

## THE HIGH COURT

[2017 No. 132 COS]

## IN THE MATTER OF THE COMPANIES ACT, 2014

## AND IN THE MATTER OF RATHMOND IRELAND LIMITED

**JUDGMENT of Ms. Justice Costello delivered on the 8th day of May, 2017**

1. In this case Rathmond Ireland Ltd. ("the Company"), having its registered office situated at 5 South Richmond Street, Dublin 2, presented a petition seeking to place the Company under the protection of the court and the appointment of Mr. Dessie Morrow as examiner pursuant to s. 509 of the Companies Act, 2014 (the Act of 2014). The petition was presented on the 7th April, 2017. On that day I declined to appoint Mr. Morrow as an interim examiner pursuant to s. 512(7) of the Act of 2014. I directed that certain creditors of the Company, including the Revenue Commissioners, be put on notice for the hearing of the petition.

2. The matter was heard on the 3rd May, 2017. The Revenue Commissioners appeared and opposed the application. No other creditors of the Company appeared and two creditors of the Company expressed their support for the application.

3. The formal proofs required are in order. The Revenue Commissioners appeared to contest that the Company was unable to pay its debt within the meaning of s. 509 of the Act of 2014. I am satisfied that the Company is unable to pay its debts as they fall due within the meaning of section 509. While it is paying some creditors, and in particular it is paying its suppliers on a cash on delivery basis, it cannot pay the historic debts which have built up due to trade creditors and cannot pay its liabilities to the Revenue Commissioners. The IER states that the Company is insolvent and unable to meet its obligations as they fall due. The deficit is €696,539.00. Mr. Sheehan, in his second affidavit, gives a slightly higher figure for the Company's liabilities and there is no explanation for the discrepancy in the figures. However, I am satisfied on the evidence before the court that it is clear that the Company is unable to meet its obligations as they fall due. Therefore, I am satisfied that the requirements for the appointment of an examiner have been satisfied and accordingly the court has jurisdiction to appoint Mr. Morrow as examiner to the Company.

4. The petition was accompanied by an Independent Expert's report in compliance with the provisions of s. 511 of the Companies Act 2014. The IE stated that he was of the view that the Company has a reasonable prospect of survival subject to the conditions set out in his report. It follows that the issue for decision is whether the court should exercise its discretion in the circumstances to appoint Mr. Morrow examiner to the Company.

**Background**

5. The Company was incorporated on the 5th July, 2010, but it did not commence to trade until November 2014. The business now operated by the Company was previously operated by Aussie Barbecue Ltd. ("ABL"). ABL ceased to trade on 31st October, 2014 following a disagreement at Board level which saw two of the Company's current directors transferring the business of ABL to the Company. All assets, liabilities and staff of ABL transferred to the Company in November 2014. The Company trades under the name of "Aussie BBQ".

6. At the date of the presentation of the petition the Company operated two Australian style barbecue restaurants in Dublin. The first restaurant was located at 5 South Richmond Street, Dublin 2. It opened its doors in March, 2012 (with ABL) and can accommodate up to 72 customers. The second restaurant opened in February 2016 and was located in Unit 128/129 The Square Shopping Centre, Tallaght, Dublin 24. It could accommodate up to 32 customers.

7. The Company's main source of turnover is their Australian style burgers which account for approximately 37% of the total turnover of the business. The burgers are produced and served on site with a wide range of wraps, sandwiches and sides also included on the menu. The Company offers alcoholic and non-alcoholic beverages to its customers and therefore requires an alcohol licence.

8. The restaurant at South Richmond Street is held under a licence agreement between the landlord and a director of ABL. Thus, while the Company has a good relationship with the owner of the premises at South Richmond Street and has made the required licensed payments, its occupancy of the premises requires to be regularised.

9. The restaurant at Tallaght was held under a lease and as of the date of the presentation of the petition the Company was in arrears in the amount of €6,150.00 which equated to one month's rent.

10. As of the date of the presentation of the petition the Company had 32 employees employed on a combination of full and part-time basis. Mr. Barry Sheehan, a director of the Company and its sole shareholder works full time as the managing director of the Company. Mr. Sean Allen, a director of the Company, is employed as head of operations.

11. The Company's turnover for the eighteenth month period end of 31st of December, 2015 was €1,546,723.00. Its turnover for the year ended 31st of December, 2016 was €1,873,201.00. Given the average number of employees and the turnover of the Company it is clear that the Company is a small company within the meaning of s. 350 of the Act of 2014.

12. The Company's restaurant at South Richmond Street has been and continues to be a successful, profitable enterprise. The opening of a second restaurant in Tallaght was not. The failure of the Tallaght restaurant led to the Company sustaining very significant losses for the years ended 31st of December, 2015 and 31st of December, 2016. The IER identifies four issues facing the Company and which led to its current difficulties.

**The Company's Difficulties**

13. The restaurant at Tallaght caused the Company to sustain significant losses and ultimately the directors realised that the Company would have to close this restaurant. On the 14th April, 2017, the Company agreed a surrender of its lease with its landlord and that restaurant has now been closed down. The directors were able to secure alternative employment for the employees working in this restaurant. Thus, this haemorrhage on the Company's assets has ceased but the damage that it has done to the Company still remains.

14. By reason of the expenses incurred in running a loss making restaurant in Tallaght, the Company started to experience significant cash flow difficulties. Its trade creditors increased from €103,439.00 as at 31st of December, 2015 to €263,669.00 as at 31st of March, 2017, an increase of 155%. The Company is operating on a pay on delivery basis with the majority of its suppliers due to the

arrears built up on the Company's account.

15. On the 8th October, 2015, the Company took out a loan with Allied Irish Banks plc. in the amount of €231,500.00 in order to fit out the unit at Tallaght. The interest rate is 4.5% per annum with monthly capital and interest repayments in the amount of €4,390.94. As of 7th April, 2017, the balance due on this loan is €169,331.18.

16. Due to the Company's cash flow difficulties the Company obtained a further loan facility from AIB on the 18th August, 2016, in the amount of €50,000.00 together with two overdraft facilities each in the amount of €10,000.00. The monthly capital and interest repayments in respect of the loan are €2,098.76. The balance on the loan as of the date of the petition is €36,416.06.

17. The 2015 loan by AIB is secured by way of a charge on all assets of the Company and has been personally guaranteed by Mr. Barry Sheehan. The charge has been registered with the Company registration office. The Company has made the repayments due to AIB in respect of these facilities and is not in default.

18. The Company has managed to pay its landlords and its bank because it has not paid its taxes. The IER notes that the Company has not paid PAYE for the year 2016 in the sum of €78,633.00. VAT 3 for the year 2016 is outstanding in the sum of €38,058.00. The Company has not forwarded PAYE for the first three months of 2017 in the amount of €18,037.00. Neither has it paid VAT for the periods of January/February (€12,999), and March/April (estimate €12,000) which amount to €24,919.00.

#### **The Revenue Commissioners' Evidence**

19. Mr. Donal Kenneally, a higher executive officer of the Collector General Office of the Revenue Commissioners swore an affidavit on the 2nd May, 2017 in these proceedings. He indicated that the information disclosed in the petition and the report of the Independent Expert is incomplete in its account of the Company's dealings with the Revenue and its default. At paras. 22 to 24 of his affidavit he stated as follows: -

*"22. The Company requested and was granted a three month Instalment Arrangement in May 2016, which related to unpaid two VAT periods. Those periods were November and December 2015 and January and February 2016. The Company discharged those debts pursuant to the Instalment Agreement, however, it transpires that it was not maintaining current taxes at the time, which is a requisite of instalment arrangements.*

*23. At this time – mid-2016 – the Company was underpaying its PAYE liabilities in respect of its employees. In effect the 2016 Instalment Arrangement allowed the Company to successfully apply for a tax clearance certificate and to be in a position to renew the liquor licence. PAYE/PRSI/USC payments for September and October, due on 23rd of October and 23rd of November, 2016 respectively were unpaid. The annual filing discloses a level of liability for the entire year of 2016 was filed on 14th of February, 2017. This alerted Revenue to the full PAYE/PRSI/USC liability of €78,633.*

*24. In relation to VAT, the return for the November and December 2016 was not delivered until 3rd of March 2017, and disclosed an unpaid liability of €38,058. A further liability for January and February 2017 of €12,919. also remains unpaid. Revenue made numerous attempts to resolve these liabilities..."*

20. Mr. Kenneally stated that the conclusion which Revenue has drawn from the petition papers, is that Revenue monies were used to discharge working capital requirements of the Company. The IER indicates that the losses suffered by the Tallaght restaurant up to the 31st December, 2016, cost the Company €158,162.00. During this period the Company failed to discharge Revenue liabilities of €141,647.00.

21. Mr. Barry Sheehan on behalf of the Company accepts that the Company failed to pay its tax and that the failure was largely due to the losses which occurred in the restaurant at Tallaght. He accepts the averments of Mr. Kenneally quoted above and stated at para. 16 of his second affidavit: -

*"I should say that I am fully aware of the Company's obligation to pay its taxes and it is a matter of great regret to your Deponent and to the other directors of the Company that the Company has not been in a position to pay its taxes over the course of the last number of months. Although I cannot excuse this behaviour I have attempted to set out above an explanation as to how this occurred. Up until relatively recently I genuinely believe that the Company will be able to clear its liabilities to the Revenue Commissioners once the Tallaght restaurant became profitable. I accept that the Revenue Commissioners are and this Honourable Court will likely be very critical of my conduct (and the conduct of the other directors). I also accept that if it is to survive the Company will have to make significant changes so that all of its tax returns and tax payments are made in the future."*

#### **Prospects of the Company**

22. Para. 7.2 of the Independent Expert's Report states that the Company has a reasonable prospect of survival as a going concern subject to five conditions as follows:

- *The protection of the High Court ("the Court") is granted to the Company.*
- *The closure of the loss making Tallaght outlet and an exit from the onerous lease obligations thereunder.*
- *The formalisation of the Company's occupancy for (sic) the South Richmond Street restaurant to provide security of tenure.*
- *The securing of investment and/or the generation of a sufficient cash surplus during the protection period which will provide sufficient capital to fund a dividend to the creditors of the Company and future cash flow requirements.*
- *The acceptance of an appropriate scheme of arrangement by the creditors and members of the Company and its approval by the court which may include a partial write down of existing creditors in the balance sheet.*

23. As referred to above, the lease of the restaurant in Tallaght has been surrendered and the employees have found employment elsewhere. At issue now is the core business of the Company at South Richmond Street, the employment of the twenty employees working from that premises and the historic debts of the Company.

24. The Revenue Commissioners agree that the core business at South Richmond Street is viable and profitable. Revenue does not

oppose the appointment of an examiner on the basis that there is little prospect of saving the business of the Company as a going concern or of the saving of the jobs of the employees. It objects as a matter of principle.

25. It says that the Company has (1) used taxes collected from its employees as working capital for the Company and has not returned the deductions to the Revenue Commissioners and (2) it failed fully to disclose the wrongful conduct of the Company to the court. While it disclosed the non-payment of taxes, it did not disclose the fact that it had misled the Revenue in negotiations in 2016 and wrongfully procured an Instalment Arrangement from the Revenue Commissioners which allowed it to obtain a tax clearance certificate and therefore to renew its liquor licence.

26. The Revenue argues that the petition has been presented for an improper purpose and should be dismissed. Revenue says that the Company has chosen to pay its landlords, its bank and it pays its suppliers cash on delivery. The only creditor it does not pay is the Revenue Commissioners. It therefore concludes that the sole or primary purpose of the petition is the avoidance of payment of tax due. It refers to s. 541(4) of the Act of 2014, which provides that a court shall not confirm any proposals presented by an examiner for a scheme of arrangement *"if the sole or primary purpose of them is the avoidance of payment of tax"*. Revenue submits that if the court is prohibited from approving a scheme on that basis, then, if it is clear that a petition has been presented for that purpose, an examiner ought not to be appointed to the Company.

27. While the Company does not dispute any of the facts averred to by the Revenue, it disputes the attribution of improper motives to it for bringing the petition. It says that the petition was brought solely with a view to saving the jobs of the employees including, if possible, that of Mr. Barry Sheehan.

## Discussion

28. The court retains a wide discretion whether or not to appoint an examiner to a company. As was stated by Fennelly J. in *Re Gallium Limited* [2009] IESC 8 at para. 46: -

*"A petitioner does not, by getting over that threshold, acquire a right to have an order made. I still think it is fair to say that the section confers a "wide discretion" on the court, or alternatively, that the court should take account of all the circumstances. The establishment of a reasonable prospect of the survival merely triggers the power, which remains discretionary."* (See also *Re Missford Limited* [2010] IEHC 11)

29. Wrongs on the part of a Company or its directors' prior the presentation of a petition are matters to be taken into account by the court in the exercise of that discretion. (*Re Wogans (Drogheda) Limited* (Unreported, High Court, Costello J., 7th May, 1992); *Re Selukwe Limited* (Unreported, High Court, Costello J., 20th December, 1991); *Re Missford Limited*; *Traffic Group Limited* [2008] 3 I.R. 253; and *Irish Car Rentals Limited* [2010] IEHC 235).

30. The court must consider whether the wrongdoings have been concealed or not disclosed to the court by the petitioner in presenting the petition (*Wogans (Drogheda) Limited*; *Missford Limited*; *Traffic Group Limited*; *O'Flynn v. Carbon Finance Limited* [2014] IEHC 458).

31. In this case the wrongdoing established, was the use by the Company of taxes, both VAT and taxes deducted from employees' remuneration, to fund the day to day running of the Company. The full scope of the wrongdoing of the Company was not disclosed to either the independent expert or the court. The directors did not disclose the fact that they had under reported the Company's tax liability to the Revenue Commissioners when they negotiated an Instalment Arrangement in 2016. This was done to enable the Company to obtain a tax clearance certificate so, in turn, it could renew its liquor licence. This was clearly designed to circumvent the statutory requirement that a licensee have a tax clearance certificate prior to obtaining a liquor licence. No explanation for the failure to disclose this conduct was forthcoming from the Company.

32. The court cannot condone, ignore or implicitly countenance such wrongdoing and any order it makes must ensure that it does not do so implicitly (*Wogans (Drogheda) Limited* and *Traffic Group Limited*).

33. The court must focus on the purpose of the legislation which is to *"make it possible to rescue companies in difficulty"* (*Gallium Limited*) or, as it was described by Clarke J. in *Re Traffic Group Limited*: -

*"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..."*

Each of these passages was cited with approval by Kelly J. in *Missford Limited* who added: -

*"... neither is it the purpose of the legislation to provide directors with a ready form of absolution in respect of corporate wrongdoings."*

34. It follows that the court must assess the level of wrongdoing established and then weigh it in the balance with the legislative purpose of saving enterprises and jobs for the benefit of employees and the economy as a whole. If the level of wrongdoing is very egregious, notwithstanding the prospects of saving potentially viable enterprises and jobs, the court cannot condone what would amount to an abuse of the court's process if it were to either appoint an examiner or approve a scheme of arrangement. It therefore follows that it must refuse the petition or refuse to authorise the scheme as the case may be. (See *Missford Limited* and *J.J. Red Holdings Limited* [2016] IEHC 524)

35. If the established wrongdoing is less egregious in the assessment of the court, then the balance lies in favour of saving the jobs and the enterprise in order that the purpose of the legislation may be fulfilled. (*Traffic Group Limited* and *Irish Car Rentals Limited*)

36. In this case in addition to the historic wrongdoings of the Company, the Revenue have argued that the petition was brought for an improper purpose, that of avoiding the payment of taxes due, and, therefore, it ought to be refused. In *J.J. Red Holdings Limited*, Baker J. had to consider the question of the *"motive"* in presenting a petition.

37. At para. 67 of her judgment she stated: -

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

38. I accept this statement of principle though in the context of avoidance of tax due, it must be qualified by the express provisions of s. 541(4) of the Act of 2014 quoted above. If the legislature solely wished to prohibit the confirmation of proposals whose sole or primary effect was the avoidance of payment of tax due, the legislation would not have referred to the purpose of the proposals. The use of the word of "*purpose*" connotes an intention which, in my opinion, must involve a subjective intention in the circumstances. Therefore, insofar as the court is required to consider the motive of the petitioner in presenting the petition where it is alleged that it is for the sole or primary purpose of the avoidance of payment of tax due, this necessarily will involve an assessment of the subjective intention of the petitioner.

39. In this case, Mr. Sheehan, on behalf of the Company, has clearly averred that the sole purpose in presenting the petition was to seek to preserve the jobs of the employees of the Company. The Revenue asks the court to infer that the intention is to avoid the payment of tax due on the basis that the Company is in a position to and is paying all of its liabilities as they fall due, save those due to the Revenue Commissioners.

40. In fact, this is not the case. While the Company has kept up its payments due to the bank and its landlords and it is paying its suppliers cash on delivery, there has been an increase in the liabilities to those suppliers of 155% and it has not been able to discharge the historic liabilities which have built up over the past eighteen to twenty months. Therefore, the court cannot say that the petition has been presented solely or primarily for the purposes of avoidance of payment of tax due.

41. The petitioner disclosed to the independent expert and to the court the fact and the amount of the arrears of tax withheld from the Revenue Commissioners. It did not disclose and therefore concealed from the court the manner in which it deceived the Revenue Commissioners in its negotiations for an instalment arrangement in 2016. While undoubtedly both the actions and the concealment are egregious, they could not be considered as grave as the concealment identified in *Missford Ltd*, *Bookfinders Ltd* [2015] IEHC 769 or *Step One Permanent Solutions Ltd* [2015] IEHC 284. In my opinion the level of concealment and the matter which was concealed in and of itself is not sufficient to warrant a dismissal of the petition.

42. The actual wrongdoing engaged in is grave and a matter of considerable concern to the court. First, there was a misuse of funds deducted from the earnings of employees for the purposes of PAYE, PRSI and USC and these were not transmitted to the Revenue. Not only did this deprive the Revenue of taxes which were due, but it also jeopardised the rights of the employees of the Company in the event that they were to be made redundant or otherwise seek to make claims for social welfare payments, which might be dependent upon these deductions having been returned by their employer, the Company. Secondly, they misled the Revenue Commissioners in obtaining an instalment arrangement. Having wrongfully obtained a tax clearance certificate, they then ensured that the Company obtained a liquor licence to which it was not statutorily entitled. These were not once off actions but occurred over a period of between eighteen and twenty months.

43. However, they could not be compared with the scale of the wrongdoings identified in *Missford Ltd*, possibly merely because its liabilities to the Revenue were not so great.

44. I am mindful of the requirement to give effect to the legislative intention, while seeking to avoid in any way condoning the wrongful acts identified. It is with some considerable hesitation that I have concluded that it is not appropriate in this case to refuse the petition. I do so primarily because I believe there are other ways in which the court may mark the wrongdoing identified so as to ensure (a) that the court is in no way seen to condone the wrongful acts identified and (b) the purpose of the legislation is not frustrated by the wrongdoers to the detriment of innocent parties (primarily the employees) and (c) ensuring that the wrongdoers do not profit from their wrongdoing or improperly escape accountability for such wrongdoing.

45. Therefore, in the exercise of my discretion, I purpose to appoint an examiner to the Company.

### **The Circuit Court**

46. In the latest financial year of the Company prior to the date of the presentation of the petition, the Company fell to be treated as a small company by virtue of s. 350 of the Act of 2014, as I have stated above. This means that this petition could have been brought in the Circuit Court. It was clearly the intention of the Oireachtas in providing for examinerships to be dealt with in the Circuit Court that this should occur in the case of small companies. It would appear that as a matter of practice, practitioners are not bringing applications before the Circuit Court. It was indicated that there are practical difficulties in so doing, related to the perception that Circuit Court judges are less available to deal with both the petition and the subsequent applications which may require to be made to the court on an urgent basis. I am by no means convinced that this is indeed the case. The Circuit Courts sit, or are capable of sitting, in like manner to the High Court. If there in fact is a difficulty in this regard this should be brought to the attention of the President of the Circuit Court. I have every confidence in his ability to ensure that the legislative intent will not be frustrated by any procedural obstacles which may, inadvertently, exist and that appropriate steps will be introduced if required to ensure that practitioners can have the same access to judges of the Circuit Court as they enjoy in relation to judges of the High Court for the purposes of examinership applications.

### **Decision**

47. I appoint Mr. Dessie Morrow of Baker Tilly Hughes Blake Accountants, Joyce House, 22/23 Hollow Street, Dublin 2 examiner of the Company. I remit the case to the Dublin Circuit Court for all further hearings. I direct that my concerns in relation to the conduct of the directors of the petitioner should be drawn to the attention of the judge of the Circuit Court dealing with the matter hereafter and to the examiner. While I will have no further say in the matter, I recommend that these matters be considered before permitting Mr. Barry Sheehan to continue to have any further involvement in the management of the Company or acting as a director of the Company. I direct that the petition papers together with a copy of this judgment be sent to the Director of Corporate Enforcement.