THE HIGH COURT

2011 592 COS

IN THE MATTER OF MR. BINMAN

AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

AND IN THE MATTER OF CLEARPOINT

AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

AND IN THE MATTER OF O'MEARA WASTE DISPOSAL

AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

AND IN THE MATTER OF RURAL REFUSE AND RECYCLING

AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

AND IN THE MATTER OF GREENPORT ENVIRONMENTAL LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

(AS RELATED COMPANIES WITHIN THE MEANING OF SECTION 4(5) OF THE COMPANIES (AMENDMENT) ACT 1990)

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 2nd day of November, 2011

1. On 27th October, 2011, I gave my decision on the petition of Mr. Binman for the appointment of Mr. William O'Riordan as Examiner of Mr. Binman pursuant to s. 2(1) of the Companies Amendment Act 1990, and of each of the four companies named in the title as related companies pursuant to s. 4 of the Act. In summary, my decision was:

(i) The presentation of the petition had been validly authorised by Mr. Binman; and

(ii) the requirements of s. 2(1) of the Companies Amendment Act 1990 ("the Act") were met; and

(iii) on the evidence and material placed before it, the Court could not be satisfied that there is a reasonable prospect of the survival of Mr. Binman and the whole or any part of its undertaking as a going concern.

2. I further indicated that I had considered all the evidence and submissions presented to the Court in accordance with the principles set out by the Supreme Court *per* Fennelly J., in *Re Gallium Ltd*. [2009] 2 ILRM 11, and *per* Murray C.J. in *Vantive Holdings* [2009] IESC 69.

3. I also indicated that it was commoncase that, unless Mr. Binman satisfied the Court that it and the whole or part of its undertaking had a reasonable prospect of survival as a going concern, the Court had no jurisdiction to appoint an Examiner and therefore could not enter into a consideration of discretionary matters, including the purpose and policy of the Act to protect employment.

4. I indicated I would give my full reasons for the above decision as soon as possible. This judgment contains those reasons.

Background

5. The petitioner, Mr. Binman, is a trading company and is the holding company of the four other companies named in the title. Together, I will refer to these as the Binman Group. The Binman Group is primarily involved in waste collection and recycling throughout Munster and Galway. Its headquarters are at Grange, County Limerick. It is primarily run and owned by the Sheahan family. Mr Martin Sheahan Snr. and Mr Martin Sheahan Jnr. are directors of most of the companies. It currently employs approximately 331 full time employees and 10 independent contractor staff.

6. On 12th October, 2011, Mr. Binman presented a petition seeking the appointment of Mr. William O'Riordan as Examiner of Mr. Binman pursuant to s. 2(1) of the Companies (Amendment) Act 1990, and of each of the other four companies named in the title, as related companies, pursuant to s. 4 of the Act. The petition was verified by affidavit of Mr Martin Sheahan Snr. ("Mr Sheahan"). It is not in dispute that the other four companies are related companies of Mr. Binman within the meaning of the Act.

7. On an *ex parte* application on 12th October, 2011, I appointed Mr. O'Riordan as Interim Examiner of Mr. Binman and the four related companies and made the petition returnable for as soon as practicable which was Tuesday 18th October, 2011. On 18th October, 2011, by consent of the parties appearing, I adjourned the hearing of the petition to 20th October, 2011, to enable exchange of affidavits and continued the appointment of Mr. O'Riordan. The petition was heard over two days with further affidavits filed in the course of the two days.

8. The petition of Mr. Binman was opposed by Bank of Scotland ("the Bank"). Bank of Scotland (Ireland) ("BOSI") had been for many years the principal banker and lender to the Binman Group and is now merged with the Bank. The Bank is owed approximately €53m by the Binman Group and hold extensive security over all the companies in the Group and from the Sheahan family. Mr. Graeme Keen, a banker of Edinburgh, swore two affidavits on behalf of the Bank. The Bank contended that the evidence before the Court did not establish a reasonable prospect of survival and that, even if it did, on a number of grounds, the Court should exercise its discretion against appointment. He also stated for reasons given that the relationship between the Bank and the Binman Group and Sheahan family had totally broken down. Mr Sheahan also makes much complaint of the behaviour of BOSI. The Court cannot resolve the cause

of the breakdown in relations but must take it into account.

9. The Revenue Commissioners appeared and took a position of "guarded neutrality". They filed two affidavits raising matters of great concern to them in relation to a withholding of approximately €1m in tax in 2010. They are currently owed €1.8 million. Limerick County Council also appeared. It is a creditor in the order of €2m, which debt is disputed by Mr. Binman. Limerick CC supported the petition and made it clear that it was doing so by reason of its concern for the preservation of jobs in the Limerick region. It is also the planning authority for the petitioner's principal site and operations and the deponent set out facts in relation to the planning and waste permit position in relation to same. Greenstar, a creditor for €2.2m, appeared at the first return date and indicated it was supporting the petition. Mr. Binman obtained letters of support from many unsecured creditors and BES investors.

10. Mr O'Riordan, the interim examiner, filed a short report on 18th October which indicated the existence of potential investors with money with an interest in investing in the Group. He also stated that no matters had come to his intention which indicated that the conditions identified by the Independent Accountant as necessary for the survival of the companies as a going concern "are not capable of being satisfied". However he does not refer to knowledge of any of the matters referred to in this judgment as causing concern for the Court.

Preliminary Objections

11. The Bank made two preliminary objections to what it referred to as the *locus standi* of Mr. Binman as petitioner. Nothing turns on the characterisation of the objections which may not be correct. The objections relate to the authorisation of the presentation of the petition by Mr. Binman and the entitlement of the persons making the decisions to do so. My reasons for rejecting that submission are as follows.

12. Mr. Binman was incorporated as a company with limited liability in 1994. The shares in it were held by Martin Sheahan Snr., Martin Sheahan Jnr., Marie Sheahan and Mark Sheahan, the latter two only holding a small number of shares.

13. In 2008, Mr. Binman was re-registered as an unlimited company with a share capital. As part of this reorganisation, it appears that Mr. Binman became the wholly owned subsidiary of Harrindale, a company incorporated in the British Virgin Islands. At the date of presentation of the petition, it is stated that the issued share capital of Mr. Binman is 200 ordinary shares held by Harrindale Ltd., and one "Y" share held by Florgant. Florgant is also a company incorporated in the British Virgin Islands. The shareholders of Harrindale are Mr. Martin Sheahan Snr., Mr. Martin Sheahan Jnr., Marie Sheahan and Mark Sheahan. Florgant is a wholly owned subsidiary of Harrindale.

14. The Bank objects to the various authorisations given for the presentation of the petition by Mr. Binman by reason of the fact that in 2005, Mr. Martin Sheahan Snr. and Mr. Martin Sheahan Jnr. both deposited with Mr. Tim Carroll, lending manager of BOSI, the share certificates to the shares then held by each of them in Mr. Binman Ltd., together with executed share transfer form as security for the liabilities to BOSI. Mr. Keen, in his first affidavit, asserted that Mr. Binman had not provided evidence as to the title of Harrindale to its shares in Mr. Binman, or of the consent of BOSI to the transfer of the shares. He further contended that any purported transfer of the shares would have been in breach of the Bank's security rights.

15. In response, Mr. Martin Sheahan Snr. exhibited an exchange of emails in relation to the new group structure in support of his contention that BOSI was aware of and consented to the share transfers. In addition, a copy of the share register of Mr. Binman had been exhibited which records, as its present members, Harrindale and Florgant. Mr. Binman, in submission, relies upon the fact that KPMG, in a review dated 28th April, 2010 refers expressly to the change to the unlimited status in 2008/2009 to facilitate a non-filing structure and states, "Mr. Binman is now a subsidiary of Harrindale Ltd., a company incorporated in British Virgin Islands and ultimately owned by Sheahan family members". This was a report prepared for Mr. Binman in response to a request from BOSI by KPMG and addressed to both.

16. There is undoubtedly a lack of clarity in relation to any continuing security in favour of the Bank over shares held by Mr. Martin Sheahan Snr. and Mr. Martin Sheahan Jnr. in the Binman Group. The Independent Accountant's Report in relation to Mr. Binman includes such security in the list of security held by the Bank.

17. For the purposes of this application, however, it is not necessary to make any determination in relation to the continuing existence of security held by the Bank over shares in Mr. Binman, or the validity in 2008 of share transfers to Harrindale. The objection made relates to the validity of decisions taken by Harrindale as a member of and the registered shareholder of the only voting shares in Mr. Binman. Section 124 of the Companies Act, 1963, provides that the register of members "shall be prima facie evidence of any matters by this Act directed or authorised to be inserted therein". It is prima facie evidence of the persons registered as members of the company and the legal owners of the shares specified opposite their names. Whilst the Court has jurisdiction to rectify the register pursuant to s. 122 of the Act of 1963, there is no current application before the Court to rectify the register. In such circumstances, on an application such as this, it appears that the Court should treat the persons whose names are entered in the register of members as the persons currently entitled to attend and vote (if applicable) at general meetings of the company.

18. The second preliminary objection made was that there was no resolution of the members of Mr. Binman passed prior to the presentation of the petition authorising same. Counsel for the Bank submitted that s. 3, properly construed, requires a resolution of the members in general meeting to authorise the presentation of a petition by the company. He did so in reliance upon the decision of Kelly J. in *Re Aston Colour Print Ltd*. [2005] 3 I.R. 609, and the fact that s. 3(1)(a) and (b) provides that a petition may, *inter alia*, be presented by the company or the directors of the company. The decision in *Aston Print* relates to the form of authorisation required where the directors of a company propose presenting a petition. It does not expressly relate to presentation by a company.

19. Again, it appears to me unnecessary to decide whether a resolution of the members in general meeting will always be required to authorise the presentation of a petition by a company pursuant to s. 3 of the Act. It may depend upon the Articles of Association and what is delegated to the directors of the company. I find it unnecessary to decide on the facts of this petition, as it appears to me, that even if a resolution of members in general meeting is required, the presentation of the petition has now been validly ratified by reason of the following facts.

20. Prior to the presentation of the petition, there was a board meeting of Mr. Binman which resolved that, ". . . it is advisable that the company and its associated trading entities make an application to the Court for appointment of an Examiner". Whilst objection was taken both to the use of the words "it is advisable" rather than some more decisive terminology, it appears to me that the intention expressed is clear. It was a decision to make an application to the Court. There was a further technical objection made to the holding of that board meeting. There are currently three directors of Mr. Binman: Mr. Martin Sheahan Snr., Mr. Martin Sheahan Jnr. and Mr. Pat Gilmartin, who is a non-executive director. The minutes of the board meeting indicate that Mr. Gilmartin attended by

phone. There is no provision in the Articles for the holding of a board meeting by phone. However, the quorum for a meeting is two directors. It is clear Mr. Gilmartin was given notice of the meeting, and even if, technically, he should not be regarded as having been present at the meeting, it still appears to have been a quorate meeting of which he was given notice. It also appears appropriate that the Court should have regard to the fact that the resolution passed is recorded as having been passed unanimously, and thus, Mr. Gilmartin did not object to same.

21. Prior to the presentation of the petition, there was, in addition, a written resolution of the four members/shareholders of Harrindale resolving that Mr. Binman, a wholly owned subsidiary of Harrindale, "should seek the protection of the Court...". The Articles of Harrindale permit of the passing of a resolution by a written resolution.

22. Counsel on behalf of Mr. Binman initially relied, principally, on the resolution of Harrindale Ltd. to bring the matter within the principles applied by this Court in *Kerr and Others v. Conduit Enterprises Ltd.* [2010] IEHC 300, that if it can be demonstrated that all shareholders entitled to attend and vote at a general meeting agree to a form of action which they could have authorised at a general meeting, then the Court will give effect to that decision as if it were a formal resolution of shareholders in general meeting.

23. However, to put the matter beyond doubt and presumably on the advice of their lawyers, a properly convened EGM of Mr. Binman was held on the evening of 20th October, 2011, attended by Martin Sheahan Snr. representing Harrindale, and Martin Sheahan Jnr. as representative of Florgant (both properly authorised) at which it was resolved to ratify and approve the application already made by Mr. Binman to appoint an Examiner. The presentation of a petition is intra vires Mr. Binman. Hence, the subsequent ratification by the shareholders of the presentation done on the authority of the directors validates the presentation of the petition.

Reasonable prospect of survival

24. I now turn to the reasons for my decision that on the evidence and material placed before it, the Court could not be satisfied that there is a reasonable prospect of the survival of Mr. Binman and the whole or any part of its undertaking as a going concern.

The Law

25. Section 2(2) of the Act of 1990 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. Further, the Court must be so satisfied even in the absence of any opposition to the petition to ground its jurisdiction.

26. There is no definition of what constitutes a reasonable prospect of survival. In *Re Gallium Ltd.* [2009] 2 ILRM 11, Fennelly J. indicated that, "the test does not require probability of survival to be established".

27. The proper approach of this Court to determining whether a petitioner has satisfied the Court that it has a reasonable prospect of survival is in accordance with the decision of the Supreme Court per Murray C.J. in Re Vantive Holdings [2009] IESC 69, where he stated:

> "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. Mere assertions on behalf of a petitioner that a company has a reasonable prospect of survival as a going concern cannot be given significant weight unless it is supported by an objective appraisal of the circumstances of the company concerned and an objective rationale as to the manner in which the company can be reasonably expected to overcome the insolvency in which it finds itself and survive as a going concern.
>
> The opinion of the independent accountant as set out in the report which a petitioner is required to provide to the Court under the provisions of the Act, must be given due weight. Again, the weight to be attached to the accountant's opinion will depend on 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."

27. It is only in the event that a petitioner so satisfies the Court that it may enter upon consideration of the matters which affect its broad discretion as to whether or not to appoint an Examiner.

Evidence and Material Presented to Court

28. The evidence and materials presented by the petitioner to the Court in relation to the reasonable prospect of survival of Mr. Binman and the four related companies is set out in five affidavits of Martin Sheahan Snr., the Independent Accountant Reports to each of the five companies and an affidavit of Mr. Con Quigley, the Independent Accountant. In addition, the evidence in the other affidavits filed and the Report of the Interim Examiner must be taken into account by the Court.

29. As Mr. Binman is both the holding company of all the trading subsidiaries and is itself trading, much of the general information given to the Court relates to the Binman Group. There is no objection to this. Clearly, the companies have been dealt with as a group and it is appropriate to give the Court a group picture. Mr. Sheahan, in his affidavits, sets out the group picture and makes the distinction between the companies. The Independent Accountant, in each of his reports, repeats a group picture and then sets out certain individual information. I propose initially considering the group information and then the specific information in relation to Mr. Binman in that context.

30. The appropriate approach appears to consider the evidence adduced in relation to the cause or causes of the insolvency and then to consider whether there is evidence before the Court which, on an objective appraisal thereof, enables the Court to conclude that the petitioner and each of the related companies has a reasonable prospect of survival as a going concern.

31. The information provided paints a positive picture of the Binman Group and its operations until the end of 2008 or beginning of 2009. Thereafter, it becomes less clear or positive, and in respect of certain matters, quite negative.

32. Mr. Binman commenced in 1993, and, from approximately 2000, expanded significantly. It made in the order of ten acquisitions.

The most significant related to the companies named in the title. In 2003, it acquired O'Meara Waste Disposal, based in Clonmel, with a domestic and commercial customer base in Tipperary, Kilkenny, Waterford and East Cork. In 2003, it also acquired Rural Refuse and Recycling based in Gort and with domestic and commercial customers based in Clare and Galway. In financial terms, the most significant was the acquisition, in 2007, of Clearpoint at a cost of approximately €17m funded by BOSI. Clearpoint operates a recycling and recovery facility in Carrick-on-Suir.

33. The final acquisition which was also very significant was in 2008, when, through Greenport Environmental Ltd., it acquired a site of 17 acres and a warehouse at Foynes, County Limerick. The acquisition was financed 90% by BOSI in the amount of €12.5 million. The timing was extremely unfortunate for the Binman Group. The intention was to develop a state-of-the-art mechanical and biological treatment plant based on an anaerobic digestion (AD) for organic waste. Greenport has applied for and claimed planning permission. It has also applied for an EPA licence. There appear to have been significant delays and costs associated with both. Since 2009, Greenport has been a financial drain on the Binman Group. By agreement with BOSI, interest of €0.6m per annum has been rolled up. The Binman Group, in difficult financial circumstances, has pursued the regulatory applications. It awaits a decision on its application for the EPA licence.

34. On the evidence before the Court I have concluded that from 2009 the financial problems of the Binman Group derived from three separate causes:

> (i) The Group had a bank debt at a level which it was unable to service from current revenue;
>
> (ii) The Group was unable to access bank funding necessary for the annual capital expenditure replacement programme which the business requires;
>
> (iii) There was pressure on operational revenues due primarily to the general economic downturn and its impact on the waste disposal business. Additional competition in the market also caused pricing and customer pressures. There was a reduction in both turnover and profitability. The specific problems are deposed to by Mr. Sheahan in his grounding affidavit and set out in graphic terms in the Independent Accountant's Report to which I refer below.

35. Each of the above contributed to the overall financial difficulties and ultimate insolvency of the Group and exacerbated each other. However, it appears that each requires resolution if Mr Binman and the related companies are to have a reasonable prospect of survival.

36. Throughout 2009, negotiations continued between the Binman Group and BOSI but without the release of any additional funding or resolution of its excessive bank debt.

37. In early 2010, BOSI appointed KPMG to undertake an independent business review of the Binman Group. This was done in February and March and reported on in April, 2010. Mr. Sheahan has exhibited that report. It discloses, as stated in his affidavit by Mr. Sheahan, that the Binman Group had paid interest and capital in excess of €30m to BOSI over the preceding ten years. However, it also shows that at the end of 2009, the Binman Group was indebted to BOSI in the sum of €44m, inclusive of overdraft, and its overall debt level was approximately €50m including bank loans, overdrafts and leasing. The report confirms the three causes of its financial problems identified above. It was based upon the Binman Group's then projected EBIDTA of €6.4m for 2010, which was stated to be challenging to achieve. Even if achieved, it stated that it would be insufficient to meet a projected capital expenditure of €1.9m and service the bank and leasing debts.

38. The KPMG report also identified that Greenport was a significant drag on group cashflow and recommended a technical and commercial property evaluation of that site. This was done in the summer of 2010 in two reports which appear technically positive but identify financial problems in carrying out the development. There were discussions in November 2010 in relation to a potential BOSI debt/equity swap. No agreement was reached.

39. The Binman Group EBITDA for 2010 was €2.8m and not the €6.4m projected in February/March 2010 and referred to in the KPMG report. This significant reduction imposed further pressure on the group. However, it does not excuse the wrongful retention in 2010 of VAT in the sum of €532,123 and PAYE/PRSI of €440,727 collected from third parties . The fact of the retention was not disclosed by Mr. Binman or the Independent Accountant, but in the replying affidavits sworn on behalf of the Revenue Commissioners. The facts deposed to are not disputed by Mr. Binman. Mr. Binman, the petitioner, is the VAT remitter for the Group and remits its own PAYE/PRSI. In 2010, it had an arrangement to pay VAT and PAYE/PRSI collected by it by monthly direct debit with an annual return. Mr Binman's obligation in the direct debit scheme was to set payments at a level which would be sufficient to meet its full liabilities for the year. Mr Binman did not do this in 2010 and, on the contrary, twice during the year reduced the amount of its monthly VAT direct debit by reference to purported changes in its potential VAT liabilities. It was only on the filing of the annual VAT return and Mr. Binman's P35 for 2010 in February 2011 that the shortfall came to the attention of the Revenue Commissioners. In March 2011, at a meeting, it was confirmed by a director on behalf of Mr. Binman, that the reduction in direct debit payments was by reason of cash flow problems and a hope that matters would be finalised with BOSI prior to the end of the year when the taxes would fall due. Simply put, VAT and PAYE/PRSI collected by the Binman Group on behalf of the Revenue in 2010, was wrongly retained by Mr. Binman by reason of its cashflow difficulties and for the most part has not been remitted.

40. In 2011, by reason of the above, Mr. Binman was required to remit VAT bi-monthly and PAYE/PRSI monthly. In addition, it entered into an instalment arrangement at the rate of €30,000 per month in respect of €963,750 due from 2010. It adhered to this up until the end of September 2011 when it was unable to make further payments. The greater part of the debt remains outstanding.

41. Mr. Sheahan, at para. 47 of his grounding affidavit, refers to the instalment arrangement in 2011 but does not properly explain its cause. Mr. Quigley makes no reference to the wrongful retention in 2010 in the Independent Accountant's Report as appears below. For present purposes, I am not considering any failure by Mr. Sheahan or Mr. Quigley to make full disclosure to the Court, save insofar as it impinges on the assessment which the Court must make of the material put before it by Mr. Sheahan and Mr. Quigley in relation to the reasonable prospect of survival of Mr. Binman.

42. It also appears an inescapable conclusion of the above that the Binman Group was only able to continue trading during 2010 by wrongfully retaining approximately €1m collected by it on behalf of the Revenue Commissioners.

43. There is one other factual matter to which I must refer prior to a consideration of a report of the Independent Accountant and the weight which the Court may give to it in accordance with the approach mandated in *Re Vantive Holdings*.

44. Counsel for the petitioner properly brought to the attention of the Court on the morning of the second day of the hearing the fact

that there are in existence proceedings under s. 160 of the Planning and Development Act 2000, against Mr. Binman, brought by Clean (Irl.) Refuse and Recycling Co. Ltd., seeking to restrain the respondent from carrying out "any unauthorised development" of its lands at Luddenmore, Grange County Limerick. A copy of the originating notice of motion was, on consent, produced to the Court. The proceedings were commenced in July 2011, and were returnable before the High Court in October 2011. They relate to the lands upon which Mr. Binman operates its waste facility. The solicitor for the petitioner has frankly told the Court that, in an error of judgment, they formed the view that it was not necessary to disclose the existence of these proceedings in the petition and did not inform Counsel of same. For the purposes of the reasoning for the decision given herein, the failure to disclose the existence of these proceedings in the petition and on the *ex parte* application is not relevant. The existence of the s.160 proceedings and the fact that the directors of Mr. Binman did not disclose same to the Independent Accountant prior to the preparation of his report are, however, relevant to my decision. I permitted the solicitor for the petitioner to give oral evidence. Another solicitor in his firm is dealing with the s. 160 proceedings. I was told that it was the view of his colleague that by reason of a decision of 13th September, 2011, by An Bord Pleanála, which was produced, the s. 160 proceedings are unsustainable and may even be considered as vexatious as they are brought by a competitor of Mr Binman. However, Counsel for the Bank drew attention to part of the s.160 claim as made which he contended does not appear to be covered by the decision of An Bord Pleanála. Upon the basis of the evidence the Court cannot take any view on the s.160 proceedings. They may or may not turn out to be without foundation. However whilst they remain in existence they cannot be ignored. I was informed by the solicitor for the petitioner that no application to strike out has been brought and they are next due for mention before the High Court on 7th November 2011. The Independent Accountant had no opportunity of assessing the commercial impact of the existence of these proceedings on the views expressed by him.

Independent Accountant's Report

45. The Independent Accountant, Mr. Quigley, is a partner in the firm of Horwath Bastow Charleton, auditors to the Binman Group. The Independent Accountant is a person who was already familiar with the affairs of the Binman Group. He prepared reports relating to Mr Binman and each of the related companies. I am referring to the report he prepared in relation to Mr. Binman, the petitioner. He divides his report into two parts, the first dealing with the Binman Group, and the second, Mr. Binman, the petitioner. At p. 5 of the report, under a heading 'The Group's financial difficulties', he stated:

> "The Group was historically profitable until 2009 and since then has achieved positive operational cashflow before financing. Its highest profits were recorded in the period in which financial crisis erupted:

	2007 €'000	2008 €'000	2009 €'000	2010 €'000
EBITDA	8,090	8,694	7,432	2,992
Profit before tax	1,568	288	(517)	(5,028)

> The reduction in profits and cash generated from operations is attributed to the cumulative impact of the deep recession in the Irish economy since 2008. In particular:
>
> • Decimation of the Group's profitable business in recycling Construction and Demolition waste.
>
> • Reduction in domestic waste volumes as a result of reduced consumption and avoidance of use of bins (there is no reliable information to hand on how this reduction should be split between illegal disposal by users, movement of customers to non-compliant and less-compliant operators and movement to new operators by users to avoid payment of bills with previous operators)
>
> • Escalating price competition to the market.
>
> • Reduction in commercial volumes and prices due to reduced economic activity in the marketplace.
>
> • Inability to pass on the full impact of increased regulatory cost (especially punitive levels of landfill levy increases in successive budgets).
>
> • Unprecedented levels of bad debts, delayed payments and payment schemes with its customers.
>
> These effects are not unique to the Group. . . "

He then continued to deal with the impact of the above on other persons in the waste sector, dependence of the Group on Bank of Scotland and its failure to provide any additional financial assistance between 2008 and August 2011. He then stated in relation to the level of debt, lack of funding and marketplace impact:

> "The combination of the removal of committed leasing facilities and the sudden drying-up of ongoing debt funding, left the Group with an overhang of historical capital creditors and a pipeline of capital expenditure for regulatory and contractual obligations for which the Group has no external source of funding. The Greenport project in particular required significant ongoing funding of development works (design, planning permission and environmental plans) in order to preserve its planning and licensing prospects and to complete its design in line with Irish operating standards.
>
> The Group has managed to absorb the impacts in the marketplace up to now almost entirely by relying on its own working capital and reserves and by making deep cuts and restructuring of its operations."

46. Counsel for the Bank submitted that the last paragraph above is inaccurate, having regard to the retention of the monies due to the Revenue in 2010 of approximately €1m and undermines the assessment made by the Independent Accountant. He referred to the criticism made by Kelly J. in *Re Missford Ltd*. [2010] IEHC 11 of the treatment of such wrongly retained monies as working capital. Unlike in that case, the Independent Accountant herein did not give oral evidence before me. I have no explanation of whether he was aware of the retention and regarded it as working capital of Mr. Binman or whether he was not made aware of it. I do note that a member of his firm was present at the meeting with the Revenue Commissioners in February 2011 at which it was discussed. I also note that after those criticisms were made, on the first day of the hearing, Mr. Quigley swore an affidavit in relation to criticisms also made in relation to his review of the projected cash flow set out for the period of the examinership. The failure either to take into account the source of monies used by Mr. Binman in 2010 to remain trading or to refer to it and assess its impact on future trading undermines, in my judgment, the ability of the Court to rely upon the opinion expressed by the Independent Accountant that the

company and the whole or a part of its undertaking has a reasonable prospect of survival as a going concern.

47. It is also, in my judgment, relevant that, whilst the Independent Accountant refers in strong terms to the impact of the recession or economic downturn on the business of Mr. Binman, and refers in his report to certain measures taken by the management team, including steps to reduce costs and obtain additional business through controlled expansion into new markets, he makes no objective or independent analysis of the Group's future trading prospects nor of the Group's projected EBDITA for 2012, nor the individual estimated EBDITA for 2012 in respect of each of the petitioner and the related companies referred to in Mr. Sheahan's grounding affidavit. This is so notwithstanding that Mr Sheahan at para. 68 thereof, states, "Mr. Binman's management projections until 31st December, 2012, are also positive and are reasonable in the eyes of the Independent Accountant". Mr Sheahan makes similar averments in relation to the other companies. The only view expressed by the Independent Accountant in relation to future trading figures are in relation to the cash flow estimates for the period of the examinership which are prepared on a particular basis of non payment of lease and bank interest. As outlined above the negative impact of the economic downturn and increased competition on the trading operations of the Binman Group is one of the causes of its present insolvency and hence its potential resolution is a matter to which the Court must have regard in assessing whether there is a reasonable prospect of survival as a going concern.

48. At part 6 of his report, the Independent Accountant sets out nine conditions subject to which he expresses the opinion that Mr. Binman and the whole or part of its undertaking has a reasonable prospect of survival as a going concern. These are:

> "6.1 *Conditions*
>
> In my opinion, based on a review of the financial information and projections prepared by the Directors, the conditions necessary to afford the Company a reasonable prospect of survival are as follows:
>
> • The projected cash flows as set out in Appendix I will be achieved during the period of protection and the business does not suffer a major adverse reaction from the examinership status. The Directors are of the view that the examinership process will not have a materially adverse affect on the existing business but have prepared the projection in a prudent manner.
>
> • Renegotiation of existing group bank facilities or replacement of these with alternative facilities or some combination of these.
>
> • Sufficient equity investment to facilitate the scheme of arrangement and future capital expenditure and working capital requirement of the Group. It is my understanding from discussions with the Directors that there are interested parties considering an equity investment.
>
> • The restructuring and recapitalisation of the company's liabilities and the acceptance of an appropriate Scheme of Arrangement for the creditors and members of the Company and its approval by the High Court.
>
> • The restructuring of the other Group companies liabilities and the acceptance of an appropriate Scheme of Arrangement for the creditors and members of such companies and the approval thereof by the High Court on foot of the fulfilment of the preconditions thereto.
>
> • Agreement of the Bank to the proposed reduction in rent payable by the company for the lease of the lands at Carriganattin, Grange, Co. Limerick which are owned by Michael Sheahan, but which are mortgaged to Bank of Scotland (Ireland) bank.
>
> • Retaining the existing Company as the operator of the Luddenmore facility and the continuity of planning permission, local authority waste permits and EPA and other approvals by the Company and fell group companies.
>
> • Completion of the rationalisation and management restructuring proposed by the board on 6 July 2011 together with such management and board changes as are necessary to accommodate new shareholders in what has hereto been a family business.
>
> • Approval of ongoing Strategic Infrastructure Development (SID) planning application which has been review by the EPA in recent months – I am informed by management that a decision is expected in the near future. This planning approval is required to continue the existing planning permission at the Luddenmore site."

49. I think it must be assumed that if Mr. Quigley had been made aware of the proceedings pursuant to s. 160 of the Planning and Development Act 2000, he would have added as a condition that no order would be made against Mr Binman in such proceedings which would interfere with its ability to continue using the site at Luddenmore, Grange for its business. The last condition above relates to the need for ongoing regulatory approvals for use of that site. There is, at minimum, a lack of clarity in the present position.

50. Insofar as the remaining conditions are concerned, the issue for the Court is whether the petitioner has placed material before it which would enable the Court to objectively determine that there is a reasonable prospect of such conditions being met.

51. There is evidence of the existence of one or more parties with money who are interested in an equity investment. However, whilst availability of such an equity investment is an essential prerequisite for a reasonable prospect of survival as a going concern it is not the only essential condition on the facts herein .

52. Counsel for the Bank submitted that there was not any independent review or appraisal by the Independent Accountant of the projected cash flow during the period of protection such that the Court could objectively determine the likelihood that these would be achieved. I reject that submission, having regard to section 11 of his report and the subsequent affidavit which explain the manner in which the review was conducted by him. I am satisfied that the Court may accept that there is at least a likelihood that, during the protection period, such cash flow would be met, notwithstanding uncertainties set out in the assumptions made by Mr. Quigley at s. 11 of his report. It is significant, having regard to the conclusion I have reached, that such cash flow projections are *inter alia* on the basis that there would be no payment of interest either on bank borrowings or lease finance, nor any principal repayments on either debt or leases during the period of protection.

53. Counsel for the Bank also submitted that there was no evidence before the Court of a reasonable likelihood of Mr. Binman complying with the condition that there be renegotiation of existing group bank facilities or the replacement of these with alternative

facilities or a combination of these. This submission appears to me valid. The Bank, through Mr. Keen on affidavit, has stated that it will not renegotiate the banking facilities which have been extended to Mr. Binman and the related companies, nor will it swap some of the debt of those companies for equity. He explains the decision by reason of the prior history, and particular, the events surrounding the letter of offer made by the Bank on 7th October, 2011, and the response given on 11th October, 2011, when it had already been determined to apply for the appointment of an Interim Examiner. Whilst, as already stated, much complaint is made of the role of BOSI in the difficulties faced by the Group over the past two years, it appears to me, objectively, that the Court must conclude that the relationship between the Bank and the Binman Group and the Sheahan family has irretrievably broken down and that the application herein must be assessed on that basis.

54. There is no evidence before the Court of the availability of any alternative banking facilities. In the present climate, that is a difficulty. On the facts herein, such difficulty is increased by the level of bank debt and the very considerable security held by the Bank from the Binman Group companies and the Sheahan family. The Bank effectively has fixed or floating charges over all the companies and all assets used directly and indirectly in the Binman Group business. This places the Bank in a very special position in relation to any future trading and any scheme of arrangement. The security held by the Bank from the members of the Sheahan family for personal debts cannot be interfered with by any scheme of arrangement. The importance of this inability is emphasised by the position in relation to the next condition referred to and to an admitted use by Mr Binman of lands at Grange owned by Mr Sheahan Snr. personally but apparently without any formal arrangement which is now also the subject of a dispute with the Bank.

55. A further condition, compliance with which is considered essential by the Independent Accountant, is the agreement of the Bank to the proposed reduction in rent payable by Mr. Binman under a lease of lands at Carriganattin, Grange, County Limerick, which are owned by Michael Sheahan, mortgaged to the Bank and used by Mr Binman in its business. This is repeated in section 9 of his report as an essential step. There is no evidence of any willingness by the Bank to agree to a reduction in rent nor is there any other method advanced by the petitioner by which such a reduction can be achieved against Bank opposition. A reduction in rent cannot be imposed as part of a scheme of arrangement. A similar problem exists in relation to resolution of the dispute in relation to the informal use by Mr. Binman of lands owned by Mr. Martin Sheahan Snr. and charged to the Bank.

Conclusion

56. For the cumulative reasons set out above, on the evidence and material placed before it, the Court could not be satisfied that there is a reasonable prospect of the survival of Mr. Binman and the whole or any part of its undertaking as a going concern.