THE HIGH COURT

[2013 No. 129 COS]

IN THE MATTER OF THE BELOHN LIMITED AND IN THE MATTER OF THE COMPANIES (AMENDMENT) ACT 1990

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 18th day of April, 2013

1. The Belohn Ltd. ("The Belohn") is a company limited by shares incorporated in Ireland on 24th July, 1973. It is the owner of premises at No. 1, Merrion Row and No. 17, Upper Merrion Street, Dublin, in which it operates several bars and a restaurant now under the name "Foley's Bar and Restaurant".

2. The Belohn is currently a wholly owned subsidiary of Merrow limited ("Merrow") which, since 2006, is its sole registered shareholder. The shareholders of Merrow are Sean Foley and his wife, Sherry Yan, who are also the current directors of both The Belohn and of Merrow. Prior to 2006, the parents of Sean Foley, John and Isobel Foley, were directors of The Belohn and also appear to have been shareholders.

3. On the morning of Saturday 23rd March, 2013, The Belohn presented a petition at a special sitting of the High Court seeking the appointment of Mr. Tim O'Keeffe as Examiner pursuant to s. 2 of the Companies (Amendment) 1990 ("the 1990 Act"). On that day, the High Court (Hogan J.) made an order *ex parte* appointing Mr. O'Keeffe as Interim Examiner and gave directions for the hearing of the petition. Pursuant to that order and further orders, the petition came on for hearing before me on Wednesday 10th April, 2013. Bank of Scotland plc. ("the Bank"), a secured creditor, was represented and opposed the petition. The Revenue Commissioners were also represented and opposed the appointment of the Examiner.

4. There is a complex and unusual background both to the presentation of the petition and the ultimate form of application made pursuant to the petition. I propose setting out briefly the main events as the detail is well known to the principal parties, being The Belohn, Merrow, their directors and the Bank. The Revenue Commissioners, by now, are also appraised of the relevant details.

5. The Belohn, historically, had banking facilities with the Industrial Credit Company Ltd. On 7th August, 1981, it created a charge over the property known as No. 1, Merrion Row and other assets in favour of the Industrial Credit Company, which subsequently changed its name to Bank of Scotland (Ireland) Ltd ("BOSI"). The Belohn continued to obtain facilities from BOSI and in 2006, was granted a facility of €3.75 million on the terms of a facility letter dated 12th May, 2006. The Belohn created a charge over its premises known as No. 17, Upper Merrion Street in favour of BOSI on 3rd April, 2008 as security for its facilities.

6. In 2007, BOSI granted a facility of €1 million to Merrow which is secured, *inter alia*, by a floating charge over that company created by a debenture dated 12th November, 2007. In the facility letter of 13th September, 2007, the purpose of that facility was stated to be the acquisition of The Belohn. This letter provides for security to be given, *inter alia,* over the assets of The Belohn. Payment of interest on the facility was effected by the payment by The Belohn to Merrow of what is referred to as a "management charge". Merrow does not appear to have had any other source of income and its only activity is the holding of shares in The Belohn.

7. On 31st December, 2010, pursuant to an order of the Court of Session in Scotland, the business of BOSI vested in the Bank and BOSI thereafter ceased to exist pursuant to the provisions of the Companies (Cross-Border Mergers) Regulations 2007.

8. The Belohn appears to have run into financial difficulties from approximately 2009. In 2012, there were significant negotiations between The Belohn and the Bank in relation to its liabilities. These were unsuccessful and on 10th October, 2012, the Bank purported to appoint Mr. David O'Connor ("the Receiver") to be Receiver and Manager of the properties at No. 1, Merrion Row, Dublin and No. 17, Upper Merrion Street, Dublin and other property and assets referred to in the mortgage debentures dated 7th August, 1981, and 3rd April, 2008.

9. Mr. O'Connor, as Receiver, took over the running of the bars and restaurant and the directors were excluded from the business consequent to his appointment from 11th October, 2012. Mr. O'Connor continued to trade the bars and restaurant and whilst there is some dispute about one employee, I am satisfied for present purposes he continued to employ all the prior employees in the business.

10. On 18th December, 2012, Merrow commenced proceedings in the High Court challenging the appointment of Mr. O'Connor as Receiver under Record No. [2012 No. 695 COS]. Those proceedings were case-managed, multiple affidavits sworn by both sides and ultimately the matter was heard and judgment given by the High Court (Gilligan J.) on 22nd March, 2013. In that judgment, handed down on the morning of 22nd March, 2013, Gilligan J. concluded that the purported appointment of Mr. O'Connor pursuant to the debentures of 7th August, 1981, and 3rd April, 2008, was void and that Mr. O'Connor did not stand validly appointed as Receiver and Manager over the property and assets of The Belohn as charged by those debentures. The conclusion was primarily based upon the requirement in the 1981 debenture that the Bank "appoint by writing under its seal a receiver of the mortgage property . . .". The appointment had not been made under seal. On the same day, in the early afternoon, orders were made pursuant to the judgment declaring Mr. O'Connor not to stand validly appointed.

11. At 4.15pm on the same day i.e. 22nd March, 2013, the Bank, through its solicitor, made demand upon The Belohn for the amount then due, stated to be €4,192,663.83 plus continuing interest. Payment was sought to be made by 5.00pm that day. At the same time, a demand was also made on Merrow for the payment of €1,068,684.41 plus continuing interest also by 5.00pm on that day.

12. The Receiver made arrangements to hand back the control of the business of The Belohn to its directors. However, primarily due to an absence of insurance, the directors were unable to re-open the bars and restaurant until Saturday 30th March, 2013. The Belohn has continued to trade since that date.

13. However, in the meantime, at 5.10pm on Friday 22nd March, 2013, the Bank appointed Mr. O'Connor as a Receiver over all the property, undertakings and assets of Merrow pursuant to a debenture creating a floating charge of 12th November, 2007. The fact of that appointment was not communicated to Merrow until approximately 4.30pm on Sunday 24th March, 2013, notwithstanding the immediate communication of the demand for repayment and the contact between Mr. O'Connor's office and representatives of The Belohn and Merrow during Saturday 23rd March, 2013.

14. On receipt of that information, Merrow arranged to present a petition, initially in its name and that of The Belohn, seeking appointments of Examiners to each company pursuant to s. 2 of the 1990 Act. At a hearing in the home of Hogan J. on the evening of Sunday 24th March, 2013, Hogan J. made an order (*ex parte*) under s. 3A of the 1990 Act (as inserted by s. 9 of the Companies

(Amendment) (No 2.) Act 1999), granting Merrow interim protection until 2.00pm on the following day, Monday 25th March, 2013.

15. The Bank moved to set aside that order. A hearing was held later that week and on 9th April, 2013, Hogan J. delivered judgment and set aside the order made *ex parte* pursuant to s. 3A of the 1990 Act.

16. In the intervening period, a petition had been filed on 28th March, 2013, in the Central Office by Merrow alone (under record no 2013 143 COS) seeking the appointment of an Examiner pursuant to s. 2 of the 1990Act. This was done following hearings before Hogan J. and in replacement for the petition presented in the joint names of The Belohn and Merrow at the hearing on the evening of Sunday 24th March, 2013. That petition also came on for hearing before me on 10th April.

17. On the first day of the hearing of the two petitions by The Belohn and Merrow before me on 10th April, 2013, counsel for The Belohn and Merrow indicated that he was not now seeking an order for the appointment of an Examiner to Merrow pursuant to s. 2 of the 1990 Act. However, counsel indicated that if an order was made for the appointment of an Examiner to The Belohn pursuant to s. 2 of the 1990 Act, he would then seek an order for appointment of an Examiner to Merrow pursuant to s. 4, upon the grounds that Merrow was a related company of The Belohn within the meaning of that section.

18. On the morning of the second day of the hearing before me, the petition of Merrow in proceedings [2013 No. 143 COS] was withdrawn. I granted leave to file in Court a motion in The Belohn petition, seeking, *inter alia*, the appointment of Mr. O'Keeffe as Examiner to Merrow as a related company of The Belohn pursuant to s. 4 of the 1990 Act. The Bank, whilst it objects to the appointment of Mr. O'Keeffe as Examiner to either company and contends that the Court does not have jurisdiction to consider the application to appoint an Examiner to Merrow, even pursuant to s. 4 by reason of its appointment of a Receiver to Merrow on 22nd March, 2013, did not object to my permitting the filing of the notice of motion and grounding affidavit in Court and entertaining the application for the purpose of determining all issues between the parties.

19. Accordingly, the final application before the Court on the second day of the hearing on 11th April, 2013, was the application by The Belohn for the appointment of Mr. O'Keeffe, as Examiner, pursuant to s. 2 of the 1990 Act, and if that application were acceded to, his appointment as Examiner to Merrow as a related company pursuant to section 4 of the 1990 Act. Accordingly, I propose considering, in the first instance, the application for his appointment as Examiner to The Belohn pursuant to s. 2 of the 1990 Act.

The Law

20. Section 2(1) of the 1990 Act, as amended, requires The Belohn to establish, firstly, that it is a company which is or is likely to be unable to pay its debts; no resolution subsists for its winding up and no order had been made for the winding up. I am satisfied of all those matters.

21. Section 2(2) of the 1990 Act provides:

> "(2) The court shall not make an order under this section unless it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern."

It is well established that the onus is on a petitioner to satisfy the Court, by sufficient evidence or material, that there is a reasonable prospect of survival as a going concern.

22. There is no definition in the 1990 Act of what constitutes a reasonable prospect of survival. In *Re Gallium Ltd.* [2009] IESC 8, [2009] 2 I.L.R.M. 11, Fennelly J. indicated at p. 22, para. 50, that "the test does not require probability of survival to be established". While there must be a reasonable prospect of survival this standard appears to be less than a requirement of probable survival. In *Re Vantive Holdings* [2009] IESC 68, [2010] 2 I.L.R.M. 156, Murray C.J. stated at p. 172:

> "In order to be satisfied that a company has a reasonable prospect of survival as a going concern, the court must have before it sufficient evidence or material which will permit it to arrive at such a conclusion on the basis of an objective appraisal of that evidence or material."

23. It is only if the petitioner satisfies the Court, in accordance with the above standard, that it and the whole or any part of its undertaking has a reasonable prospect of survival as a going concern that the Court may enter upon a consideration as to whether or not to exercise its discretion to appoint an Examiner.

24. An important part of the material put before the Court is the opinion of the independent accountant expressed in his report. However, it is only part of the material and the weight to be attached to the accountant's opinion will, as has been previously determined, depend upon "the degree and extent to which he supports that opinion by his or her own objective reasoning and the appraisal of material or factors relied upon for reaching his or her conclusions". (See Murray C.J. in *Re Vantive Holdings* at p. 172).

Evidence and Material presented to the Court

25. The principal evidence and material before the Court insofar as relevant to the prospect of survival of The Belohn and the whole or any part of its undertaking as a going concern, and the exercise of the Court's discretion includes the following matters:

> (i) The Belohn is the owner of the two premises on the corner of Merrion Street and Merrion Row in which it operates a single business which comprises two bars and a restaurant and an apartment currently let.
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> (ii) The Bank holds fixed and floating charges over the premises and all the assets of The Belohn as security for current liabilities in excess of €4 million.
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> (iii) Audited accounts for the years ending 31st January, 2008, to 31st January, 2012, inclusive and nine-month management accounts to 30th September, 2012, have been exhibited. These as summarised in the Independent Accountant's Report ("the IAR") disclose a significant decrease in turnover from year end 31/01/08 to year end 31/01/10, and a modest increase in turnover each year since then. Throughout the period EBITDAM (earnings before interest, tax, depreciation, amortization and management fees) has remained positive (although barely so in the year ending 31/01/09) and increasing to €288,995 for the year ending 31/01/12. Notwithstanding the positive EBITDAM, throughout the entire period from 2008 to 2012 The Belohn made losses in each year.
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> (iv) The explanation given for the losses include the reduction in turnover due to the downturn in the economy and an initial failure to reduce costs appropriately. In the last three years, it is stated that a decision made by the directors in January, 2008 to move with BOSI to fixed interest at a time when ECB rates were at 4% has, since 2009, meant that the

interest payable has been at higher rates than if the facilities had remained on variable rates. The period for which interest was fixed expired in February, 2013.

(v) A Revenue VAT audit in 2007 resulted in additional revenue liabilities including interest and penalties commencing in 2011which have been fully paid off by 28th March, 2013.

(vi) The former Receiver of The Belohn produced trading accounts for the 23 weeks of the trading receivership, which show a positive bar trading of €44,171 over the 23 weeks.

(vii) The former Receiver, in an affidavit sworn in the earlier proceedings, has referred to the fact that he had reached agreement for the sale of the premises, subject to contract, and a booking deposit received. The sale price has not been disclosed. Counsel for the Bank indicated in the course of the hearing that it was intended that there be a continuation of the bar and restaurant business and that the employees transfer to the new owners under the Transfer of Undertakings Regulations.

(viii) The directors of The Belohn have prepared the following financial statements , all of which are unaudited and are referred to in the IAR:

1. 9-month management accounts for the period ending on 30th September 2012.

2. A statement of affairs as at 11th October 2012.

3. A 10-week cash flow for the period of protection by the Court.

4. Cash flow projections for the period to 31st May, 2014, if The Belohn were to exit the protection period with a successful scheme of arrangement confirmed by the Court.

(ix) A report prepared by Mr. O'Connor, the former Receiver, with analysis and criticism of the directors' management accounts, statement of affairs and projections, to which I will return.

(x) The directors have agreed to provide funds currently external to The Belohn and Merrow for two purposes: firstly, to provide The Belohn with cash flow for trading during the protection period up to a maximum of €100,000, and secondly, to provide funds in an amount agreed with the Interim Examiner but not disclosed to the Court to The Belohn so that it can now deposit with the solicitors for the Interim Examiner such sum with authority that it may be used to discharge the remuneration and costs of the Examiner, if appointed.

(xi) The opinion of the Independent Accountant is that subject to the conditions set out in paragraph 10.2 of his report The Belohn and its undertaking has a reasonable prospect of survival as a going concern. The Interim Examiner in his report for the period to 9th April concurs in this view for reasons set out therein.

(xii) The Interim Examiner, following an advertisement placed, has received five expressions of interest in investment in The Belohn from sources external to the Foley family, two of which are, the Court is informed, from persons well-known in the restaurant and bar trade.

Reasonable Prospect of Survival of The Belohn and its Undertaking

26. Upon a consideration of all the evidence put before the Court, the principal elements of which are summarised above, The Belohn has, in my judgment, established that its undertaking, in the sense of the business being conducted as Foley's Bar and Restaurant and the renting of an apartment in the premises, has a reasonable prospect of survival as a going concern.

27. However, the establishment of a reasonable prospect of survival of The Belohn and its undertaking as required by s.2 of the 1990 Act is more complex on the facts of this petition by reason principally of two matters which, in my view, are not fully addressed by the Independent Accountant in his report.

28. Firstly, the current level of indebtedness of The Belohn to the Bank; the apparent total breakdown in the relationship between the Bank and The Belohn, and the fact that the Bank has made clear that it will not continue to provide banking facilities to The Belohn means that any scheme of arrangement will probably have to include the introduction of sufficient funds which will enable the Bank receive a payment consistent with the value of the security which it now holds so as to procure by agreement the release of its security. Such funds could, of course, be provided by a combination of fresh investment and banking facilities. The 12-month projections in the Independent Accountant's Report include a cumulative total figure of €250,000 for the payment of bank interest (including the so-called management charges to Merrow, which is effectively payment of bank interest, albeit in respect of the debt of Merrow). The evidence before the Court is that the Bank, through the former Receiver, had agreed in February, 2013 upon a figure at which it was prepared to sell the premises and effectively dispose of its entire security. This has the significant advantage that it sets a figure which the Bank as recently as February, 2013, considered to be commercially acceptable to dispose of its security. Counsel for the Bank confirmed, properly, that I am entitled to assume, in reaching my judgment, that the Bank will henceforth act in a commercially sensible and reasonable way and therefore I am prepared to assume that it will disclose to the Examiner, if appointed, that figure and will permit an Examiner to determine, having examined the affairs of the Belohn and offers from prospective investors, whether he can propose a scheme of arrangement which would include such a figure for the Bank. I recognise that to enable a scheme of arrangement be prepared, there would have to be sums available in excess of this amount so as to provide for other creditors and working capital into the future. I am prepared to conclude on the present evidence that there is a reasonable prospect that this could be done.

29. The second matter relates to the criticisms made by Mr. O'Connor in his review of the financial statements in the IAR, in particular of the 9-month trading figures for the period ending 30th September, 2012 when analysed having regard to the statement of affairs as at 11th October, 2012 as compared with that of 31st January 2012 and his experience as Receiver in relation to staff costs and the projections prepared for the 10-week protection period and subsequent 12-month period in relation to staff costs.

30. There are two separate criticisms made by Mr. O'Connor. The first is that he contends that there is a sum of approximately

€140,000 unaccounted for in the 9-month management accounts and the statement of affairs as at 11th October, 2012. He contends that of the EBITDAM amount of €320,513 in the management accounts, only €26,220 was used to pay bank interest (including via management charges). Mr. O'Connor contends that there should therefore have been approximately €294,000 available to pay creditors. Yet, he states that the financial information shows only apositive cash movement of €22,454, resulting in approximately €36,000 in cash in the The Belohn's bank account on the date of his appointment, 11th October, 2012. He states it is unclear where the difference of approximately €271,546 went. It appears probable from Mr Foley's affidavit of 9 April, 2013, that a sum of approximately €127,732 was paid to his mother as part repayment of an investor's loan. However, there still remains a figure of approximately €140,000, which, on Mr. O'Connor's analysis, is unexplained. Mr. Sean Foley, in his affidavit, denies any wrongdoing and has attempted to give an explanation by reference to payments to Revenue and of accruals. However, having heard the submissions of counsel for both sides, and having regard to the overall movement in creditors over the period I am not satisfied that this is a full explanation. However this does not appear to me to be an issue which this Court can now resolve.

31. The second criticism relates to the figure of €109,452 in the 9-month management accounts to 30th September 2012 for wages and salaries. This, Mr. O'Connor explains, is for a 39-week period and gives an average weekly cost of approximately €2,800. He contends, when divided by the legal minimum hourly rate of €8.65, it amounts to payment for 324 working hours per week.

32. Mr. O'Connor has compared these figures with a number of other figures produced. Firstly, when appointed on 11th October, 2012, he had available to him the staff rosters for the two weeks and the 5-day period prior to his appointment. In the two full weeks, he states these rosters indicate weekly salary costs of €6,764 and €6,825 and show total hours worked *per* week at the legal minimum hourly rate as 782 hours and 789 hours respectively. In the figures produced by Mr. O'Connor for his 23 weeks of trading, average weekly wages (including employer's PRSI) were *circa* €8,000. However, in the 10-week projections for the period of protection prepared by the directors, wages average a cost of €4,460 *per* week. In the 12-month projections prepared, the annual figure given for wages is €250,384 which gives an average weekly cost of approximately €4,800. These latter figures all appear to include PRSI whereas the 9 month figures do not but the differences to the total amounts would be small. Mr. O'Connor further refers to the fact that "wages as a percentage of turnover" in the management accounts is about 15%, whereas in his experience, a pub with a food and drink offering will have a target of 30% to 33% for this percentage and a pub with only a drink offering will be targeting a percentage of 18% to 20%. He finally refers to the fact that the audited accounts for the years ended 31/01/11 and 31/01/12 also have a low wages as a percentage of turnover percentage.

33. The Bank contends that these figures indicate that as a matter of probability, staff were being paid in cash off the books. The Revenue Commissioners in submission raise similar concerns. This is absolutely denied in the replying affidavit by Mr. Foley and references are made to similar denials in the earlier proceedings. Reference is also made to the settlement reached with the Revenue in approximately June, 2011 and Mr Foley deposes that he is confident that all Revenue matters have been appropriately managed since that date. Reliance is also placed upon the unpaid work done by members of the Foley family and likely increased wage costs while the Receiver was in place.

34. The analysis made by Mr. O'Connor, at very least, raises serious questions in relation to the wages of staff as recorded in the 9-month management accounts. Whilst I accept that staff costs while the Receiver was in place may have been higher than previously, on Mr O'Connor's analysis, they are lower than the directors' own projections for the 10-week period of trading during the protection period and the 12-months subsequent trading. The Independent Accountant has indicated that the Foley family intends making themselves available for work without remuneration during the latter period.

35. I recognise that by reason of the fact that a Receiver has been in place since October, 2012, and removed the day before the presentation of the petition that the directors of The Belohn are in a highly unusual and difficult situation in presenting this petition to the Court and giving explanations of the matters raised. In my judgment the Court cannot fairly resolve on this application the issues raised by the analysis by Mr O'Connor of the 2012 figures. It therefore appears to me that having regard to the highly unusual circumstances in which this petition was presented following a period of receivership and the High Court judgment declaring same invalid, that I should, for the purposes of s. 2 of the Act of 1990, accept the averments of Mr. Foley as to the absence of any irregularities and that I should assess the reasonable prospect of survival upon the basis that all cash taken into the business of The Belohn since January, 2012 has been properly accounted for and no impermissible payments made and that there were no irregularities in relation to the payment of staff and the making of appropriate PAYE and PRSI provision or payments, in particular, in the period commencing January, 2012.

36. I have concluded upon this basis that The Belohn and its undertaking have a reasonable prospect of survival as a going concern, subject to the conditions set out in para. 10.02 of the IAR and the approval of a scheme of arrangement which includes a payment for the Bank consistent with the value of its current security. I have also formed the view on the evidence that conditions are capable of being met.

37. This conclusion only means that the Court has jurisdiction under s. 2(2) to consider exercising its discretion to appoint an Examiner. Counsel for the Bank submits that on the facts of this application that I should exercise my discretion against appointing an Examiner. Counsel correctly points out that it is not the purpose of the Act of 1990, or the examinership process, to protect or preserve the position of shareholders of an insolvent company or directors who have been involved in wrongdoing. He submits that this would be the effect of an order appointing an Examiner having regard to the evidence, both in relation to the earlier applications before Hogan J. and his decision to set aside the order made pursuant to s. 3A of the 1990 Act in the separate petition presented by Merrow, and the issues raised by Mr. O'Connor's analysis of the financial statements and projections produced on behalf of The Belohn. Hogan J., in his judgment delivered of 9th April, 2013, concluded that the failure of disclosure, which caused him to set aside the order made ex parte under s. 3A of the Act of 1990, came about by reason of a *bona fide* error. In addition, it appears to me that in any consideration of the earlier steps taken in this and the Merrow petition , I should have regard to the failure of the Bank to notify Merrow and The Belohn of the fact that it had appointed a Receiver over Merrow on Friday 22nd March, 2013, at 5.10pm until approximately 4.30pm on Sunday 24th March, 2013, in the context of the earlier communication on the same day to demand repayment and the three-day rule in s. 3(6) of the 1990 Act.

38. On the cash and wages issues in the nine months trading to 30th September 2012, I have concluded that I cannot make a determination on the questions raised by Mr. O'Connor's analysis on the present evidence and information having regard to the affidavits sworn by Mr. Foley in the absence of any cross-examination. That being so, having regard to the purpose of the Act and the fact that The Belohn has approximately 20 employees and an established business with a reasonable prospect of survival as a going concern, I have decided that in the absence of any prejudice to the Bank or the Revenue I should, on the facts herein, appoint an Examiner and give him a specific direction requiring him to report to the Court on the issues raised by the report of Mr. O'Connor.

39. The potential prejudice to the Bank in appointing an Examiner is agreed to be the priority capable of being given to the remuneration and costs of an Examiner pursuant to s.29 of the 1990 Act. To avoid such prejudice the directors of The Belohn have

agreed to provide funds in an amount agreed with the Interim Examiner but not disclosed to the Court to The Belohn so that it can now deposit with the solicitors for the Interim Examiner such sum with authority that it may be used to discharge the remuneration and costs of the Examiner, if appointed. The Interim Examiner indicated that if appointed and if he was unable to get approval for a scheme of arrangement that he would not seek an order for his remuneration or costs in excess of the deposited amount. This arrangement appears to remove any potential prejudice to the Bank in the appointment of an Examiner. The Revenue did not submit that it would suffer any potential prejudice by the appointment of an Examiner.

40. The Court has also noted that the Interim Examiner has indicated that if appointed as Examiner he would not issue any certificate pursuant to s.10 of the 1990 Act without leave of the Court.

41. Hence I will now make an order appointing Mr. O'Keeffe as Examiner of The Belohn and direct that as part of his examination of the affairs of The Belohn he should prepare a report for the Court within three weeks of today's date, clarifying whether having regard to the issues raised in Mr O'Connor's report :

> (i) all cash received by The Belohn in the 9 months ended 30th September 2012 is properly accounted for ;and
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> (ii) all payments made to staff in the said period have been properly recorded and accounted for and either provision or payment made for PAYE and PRSI in relation to all staff in the same period.

If the report of the Examiner on these issues does not disclose a satisfactory state of affairs, then the Court would have to consider what further order is required. Notwithstanding the direction to report on the above matters within three weeks the Examiner remains under the usual obligation to report to the Court immediately if he is of the view that he is unable to formulate a scheme of arrangement with a reasonable prospect of acceptance and approval.

42. I have considered whether, having regard to the agreement made by the Interim Examiner in relation to costs in the event that the Examinership is not successful, I am adding to the potential costs by giving the above direction. I consider that this should not be so for the following reasons. If the Examiner is to prepare a successful scheme of arrangement, he is, for the reasons already explained having regard to the position of the Bank, going to have to obtain significant funding from a new investor and/or new banking facilities. Such persons will inevitably require audited accounts for the year ended January, 2013 and, probably, any new investor will require due diligence to be conducted. Accordingly, the Examiner, in examining the affairs of The Belohn, will have to ensure that the issues raised by Mr. O'Connor's report are fully answered. In giving the specific direction to report on these issues within three weeks, which is similar to directions given in previous Examinerships where questions have been raised by an independent accountant's report, the Court is only bringing forward the timescale in which this aspect of the work must be done. However I will give the Examiner liberty to apply in relation to the cost of this report which should be separately recorded.

Merrow Ltd.

43. As I have concluded that I should appoint an Examiner to The Belohn, I must now consider the application to also appoint Mr. O'Keeffe as Examiner to Merrow as a related company pursuant to s. 4 of the 1990 Act. Section 4 (as amended) insofar as relevant provides:

> "(1) Subject to subsection (2), where the court appoints an examiner to a company, it may at the same time or any time thereafter make an order-
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> (a) appointing the examiner to be examiner for the purposes of this Act to a related company, or
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> (b) conferring on the examiner, in relation to such company, all or any of the powers or duties conferred on him in relation to the first-mentioned company.
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> (2) In deciding whether to make an order under subsection (1), the court shall have regard to whether the making of the order would be likely to facilitate the survival of the company, or of the related company, or both, and the whole or any part of its or their undertaking, as a going concern and shall not, in any case, make such an order unless it is satisfied that there is a reasonable prospect of the survival of the related company, and the whole or any part of its undertaking, as a going concern.
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> (3) A related company to which an examiner is appointed shall be deemed to be under the protection of the court for the period beginning on the date of the making of an order under this section and continuing for the period during which the company to which it is related is under such protection.
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> (4) Where an examiner stands appointed to two or more related companies, he shall have the same powers and duties in relation to each company, taken separately, unless the court otherwise directs.
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> (5) For the purposes of this Act, a company is related to another company if—
>
> (a) that other company is its holding company or subsidiary."

44. It is not in dispute that Merrow is a related company within the meaning of s. 4(5)(a) of the 1990 Act.

45. The first objection taken on behalf of the Bank is that the Court does not have jurisdiction to appoint an examiner to Merrow by reason of the fact that a Receiver will have stood appointed to Merrow for more than three days at the date upon which the Court determines to appoint an Examiner to The Belohn and is considering whether or not to appoint him to Merrow as a related company.

46. This objection is primarily based on s. 3(6) of the 1990 Act (as amended), and the scheme of the Act. Section 3(6) (as amended) provides:

> "The court shall not give a hearing to a petition under section 2 if a receiver stands appointed to the company the subject of the petition and such receiver has stood so appointed for a continuous period of at least three days prior to the presentation of the petition."

47. It is accepted by counsel for the Bank that s. 3(6) does not by its express terms prohibit the hearing of the petition presented by

The Belohn under s. 2 as no receiver was appointed to The Belohn. Nevertheless, counsel submits that the Oireachtas by the terms of the 1990 Act (as amended) did not intend that the Court consider the appointment of an examiner to a related company pursuant to s. 4 (as amended) where a receiver stands appointed to that related company for more than a period of three days. It does not appear to me that such submission is correct.

48. The starting point of a consideration of the jurisdiction given to the Court by the 1990 Act (as amended) to appoint an examiner to a related company must be section 4(1). That section, as appears, gives jurisdiction to the Court where it appoints an examiner to a company, subject to the provisions of sub-section (2), to make either at the same time or at any time thereafter an order appointing the Examiner to be an examiner for the purposes of the Act to the related company. It is, in my judgment, significant that the jurisdiction given to the Court allows the Court to make the appointment either "at the same time or at any time thereafter" (emphasis added).

49. An application to appoint a person already appointed as the Examiner to a company pursuant to s. 2 as examiner to a related company pursuant to s. 4, does not require the presentation of a separate petition pursuant to section 4. The normal practice is to present a petition seeking an appointment of an examiner pursuant to s. 2 to the principal company, and if the appointment is made, to seek ancillary orders appointing him or her as examiner to certain specified related companies. However the presentation of the petition does not of itself gain any benefit for the related company. The scheme of the Act for Court protection of a related company pursuant to s. 4(3) differs significantly from that for a company in relation to which a petition under s. 2 is presented. A related company is only under the protection of the Court from the date upon which the Court makes an order appointing the person as examiner to the related company.

50. Counsel for the Bank referred to the potential for abuse if the 1990 Act is not construed so as to prevent the appointment of an examiner to a related company pursuant to s.4 where a receiver stands appointed to that company for more than 3 days. Such a concern is not well founded as the jurisdiction given to the court in s. 4(1) is a discretionary one with a capacity to prevent abuse. In any event such a concern does not justify a construction inconsistent with the plain wording of the Act.

51. In my judgment, the Oireachtas, by enacting s. 4(1) of the 1990 Act (as amended) has expressly given to the Court a jurisdiction to consider making either "at the same time or any time thereafter" an order appointing the person appointed as Examiner pursuant to s. 2 to be an Examiner of a related company pursuant to section 4. There would have to be express words in the Act to limit the Court's jurisdiction to consider making an order for appointment of an examiner in circumstances where a receiver stands appointed to a related company. Section 3(6) of the Act (as amended), which is directed to a situation where a receiver is appointed, does not contain any such prohibition. Section 6 does not appear to give the Court jurisdiction to make specific orders in relation to a receiver already appointed to a related company. Whilst the basis for this distinction is difficult to understand it does not justify the construction contended for.. It may be simply an oversight. Protection pursuant to s. 5 applies to a related company once an examiner is appointed.

52. In such circumstances, in my judgment, the Act must be construed as not precluding the consideration by the Court as to whether it should appoint the Examiner of The Belohn as examiner of Merrow pursuant to section 4. Rather, the fact that a Receiver stands appointed to Merrow is a relevant fact to be taken into account in the exercise of the Court's discretion. .

53. The next issue is whether a holding company such as Merrow, whose only undertaking is the holding of shares in its subsidiary, The Belohn, is a company with an undertaking which may be considered as a going concern for the purposes of s. 4(2) of the Act. The issue was considered in the Supreme Court by Denham J. in *Re Tivway Ltd. (In Examination)* [2010] IESC 11, [2010] 3 I.R. 49, where at pp. 71 to 72, she stated:

> "[71] It has been held by the courts that a holding company may have an examiner appointed. It may be highly desirable where there is a group of companies trading that a holding company in that group be part of an examinership (see McCracken J. *in Re Tuskar Resources plc*. [2001] 1 I.R. 668 at p. 679).
>
> [72] The court was provided with a diagram of the Fleming group, which showed the position of the three companies within the group. In this case and similar situations it is necessary to consider the three companies and not a holding company in isolation. I am satisfied that the court has jurisdiction to admit a holding company, a related company, to examinership, to enable companies in a group obtain the protection of the court - if they comply with the Act of 1990. However, the position of a holding company is dependent upon whether the court is satisfied that there is a reasonable prospect of survival of the related companies as a going concern. Thus in this case the issue is whether the court is satisfied that under the proposed schemes of arrangement that there is a reasonable prospect of the survival of Construction and/or Tivway as a going concern. If there is, then Holdings may also proceed in examinership."

54. The above consideration related to s. 4(2) of the Act as amended in 1999. It refers to *Re Tuskar Resources plc*. [2001] 1 I.R. 668, in which McCracken J. in the High Court at p. 679, appears to distinguish between what might be required for the purposes of s. 2 (as was at issue in relation to Tuskar Resources plc) and the requirements of s. 4(2), in relation to the express jurisdiction given to appoint an examiner to a related company which is a holding company.

55. In accordance with the decision of the Supreme Court in *Re Tivway Ltd.*, it appears that s. 4(2) should be construed as including a holding company whose only undertaking with a potential going concern is the continued holding of shares in the subsidiary company. As pointed out by Denham J., the prospect of survival of the holding company is dependent upon whether the Court is satisfied that there is a reasonable prospect of survival of the subsidiary company as a going concern.

56. On the facts of this application, in addition to holding shares in the subsidiary, there is a debt in the holding company to the Bank and the only potential source of income in Merrow for its discharge is the payment by The Belohn of what is described as a "management charge" and the prospect of a dividend if The Belohn were to become profitable. However this does not appear to me to change the approach indicated by the Supreme Court *in Re Tivway Ltd*.

57. For the purposes of s. 4(2) the court must be satisfied that there is a reasonable prospect of the survival of the Merrow as the holding company of The Belohn as a going concern. I am so satisfied because I am satisfied that there is a reasonable prospect of survival of the subsidiary company, The Belohn, as a going concern. I also consider that the appointment of Mr O'Keefe as examiner to Merrow is likely to facilitate the survival of The Belohn. The introduction of a new investor for the purposes of a scheme of arrangement in The Belohn may require changes to shareholdings. Further the relationship between The Belohn, Merrow and their liabilities to the Bank are so intertwined that it is desirable, in seeking to propose a scheme of arrangement in The Belohn acceptable to the Bank, that Mr O'Keefe be in a position to examine the affairs of both companies.

58. Having regard to the short period of time for which a receiver was appointed to Merrow prior to the presentation of the petition by The Belohn and the background to that appointment, it does not preclude the Court from exercising its discretion pursuant to s. 4(1) of the 1990 Act in favour of appointing Mr O'Keefe as examiner to Merrow as the holding company of the Belohn.

59. I will also therefore make an order pursuant to s. 4(1) of the Act of 1990 appointing Mr O'Keefe as examiner to Merrow.