

THE HIGH COURT

[2005 No. 314 COS]

**IN THE MATTER OF WELLINGFORD CONSTRUCTION LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 1963 TO 2005
AND IN THE MATTER OF AN APPLICATION UNDER SECTIONS 205 AND 213 OF THE COMPANIES 1963**

BETWEEN

JOHN JOYCE

PETITIONER

AND

WELLINGFORD CONSTRUCTION LIMITED, JOHN SHAW AND PATRICK CARROLL

RESPONDENTS

Judgment of Mr. Justice Clarke delivered 17th November, 2005.

1. Introduction

1.1 The substantive proceedings in this matter involve a claim by the petitioner ("Mr. Joyce") under s. 205 of the Companies Act 1963 ("the 1963 Act") for relief against what he contends is oppression of his position as a minority shareholder in Wellingford Construction Limited ("Wellingford"). The oppression is alleged against the second named respondent ("Mr. Shaw") and the third named respondent ("Mr. Carroll"). The relief claimed, as is normal in such cases, raises not only the possibility of one or other opposing side being required by the court to buy out the other but also, as an alternative, seeks the winding up of the company. There is, therefore, before the court a petition to wind up Wellingford. It should be noted, however, that there is no suggestion from either side that the assets of Wellingford are not sufficient to meet all of its creditors. Therefore the situation in which the company finds itself is unusual (but by no means unique) in that there is a petition in being which seeks to have it compulsorily wound up by the court in circumstances where its assets exceed its liabilities. It will be necessary to return, to some extent, to the contentions of the parties in respect of the underlying application under s. 205 in due course.

1.2 In the application now before me, Mr. Shaw and Mr. Carroll ("the moving parties") seek an order under s. 218 of the 1963 Act, validating a sale of a significant company asset. I turn first to the legal reason why such an order is required and my jurisdiction to make such an order at this stage.

The fact that there is before the court an application to wind up the company does alter the company's situation in a number of material respects. It is necessary to turn first to the provisions of s. 218 of the 1963 Act which provides:- "In a winding up by the court, any disposition of the property of the company, including things in action, and any transfer of shares or alteration in the status of the members of the company, made after the commencement of the winding up, shall, unless the court otherwise orders, be void".

1.4 Under s. 220(2) of the 1963 Act the winding up of a company by the court is deemed (save in the limited circumstances specified in subs. (1) which have no application here) to have commenced at the time of the presentation of the petition for the winding up.

1.5 Therefore in the event that the company is ultimately wound up by order of the court, that winding up will be deemed (under s. 220(2)) to have commenced at the time of the presentation of the petition. Therefore, under s. 218, any disposition of the property of the company after the presentation of the petition will be void "unless the court otherwise orders".

1.6 In those circumstances it is clear that any disposition of the property of a company while there is pending before the court a petition to wind up such company, is open to the risk that it may be declared void.

1.7 In those circumstances the question of the exercise by the court of its power to "otherwise order" and thus approve of a disposition of the property arises. Both parties to this application are agreed that the jurisdiction of the court to approve of a disposition arises even though a winding up order has not yet been made. In considering the then operative equivalent provision under the United Kingdom Companies Act 1948 (s. 227) Buckley J. in *Re A.I. Levy (Holdings) Limited* (1963) 2 All ER 556 found that there was jurisdiction under the relevant section to authorise a sale of property notwithstanding that a winding up order had not yet been made. Having reviewed the facts which, it was contended, made it in the interest of the unsecured creditors of the company concerned that the sale under consideration go ahead immediately Buckley J. went on to say the following:-

"In those circumstances, this being a case in which it appears to me to be manifest that the transaction is one which must benefit the unsecured creditors of the company if in due course a winding up order is made, the reason which effected the mind of Vaisey J., that is to say that the liquidator should be given an opportunity to investigate the matter and bring it before the court representing the interests of all the creditors, does not affect my mind, for I do not think that the liquidator could make the position clearer to me than it is at the present time on the facts. With the greatest respect to Vaisey J. from whose view as to jurisdiction I think I am, in the circumstances, at liberty to differ, I hold that I have jurisdiction and that on the facts of this case I should exercise my jurisdiction here and now, notwithstanding that no winding up has yet been made".

1.8 I agree that the position as identified by Buckley J. in *Levy* represents the proper interpretation of s. 218 of the 1963 Act (which is in identical terms to s. 227 of the United Kingdom Companies Act 1948) and it seems to me therefore that there is a jurisdiction to make an order under s. 218 validating a sale of any of the companies assets in an appropriate case even where a winding up order has yet to be made.

1.9 In the application currently before the court the moving parties seek such an order. It is opposed by Mr. Joyce.

1.10 Before passing on to the issues which arise between the parties on this question it should be noted that when the matter originally came before the court the respondents sought validation of the sale by the company of two types of property as specified in the schedule to the motion. The first was a property known as "Derg Marina, Killaloe, Co. Clare" whose sale by the company remains in dispute between the parties. The second set of properties consisted of various apartments in specified blocks at a property known as Ballyvalley 1, Killaloe, Co. Clare. No dispute as to the sale of such properties by the company arose and the court has already validated those sales. The dispute with which I am concerned relates, therefore, to Derg Marina.

2. Background

2.1 Wellingford is the owner of Derg Marina. The property comprises lands and berths and ancillary structures to the marina adjacent to Lough Derg. The lands were purchased in early 2003 for €4 million. Wellingford has also been involved in the development and sale

of the apartments at Ballyvalley 1, Killaloe which, as I indicated above, have already been the subject of a court validation order. Mr. Joyce is a 45% shareholder in the company. Mr. Shaw is also entitled to 45% of the shareholding while Mr. Carroll is entitled to the remaining 10% of the shareholding. It should also be noted that the same three parties and in the same shares, hold certain other lands through a partnership.

2.2 While it would be impossible and inappropriate at this stage to express any views as to the merits or otherwise of the contentions which the parties put forward in the substantive s. 205 proceedings it should be noted, by way of background, that Mr. Joyce alleges in those proceedings that he has been excluded, in an oppressive manner, from the management of the company and also relies upon a contention that the decision (to which I will refer) of the company to sell Derg Marina is, in itself, an example of such oppression.

2.3 The respondents contend that Mr. Joyce misappropriated certain funds of the company, which alleged misappropriation is currently, it would appear, under investigation by Grant Thornton.

2.4 For completeness it should also be noted that both Mr. Joyce and Mr. Shaw have, in parallel proceedings, sued for a dissolution of the partnership through which they, together with Mr. Carroll, own certain other properties.

2.5 Whatever else may be in dispute it is abundantly clear from the above brief recitation of the current state of the parties interlinked commercial interests that all trust between them has broken down.

In that context it is necessary to turn to the immediate issues which give rise to this application. At a Board meeting of Wellingford on 15th July, 2005 it was resolved to sell Derg Marina. For the reasons indicated above no sale of the property could, in practice, be effected without the prior sanction of this Court because any purchaser would be open to the risk that, in the event of the court making a winding up order, the sale would be void unless validated by the court. In practice no purchaser would buy on those terms without a court order. It is in those circumstances that it is necessary for the court to consider whether prior validation of a sale should occur.

3. The Case for Sale

3.1 In his original grounding affidavit in support of the application for validation of a sale Mr. Shaw indicated that the reason why, in his view, it was necessary for Wellingford to sell Derg Marina was because of the pressing nature of various liabilities which the company had. There would not appear to be any significant dispute as to the fact that the company is indebted to its bankers (ACC) in the sum of approximately €6 million. ACC are entitled, in the ordinary way, to the payment of the net proceeds from the sale of the apartments to which I have referred. In that way it is anticipated that approximately €2 million of the ACC debt will be discharged as the apartments come to be sold. The remaining €4 million will, in effect, be secured on Derg Marina.

3.2 In addition to the bank debt there are certain other non bank liabilities of the company. In the original grounding affidavit to which I have referred reference is made to certain liabilities to Wellingford's main contractors (Tom Hayes Limited) in a sum of just less than €500,000 together with lesser sums owed to professionals and others involved in the company's business. In a subsequent affidavit there are exhibited figures prepared by Mr. Carroll (whom I understand to be an accountant and who is also the company secretary) which suggests a variety of other liabilities to non banker creditors which would appear to be show very significant cumulative liabilities on the part of Wellingford to those creditors.

3.3 Since this application was originally brought Tom Hayes Limited has petitioned for the winding up of Wellingford by virtue of the debt referred to (which on the evidence before me is not disputed). That petition stands adjourned until next Monday the 21st November.

3.4 In all those circumstances the moving parties contend that unless there is an immediate sale of Derg Marina the likelihood is that the company will go into liquidation and that Derg Marina would then have to be sold in any event by the liquidator in circumstances less advantageous to all concerned in that the costs of the liquidation would need to borne out of the sale proceeds and, it is said, there is a risk that a sale by the liquidator might not be on as advantageous terms as might be achieved on a sale by the company itself.

3.5 As to the manner of sale suggested, the moving parties seek the validation by the court of a sale for not less than €6 million. This figure appears to be arrived at from a consideration of a third party offer which, it would appear, was made for the property. In fairness to the moving parties it was made clear by their counsel that the offer to pay €6 million for Derg Marina was conditional on the acceptance of a separate additional offer to buy other properties from the partnership at a specified price. There is not, therefore, an unconditional offer "on the table" to purchase Derg Marina for €6 million. However, it is suggested that that offer indicates the sort of price which should be obtainable. It should also be noted that Mr. Joyce has made an offer to purchase the property from the company for the same price although certain questions as to his ability to complete such a sale have been raised by the moving parties.

4. The Case Against Sale

4.1 Leaving aside certain legal issues to which I will refer in due course the substance of Mr. Joyce's argument against sale is to criticise the quality of the evidence put forward on the part of the moving parties. He draws attention to the fact that the case made in the original grounding affidavit of Mr. Shaw suggested that the company's bankers were pressing for payment. It would now appear to be the case that those bankers have agreed to roll over the loan until February of 2006 so that there is no longer a pressing difficulty from that source. In addition there is criticism of the list of non banking creditors produced by Mr. Carroll based on the absence of any independent figures. Furthermore it is contended that the value of the property is greater than €6 million. It is also suggested that the evidence as to how the third party offer to buy the property came about is sparse.

4.2 Against that background it is necessary to turn to the legal basis upon which I should approach resolving the dispute between the parties.

5. The Law

5.1 Counsel on all sides have referred to a number of decisions in both this jurisdiction and in the United Kingdom in which the court has been called upon to exercise the role of validation in respect of dispositions of a company's property. See for example *Re Lynch, Monaghan and O'Brien Limited* (Unreported, High Court, Costello J., 14th October, 1986; *Re Pat Ruth Limited* [1981] ILRM 51; *Re Industrial Services Company* (Dublin) Limited (No. 2) [2002] 4 I.R. 394 and *Levy* to which I have already referred. However in all the reported cases the circumstances giving rise to the exercise of the courts discretion involved a company which, on the evidence before the court, was unlikely to be in a position to meet its liabilities. Counsel have been unable to discovery a case where, as here, the companies assets exceeded it's liabilities.

5.2 It seems clear that the underlying purpose of s. 218 is to ensure that the interests of those parties who might be affected by a disposition which takes place after the commencement of a winding up are not materially altered by any such disposition. In the case of a company which will be unable to meet its debts then the persons who will be affected (or at least potentially affected) by a disposition of the company's property are likely to be the creditors and most especially, in many cases, the unsecured creditors. If, for example, the disposition leads to some liabilities of the company being met and others not met then there may be less assets available to pay the unsecured creditors and the percentage of their debts which may ultimately fall to be paid may thus be reduced. For that reason the focus in all of the cases to which I have been referred is, understandably, the position of the creditors whose rights may be affected by an inappropriate disposition of the company's assets post the commencement of winding up.

5.3 However where, as here, there does not appear to be any suggestion that the company would not be, were it to be wound up, in a position to meet all of its liabilities, the parties whose interests might be affected by a post commencement disposition are the members of the company who would, in the event of a winding up, share in the distribution of the net surplus of the company's assets.

In those circumstances it seems to me that while the authorities are of assistance they need to be read in the context of the type of liquidations with which the court was concerned in each case. Those authorities need, therefore, to be read as applying in a case such as that with which I am concerned to the interests of the members as a whole rather than the creditors.

6. Application to the Facts of this Case

6.1 In that context it is necessary to look at the interests of the members taken as a whole. The starting point has to be the fraught financial position of Wellingford. I agree with counsel for Mr. Joyce that there are legitimate question marks over the manner in which the financial difficulties of the company were initially presented to the court. A reading of the correspondence from ACC exhibited in the original affidavit sworn to ground this application does not really bear out the fact that the bank was pressing to have the Derg Marina debt paid immediately. This fact is confirmed by the current position of the bank which has been to roll over the company's liabilities for an appreciable period.

6.2 However, that being said, there is nothing in the evidence before me to take away from the fact that the company does not appear, as of now, to be in a position to meet its debts as they fall due. This is evidenced by the fact that there is currently before the court a petition to wind up the company from a significant creditor who appears to be owed a sum of just under €500,000. In the light of that evidence it is difficult to escape the conclusion that there is a high degree of probability of the company going into liquidation unless something radical is done to solve its cash problems in the short term.

6.3 In substance Mr. Joyce's case is that he wishes the property to remain in the company so that it can, as originally planned, be developed to the benefit of the company. I will come to the question of the valuation of the property with or without planning permission later in the course of this judgment. It is, of course, on any view, the case, that the lands are likely to secure a higher price if an advantageous planning permission is secured. It is also, of course, the case that it is likely that the company would be in position to make even greater profits from the development of the lands in accordance with such a planning permission. Mr. Joyce is entitled to draw attention to the fact that the additional profits that might be achieved either by securing planning permission and selling the property with the benefit of that planning permission or, indeed, actually carrying out the development itself, will be foregone if the property is now sold.

6.4 There will always be a question of commercial judgment as to whether the best interests of a person who holds property is to sell the property at its current value or take a chance on the property increasing in value whether by reason of an anticipated change in the market or because of a change in circumstances such as the acquisition of a commercially advantageous planning permission. Such decisions are not, of course, without their risks. The market may not improve in the way anticipated. The planning situation may turn out to be less advantageous than hoped for. The improvement in value, even if it occurs, may be delayed so that its advantages may be reduced and the costs associated with the delay (such as interest) may outweigh those advantages. It is necessary for any commercial judgment to factor in the potential gains and losses and come to a view.

6.5 However there is a more fundamental question. In order to retain property for the purposes of exploiting any "upside" in its value it is, of course, necessary for the owner of the property to be in a position so to do. In the case of a corporate owner who has acquired the property by borrowing and has also incurred other expenditure whether in relation to that or other ventures, the price that has to be paid for being in a position to exercise a commercial judgment in favour of retaining the property is that the company must be put into a position where it is able to pay its other obligations as they fall due. It may well be that an appropriate commercial judgment for Wellingford to take (if it had no liabilities) would be that its best advantage would be to wait and obtain a planning permission and either sell then with the benefit of that planning permission or, perhaps, develop the property itself. However in order for that course of action to be an option for Wellingford it has to be in a position to pay its way in the intervening period. The price that has to be paid for the ability to exercise the commercial judgment in favour of holding on to the property is that the company has to have access to sufficient funds to pay its debts as they fall due in that period.

6.6 It would appear, on the evidence, that the company's bankers, while content to roll over the existing debt, are unwilling to make further advances. This, it would appear, may, at least in part, be due to the fact that Mr. Joyce has indicated that he does not wish there to be any further borrowings. While some criticism was made of Mr. Joyce in the course of the hearing in that regard I am persuaded by the argument of counsel for Mr. Joyce that such criticism is not well founded. Mr. Joyce has guaranteed the liabilities of the company to the bank. Without in anyway expressing a view as to the correctness or otherwise of Mr. Joyce's contentions concerning his exclusion from the management of the company it does not, in all the circumstances, seem to me that I could conclude at this stage that he should be criticised for not being prepared to see the extent of his exposure on foot of the guarantee increased.

6.7 However there are consequences of that decision. For better or worse it leads to a situation where the company is not in a position to raise extra funds from its bankers. There seems to be no reality in the company receiving extra funds from the shareholders having regard to the disputes which have arisen. In all the circumstances there is no obvious source of additional funding for the company.

That being so it does not seem to me that Mr. Joyce has pointed to any way in which the company can be funded so as to buy for it the option of making a commercial decision as to whether its best advantage lies in selling or retaining the property. In those circumstances the best advantage to the shareholders taken as a whole must, at present, lie in the sale of the property. For those reasons I have come to the view that, at the level of principle, I should indicate that I am prepared to validate a sale of the Derg Marina property.

7. Terms of Sale

7.1 That leads, however, to a difficult question concerning the terms upon which such a sale should be authorised. The moving parties placed before the court a professional valuation from the spring of this year which placed a value on the property as it stood of €4,250,000 with a valuation, in the event of planning permission, of €7,250,000.

7.2 However Mr. Joyce draws attention to the fact that there is now an offer of €6 million for the property as it stands. On that basis he suggests that the property with planning permission might well be worth €9 million. I have to confess that I remain unconvinced by the logic of that argument.

7.3 Where property may have a significantly enhanced value if its owner were to obtain a planning permission, a variety of factors need to be taken into account in reaching a view as to its current valuation. To take a simple but illustrative example one might envisage a property currently used for agricultural purposes and which, on an agricultural basis, a value of €1 million might be put. The same property, should it obtain a commercially advantageous planning permission, might be worth as much as €10 million. What its value at any point in time may be will depend on the estimation of the marketplace of the likelihood of obtaining such a planning permission, the length of time that it might take to secure same, and a variety of other factors such as the costs associated with securing the planning and the risk involved in estimating the state of the marketplace when the planning was obtained.

7.4 At one extreme might well be a case where the land was some distance from an urban area but where there might be some possibility in the medium or long term that the urban area might extend to the land in question. In such a case an additional "hope" value might be added to the agricultural price to give the current value of the lands. At the other extreme might be lands where appropriate rezoning had already occurred and where planning permission had already been granted in respect of a neighbouring property establishing the parameters which were most likely to be applied in relation to granting planning permission for the property in question. In those circumstances it might well be that the current value would represent a relatively small discount on the value which would be applicable when planning permission had actually been obtained.

7.5 The extent to which the current value of any property may fall short of the value which it would have in the event of obtaining a commercially advantageous planning permission is, therefore, dependent on a variety of factors. Such factors include an estimate as to the likelihood of obtaining planning permission, the length of time that would be likely to elapse prior to obtaining such a permission, the risks in the planning process associated with obtaining a planning permission which was less advantageous than might be anticipated (for example by a reduction in the number of units that might be allowed or the imposition of onerous conditions) and the costs likely to be associated with securing planning permission. Even extraneous factors such as the anticipated interest rates likely to be payable over the period between purchase and any planning permission becoming available could well be a factor.

7.6 While some of the above matters may be capable of relatively precise calculation (for example the likely costs of securing a planning permission) others involve judgments upon which persons may well form significantly different views. Clearly the difference between the current value and the maximum theoretical value that would be present were the company to obtain the most advantageous planning permission depends on an assessment of all of those factors. The current value is not, therefore, at a fixed remove from the full value that would pertain in the event of the most advantageous planning permission being obtained. The fact that the professional valuation on Derg Marina compiled earlier this year placed a difference of three million euro between the then current value and the value with planning permission does not necessarily mean that that difference would pertain now. For example it might well be the case that the reason why persons are willing to offer six million euro for the property now, represents, in whole or in part, a more optimistic planning scenario and a reduced planning time scale which would justify a lesser difference between the current value and the post planning value. I would wish to emphasise that there was no evidence in relation to these matters and I do not, therefore, reach any conclusion in respect of them. The purpose of the above analysis is simply to demonstrate that the argument advanced by Mr. Joyce does not necessarily follow.

7.7 What does, however, follow is that there may well be very great difficulties indeed in placing a value on a property where a significant portion of the value attributable to the property concerned stems from the chances of that property obtaining an attractive planning permission. The value could change significantly, even in the relatively short term, because of a change in circumstances that would affect the assessment of the marketplace on the likelihood of obtaining a suitable planning permission.

7.8 It is against that background that it is necessary to address the concerns expressed by Mr. Joyce as to the terms upon which any sale might be contemplated.

7.9 I am satisfied that there is some merit in the contention of Mr. Joyce that the circumstances leading to the third party offer for Derg Marina have not been fully explained in the evidence before the court. Furthermore given the potentially fast moving factors in the valuation of a property such as that with which I am concerned, I am not satisfied that a professional valuation which is some six months out of date is necessarily the most reliable indication of the current value of the property. Furthermore, without in any way entering into a consideration of the merits or otherwise of the parties contentions in respect of the substantive s. 205 proceedings, it seems to me that having regard to the break down in trust between the parties it is essential, in the interests of the shareholders taken as whole, that there be the maximum possible transparency in respect of any sale.

7.10 In that same context it is necessary to make some reference to the offer which Mr. Joyce has made to buy the property. In the course of the hearing before me counsel for Mr. Joyce indicated, on instructions, that Mr. Joyce was in a position to enter into an unconditional contract to purchase provided that the closing date was fixed for as late as March of next year. This fact, of itself, illustrates that there may well be additional factors that could legitimately be taken into account in assessing where the best commercial interests of the company and, therefore, the shareholders taken as a whole, lie, in relation to the property concerned, other than the price to be obtained on its sale. For example, any company exercising a commercial judgment in such circumstances could properly have regard to the time required to complete the sale and, indeed, to any risk that there might be that the sale might not complete. Such factors are potentially of even greater importance in the exercise of a commercial judgment by a company in the position of Wellingford which is in need of an early cash flow.

7.11 In this latter context I should also mention the argument put forward on behalf of Mr. Joyce which pointed out that in the event of a sale of the Derg Marina property for a sum of six million euro, ACC would be entitled to take the entire sum on foot of its security over the property for all its liabilities. However, it does seem clear that, in round terms, a sale for six million euro would have the effect of clearing the bank's debt so that the anticipated income stream of two million euro from the net proceeds of the sale of the apartments (which have already been validated by the court) would be available to meet the demands of other creditors and be freed from any obligation in respect of the bank. In those circumstances it seems to me that the ability of the company to deal with its creditors would be significantly enhanced by a sale of the Derg Marina property. While the company might not have a sufficient sum to meet all of its other liabilities straight away it is likely that it would be able to put to such creditors proposals in relation to the net proceeds of the sale of the apartments in such a way that would at least give it a realistic chance of being able to deal with those creditors in a manner that would stave off liquidation. In the circumstances I am satisfied that a sale of the Derg Marina property, at

an advantageous price, has the potential to effect a very significant reduction in the risk of liquidation. Liquidation is not certain even if Derg Marina is not sold. Avoiding liquidation is not certain even if it is sold. However, the chances of liquidation would, in my view, be significantly reduced by a sale.

7.12 However, that being said, it is clear that if such a sale is to achieve the intended end (that is reducing significantly the risk of liquidation and thus advancing the interests of the shareholders taken as a whole) the sale will either need to have an early closing date or the company's bankers will need to be given sufficient comfort as to the low risk of the sale not closing to enable those bankers to be persuaded to give such accommodation to the company as would give it room to negotiate with its other creditors.

7.13 As I indicated above the test by reference to which validation should be ordered by the court is, in a case such as this case, the interests of the shareholders taken as a whole. In principle therefore, to achieve that interest, the sale needs to be on the most commercially advantageous terms (which question is likely to be determined by the sale price and the likely time of closing) but must also not be subject to any circumstances that would mitigate against the sale achieving its principle object which is staving off a threatened liquidation. Thus it would be entirely legitimate for the company to prefer an offer which was more secure and had a shorter closing date (and thus would offer greater comfort to the bank) over one which had a higher price but was riskier or had a longer closing date such that the company would be deprived of any effective ability to deal with its other creditors for a significant period of time.

7.14 Having regard to the lack of trust between the parties and the variety of factors which might effect the appropriateness or otherwise of validating any particular sale, I have come to the view that I should not, at this stage, prospectively validate a sale simply because the price achieved was not less than six million euro. What I am, however, prepared to do is to indicate that I would be prepared to validate a sale which was achieved having complied with the following conditions:

1. The property was offered for sale on the open market through a "neutral" auctioneer.
2. The neutral auctioneer was agreed between the parties or, in default of agreement, was nominated by the relevant professional body.
3. The instructions to the auctioneer concerned were to obtain the most commercially advantageous contract from the prospective of the company paying due regard to the necessity that the company be in a position, at the earliest possible date, to be in a position to make an appropriate accommodation with its creditors so that factors of the type which I have identified above could, legitimately, be taken into account by the auctioneer concerned in reaching a view as to the most commercially advantageous terms available.
4. Having offered the property for sale in such a manner and for such a period as, having regard to all the circumstances of the case, the auctioneer concerned considered to be appropriate to achieve the ends to which I have referred, the auctioneer concerned is prepared to recommend entering into a contract on specified terms.

7.15 In indicating that I would be prepared to validate a contract entered into in those circumstances I should emphasise that it is no part of the function of the court in an application such as this to direct a sale of the company's assets. That is a matter for the company. Any such sale would, therefore, be a sale by the company rather than a sale by or under the direction of the court.

7.16 However what I do indicate is that in the absence of a transparent process, such as I have indicated, being put in place I am likely to remain unsatisfied that a sale would necessarily reflect the best interests of the shareholding taken as a whole.

7.17 In those circumstances I am not prepared to make any order under s. 218 at this stage and will confine myself to giving an indication of the circumstances in which I would be prepared to make such an order. In order to give the parties an opportunity to consider this matter and, if they wish, to bring it forward, I would propose putting this case in for mention before me on this day week (24th November). In the event that the moving parties wish to attempt to pursue the process which I have outlined then an attempt should be made, during that period, to agree a neutral auctioneer. In the event that the moving parties indicate on Thursday of next week that they wish to pursue the process outlined and have attempted but failed to agree a neutral auctioneer, I will, if they request that I should do so, authorise that they should write to the Chief Executive of the Institute of Auctioneers of Ireland enclosing a copy of the judgment in this case and inviting that organisation to nominate an appropriate auctioneer to carry out the task envisaged in this judgment on behalf of the company. It would have to be made clear in any such letter that the auctioneer concerned would be employed by the company and would not, in any way, be acting on behalf of the court.

7.18 Should such a course of action be adopted I would then intend that the matter should be adjourned generally with liberty to re-enter on forty eight hours notice with the intent that if the auctioneer so nominated recommended a sale on any particular terms I would be prepared to give favourable consideration to validating such a sale subject only to it remaining the case, at that stage, that the sale was likely to bring about a significant improvement in the chances of the company avoiding liquidation.