

THE HIGH COURT**2008 No. 347 COS****IN THE MATTER OF THE COMPANIES (AMENDMENT) ACT, 1990 (AS AMENDED)****AND****IN THE MATTER OF FERGUS HAYNES (DEVELOPMENTS) LIMITED****Judgment of Ms. Justice Laffoy delivered on the 1st day September, 2008****The proceedings**

1. This is a petition by Fergus Haynes (Developments) Limited (the Company) seeking the appointment of an examiner pursuant to s. 3 of the Companies (Amendment) Act, 1990 (the Act of 1990). The resolution of the board of the Company that a petition be presented to this Court seeking the appointment of an examiner was passed on 18th August, 2008. The petition was presented on 20th August, 2008 and, pursuant to directions given, it was listed for hearing on 27th August, 2008. The petition is grounded on the affidavit of Charles Fergus who is the owner of 99.995% of the issued share capital of the Company and is a director of the Company. That affidavit is the only evidence before the Court.

2. There is pending before the Court a petition presented on 7th August, 2008, by Atradius Credit Insurance N.V. (Atradius), a creditor of the Company, seeking that the Company be wound up by the Court. That petition was also listed for hearing on 27th August, 2008 but it was adjourned pending the decision of the Court on the Company's petition to appoint an examiner. The appointment of an examiner was opposed by counsel for Atradius, who invited the Court to draw the inference that the petition to appoint an examiner was a reaction to the petition to wind up. I think it reasonable to draw that inference on the basis of the evidence before the Court.

The Company's trading history and current position

3. The Company was incorporated on the 26th April, 1973. It has carried on the business of the construction of residential houses, property speculation and rental of plant and machinery and holiday homes. It operates primarily from Bundoran, County Donegal. Its principal business activity in the construction of residential housing has been in the areas of South Donegal and North Leitrim. From the evidence presented, the Company's business expanded considerably in the years 2004 to 2007. The most recent audited financial statements available are for the year ended 31st December, 2006. However, the Company's turnover in the recent past has been adversely affected as a result of the general downturn in the property market. In consequence, the Company ceased actively trading in April, 2008. The Company has been primarily involved in two developments in the recent past: the Stracomer development in Bundoran, County Donegal; and the Kinloch development at Kinloch, County Leitrim.

4. The Company's current position is reflected in the current status of those developments, its land banks and other properties, its liabilities to creditors and its current activities. I will consider each in turn.

Stracomer development

5. The Stracomer development is owned by the Company but is subject to mortgages and charges in favour of Bank of Ireland (BOI) and Bank of Scotland Ireland (BOSI). Both BOI and BOSI appeared on the hearing of the petition and opposed the appointment of an examiner. According to the workings for the statement of affairs as at 31st July, 2008 appended to the independent accountant's report referred to later (the workings), the directors' estimation of bank loans is €11.886 m. The Court was not given a breakdown of that figure between the various banks. However, the Court was informed that the indebtedness of the Company to BOSI at 22nd August, 2008 was €7.778 m, on which interest was accruing at a daily rate of €1,618.58. The Court was informed that the Company is indebted to BOI in the sum of €2.6m.

6. The Stracomer development is a residential development which will comprise 79 houses to be constructed in two phases. There are 53 residential units in phase one, of which 20 units have been sold and 33 units are at various stages of construction. Binding contracts are in existence for the sale of four of the 33 units. While the purchasers of the four units are anxious to complete the purchases, the Company has not been in a position to complete.

7. The four units in question are charged in favour of BOSI. It was represented in the petition and averred to in the grounding affidavit that BOSI had confirmed to the Company that it was willing to make the requisite funds available to the Company to complete the necessary works to the four units on a phased basis. In response to the petition, the solicitors for BOSI wrote to the solicitors for the Company on 26th August, 2008 informing them that they were opposing the appointment of an examiner and that they were considering their options in relation to the enforcement or preservation of their security position. At the hearing of the petition, counsel for BOSI vigorously opposed the appointment of an examiner and informed the Court that BOSI wishes to exercise its rights under its securities.

8. It was also represented in the petition and averred to in the grounding affidavit that BOI had agreed to fund the Company in relation to completion of the residential units in the Stracomer development over which it has security as and when binding contracts are entered into. At the hearing of the petition, the Court was informed by the solicitor for BOI that there is no arrangement in place for BOI further funding the operations of the Company and BOI is in the process of issuing a demand with a view to enforcing its security.

9. The case as presented on behalf of the Company envisages the Stracomer development being built out within three years. The Company estimates that, if all of the 79 units were sold, the outcome would be as follows:-

(a) As regards the units on which BOI has security, the indebtedness to BOI would be fully discharged and there would be a profit of €543,221.00 accruing to the Company; and

(b) In relation to the units secured in favour of BOSI, there would be a shortfall of €339,558.00 on the Company's indebtedness to BOSI, so that BOSI would rank as an unsecured creditor in respect of that sum.

10. Counsel for BOSI took issue with the proposition at (b). He asserted that the surplus at (a) would be swallowed up by a floating charge on the assets of the Company which BOSI shares with Anglo Irish Bankcorp plc (Anglo), leaving nothing for the unsecured creditors.

Kinloch development

11. The Company does not own the Kinloch development. It is owned by Mr. Fergus personally. Mr. Fergus engaged the Company to construct and develop residential units on the Kinloch development but there is no formal written agreement in place. The Company is owed approximately €3.6m by Mr. Fergus in respect of the works which the Company has carried out. In the grounding affidavit, Mr. Fergus has averred that he believes that "in time" he "will be in a position to deal with this liability". The evidence discloses per the statement of affairs as at 31st July, 2008, that, on the directors' estimation, the Company has trade creditors of €5.750 m. It is represented in the petition and averred to in the grounding affidavit that approximately two-thirds of the Company's creditors in the estimated sum of €2.5 m relate to the Kinloch development. That averment is not reconcilable with the figure in the statement of affairs.

12. Counsel for BOSI submitted that the directors of the Company have a serious issue to answer in relation to whether the Company's credit exposure to Mr. Fergus, a director of the company, is a prohibited credit transaction contrary to s. 31 of the Act of 1990. It was also commented on that the report of the independent accountant, to which I will refer later, has made no reference to this potentially serious matter and it has not been pointed to as one that requires investigation and, perhaps, action. I make no comment on that contention, which may be for another day. However, viewing the evidence in relation to the Kinloch development before the Court objectively, it is impossible to give credence to Mr. Fergus's belief that "in time", whatever that means, he will be in a position to deal with his liability to the Company. Mr. Fergus has averred that he was loaned €9m by Bank of Ireland Corporate Banking, Northern Ireland to fund the purchase and development of the Kinloch development, which I assume is secured on the Kinloch lands, although that is not stated. What is clear is that the funding from that source for further development has dried up. Mr. Fergus has averred that he is taking legal advice in relation to the matter. In the workings the figure for work in progress at Kinloch (€3.699m) has been wholly written down. Therefore, for present purposes, the Kinloch development would seem to be something of a "red herring".

Land banks/property

13. It is disclosed in the petition that the Company owns a number of land banks or interests in properties which it acquired for the purposes of future property development or for resale. Five properties are mentioned. As things stand, the Company has no equity in the first two properties mentioned. In relation to the third property, on the figures mentioned in the grounding affidavit it would appear to have an equity of less than €50,000.00, although this is inconsistent with the workings (on a winding up basis).

14. The fourth property mentioned is a site in London. The property in question is not owned by the Company. It is owned by a company registered in Scotland, of which Mr. Fergus is a director and company secretary. It is stated that the Company has entered into an arrangement with the Scottish company for the development of the site but there is no formal written agreement in place. It is impossible to conclude on the evidence that, whatever arrangement it has been entered into in relation to this site, the Company can derive any value from it. Apart from that, the Company is indebted to Anglo in the sum of €757,310.00 in relation to "this venture". A receiver has been appointed over the Scottish company's interest in the site on foot of a fixed charge in favour of Anglo. For present purposes, this property would also seem to be something of a "red herring".

15. The final property mentioned comprises rental properties at Bundoran, Co. Donegal (the Bundoran properties). On the basis of the workings (on a winding up basis) the Company would appear to have no equity in them currently, these properties being subject to a charge in favour of BOSI, as is stated in the grounding affidavit. It is also stated that there is a caution registered against three of them. The claim in respect of the three seems to have advanced beyond the registration of a caution stage, in that it appears that the claimant, Aidan McCarthy, has obtained judgment against the Company in plenary proceedings in this Court commenced in 2006 and the proceedings have been the subject of an appeal to the Supreme Court since 2007. I cannot assess the significance of that.

16. By way of general observation, on the basis of what is averred in the grounding affidavit, I find it impossible to conclude to what extent, if any, these properties could contribute to the survival of the Company, or the Stracomer development, as a going concern in the short to medium term.

Creditors generally

17. The petition is presented on the basis that the Company is insolvent and can not pay its debts. The workings show current liabilities aggregating €19.407m, which include bank overdraft (€0.080m), bank loans (€11.886m) and trade creditors (€5.749m).

18. Aside from Atradius, BOSI and BOI, six creditors appeared at the hearing of the petition. Two creditors, who have obtained judgments which the Company contends are subject to appeal, but issues were raised about that, opposed the appointment of an examiner. The other creditors took varying positions ranging from neutral to supporting the petition.

Atradius

19. Atradius claims to be a creditor of the Company in the sum of €1,217,676.65 by way of subrogation on foot of two separate credit insurance policies between two former suppliers of the company, F. K. Lowry (Piling) Limited and Kingspan Century Limited. The Company has acknowledged that, of the sum claimed, €400,000.00 is undisputed and that it had agreed to discharge the undisputed amount by instalments, but due to constrained financial circumstances, was not in a position to do so. On foot of the agreement, a petition to wind-up the Company presented in November 2007 was withdrawn in June 2008.

Current Activity

20. Since it ceased trading actively in April, 2008, the Company's ongoing activities have involved some minor works in relation to the Stracomer development, the collection of rental income in respect of the Bundoran properties, administration, security and the preservation of the integrity of its assets. The Company has retained only three employees. It has a weekly rental income of €1,920.00 from the Bundoran properties. The shortfall on the employees' wages, PRSI, and such like is made up by Mr. Fergus by way of shareholder's loan.

Need for investment

21. It is envisaged in the petition that, if the Court were to grant the relief sought by the Company, the Company would have an opportunity to restructure its liabilities and seek equity investment. It is represented and averred to by Mr. Fergus that, in the light of the Company's reputation and expertise which has been built up over a period of twenty five years and the land banks, which it is hoped will increase in value, such investment would be attractive. Counsel for BOSI submitted that, in the light of the fact that the Company has already had a de facto four month moratorium since it ceased actively trading and has put no evidence before the Court as to what steps, if any, it has taken to seek investment and, if it has taken steps, what the outcome was, it must be assumed that there is no real prospect of finding an investor. On the other hand, counsel for the Company submitted that an examiner under the supervision of the Court would be in a better position than the directors to explore the possibility of seeking investment.

Independent accountant's report

22. The independent accountant's report, as required by s. 3(3B) of the Act of 1990, has been furnished by FGS and is dated 19th August, 2008. In relation to the matters on which the opinion of the independent accountant is required under s. 3 (3B) which have given rise to controversy, the position is as follows:-

(1) In relation to para. (e), which requires a statement of opinion by the independent accountant as to whether the Company, and the whole or any part of its undertaking, would have a reasonable prospect of survival as a going concern and a statement of the conditions which are considered essential to ensure survival, whether as regards the internal management or controls of the Company or otherwise, the report is directed to the completion of the Stracomer development. It is stated in Clause 5.1 of the report that the independent accountant has reviewed the directors' estimates in relation to the completion of the Stracomer development and discussed with them the assumptions upon which the estimates are based. The following is then set out:-

"In my opinion, subject to the following conditions, the Company would have a reasonable prospect of survival as a going concern:

- O The proceeds of the sale of houses, as estimated by the directors, should not fall significantly below the estimated proceeds per unit.
- O Continued support of suppliers.
- O No additional liabilities over and above those estimated by the directors arise in respect of the completion of the development.

Based on the directors' estimates the completion of the Stracomer Hill Development should result in the release of cash for the benefit of the banks and the Company".

A number of points have been made by the opponents of the petition in relation to that opinion. First, it is based on the directors' estimates, not on any objective evidence of valuation from a valuer or a quantity surveyor. Secondly, insofar as it is predicated on continued support of suppliers, there is no evidence that such support would be forthcoming. Indeed, it was submitted on behalf of Atradius that, in the light of its experience of having had to pay out on insurance policies to suppliers, it should be inferred that support would not be forthcoming. Thirdly, there is no recognition in it of the need for fresh investment or, if there is, where it would come from.

(2) In relation to the requirement in para. (f) for an opinion as to whether the formulation, acceptance and confirmation of proposals for a compromise or scheme of arrangement would offer a reasonable prospect of survival of the Company, and the whole or any part of its undertaking, as a going concern, in clause 5. 2 it is opined that a scheme of arrangement would offer a reasonable prospect of the survival of the Company as a going concern, stating that the sale of houses not yet disposed of would result in the release of a substantial amount of cash and subsequently reduce the debt and securities held by the banks. Counsel for BOSI submitted that the report was deficient in that it did not indicate how a scheme of arrangement could be achieved and, in particular, it was pointed out that BOSI was a secured creditor for €7.78m and wanted to rely on its security as it thought fit. There was no real prospect of achieving a scheme of arrangement, he submitted, given that an investor had not been identified and the banks which are involved in the Stracomer development are not likely to cooperate in a scheme.

(3) In relation to the requirement in para. (g) for an opinion as to whether an attempt to continue the whole or any part of the undertaking would be likely to be more advantageous to the members as a whole and the creditors as a whole than a winding up of the Company, the opinion expressed in clause 5. 3 is that it would be likely to be more advantageous. This opinion is based on two statements of affairs as of 31st July, 2008, which are appended to the report, one which was prepared on a winding up basis and the other which was prepared on a going concern basis. In the case of the former, the excess of liabilities over assets would be €9.5m, whereas on a going concern basis the total deficit would be €7m. It was stated that it is anticipated that the unsecured creditors would receive some payment in the event of the Company continuing as a going concern. For the members, it was suggested, there is a potential for the company ultimately to return to profit in the future. In relation to the unsecured creditors, it was not indicated when they would receive payment or how much. On the basis of the expectation of the treatment of the creditors secured on the Stracomer development at the end of three years, it could not be soon or very much. Further counsel for BOSI pointed out that the costs of the examinership, which he contended were going to fall on the secured creditors, were not factored into the figures, nor was ongoing interest on the Company's borrowings.

The Law

23. Section 2(2) of the Act of 1990 provides as follows:-

"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."

24. That requirement was introduced by the Companies (Amendment) (No. 2) Act 1999. In *Re Tuskar Resources plc* [2001] I I.R. 668, McCracken J. considered what that provision required against the background of earlier authorities which had been decided before its introduction, stating (at p. 676) as follows:-

"In *re Atlantic Magnetics Ltd (in Receivership)* [1993] 2 I.R. 561 Finlay C. J. also stated that there cannot be an onus of proof on a petitioner to establish as a matter of probability that the company is capable of surviving as a going concern. It seems to me that this is no longer the position under the Act of 1999 by reason of the wording of the new sub.-s. 2 (2). Under the Act of 1990 as originally enacted there would appear to be a wide discretion given to the court. However, the new subsection prohibits the court from making an order unless it is satisfied there is a reasonable prospect of survival. If the court is to be 'satisfied', it must be satisfied on the evidence before it, which is in the first instance the evidence of the petitioner. If that evidence does not satisfy the court, the order cannot be made, and in my view this is tantamount to saying that there is an onus of proof on the petitioner at the initial stage to satisfy the court that there is a reasonable prospect of survival. For this reason, the court has to view the evidence in a different manner to that applicable prior to the Act of 1999."

25. There was consensus that the correct test to be applied is set out in that passage.

Conclusion

26. Accordingly, the core issue for decision on this application is whether the petitioner has adduced sufficient evidence so that the court can be satisfied that, if an examiner is appointed and the Company is given the protection afforded by the Act of 1990, there would be a reasonable prospect of the survival of the Company, and the whole or any part of its undertaking, as a going concern. I should, make it clear that I do not accept as correct the submission made on behalf of Atradius that, because the Company has not been actively trading for four months, it is not operating as a going concern and, consequently, the court does not have jurisdiction to make an order under s. 2 of the Act of 1990. The mere fact that the Company has not been actively trading in the recent past, because of financial constraints, of itself does not mean that it, and the whole or part of its undertaking, cannot survive as a going concern. However, it supports the contention that the Company has little enterprise value, as distinct from asset value.

27. For the various reasons advanced on behalf of BOSI and Atradius I am not satisfied that the Company, or any part of its undertaking, can survive as a going concern. The absence of any evidence to suggest that –

(a) an investor could be found who would enable the Company to recommence the development of the Stracomer development, fresh investment being necessary given that BOI and BOSI will not continue to fund it, or

(b) suppliers would support the Company in the future, or

(c) a scheme of arrangement could be achieved, given the attitude of BOSI and BOI, the level of indebtedness of the Company to its secured creditors and the fact that the unsecured creditors would have little, if anything, to gain,

precludes such a conclusion.

28. Such evidence as there is, does not facilitate an objective appraisal of the prospects of the Company, or the Stracomer development, surviving as a going concern, on the basis of which one could be satisfied that there is a reasonable prospect of that outcome. The absence of any objective evidence to support the difference in the total deficit situation on a winding up basis and on a going concern basis is particularly significant. There are two elements in the difference (€2.421m): an uplift in fixed assets, which relates primarily to an uplift in the value of the Bundoran properties (€0.877m); and an uplift in work in progress, which relates solely to the Stracomer development (€1.544m). The figures are based on directors' estimates without any independent assessment or verification by appropriate independent professionals. In these circumstances, it is difficult to view the case advanced by the petitioner as other than a bald assertion, which is not sufficient to satisfy the test in section 2 (2).

Order

29. There will be an order refusing the petition.