THE HIGH COURT

[2013 No. 129 COS]

[2013 No. 143 COS]

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

JUDGMENT of Mr. Justice Hogan delivered on 9th April, 2013

1. This is an application by Bank of Scotland to set aside the appointment made by me *ex parte* on Saturday 23rd of March, 2013, pursuant to s. 2 of the Companies (Amendment) Act 1990 ("the 1990 Act") of an interim examiner to Belohn Ltd. This company runs and operates a well known bar and restaurant, Foley's Bar and Restaurant, at 1 Merrion Row, Dublin 2. The sole registered shareholder of Belohn is a company known as Merrow Ltd.

2. There is little doubt but that Belohn is significantly indebted to Bank of Scotland. While the precise extent of that debt may be in dispute, it would seem that the full extent of the loan is in the region of €4m. Belohn has other creditors (principally trade creditors), but these would appear to be fairly small in comparison. Merrow is indebted to Bank of Scotland for a sum which is in the region of €1m. and it has no other creditors.

3. The Bank appointed a receiver to Belohn in October, 2012. In a reserved judgment delivered on Friday 22nd March, 2013, Gilligan J. held that this appointment was invalid because the receiver had not been appointed by deed under seal. Up to that point, no receiver had ever been appointed to Merrow.

4. As will become clear more detail in the course of the judgment, the Bank, however, appointed a receiver to Merrow at about 5.10pm on that Friday afternoon. The directors of Merrow learnt of this appointment in the mid-afternoon of Sunday, 24th March. Within a matter of hours, Merrow had also petitioned the Court for examinership and at about 10.45pm that evening at a special sitting which was held in my own private residence, I made an order (which was also made perforce ex parte) under s. 3A of the 1990 Act (as inserted by s. 9 of the Companies (Amendment) (No.2) Act 1999) ("the 1999 Act") granting Merrow interim protection until 2pm on the following day. The Bank also now seeks to set aside that order on the ground of alleged lack of candour on the part of the petitioners.

The nature of an order appointing an interim examiner

5. The very fact the Bank of Scotland have applied to have the order appointing an interim examiner thereby placing the company under the protection of the court discharged, obliges us to consider afresh the nature of the examinership system. It is true that the examinership procedure is generally disliked by secured creditors because the appointment of an examiner not only tends to involve the company incurring additional costs, but it also affects the otherwise settled scheme of priorities for creditors. Just as importantly, it also postpones the right of those creditors to enforce their loan agreements during the course of the examinership procedure.

6. There is accordingly no doubt that both the act of placing companies under the protection of the court and the appointment of an examiner actually or potentially affects the rights of secured creditors. Of course, by virtue of the presentation of a petition, a company is (subject to certain exceptions not here relevant) "deemed to be under the protection of the court", so that the enforcement of debts against the company is there suspended for that period of protection: see s. 5(1) and s. 5(2) of the 1990 Act. The Oireachtas has, however, determined that in the general public interest that those rights shall suffer temporary and limited abridgment in the more general public interest of rescuing otherwise viable companies.

7. Yet there is equally no doubt but the rights of creditors are affected by the making of any interim orders in the examinership process. It is, of course, perfectly clear from s. 3(7) of the 1990 Act and s. 3B(2) of the 1990 Act (as inserted by s. 10 of the 1999 Act) that the Oireachtas expressly contemplated that such orders could be – and in many cases, would have to be – made *ex parte*. It would quite often be too late if the decision to either to afford protection or to appoint an examiner had to await the actual appointment of an examiner following a contested hearing because in that crucial period many creditors would then irreversible steps to realise their security. Yet while there are obvious reasons why the court has to have jurisdiction to make orders *ex parte*, it is equally clear from the established case law that an order of this kind is not – and could not constitutionally be regarded as – a final order.

8. Many authorities could be cited for this latter proposition but it is probably sufficient for present purposes to refer to leading decisions of the Supreme Court dealing with status of orders made *ex parte*, namely *Adam v. Minister for Justice* [2001] 3 I.R. 53 and *D.K. v. Crowley* [2002] 2 I.R. 744. *Adam* was concerned with the status of the *ex parte* grant of leave in judicial review proceedings. The judgments of McGuinness and Hardiman JJ. both stress the provisional nature of any orders made *ex parte* and how, in the interests of fair procedures, a person affected by such orders must have the right to apply to the High Court have such orders set aside.

9. The judgment of the Supreme Court in *DK* is, perhaps, even more in point. In *DK* the Supreme Court held that s. 3 of the Domestic Violence Act 1996, was unconstitutional, chiefly because the section empowered the District Court to make a barring order *ex parte* without any of the necessary safeguards, such as would attend the grant of an interim injunction in the High Court. Specifically, the Court considered that the fact that the barring order was open-ended was itself an objectionable factor which pointed to the existence of a disproportionate interference with the right to fair procedures. It was true that a person affected by the order could apply to discharge such an order, but even then this effectively reversed the burden of proof.

10. As Keane C.J. explained ([2002] 2 I.R. 744 at 760):

> "It is undoubtedly the case that the respondent may apply to the court at any time to have the interim order discharged or varied. No reason has been advanced, however, presumably because there is none, as to why the legislature should have imposed on respondents in this particular form of litigation, with all its draconian consequences, the obligation to take the initiative in issuing proceedings in order to obtain the discharge of an order granted in his or her absence which, it may be, should never have been granted in the first place. It has not been demonstrated that the remedy of an interim order granted on an *ex parte* basis would be in some sense seriously weakened if the interim order thus obtained were to be of a limited duration only, thus requiring the applicant, at the earliest practicable opportunity, to satisfy the court in

the presence of the opposing party that the order was properly granted and should now be continued in force."

Although these principles have been applied in many different context, two further examples with some affinities to the present case may nevertheless be given. In *Dellway Investments Ltd. v. National Asset Management Agency* [2011] IESC 11, [2011] 4 I.R. 1, the Supreme Court held that the National Asset Management Agency was required to give borrowers an opportunity to be heard before their loans were transferred from commercial banks to the agency. The Court stressed the reputation impact such a transfer might have and it also noted that the statutory powers of the Agency were far more extensive than those enjoyed by commercial banks. Applying standard *East Donegal* principles (*East Donegal Co-Operative Ltd. v. Attorney General* [1970] I.R. 317) the Court rejected a construction of the National Management Agency Act 2009, which would have excluded the right to fair procedures in the circumstances.

11. As Murray C.J. put it in *Dellway* [2011] 4 I.R. 1, 208-209:

> "In the course of the hearing it was at one point argued on behalf of the State that the exclusion of a right to a hearing might be justified by reason of the crisis affecting the national banking system and the urgency of the measures needed to counter systemic threats to that system. I have to say that there was no evidence or material before the High Court to suggest that the time involved in permitting persons such as the appellants to make representations to NAMA before it made a final decision would impinge on, let alone be fatal for, its effective functioning. Moreover I find it difficult to envisage circumstances where the principles of constitutional justice ensuring that decisions are fair for the individual could be overridden. To do so would be to abrogate a constitutional protection which every citizen enjoys when the State decides to exercise a power which encroaches on individual rights.
>
> The State in exercising its powers through the organs of government designated by the Constitution have extensive powers to regulate and limit the exercise of individual rights in the interest of the common good and this may be relevant where the State is faced with a national crisis, such as one of a fiscal nature. The State has the power to act in the interests of the common good because the Constitution, in its provisions, expressly envisages that. It also envisages that in exercising such powers the State must act within the ambit of the Constitution as a whole. In a democratic State founded on the rule of law there are definite limits to the extent to which the State can interfere with or restrict constitutional rights or rights vested in or acquired by individuals - freedom of expression, assembly, freedom of religion, right to education, right to earn a livelihood, property rights (including contractual rights), right to strike - to name but some, even when it is acting or purporting to act in the interest of the common good in a national crisis. In common with international instruments, such as Covenants of the United Nations and the European Convention on Human Rights, the Constitution envisages that rights may be regulated and limited but not to an extent that it is disproportionate or in a manner which is arbitrary or discriminatory in an invidious sense. In particular the State cannot act in a manner which would abrogate a right or deprive it of its very essence.
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> If the State were to succeed in its argument, namely that the Act of 2009 prohibits NAMA from giving any consideration to representations from persons in the position of the appellants, it would be denying the very essence of a right to a hearing, a concept at the core of the principle of constitutional justice and due process."

12. I likewise took the same approach in *Re Custom House Capital Ltd*. [2011] IEHC 298, [2011] 3 I.R. 323. In that case I held that an order made *ex parte* appointing inspectors to investigate the affairs of a company under Article 166 of the European Communities (Markets in Financial Instruments) 2007 could not be regarded as a final order, since this would amount to a breach of fair procedures. Having referred to *DK* and to *Dellway Investments*, I then observed ([2011] 3 I.R. 323,331-332):

> "In the light of these authorities, I could not constitutionally sanction the appointment of inspectors by means of the making of a final order on an *ex parte* basis. It cannot be said that such an appointment represents merely some routine procedural step and that Custom House will have its opportunity of defending its position before the inspectors. It is rather a step which will have significant reputational issues for the company, whose business may be severely affected by the publicity attendant on such appointment. This is much more comparable to a decision by a professional body to commence an investigation into a professional person, a decision which in itself attracts the right to fair procedures….
>
> It follows, therefore, that the application of Article 166(2) must be re-fashioned somewhat beyond its bare language in order to make it operate, *East Donegal*-style, in a constitutional fashion by, if necessary, interpolating appropriate safeguards in order to vindicate the company's constitutional right to fair procedures and, indeed, the protection of its property rights in the manner required by Article 40.3.1 and Article 40.3.2 of the Constitution. If the *ex parte* nature of the original appointment can be justified on the basis that it was necessary so to act in order to protect investor funds, the principle of proportionality correspondingly requires that this must be counter-balanced by a stipulation that the appointment be in the nature of an interim order or on a provisional basis."

13. Applying these principles, it is plain that any interim order made *ex parte* interferes with the contractual rights of secured creditors, even if the examinership procedure does not present the reputational issues which were also in view in both *Dellway Investments* and *Custom House Capital*. The mere fact that the order interferes with a constitutionally protected right – whether as a property right (such as a contractual right of that kind) or a right to fair procedures - *does not in and of itself* make this process unconstitutional, for as Costello J. put it in *Daly v. Revenue Commissioner* [1995] 3 I.R. 1, 11, "legislative interference in property rights occurs every day of the week and no constitutional impropriety is involved." But all of this does mean that any interim order made in examinership process is of a necessity a provisional one, precisely because the court could not constitutionally be given the power by means of a final order to override such due process and property rights prior to at least hearing the affected parties and for all the reasons given by the Supreme Court in *D.K.* and applied by that Court in *Dellway Investments*.

Whether the interim order made in Belohn should be discharged?

14. We may now consider the various arguments advanced as to why the interim orders in Belohn should be discharged. Although nothing strictly turns on it so far as the present case is concerned, it may nonetheless be observed that this is an application to discharge orders *already made* as distinct from a contested *inter partes* application which would arise on the usual return date following the making of the interim order. The potential significance of this is that whereas in the latter instance the petitioner would carry the burden of proof on the question of whether any further relief should be continued following an *inter partes* hearing, it is otherwise where (as here) the Bank seeks to have orders made *ex parte* discharged during the currency of those orders.

Section 3(4): Letter of Consent

15. Section 3(4) of the 1990 Act provides:

> "A petition presented under s. 2 shall be accompanied-
>
> (a) by a consent signed by the person nominated to be examiner…."

16. Although I was informed on the application for the appointment of an interim examiner that Mr. O'Keefe had consented to this – a fact which is also averred to on affidavit – there was through an apparent oversight no actual letter of consent furnished to the court on that Saturday morning. That letter was, however, furnished subsequently. It is, however, contended that this omission is in itself sufficient to vitiate the entire order and to justify its setting aside.

17. It is true that the s. 3(4) requirement is mandatory. Yet the object of the subsection must also be borne in mind; it is designed to ensure that the onerous task of examinership are not foisted on an unwilling examiner. There is, however, nothing of the kind here. Accordingly, the non-compliance with this mandatory requirement is at most a technical one which has caused the Bank absolutely no prejudice. As Henchy J. remarked in his classic judgment on the question of compliance with mandatory statutory requirements in *Alf-A-Bet Promotions Ltd. v. Monaghan U.D.C.* [1980] I.L.R.M. 65, 69:

> "In such circumstances, what the Legislature has, either immediately in the Act or mediately in the regulations, nominated as being obligatory may not be depreciated to the level of a mere direction except on the application of the *de minimis* rule. In other words, what the Legislature has prescribed, or allowed to be prescribed, in such circumstances as necessary should be treated by the courts as nothing short of necessary, and any deviation from the requirements must, before it can be overlooked, be shown, by the person seeking to have it excused, to be so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore adequately, complied with."

18. In the present circumstances the non-compliance with the statutory obligation must be adjudged to be practically *de minimis* and, accordingly, the analogy with the classical analysis of this issue contained in the judgment of Henchy J. in *Alf-a- Bet Promotions*, this non-compliance can accordingly be excused.

The Failure to Trade

19. It would appear that the standard public liability insurance attaching to the bar and restaurant premises either lapsed or was allowed to lapse during the currency of the receivership. The receiver had, of course, his own insurance policy which also lapsed when the receiver was discharged by reason of the order of Gilligan J. made on 22nd March, 2013. The company was then faced with a somewhat unusual situation in that it was suddenly required to seek insurance cover at short notice. It could not, of course, trade as a bar or restaurant without such cover. I think it clear from the evidence that this was an issue which the directors had not actually foreseen prior to the ending of the receivership on the 22nd March. All of this meant that the premises did not actually open for several days while the directors frantically sought source insurance cover. On the day of the hearing itself (28th March) I was informed that the issue had since been resolved so that trading would the recommence on 30th March.

20. The fact that the company had not traded for the best part of a week in the aftermath of the ending of the receivership was relied on by Mr. Walker to demonstrate lack of candour on the part of the petitioners. One must, of course, agree that the presentation of the petition in respect of a company which has no intention of endeavouring to trade its way out of difficulties could well be – and, indeed, often would be – abusive. This, however, is not such a case. Whatever else may be said about Mr. Foley and Ms. Yan (the directors of the petitioners) their determination to ensure that this public house and restaurant survives cannot be in doubt. For my part, I think it was plain that the insurance issue was just another obstacle which fate had placed in their way and which they had hurriedly to resolve.

21. It is for these reasons that I reject the argument that the failure to trade in the days immediately following the appointment of the examiner constituted evidence of lack of candour.

Whether an Interim Examiner Ought to have been Appointed

22. At the heart of the present case lies the question of whether an interim examiner ought to have been appointed on an *ex parte* basis. At the hearing of the application to set aside the appointment of the interim examiner, no issue was as such taken with the adequacy of the jurisdictional issues as stipulated by s. 2 of the 1990 Act (as amended) namely, insolvency and reasonable prospects of survival although, of course, these are questions which will be explored at the full hearing.

23. In essence, therefore, the argument now advanced by the Bank then must be that I wrongly exercised my jurisdiction in such an erroneous fashion as would merit the setting aside of that decision. Mr. Walker relied strongly for this purpose on the comments of Kelly J. in *Re Eircom Limited* [2012] IEHC 107:-

> "The appointment of an interim examiner ought to be the exception rather than the rule. Most cases of examinership do not require the appointment of such an officer."

24. Mr. Walker urged that *Eircom* constituted an authority for the proposition that the appointment of an interim examiner must be regarded as being warranted only in exceptional cases. It is, however, important to be clear on what Kelly J. actually decided in that case. He did *not* say that the appointment of an interim examiner ought to be confined to exceptional cases. Rather, Kelly J. observed that in a majority of cases such an appointment was unnecessary and that this step should constitute "the exception rather than the rule".

25. At the hearing before me on 28th March, various arguments were advanced on both sides regarding the appointment of an interim examiner. Mr. Maguire S.C., counsel for the petitioners, relied on the various arguments set out in Mr. Foley's affidavits to justify such an appointment including, for example, dealing with payments to suppliers and the insurance issue. For his part Mr. Walker contended that these arguments amounted essentially to *post-hoc* rationalisations, especially when some of these issues (*e.g.*, the insurance question) had not been raised when this petition was first moved before me on Saturday 23rd March.

26. It is true that the petition as presented did not in terms directly address itself to the question of whether an interim examiner ought to have been appointed. It must, of course, be recalled that the application was moved of not inconsiderable urgency on a Saturday morning following the decision of Gilligan J. on the previous day. At that hearing concerns was expressed that the Bank of Scotland might move quickly to appoint a receiver – and, indeed, that they might already have done so - and it was therefore necessary to apply with considerable expedition so as to ensure that the three day time limit would not otherwise expire. (This is a topic to which I will revert in more detail in a later part of this judgment).

27. In my view, even if the petition did not quite in terms address the interim examiner issue, the underlying reason for such an

appointment is at least nonetheless necessarily implicit therein. One consequence of the decision of Gilligan J. it that it is plain the directors were wrongfully excluded from the company for the best part of six months. This in itself is a highly unusual state of affairs since there can be few – if, indeed, any – cases where the appointment of a receiver has been heretofore held to be invalid in this fashion. It seems obvious in these circumstances that the appointment of an interim examiner would be appropriate (provided, of course, that the jurisdictional stipulations contained in s. 2 of the 1990 Act were otherwise satisfied) because the appointment of an independent officer who would report – if only on an interim basis- as to the present state of affairs of the company, would be of benefit to all concerned. Indeed, the petition itself referred to some of these matters and further stated (at para. 63):

> "The independent accountant has prepared a statement of affairs for the petitioner on both a going concern basis and on a liquidation basis…The statement of affairs was prepared when the receiver was invalidly in control of the petitioner and the independent accountant notes that further inquiries will have to be made as a result."

28. The interim examiner's report would, I think, be of considerable assistance in these unusual circumstances to any court called upon to decide whether to make a final order under s. 2 of the 1990 Act. This is especially so when the persons most intimately connected with the company – namely, the directors – and who would normally be best placed to put all relevant information before the court regarding the up to date trading and financial position of the company would have been handicapped in that process in the present unusual circumstances by reason of their exclusion for the last six months from the day to day running of the company. For this reason, I consider that the appointment of the interim examiner was justified given this unusual state of affairs.

29. For the avoidance of any possible doubt, I should make it plain that all that I have found that the appointment of an interim examiner was justified in the highly unusual circumstances of the present case in order that the court - and all interested parties - can have an up to date and independent report on the company's affairs. It does not at all follow from this that at the full hearing the appointment of an examiner will be confirmed by this Court.

30. Here it will also be recalled that at that full hearing the judge hearing the petition will also have the benefit of hearing from a full range of interested parties in a way that I, as the judge called upon to hear the original *ex parte* application, did not. In these circumstances, there could be no question that the judge assigned to hear the full petition could be bound in any way by any orders that I made or any views which I expressed on this question: see, *e.g.*, by analogy the important judgment of Finlay Geoghegan J. in *Chambers v. Keneflick* [2005] IEHC 402, [2007] 3 I.R. 526, where she held that a judge hearing an application *inter partes* under Ord. 8, r.2 to set aside an order made *ex parte* to renew a summons could not be bound for reasons of fair procedures by the views expressed by the judge who made the original *ex parte* order.

31. Indeed, I applied this principle in *Doyle v. Gibney* [2011] IEHC 10 when, having referred to *Chambers*, I went on to observe:

> "On this basis, therefore, any order made *ex parte* renewing a summons must, in the words of Hardiman J. in *Adam*, be regarded as being in the nature of a provisional order. Perhaps just as importantly, if O. 8, r. 2 is to be construed - as it must be - in the light of *East Donegal* principles (*East Donegal Co-Operative Ltd. v. Attorney General* [1970] IR 317) and if it is given a construction which conforms with that basic constitutional guarantee, then it follows as a minimum that a judge hearing a matter *inter partes* cannot be bound or constrained by any view formed by the judge who granted the order *ex parte*."

32. It follows, therefore, that at that full hearing, the petitioners will have apply entirely afresh – and on this occasion on notice to the interested parties – and satisfy the court that it would be appropriate to appoint an examiner and for this purpose to satisfy the jurisdictional and other relevant tests.

The Application of Merrow

33. It is now necessary to consider the application of Merrow which was a subject of a separate examinership petition to me on Sunday evening, 24th March. There are at least three distinguishing features to the Merrow petition which can be immediately mentioned. First, Merrow is not a trading company, but it is simply the sole shareholder of Belohn. Second, it only became clear to the directors of Merrow on that Sunday afternoon that a receiver had been appointed to Merrow on the previous Friday. Third, no independent accountants report accompanied that particular petition.

34. As originally enacted, s. 3(6) of the 1990 Act provided:

> "(6) The court shall not give a hearing to a petition under section 2 if a receiver stands appointed to the company the subject of the petition and such receiver has stood so appointed for a continuous period of at least 14 days prior to the presentation of the petition."

35. Section 3(6) was shortly thereafter amended by the substitution (by s. 180(1)(a) of the Companies Act 1990) of the period of three days for the original period of 14 days. Accordingly, if a receiver has been appointed, then the petitioners have only three days within which to apply for examinership. The Court enjoys no power to extend that period and the neither the debenture holder nor the receiver is obliged to give *contemporaneous* notice of such appointment to the directors of the company. It is true that s. 107(1) of the Companies Act 1963 provides that notice of the appointment of a receiver must be published in *Iris Oifigiúil* and advertised in a newspaper circulating in the district where the registered office of the company is situated. But, of course, by the stage of such notification the three day period might well have expired.

36. Mr. Justice Gilligan delivered his judgment on Friday 22nd March, 2013. In that judgment he held that the original appointment of the receiver, Mr. David O'Connor, to Belohn was invalid. Mr. O'Connor had purportedly been appointed as receiver on 10th October, 2012. It appears that the judgment was delivered that morning and the matter came back before the Court early that afternoon. By about 2.15 pm it was accepted by all concerned that the receivership had lapsed.

37. Later that afternoon Bank of Scotland caused a demand letter to be sent to Mr. Foley, a director of Merrow. The letter was handed to him at about 4.15pm and it demanded repayment by Merrow of some €1,068,841.41 by 5.00pm later that evening to a nominated bank account in Dublin. In other words, the Bank formally requested repayment of this sum within a matter of at the very most forty-five minutes.

38. I should also observe at this juncture that a demand was made in similar terms at the same time in respect of Belohn for the repayment of a sum in excess of €4m., but no receiver has subsequently appointed by the Bank in respect of Belohn.

39. While the indebtedness of Merrow to the Bank cannot be in dispute – whatever about the precise amounts due and the date of the maturity of these loans –one could not realistically regard the *manner* in which *this particular demand* was made as *bona fide*.

First, the demand was made outside normal banking hours. Second, the time allowed for payment was quite impossibly and quite unrealistically short. Even if Mr. Foley's bank had actually been open at the time he received the letter, it would have represented an heroic feat of efficiency for Mr. Foley and his own bank to have ensured that the money was actually *received* in a particular account by the Bank of Scotland by 5pm, as anyone who has ever stood in a bank queue or tried to effect even the simplest banking transaction such as transferring money from one account to another would immediately understand. Of course, depending on the circumstances and the contractual terms governing the loan agreements, a demand letter may reasonably request payment within a matter of hours during the course of a banking day. But the time permitted for repayment must nonetheless be reasonable and realistic and in this case it was neither.

40. At all events, a receiver was appointed to Merrow at 5.10 pm. on Friday evening, March 22nd. In passing, I would observe that unless the terms of the loan agreement between the Bank and Merrow were different to those which obtained between the Bank and Belohn and, specifically, did not require the appointment of a receiver by deed under seal, it is not immediately clear to me how such a receiver could have been validly appointed in the light of the judgment of Gilligan J. with respect to the appointment of the receiver in *Belohn*. Assuming, nevertheless, for present purposes that such an appointment was a valid one, the three day time period within which an application for examiner can then be made then came into play.

41. It is accepted that the directors of Merrow first learnt of the fact that a receiver had been appointed in the mid-afternoon of Sunday, 24th March, 2013, following exchanges between the solicitor for Merrow and Mr. Simons, solicitor for the Bank regarding the Belohn examinership. It was that particular exchange which then gave subsequently rise to the *ex parte* application for the presentation of an examinership petition in my private residence later that evening at about 9pm. In the course of that application, it was impressed upon me that it was imperative that the application be presented prior to midnight, lest that time period would otherwise expire.

When does the three day time period specified by s. 3(6) of the 1990 Act begin to run?

42. The first question which arises at this juncture is the date upon which the three day period commenced to run. Section 18(h) of the Interpretation Act 2005 ("the 2005 Act") provides:

> "Where a period of time is expressed to begin on or be reckoned from a particular day, that day shall be deemed to be included in the period and, where a period of time is expressed to end on or be reckoned to a particular day, that day shall be deemed to be included in the period."

43. The time period specified in s. 3(6)(as amended)("..a continuous period of at least three days prior to the presentation of the petition….") is one which is "reckoned from a particular day" in the sense understood by s. 18(h) of the 2005 Act, since time runs from the day the receiver was actually appointed. It follows further from this sub-section that that particular day (*i.e.*, the day on which the receiver is actually appointed) is included in the computation of the three day period.

44. It should also be noted that s. 3(6) uses the term "day" *simpliciter*. This compels one to the conclusion that Saturday and Sunday are to be included in the period of computation. If, for example, the Oireachtas had intended that Saturday and Sunday be excluded from the computation, it would easily have used the term "working day", as the Part II of the Schedule to the 2005 Act provides that this is deemed to mean "a day which is not a Saturday, Sunday or public holiday." Here it may also be noted that s. 3A(2) of the 1990 Act (as inserted by s. 9 of the 1990 Act) excludes Saturdays, Sundays and public holidays from the calculation of the maximum 10 day period during which companies can be placed under court protection pending the presentation of the independent accountant's report. The very fact that this was done in respect of that period of time computation for the purposes of s.3A(2) must further re-inforce the conclusion that time does run on a Saturday and Sunday in calculating the three day period during which for examinership can be brought following the appointment of a receiver given that, unlike s. 3A(2), s. 3(6) draws no such distinction between the weekdays, Saturdays or Sundays for the purposes of the running of time.

45. In the present case, therefore, the effect of the appointment of the receiver on Friday evening was that Friday was included for the purposes of the calculation of the three day period. It followed accordingly that the period for the presentation of the petition therefore expired at midnight on the following Sunday, March 24th. I should, perhaps, have added in my earlier account that the Bank had, in fact, given written notice of the appointment of the receiver. This, however, was done by post, so that the first written notice Merrow would have received would have been on Monday, at which point it would have been then too late to present an examinership petition.

46. During the course of the hearing I was informed that Friday was the preferred day of choice for banks wishing to appoint receivers, because, of course, in such circumstances applications for examinership at a weekend are contingent on (i) learning that a receiver has already been appointed and (ii) on locating the duty judge in time. It is too late to apply on Monday, as the time for the presentation of an examinership petition will by then have already lapsed. For those well versed in these matters, one can refine this further and make sure that the appointment of the receiver takes effect after close of business on the Friday evening, so that time then expires on Sunday at midnight, even though the effective limitation period will then have been compressed into little more than two (non-working) days.

47. As Courtney has observed, *Law of Private Companies* (Dublin, 2012)(at 23.040):

> "Secured creditors often try to take advantage of this provision by appointing a receiver on Thursday or Friday. The hope is that petitioners seeking to have an examiner appointed will not have ready access to the courts on a Saturday or Sunday. Determined petitioners however, will succeed in allocating a High Court judge on such days, at their home if necessary."

48. Counsel for the Bank, Mr. Walker, quite fairly described all of this this as a game of "cat and mouse". If that is so, then it is the duty of the Court to decree that this particular game shall henceforth cease. The Oireachtas has provided in the public interest for the examinership procedure in s. 2 of the 1990 Act. It likewise sought to take account of the interests of creditors by restricting the right to apply for examinership once a receiver had been *in situ* for three days. What it certainly did not intend was that the statutory right to apply for examinership should be carefully frustrated by calculated counter-manoeuvring on the part of the banks which, in other circumstances, might well encourage a form of trickery which would be just a stone's throw away from actual deceit.

49. This is especially so given that access to justice is fundamental to the constitutional mandate of the judicial branch generally (Article 34.1) and of this Court in particular (Article 34.3.1). In these circumstances, the courts should not – and simply will not - allow what is in effect a very short limitation period (albeit, more accurately, a jurisdictional bar to the appointment of an examiner) to be manipulated in this manner so that by good timing and calculated silence on the part of the entity appointing the receiver this limitation period would expire before any person contemplating applying for examinership would realise it.

50. This principle is fundamental to private law and public law alike. Private law has long used doctrines such as estoppel by conduct and concealed fraud to ensure that limitation periods are not manipulated by the tactic of allowing time to run silently against an unsuspecting potential litigant. Effective access to justice is likewise recognised as a constitutional fundamental so far as public law is concerned.

51. Thus, for example, in *The State (Quinn) v. Ryan* [1965] I.R. 170 the Supreme Court held that provisions of the Petty Sessions Act 1851 which allowed for the extradition of a person out of the State before that person had an effective opportunity to challenge the validity of the extradition warrant was unconstitutional. The Supreme Court's decision in *White v. Dublin City Council* [2004] IESC 35, [2004] 1 I.R. 545 is in the same vein. Here s. 82(3A) of the Local Government (Planning and Development) Act 1963 was found to be unconstitutional, precisely because that sub-section permitted time to run and to expire before an affected person seeking to challenge the validity of a planning permission could reasonably have had notice of the existence of the original planning application.

The circumstances in which the Merrow petition was presented
52. It is now necessary to say something about the circumstances in which the Merrow petition was presented. At the hearing before me on Sunday evening 24th March, it was explained to me that there were two reasons why no independent accountant's report accompanied the petition in the manner required by statute. First, no receiver had previously been appointed to Merrow, even though a letter demand had previously been sent in October, 2012. It accordingly had not been anticipated the receiver would then be appointed, certainly so quickly after the decision of Gilligan J. Second, it was said that the receiver had refused to hand over company documents relating to Belohn following the order of Gilligan J., thus hampering the completion of the independent accountants report.

53. One further complication must also be noted at this point. The application as presented was headed "in the matter of Belohn Ltd and Merrow Ltd" and it was suggested that I should vacate the orders made in Belohn and treat this as an entirely fresh examinership application in respect of both companies. This procedure struck me as too complicated and involved. I accordingly deemed the petition to relate to Merrow only and proceeded on that basis.

54. Having heard submissions at a hearing which lasted for little more than one and a half hours, I then made an order under s. 3A(1) of the 1990 Act (as inserted by s. 9 of the 1999 Act) placing Merrow under court protection pending the submission of an independent accountants report. I directed that this order should last until 2.00pm on the following day which gave the petition a short service to enable an application for mandatory interlocutory injunction directed to the receiver to be brought for 2.00pm on the following day Monday, 25th March, 2013.

The nature of an order made under section 3A
55. Section 3A of the 1990 Act (as inserted by s. 9 of the 1999 Act) provides:-

> "3A. (1) If a petition presented under section 2 shows, and the court is satisfied—
>
> (a) that, by reason of exceptional circumstances outside the control of the petitioner, the report of the independent accountant is not available in time to accompany the petition, and
>
> (b) that the petitioner could not reasonably have anticipated the circumstances referred to in paragraph (a),
>
> and, accordingly, the court is unable to consider the making of an order under that section, the court may make an order under this section placing the company concerned under the protection of the court for such period as the court thinks appropriate in order to allow for the submission of the independent accountant's report."

56. It is clear that the effect of an order made under s. 3A to suspend the enforcement of a creditors rights during the period of protection. To that extent it is tantamount to granting an injunction *ex parte* restraining a creditor from enforces a security or otherwise refraining from taking enforcement steps against the company. Viewed in this light it is plain that any order granting under s. 3A which has been granted *ex parte* must be in the nature of a provisional order. Such an order is likewise liable to be set aside on the application of any creditor affected thereby in the same manner as any other *ex parte* order.

57. Indeed, this very point is highlighted by the facts of the instant case. One of the "exceptional reasons" highlighted by the petition is to the purpose of s. 3A(1)(a) was said to be the fact that the independent accountants report could not be compiled in time by reason of the fact that the receiver was failing to hand over company documents to the company and its directors. Yet it is now acknowledged that the position is – at the very least – considerably more complex than that presented to me at the *ex parte* hearing. Is it to be said that the court was empowered to make a final order *ex parte* even though the information which was acting was at best incomplete? In my view such construction of s. 3A would have to be rejected as unconstitutional. As I have already endeavoured to explain, it is clear from the Supreme Court's decision in *D.K.* that the Oireachtas cannot constitutionally vest courts with the powers to make final orders *ex parte* at least, where (as here) such orders would impact on the legal rights of affected parties.

58. It cannot be otherwise on a constitutional order based on the rule of law where access to justice is a fundamental aspect of the judicial mandate (Article 34.1) where the protection of due process and property rights are important constitutional values (Article 40.3.1 and Article 40.3.2). It follows, therefore, that any order made *ex parte* under s. 3A is simply a provisional order which is inherently liable to be set aside once the court has an opportunity of hearing the affected parties.

Whether the order made *ex parte* on 24th March should be set aside by reason of lack of candour on the part of the petitioners?
59. Mr. Walker argued strongly that the *ex parte* order should be set aside by reason of the lack of candour on the part of the petitioners. This lack of candour was said to consist of incorrect assertions made by the petitioners. The first incorrect assertion was the statement which the solicitor for the petitioner made in an email to the Bank's solicitor to the effect that I had granted an interlocutory injunction compelling the receiver to hand over all relevant documents to the directors of Belohn and Merrow. This email was sent at approximately 11.00pm on Sunday 24th March, *i.e.*, at most a few minutes after the hearing in my house had concluded. It needs to be said immediately that no such order was ever made by me – all that I had done was give the petitioners short service to seek such relief on notice to the Bank and the receiver for 2.00pm on the following day.

60. It is most unfortunate that such comments were made. In fairness it should be recorded that an apology was quickly offered to Mr. Simons (solicitor for the Bank) and to the Bank, both orally and in writing at the first opportunity. It was only appropriate and fair that this should have been done.

61. One may I think, fairly ascribe this error - which occurred at the end of three demanding days for the legal team acting for the petitioners – to a misunderstanding on the part of the solicitor for the petitioner concerned. It cannot realistically be regarded as a lack of *bona fides* on his part. Critically, however, this error did not have any bearing on any order which I either made or was called upon to make. In those circumstances, beyond regretting the fact that such statements were made, there are no grounds for setting aside the order which was actually made on this basis.

62. We can now turn to the second issue relied on for this purpose. As we have seen, one of the other grounds advanced was that the petitioners did not disclose the fact that the receiver was, in fact, willing to return all documents to the company and that the failure to disclose this fact undermined the argument that the independent accountants report could not have been prepared in time. The attitude of the receiver (and that of the Bank) was confirmed in an email exchanged between the Bank's solicitor and the company's financial adviser on the Sunday afternoon, 24th March. The Bank's solicitor wrote shortly after 2.30pm to the following effect:-

> "The former receiver will return all documentation belonging to the company. The company is not entitled to the form of solicitors file and I fail to see how the receiver's file is relevant as to whether the company has a reasonable prospect of survival as a going concern. All further correspondence should be between the company's solicitors and my firm."

63. It is accepted that the existence of this email was not disclosed to me at the time of the making of *the ex parte* application. I suspect there were two reasons for this. First, the application was made with extraordinary haste. A huge range of matters had to be attended to on that Sunday afternoon and evening once the petitioners had learnt of the appointment of the receiver to Merrow on the previous Friday. It is scarcely surprising that in such circumstances mistakes have been made and matters overlooked.

64. Second, the email was sent to the company's financial adviser. It is, I think, entirely possible that he did not realise the significance of this communication instead of a number of legal issues which did actually arise at the hearing before me later that evening on 24th March.

65. For these reasons I am satisfied that the non-disclosure came about as a result of a *bona fide* error and oversight and that no personal blame should in that regard attach to either the petitioners or their advisers. Yet the objective relevance and materiality of this communication cannot be gainsaid. It was, after all, the alleged failure of the receiver to hand over these documents which were said to constitute "exceptional circumstances" for the purpose of s. 3A. While I accept that there was a dispute as to the extent to which documents generated by the receiver during the six month period of the receivership should be handed over, the receiver's willingness to abide by orders of this Court in that regard cannot properly be doubted. In these circumstances, given the objective materiality of the non-disclosure of this correspondence from the Bank's solicitor, it would be unjust to allow the order which was actually made to stand.

66. If I may venture to repeat in this context that which I said in *A.O. v. Minister for Justice, Equality and Law Reform* [2012] IEHC 1 regarding the object of the jurisdiction to set aside by reason of non-disclosure:-

> "The exercise of the set aside jurisdiction in a case such as the present one is not intended to be punitive although, of course, different considerations might well apply where a litigant acted *mala fide*. Nor is the jurisdiction to be exercised in a formalistic or mechanical fashion: it is rather essentially restitutionary in nature. In other words, by setting aside the original order the court is acting in the interests of two fundamental constitutional values, namely, the integrity of the administration of justice itself (as reflected in Article 34.1) and the importance of fair procedures (as reflected in Article 34.1 and Article 40.3.1).
>
> By thus setting aside the original order, the court thereby seeks to restore the status quo ante insofar as it is feasible to do so. This does not mean that the court cannot grant the applicant further relief (*cf.* the comments of Glidewell L.J. in *Bowmaker Ltd. v. Britannia Arrow Holdings Ltd.* [1988] 3 All E.R. 178). It does mean, however, that in the event that the court were to grant an applicant further injunctive relief, it would do so now afresh in circumstances where it has been armed with all the relevant facts and where it is not now operating under a misunderstanding or misapprehension as to those facts."

67. These sentiments have relevance here. It does not mean that the court could not – if required – have made a fresh order under s. 3A, but, if this were to have occurred, it would then have done so in circumstances where it would have been fully appraised of all relevant facts. In that sense, as I have ventured to point out in *A.O. (No.1),* the set aside jurisdiction is essentially restitutionary in nature and it is generally designed – as here – to restore the *status quo ante* prior to the making of the original order which was tainted by the non-disclosure.

68. As it happens, however, the issue has been overtaken by subsequent events. The independent accountants report from Merrow was prepared by Mr. Flanagan on 25th March, 2013, and no further relief is now sought by the company under s. 3A.

Whether an examiner could be appointed to a non-trading company such as Merrow

69. In these circumstances it is now unnecessary to consider other questions which might otherwise have called for adjudication. Specifically, it is unnecessary to examine the question of whether a non-trading holding company such as Merrow can properly be the subject of an examinership application is an issue which may yet arise so far as the balance of these proceedings are concerned. While Mr. Walker strenuously argued that such a company fells outside the examinership scheme, yet the Supreme Court's decision in *Re Tivway Ltd.(in examination)* [2010] IESC 11, [2010] 3 I.R. 49 might be thought to all but determined this particular point to the contrary, provided – as Denham J. put it in her judgment – "the court is satisfied that there is a reasonable prospect of survival of the related companies as a going concern": [2010] 3 I.R. 49, 72.

Conclusions

70. It remains only to summarise the main conclusions contained in this judgment:

> A. Any interim order made *ex parte* under the 1990 Act (including an order appointing an interim examiner under s. 2 and an order under s. 3A granting interim court protection from creditors where no independent accountant's report accompanies the petition) is in the nature of a provisional order. Any creditor affected by such an order may accordingly apply to have such an order discharged.
>
> B. The decision to appoint an interim examiner in the case of Belohn may be justified on the ground that having regard to the very special circumstances which preceded the petition (namely, the fact that a receiver had been appointed for the six months previously prior to the decision of Mr. Justice Gilligan on 22nd March, 2013), it was desireable that such an

examiner would present a report on the current state of affairs of the company prior to any final decision on the examinership petition itself.

C. The time allowed by the Bank – at most 45 minutes – for the repayment of the €1.068m. loan by Merrow prior to the appointment of the receiver to that company sometime after 5pm on Friday, 22 March was neither realistic nor reasonable given, in particular, that this demand was not made during banking hours. It is likewise hard to see how a demand for repayment in a matter of minutes could ever be regarded as a reasonable one, even if under certain conditions it might be reasonable to demand repayment within a matter of hours.

D. The three day time limit stipulated by s. 3(6) of the 1990 Act nonetheless operated from the day (Friday, 22 March) the receiver was appointed and included Saturdays and Sundays: see s. 18(h) of the Interpretation Act 2005. It followed, therefore, that the time within any application for an examinership petition had to be presented by Merrow expired on Sunday evening 24th March.

E. The assertion which was made by the petitioner's solicitor to the solicitor for the Bank to the effect that I had made a mandatory interlocutory order on the evening of Sunday 24th March requiring the receiver of Belohn to hand over certain papers and documents to the directors of the company was both incorrect and unfortunate. It was nevertheless plainly a bona fide error and an apology has been tendered. Nevertheless, as it had no bearing on any order which I made, I would not set aside the order which I made under s. 3A on this ground.

F. Different considerations apply, however, to the failure to disclose the email correspondence from the Bank's solicitor which clearly showed a willingness on the part of the receiver to hand over the documents in question. While I am perfectly satisfied that the failure to make disclosure came about by reason of *bona fide* error, caused in part by the hurried nature of the application on that Sunday evening, the failure to disclose was nonetheless objectively relevant and highly material to the exercise of my discretion under s. 3A.

G. It follows, accordingly, that the order made *ex parte* under s.3A must accordingly be set aside.