The test of utmost good faith and full disclosure are ones which are taken separate from the test applied by the court at the initial stage of the examinership process. The questions of proportionality do indeed come to be engaged, they are more properly speaking questions which are engaged in their separate spheres and separate individual statutory contexts. For that reason it seems to me that the failure of disclosure is a factor which feeds my general discretion under s. 2 to which I now return.

Conclusion

68. I have come to the conclusion that there has been poor stewardship of this company, and that there is a significant overlap with similar failures in AGC, now in liquidation, which overlap was not identified at the initial stages of this application.

69. I am also of the view, and this is a weighty factor in my consideration, that the bulk of the 400 persons who are employed on a temporary basis as agency staff by the petitioning company, while their transition is not likely to be seamless from one employer to the next, are not likely to be lost either to the economy as a whole or to the economy of Tallaght where the petitioning company has its registered offices. These persons do not work for the petitioning company, and will in my view find their way onto the books of other recruiting companies. If the temporary skilled and unskilled services that they provide are in demand then they too will be in demand in what seems to be a very active and growing agency recruitment sector in the economy. This cannot readily be said of the 16 permanent employees, but I consider their positions to have been identified as vulnerable in any event even at this early stage in the examinership process, where talk of "automation" and "reduction in costs" has already been noted by me.

70. I take particular note of the fact that Revenue is the only creditor likely to be affected by the examinership, and as it is the only such creditor, and as it is owed a significant amount of money, its concerns cannot be easily ignored. It is in that context that I

consider my discretion as engaged, and also in that context that I consider that the failure to fully disclose the true identify of the personnel involved, whether at an equity level, consultancy level or otherwise, in the management and or ownership or financing of this company comes to have particular resonance. Revenue's argument may be summarised as saying that this company has used its Revenue liabilities as a bank of last resort, the same complaint is made of the previous company AGC, and a significant overlap has been identified in the personnel of the two companies, which was neither disclosed nor fully explained in the considerable amount of affidavit evidence available at the hearing of this petition.

71. I note that some of the permanent employees were present in court at the hearing of the petition and have considered their obvious concern and distress at the prospects of losing their jobs. However, in my discretion and on the grounds here identified, I decline the petition and refuse to appoint an examiner.