Neutral Citation: [2015] IEHC 796

THE HIGH COURT

[2015 No. 401 COS]

IN THE MATTER OF

CLAREMORRIS TOURISM LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT 2014

AND

IN THE MATTER OF MOPB DEVELOPMENTS LIMITED AS A RELATED COMPANY WITHIN THE MEANING OF SECTION 517 AND SECTION 2(10) OF THE COMPANIES ACT 2014

JUDGMENT of Mr. Justice Baker delivered on the 9th day of December 2015

1. On 10th November, 2015, the directors of Claremorris Tourism Ltd (hereinafter "CTL") presented a petition seeking the protection of the court pursuant to s. 517 of the Companies Act, 2014 (hereinafter "the Act of 2014"). On foot of the ex-parte application, Ciarán Wallace was appointed by me as interim examiner of CTL and of a related company MOPB Developments Ltd (hereinafter "MOPB"), it being asserted that MOPB satisfied the definition of a related company contained in s. 2(10) of the Act of 2014.

2. Friday the 27th November was fixed as the date for hearing of the petition and it proceeded to a hearing on that date, opposition being made by a number of creditors as follows:

a. Coney Investments Designated Activity Company (hereinafter "Coney"), which had acquired the relevant assets and associated securities of Ulster Bank Ireland Ltd., to which CTL and MOPB owe significant monies.

b. The Revenue Commissioners, to which CTL has a liability in respect of corporation tax of approximately €735,714.00 for the last relevant financial year.

c. John Killeen, a shareholder and former director of MOPB commenced proceedings against MOPB on 25th June, 2014 bearing record number 2014/1336S, seeking judgment in the sum of €974,775.00, and on 1st July, 2014 Gilligan J. granted a mareva injunction for this sum over a bank account of the Claremorris Co-Ownership. A motion for judgment in those proceedings was listed to be heard before the Master of the High Court on the 11th November 2015, and the injunction was listed for mention in the Chancery Court on the 19th November, 2015. Mr. Killeen asserts that the purpose of the presentation of the petition seeking the protection of the Court was not bona fide, and that the true purpose was to prevent his further prosecution of those proceedings. One John Finn, also a shareholder of MOPB, issued proceedings for relief from alleged oppression, but did not attend the hearing of the petition.

The company structure and undertaking

3. The petition was brought by the directors of CTL following a resolution made at a meeting on the 7th November, 2015.

4. CTL is a single member private company limited by shares, incorporated under The Companies Act 1963, as amended, on the 7th July, 2004. Its registered office is located at the McWilliam Park Hotel, Claremorris, Co. Mayo. The nominal share capital is €1,000.00, divided into one thousand shares of €1.00 each, the total paid up the share capital being €100.00. The primary object for which the company was established was to carry on the business of operating a hotel and related business, which it does from the hotel premises known as the McWilliam Park Hotel, in Claremorris, Co. Mayo.

5. MOPB is a private limited company limited by shares, incorporated in the State on the 15th May, 2005 with a registered office at Dalton Street, Claremorris, Co. Mayo. It has a nominal share capital of €100,000.00, divided into one hundred thousand shares at €1.00 each, of which €1,000.00 is paid up share capital. John Killeen and John Finn each hold 22.5% of the shareholding in the company, the balance of the shareholding being held by the three current directors of CTL. MOBP is the owner of the entire shareholding in CTL. The objects for which MOPB was established was to engage building and site development, and it is the owner of the lands in which the McWilliam Hotel is constructed.

The inter-company connections

6. The principal activity of CTL is the operation of a four star hotel and leisure centre at Claremorris, Co. Galway. It commenced trading on the 28th October, 2006 in the hotel which comprises 103 bedrooms and associated restaurants, function room, conference and leisure facilities. The company employs 122 people on a full-time and permanent part-time basis, and is described in the grounding affidavit as "major employer in the local area". The hotel, as well as having a broad local customer base, is described as a popular wedding and music entertainment venue.

7. The hotel has confirmed bookings for twenty-nine weddings for 2016 and ten for the calendar year 2017, and is holding booking deposits in respect of these.

8. The ownership structure of the hotel was established with a view to qualifying for then available tax relief schemes. The freehold in the site was acquired by MOPB by conveyance and transfer made on the 2nd December, 2005. MOPB granted a 99-year lease to a group of tax investors, the "Claremorris Co-ownership", on the 2nd December, 2005. For convenience I will describe the 99- year lease as the "investor lease", and the lessees as "the investors" where necessary. None of the investors have appeared at the hearing of the petition.

9. The investors entered into a development agreement with MOPB for the development of the hotel, and made an agreement for sub lease on the 5th December, 2005 with CTL, to which was annexed a draft occupational lease agreed to be executed when the development was complete.

10. The agreement for lease was the focus of some of the argument before me on the hearing of the petition, as the draft lease was never executed.

11. The purchase and fit out of the hotel was largely funded by way of various facilities advanced by Ulster Bank Ltd. Briefly, the hotel site was purchased by MOPB on foot of funding advanced by Ulster Bank, secured by way of a debenture made on the 2nd December, 2005. The building and the development of the hotel was also funded by Ulster Bank Ltd. by way of a loan to MOPB, secured inter alia by that debenture and by other securities, including a guarantee and indemnity from the three current directors and the said John Finn and John Killeen, as well as by a mortgage or charge made between the tax investors and that Bank. The fit out works were carried out by CTL also on foot of secured funding advanced by that Bank, and the tax investors in turn financed the payment of the contract price pursuant to a development agreement with MOPB, through a loan from that Bank, secured inter alia by a charge over receivables and various guarantees and indemnities.

12. The final link in the chain of the ownership structure is three put and call option agreements executed on the 5th December, 2005 between the investors and MOPB, by which was granted *inter alia* the right to the investors to require the purchase of the hotel by MOPB, and the right to MOPB to purchase the leasehold interest in the investor lease, and subject in each case to express conditions.

13. On the 25th March, 2014 the investors served a call notice on MOPB to acquire its leasehold interest in the hotel for the option price of €15,288,745.00. MOPB disputes the validity of the exercise of the option and/or the option price therein identified, but for the purposes of the petition, it has confirmed that it does not have the funds to close the sale.

14. The loan to the investors was secured *inter alia* by an interest guarantee account with a balance of in excess of €2 million held with Ulster Bank, and which is earmarked such that it may be available only for the purpose of the acquisition by MOPB of the leasehold interest of the investors in the hotel. The petitioner suggests that this capital fund might be made available to creditors in the context of an examinership.

The primary task in examinership: reasonable prospect of survival
15. Section 509(1) of the Act of 2014 sets out where:

> *(a) a company is, or is likely to be, unable to pay its debts,*
>
> *(b) no resolution subsists for the winding up of the company, and*
>
> *(c) no order has been made for the winding up of the company,*

the court may, on application by petition presented, appoint an examiner to the company. Section 509(2) sets out that 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."*

16. Both CTL and MOPB are insolvent, although each of them is profitable on a current basis. CTL operates a profitable hotel business but it is insolvent as its long-term survival is vulnerable to the demands of the lenders who advanced monies for the fit out of the hotel premises. Therefore, the threshold test contained in s.509 (1) is met, however as in most applications, the dispute in this case centres on s.509 (2), whether the petitioner had demonstrated that there is a reasonable prospect of the survival of the company or companies. This test contains a number of elements, and requires the court to be satisfied that there is a reasonable prospect of survival of the company or companies, and of the whole or part of its or their undertaking as a going concern. It is well established in the case law that the onus of showing that a company has a reasonable prospect of survival lies on the petitioner, although it is argued by the petitioner that the bar set by the courts is not high.

17. That the bar has been set at a relatively low level might be said to come from the primary purpose of the legislation identified with admirable clarity by McCarthy J in one of the first cases brought under the Companies (Amendment) Act of 1990, Re Atlantic Magnetics Limited 1993 2IR 561 that;

> *"The Act is to provide a breathing space albeit at the expense of some creditor or creditors."*

18. It is clear that such breathing space however is available only to a company that can show some prospect of surviving as a going concern, and that the period of protection is likely to lead to the preservation of some or all of its undertaking. The protection was identified by McCarthy J as being for its *"shareholders, workforce and creditors",* and it is clear form the authorities that one large creditor should not by virtue of exercising a power to appoint a receiver, have the power to determine the fate of the relevant interested parties.

19. In recent years the protection of the workforce has come to have a particular significance in the context of a petition, and this focus is identified in particular by Clarke J in *Re Traffic Group Limited* 2008 3IR 353. CTL employs 122 people, and those jobs are permanent, although some them are part-time. The particular difficulty that led me to the refusal of the petition in *Re Step One Permanent Solutions Limited* [2015] IEHC 284, where the employees were not in fact employees of the company, a recruitment company, does not fall to be considered in this case. The position of Revenue too is one that requires to be protected, and that protection may be particularly relevant where one secured creditor has security over most or all of the assets of the company.

20. What is also clear however is that the exercise is not formulaic, and the court must engage with the individual factors present in the company or companies subject to the petition, and this was made clear by McCracken J in Re Antigen Holdings 2001 4IR 600 where he referred to the need to consider the position *"in the light of the particular circumstances of each case".*

21. The opposition by Coney is made on a number of grounds to which I now turn.

The first ground: insufficient evidence of a reasonable prospect of survival
22. Coney has argued that the petitioner has not established by sufficient evidence that the company has a reasonable prospect of survival. The bar is relatively low, and a petitioner is not required to establish the probability of survival as explained by Fennelly J in the Supreme Court decision, Re Gallium t/a Private Equity [2009] IESC 8, and in that context the court will frequently compare the likely consequence of examinership against those consequences likely to flow from liquidation, or from a receiver being appointed to

some or all of its assets.

23. Most notably in Re Gallium t/a Private Equity, Fennelly J identified another factor which must influence my decision in this case, mainly that;

> *"The entire purpose of examinership is to make it possible to rescue companies in difficulty. The protection period is there to facilitate examination of the prospect of rescue."*

24. Thus while a petitioner must show by evidence before the court that there is a reasonable prospect of survival, the protection period enables the detailed examination and refining of such prospects, and during the protection period the examiner may avail of various means to work through various prospects, seek investors, deal with onerous leases or other restrictions on the continued profitability of the company.

25. It seems to me that a particular approach might be warranted in the case of a company which is operating successfully as a going concern, but where historic overall debt is putting the continued undertaking and operation of that company at risk.

26. The test is whether a reasonable prospect of success of the company is shown, not whether all factors that might lead to that success have been established. The position of a large creditor, while it cannot be ignored, and while the argument it makes must be met, cannot be allowed to be the single or governing factor in the court's considerations.

27. Two reports of an independent expert (hereinafter "IER") produced by the petitioner in support of the petition were prepared by Arkins Kenny. The first of these was prepared in support of the initial petition and it is dated 10th November, 2015. Certain elements of that report will be considered below. The second IER was prepared by way of supplemental report on the 23rd November, 2013, in particular to address certain concerns expressed in a detailed affidavit of Tom Kavanagh sworn on behalf of Coney on the 18th November, 2015, in which he makes a number of critical comments with regard to the first report.

28. Mr. Kavanagh is a well-known insolvency practitioner and makes his affidavit in reliance upon his experience as an examiner in a number of large companies, and confirms his knowledge of the operation of the examinership process. His affidavit is carefully framed and at para. 5 he avers that it is "not possible to assess whether there is a reasonable prospect of the survival" of either CTL or MOPB, or of their undertakings, as he considers the IER to be materially deficient. Mr. Kavanagh identifies a number of what he considers to be materially deficient elements in the first IER.

29. Counsel for Coney relies on this affidavit in two ways, pointing to deficiencies such that insufficient evidence is before the court to enable me to grant the reliefs sought in the petition, but also as illustrative of what is argued to be a material nondisclosure in the documentation presented to the court. The second of these factors will be dealt with below, as it is clear as a matter of law that non disclosure may influence the exercise of the court in its discretion whether to appoint an examiner, and discretionary factors do not come to be engaged until the petitioner satisfies the court that the evidence points to a reasonable prospect of survival.

30. Mr. Kavanagh appoints to the very significant liabilities of CTL of over €6 million, of which €1.2 million is owed to Ulster Bank (now Coney), in respect of the fit out of the hotel, as well as the very significant indebtedness of approximately €13 million arising under guarantees to Ulster Bank as part of the obligations arising under the investor loan.

31. In response, the independent expert in his supplemental IER says that the full liability was included in the liquidation statement of affairs, and also says that the first report did show the complex cross guarantees, as well as the fact that the put and call option agreement has been exercised with the effect that MOPB has at least an arguable contractual obligation to purchase the hotel for the option price. The petitioner also argues that the obligation of CTL to Coney and under the cross-guarantees have not yet been triggered by a demand letter for repayment.

32. The relative complexity of the security is of itself not a factor that could influence my decision on the petition, but may in due course give rise to litigation, or indeed make the successful conclusion of the examiner process more difficult. I do not consider that those factors ought to now influence my consideration of the facts, which I consider to be relatively straightforward, although noting the complexity and interconnectivity of the security arrangements.

33. Mr. Kavanagh makes substantial arguments with regard to what he considers to be a paucity of information as to the updated position of CTL in particular. He points to the fact that the last available accounts bring figures up to the 30th April, 2015 only. He suggests that at the very least management accounts to the end of September, 2015 ought to have been prepared for the purposes of the examinership in order to give a true picture of the current state of the company. The petitioner has furnished an independent report from a second insolvency practitioner, Mr. Luby, who suggests that it is not standard practice to prepare additional financial accounts for the purposes of an examinership, although I consider that what his evidence really points to is that it is not necessary to do so, as there will clearly be circumstances where updated financial accounts would be necessary to give the court a true picture of the financial state of the company.

34. While Mr. Kavanagh makes some very substantial arguments, in truth he makes objections relating more to the availability of accounts, rather than to the contents of those which he has examined. While I consider that his evidence is useful, and it is incumbent upon a petitioner to make available to the court all relevant accounting information in the presentation of the petition, and while it may be, and probably in many cases will be, necessary to furnish up to date or reasonably current accounts for that purpose, the evidence in this case points to the fact that CTL operates as a successful going concern, has a significant number of bookings for the year 2016, and there is direct evidence available that the company has been able to avail of improvements in the economy and increased tourist numbers in the area.

35. Whilst I consider Mr. Kavanagh's objections to be well founded and identify matters of concern, I am satisfied that the overall picture available to me for the purposes of my assessment is significantly robust to enable me to make an assessment of the financial state of the company. I consider that at this point in time, the question the court must engage is a general question as to the financial state of the company, and that more detailed and in depth analysis is to be engaged at a later stage in the process.

36. Mr Kavanagh also points to the failure to file the accounts in respect of the year ended April, 2014, and I accept this to be a matter of some significance and to which I return below, in that the company's liability to corporation tax was not identified, and Revenue asserts that it was only on the service of the petition that it became aware of the substantial liability of CTL to tax for that period.

37. Mr. Kavanagh goes on to deal with what he considers to be other shortcomings in the first IER, and suggests that insufficient

estimates of projected trading performance have been furnished to demonstrate that CTL is likely to be profitable in the three to five year period post examinership. Projections have been furnished for twelve months, although there have been some bookings identified for the calendar year 2017. The IER does contain what is described as a "high level" review of projections for the period 2017 to 2019, but Coney argues that the independent expert does not clearly state his view as to whether these are achievable. Mr. Luby in his report deals further with this question, and I consider the matter below at paras. 73 ff.

38. The strongest focus of the objection of Coney is that there is insufficient evidence before the court on foot of which it may appoint an examiner. In particular it is argued that the accounts have not been made up to the latest practicable date, a statutory imperative. Counsel is undoubtedly correct that the statutory provisions contain an imperative that the court be informed of the most up-to-date position practicable. It is argued by counsel for Coney that the figures are up to May, 2015 only and that this is not sufficiently close to the time of the presentation of the petition. It is argued that the figures should have been brought up to October, 2015 at the earliest.

39. This is a serious criticism by Coney, and one which I consider to be to some extent justified. However, I am persuaded somewhat by the replying affidavit of Jim Luby, Chartered Accountant who has over thirty years experience in insolvency and restructuring, and who suggests that it is not in his experience suitable or usual for management accounts or other workings to be contained in IER, as such a requirement might raise issues of confidentiality. While Mr. Luby suggests that "recent court decisions have upheld" this approach, none have been identified to me. It seems to me that the legislation requires the financial information to be set out at the latest practicable date, but the nature of that information is not mandated by statute, such that management accounts could be said to be an essential proof.

40. In general, I consider that a gap of six months is too long in the case of a trading company such as CTL.

41. However, certain other evidence is available to me including cash flow statements which were are appended to the IER, and evidence that the turnover has been in or around the sum of €5 million for the past number of years. Mr. Luby suggests that industry reports predict solid growth in the hotel industry, and both Mr. Luby and Mr. Arkins, as well as the interim examiner himself, Ciarán Wallace, are unanimous in their views that CTL is viable as a going concern, and that the risk to its undertaking arises from historic debt. On balance, and for the reasons I now detail, I consider that there is sufficiently detailed accounting information before me.

Discussion on this ground

42. The trading trends are quite clear, and have been identified as positive by all relevant persons, including, somewhat curiously, John Killeen, one of the objectors who asserts that in his view both companies have a reasonable prospect of survival, and that it is capable of being profitable.

43. The particular context of this company in what is described as a fairly robust hospitality industry, where there are already fairly substantial bookings for the next calendar year, is a matter that influences me, although that is not to say that I consider the financial information to be entirely satisfactory.

44. I return later to the question of nondisclosure, but note that the argument of Coney with regard to the accounts is to a large extent not an argument of disclosure but an argument that adequate evidence has not been adduced. While I do accept the argument of counsel that the accounting evidence is not sufficiently complete, I consider that I am capable of gleaning sufficient information from the combined reports of Arkins, Jim Luby, and the short but helpful report from the interim examiner himself. Without those elements the deficiency in evidence would have left me without sufficient information on which to make a reasoned judgment as to the prospect of survival.

45. It is for the court, and not the parties, to weigh the evidence, and to determine whether sufficient evidence is before it to support the petition. The Supreme Court made it clear in *Re Vantive Holdings* [2009] IESC 68 that the petitioner must present evidence and material to support the application, and as stated by Murray C.J., delivering the judgment of the court, it is not sufficient for a petitioner to simply demonstrate that the assets of the company could be disposed of in a more orderly fashion by means of an examinership. The court must be satisfied that sufficient evidence and *"objective reasoning and the appraisal of materials"* has been shown to support any opinion given by an independent expert as to the prospect of survival. The court made the following clear statement of the type of evidence that it required:

> *"Mere assertions on behalf of a petitioner that a company has a reasonable prospect of survival as a going concern cannot be giving significant weight unless it is supported by objective appraisal of the circumstances of the company concerned and an objective rationale as to the manner in which the company can be reasonably be expected to overcome the insolvency in which it finds itself and survive as a going concern."*

46. Later in the judgment Murray CJ. identified the requirement for supporting or "objective evidence" to satisfy the court, and pointed to the fact that the court had to weigh that evidence and scrutinise that evidence.

47. The question that is in particular engaged in this case is the extent to which the court should be influenced by the fact that certain information was not before it in the initial papers presented, and that some information became to light only in affidavits in reply to those filed by objectors. Clearly that factor is an element in the broad discretion that the court has in considering the evidence, but what is less clear is whether a petition should be refused on account of a failure to initially present sufficient facts as to the prospect of survival, when the court on the full hearing of the petition considers that up-to-date and additional evidence is sufficient to satisfy it.

48. Having regard to the procedure fixed by the legislation for the appointment of an examiner, it seems to me that the point at which the court must apply the test of whether a company has a reasonable prospect of survival must be the date of the hearing of the petition, and that is the date when all the evidence is before the court including the evidence in reply to any objecting creditor. Thus failure to put sufficient documentation before the court at first instance at an *ex parte* application is relevant to the question of discretion, but the court makes its decision on the appointment of an examiner on the basis of all of the evidence it has at the full hearing, including evidence advanced by an objector.

49. I consider that my approach to the financial information must bear in mind the fact that the historic trading figures of the company have continued to improve, and that it is asserted that the hotel business generally in the country is returning to profit. I also must bear in mind that Mr. Arkins is the auditor to the company and he has a particular degree of knowledge arising from this which has informed his approach, and bearing in mind his obligation to the court as an independent expert, I consider that the evidence that he has furnished, which is to some extent less than fulsome, is adequate for the purpose, and gives me an overall picture of the prospect of profitability, which I am satisfied would provide a suitable springboard for an examiner in the context of

achieving an arrangement for the overall survival of the company.

50. Mr. Luby in his report does suggest, correctly, that some of the figures and statements in the IER "could have been clearer". However, I consider that some of the lack of clarity arose as a result of the form or the style of the report and it would not be correct for me to dictate the particular details which an independent report must contain, bearing in mind both the relatively low threshold, and that the statutory requirement is that there be shown a reasonable prospect of survival rather than a real or substantial prospect. It would be disproportionate for me to require a particular level of detail and to require for that purpose the preparation of very detailed projection figures, when the timeframe envisaged by the Act is necessarily short, and when the cost of that exercise might not be justified in the context of a company which is already in crisis.

The second ground: the occupational lease

51. The agreement for lease referred to above at para. 9 above, and made on the 5th December, 2005 provided for rental payments geared so that the rent was calculated as been the amount equal to the interest due to the Bank on the investor loan and the amount of the rent reserved under the 99-year lease. An agreement was entered into by which CTL instead of paying its rent to the investors paid an amount equivalent to that rent and the investor lease directly to MOPB. This is treated as an intercompany debt in the accounts of the companies.

52. As a result of reductions in interest rates in the last few years, quarterly payments on the occupational lease currently amount to approximately €53,000.00 per quarter, €212,000.00 per annum, This rent is paid up to date, although the last three moieties of rent were paid late. The rent is paid directly to the Bank, and the last payment, in respect of three moieties was paid to Coney on the 30th September, 2015.

53. Coney asserts that CTL occupies the hotel under a different lease, reserving a substantially higher rent, made on the 18th October, 2006 between the investors and CTL and by which is reserved an initial rent of €583,820.00 per annum, and containing a so-called "upwards only" rent review, the provisions of which have not yet being triggered. That lease is registered as a burden on the freehold folio. I will refer to this lease as the "lease of 2006".

54. Some argument was had before me arising from the non-disclosure by the petitioner of the existence of this lease when the petition was first presented. The petitioner asserts that the lease of 2006 was never operated between the parties, and that registration was effected by Ulster Bank, presumably in the context of the then anticipated sale of its economic interest in the loan and security. The petitioner asserts that, notwithstanding a material difference in the quantum of the rent, CTL could still meet the higher rent payable under the lease of 2006 should it be found to be binding. Coney denies the evidence points to even a prima facie case that this is so, and argues that the existence of this liability is one factor that points to the fact that CTL cannot meet its obligation even during the examinership process, and that it has no reasonable prospect of surviving that process.

55. Coney points in particular to clause 5.1 of the lease of 2006 which creates a right of re-entry to the investors on the happening of certain events, including the appointment of an examiner or intern examiner, and argues that this provision points to the vulnerability of CTL's occupation of the hotel premises. Coney also argues that clause 6 contains a break clause by which the investors are entitled to terminate the lease on the 16th October, 2016, also identified as an impediment to the long-term sustainability of the hotel business under its current structure.

56. While Coney makes the point that the non-disclosure of this lease is a matter that ought to influence my discretion to refuse to appoint an examiner, its primary focus has been the fact that the existence of this lease creates a number of significant and real difficulties for the continued financial viability of CTL. Counsel for CTL however argues that, as no waiver has been executed in regard to statutory rights, CTL may avail of the statutory right to a new lease under the landlord and tenant code, and or seek relief against forfeiture in the context of a scheme of arrangement.

Discussion on this ground

57. I am satisfied that the petitioner has shown that CTL can meet its current obligations under the agreement for lease of 2005, or if necessary the materially higher rent reserved by the lease of 2006, although I note that the evidence does point to a shortfall in cash flow in an excel spreadsheet in the IER, which is likely to occur in the months of January and February 2016 (weeks eight and nine) should the higher rent be payable. I am satisfied on the balance of probabilities that the argument that CTL has obligations under the lease of 2006 do not create sufficient ground to refuse the petition. In particular, I am satisfied that the company can with relative ease meet its rental obligation under the now operating lease of 2005, which has after all been the commercial basis upon which the hotel has been occupied for ten years or thereabouts, and that it can, albeit with some difficulty, meet its obligation to pay the higher rent should this become relevant. I note also that Coney, while it has suggested that it will appoint a receiver to CTL should the examinership process fail, or should an examiner now not be appointed on foot of the petition, has not suggested that there is any evidence to point to the fact that the investors had demanded the higher rent, or have sought to determine the lease in reliance on clause 5, which they were entitled to engage following on the appointment of an interim examiner.

58. I accept the argument of the petitioner that the interest of the investors is primarily in the tax break available to them, and that the fact they have never pursued the making of a profit from their leasehold interest, that no demand has been made by them for the payment of the higher rent reserved by the lease of 2006, no forfeiture has being threatened, that they have not triggered the rent review in the lease of 2006, and have not appeared on the petition, are an indicator of the likely medium term approach that the investors will take to their interest. I consider that the evidence points to the 2005 agreement for lease being operated without demur by the investors for upwards of ten years.

59. Accordingly, I consider that the question of the lease does not present a difficulty to CTL which suggests that the petition be refused.

The third objection: the holding company

60. MOPB is the freehold owner of the land on which the hotel is built and its enterprise is limited to the collection of a small rent of €50,000.00 per year in respect of those lands. It does not have any employees. Coney, and another objector John Killeen, both assert that the true purpose of the petition is not to protect CTL, but rather to protect MOPB, and that regard must be had to the fact that MOPB would be highly unlikely to succeed in an application to have an interim examiner appointed in its own right. It is asserted, in particular by Coney, that whilst MOPB is in imminent risk from its creditors that CTL is not. I consider that the facts do not bear out this argument as Coney has made a formal demand on the 12th October, 2015 against CTL in respect of the fit out loan, and a demand on the 29th October, 2015 in respect of rent arrears alleged to be due on foot of the lease of 2006.

61. Coney argues strongly MOPB does not have an undertaking in any true sense. It is argued that the presentation of the petition is an abusive of the legislative scheme. The particular urgency which inspired the presentation of the petition was the litigation against

MOPB, and it is argued that the survival of MOPB is not necessary at all to the continued survival of some or all of the enterprise of CTL.

Discussion on this ground
62. I accept that the evidence does not point to MOPB having a sufficient undertaking to benefit from the examinership process, and accordingly if MOPB is to obtain the benefit of the Court it may do so only by seeking to avail of the provisions of s.517 of the Act of 2004 as a "related company".

63. The court when deciding to appoint an examiner is required by s.517(2) to have regard to whether the making of the order would be likely to facilitate the survival of the company, or of the related company, or both, and the whole or any part of its or their undertaking. Thus the legislation it seems to me envisages a circumstance where a company may seek the protection of the court in respect of a related company if that order would facilitate the survival of the main company, or part of its undertaking. Clarke J considered in *Re Vantive Holdings (No 2)* [2009] IEHC 409, that there is no impediment to the appointment of an examiner to a related company, even when the related company is solvent, because he took the view that *"the failure of the group as a whole would lead, inevitably, to insurmountable obstacles"* for the solvent companies.

64. While this application does not involve a group of companies such as was in the consideration of Clarke J., I consider that there is a very significant interconnectedness in terms of land ownership between CTL and MOPB, and the right to occupy the hotel, while there is an intermediate leasehold interest, remains one of a very close connection, because of the option agreement and the fact that the intermediate lease was created for tax benefits, I consider it appropriate that the petition also seeks protection in respect of the related company. I consider too that the fact that MOPB is the sole shareholder in CTL must impact on my considerations, as it may be difficult to achieve a satisfactory rescue of CTL if its shareholder is in receivership or liquidation. I also reject the suggestion made by Mr. Killeen that the application to appoint an examiner in respect of MOPB was done cynically in order to delay his litigation, as it seems to me that, at best, the appointment of an examiner could delay the litigation for a matter of months only, and that does not create any great prejudice to Mr. Killeen, or any particular unwarranted advantage to the company. I accept that the motivation for the presentation of a petition might not be as first appears, and that had CTL not been in immediate risk from its creditors, it would not have been appropriate for CTL to have been the "lead company" for the purposes of the examinership, but as I have noted, I consider that there is an immediate risk to CTL having regard to the clear position identified by Coney, that it will appoint a receiver to CTL if the examinership process is unsuccessful.

65. I also have to take account of the fact that the grounding affidavit of Mr. Prendergast identifies the possibility that a potential investor may become a source of funds to enable MOPB to meet in its requirement under the option agreement, and were this to occur the prospects for CTL will improve, as it would not be so exposed to the bank seeking to recover on foot of the interconnected securities in respect of any liability which may arise in MOPB under that option. Furthermore in his affidavit Terry Brennan, one of the directors of CTL, suggests that CTL and MOPB may be in a position to jointly put a proposal to Coney with regard to the acquisition of the 99-year leasehold interest. A joint proposal acquire the long leasehold interest and the freehold of the hotel premises is a prospect that may well be of benefit to the continued survival of both companies, but especially to CTL.

66. Furthermore CTL it a notice party in the Killeen summary proceedings, for reasons not quite understood by me, but this fact alone shows a belief, by Mr. Killeen at least, that there is interconnectedness.

67. The interim examiner Ciarán Wallace also suggests that it might be of benefit to him to deal with the possibility of "overall investment" in the two companies. I am comforted by the fact that Mr. Wallace has clearly identified the possibility that MOPB might not be an entity which meets the criteria for examinership, and has given an undertaking in his report to return to the court at the earliest possible opportunity to have any protection offered to MOPB lifted should this be necessary.

68. Thus for these reasons, I reject that the argument that an examiner should not be appointed to MOBP.

The position of Revenue
69. Revenue initially took a position of "guarded neutrality" in respect of the petition, but subsequently hardened its objection, which is grounded on the fact of a very significant corporation tax liability, and having regard to the fact that this was disclosed only on the petition. It cannot be ignored by me that the objection by Revenue is not that the petition failed to disclose the Revenue debt, which would be a very serious omission, but rather that the failure to file returns has meant that the liability was up to the date when the petition was served on Revenue unknown to it. Revenue has taken no position on the question of whether there is reasonable prospect of the companies or either or both of them surviving, but the possession of Revenue is one that seems to me to be a factor in my discretion.

70. The circumstances are not egregious in the sense of the circumstances which gave rise of a refusal to appoint an examiner in *Step One Permanent Solutions*, where the company engaged in the same form of non payment of current tax as a previous company whose undertaking it had acquired, and where there was in reality no prospect of survival had the company been tax compliant. There is no suggestion that CTL or MOPB have failed to pay current PAYE, PRSI or make VAT returns, although it seems that there may have been some delay in the very last return, in respect of which counsel for the petitioner was unable to offer much assistance.

71. Non disclosure of Revenue liability in a petition is a serious matter, and this is apparent from the judgment of Charlton J. delivered on the 4th November, 2013 in *Star Elm Friends Ltd* [2013] IESC 57 where he refused the appointment of an examiner in the case of a company which had not returned VAT that it had collected over a period of approximately a year. The Supreme Court reversed that finding, but did so where the circumstances had changed and where Revenue did not oppose the appointment of an examiner.

72. In *Step One Permanent Solutions* the evidence was that the company had for the entire of its existence failed to make VAT returns or the returns of its employees' PAYE or PRSI which I held amounted to a "gross misconduct" which weighed significantly in my discretion, particularly as all creditors including Revenue had opposed the application in that case. I do not consider the counsel for Coney is correct to rely on that judgment as authority for the proposition that failure to pay Revenue liabilities is a singular failure which must in all cases give rise to the rejection of a petition, or weigh heavily against appointment, and although I accept that Revenue as a preferential creditor must be given due weight, that the position it adopts will be influential, there is a difference in quality between a company which uses current monies collected on behalf of Revenue such as VAT employees PAYE and PRSI to fund its operation, and a company which has an outstanding corporation liability for one year only, albeit a significant liability.

The IER
73. Counsel for Coney also makes a number of other critical comments with regard to the IER. He points to the fact that not withstanding the requirements of s.511(3)(h) the independent expert makes no recommendations as to how the financial difficulties of the companies could be dealt with, and further that he has expressed no view as to the possibility that the "undertaking" of the

companies could survive the process. Further he correctly points to the fact that the analysis in the IER is based primarily on information from management, and counsel points me to the requirement that the independent expert provide an independent and objective view following his own analysis.

74. I accept that the criticisms levied by counsel for Coney are correct, and note too that the statutory requirements are mandatory. Mr. Luby in his additional report suggest that certain matters are "implicit" in the IER, including the fact that the independent expert was of the view that the undertaking or undertakings could survive, and that the view he expresses is based on his own information. In general I do consider that an IER is not complete if it relies on implication, and the court should never be placed in the position where it must itself extrapolate from evidence and assertions on the opinion of the independent expert as to the prospect of survival. However certain factors might be noted in ease of the petitioner in this case. The IER was prepared by the auditor for the companies. It can be assumed in these circumstances that he does have close and detailed knowledge of the affairs of the companies, and that he is aware of his statutory obligation of independence also in that context. It is clear also from the legislation that there is no impediment to an auditor acting as independent expert, and there may well be circumstances where that is desirable perhaps from the point of view of the relative costs of employing an additional person and the delay factor that might be involved in employing a complete outsider to prepare the report. CTL is a classic services trading company, the business activity of which is fluid and changing. An overall picture will depend on a number of factors and may not be that readily understood from the minute details in current management accounts. A particular factor in this case is the extent to which the company has maintained profitability, and diversified its activities, and the level of contractual commitments with customers that it has for the next calendar year. Thus I consider that although the IER is deficient, Mr Arkins does express a view as to the likelihood of success.

75. Further, I accept Coney's argument that there is no independent analysis in the IER of the effect on CTL of the investors seeking to enforce any obligation of the part of the lessee under the lease of 2006, but my considered view is that it is unlikely that in the short window that would be available for the examiner to prepare a scheme of arrangement, that the investors will successfully persuade the examiner that the obligation in that lease are binding on CTL, although in due course and depending on the position adopted by all of the parties, and if necessary the view of a court, that lease may prevail. I cannot ignore the fact that CTL has been in occupation under the terms of the payment for lease, and that the investors have not appeared on the petition. That suggests that the investors are not pressing, for the present at least, their entitlement under the lease of 2006.

76. Accordingly I reject the argument by counsel for Coney that I ought to disregard the IER or give little or no weight to its contents, and while I consider it to be unsatisfactory that I now have two reports from an independent expert, and an additional report from an insolvency practitioner, I consider that I have sufficient information with which to come to a decision. The process could have been better managed, the evidence could have been better presented, and it is likely that the petition was prepared with some haste having regard to the closeness of the date of litigation, and the fact that Coney came to assert its rights and make demand for payment of the fit out loan only in the middle of October 2015. Nonetheless, and noting that it is the function of the court, and not the expert, to assess the prospect of success, I consider that the IER is sufficient.

77. If I further take the view that the IER makes it clear that the writer did have regard to the statutory tests, and indeed set them out in the report, not I believe as a formality, but rather to point to the elements considered by the expert. I consider that the correct approach of the court is not to treat each individual factor as determinative, but to look at the information and evidence as a whole.

Alleged non-disclosure
78. Counsel for Coney, and to a lesser extent counsel for Mr. Killeen and Revenue, make the point that I should in the exercise of my discretion refuse the petition as a result of material non-disclosure. Section 518 of the Act of 2014 provides that the court may decline to hear a petition, or to continue to hear a petition if it appears that the petitioner or the independent expert has

> *failed to disclose any information available to him or her which is material to the exercise by the Court of its powers under this part.*

79. The court's discretion may also be exercised if the court is of the view that either the petitioner or the independent expert has "in any other way failed to exercise utmost good faith".

80. The case law establishes the role that the court's discretion plays in the examinership process, and Clarke J. in *Traffic Group Ltd* [2008] 3 IR 253 said that the function of the court was to balance its concerns arising from the lack of good faith or absence of disclosure, with other interests which it considers relevant.

81. Irvine J. in *O'Flynn Construction v. Carbon Finance Ltd* [2014] IEHC 458 clearly and correctly set out that the requirement of good faith is one of utmost good faith, but also said that matters that might influence the exercise of discretion must be treated as separate from the evidential test of whether there is a reasonable prospect of survival.

82. Irvine J. regarded the behaviour of the petitioner as *"highly relevant".*

83. Matters said not to have been disclosed include the lease of 2006, the corporation tax liability, full information with regard to the shareholder litigation, and the absence of sufficient accounting information.

84. I have already dealt with the 2006 lease and I am satisfied that the evidence of the petitioner does point to the fact that the relevant parties at all material times, and for a period of almost ten years, operated the agreement for lease. I do not consider it relevant to the question of disclosure whether CTL is said to be in a financial position to meet the materially higher rent in the lease of 2006, as that factor is a factor in the financial picture which informs my judgment as to the reasonable prospect of survival, but I do not consider that there was a failure to disclose details of that lease, noting too that it was Ulster Bank and not the lessee who registered the lease in PRA, and that the rights and obligations of the parties have not been sought to be triggered by those parties, but rather by the financial institution which has the entitlement of the benefit of the rental payments.

85. I consider also that I was sufficiently informed as to the litigation, and Mr. Killeen has appeared and fully ventilated his position through counsel. Mr. Finn, who is involved in other litigation, has chosen not to appear on the petition, and I regard that as a factor of importance in the exercise of my discretion, as clearly were Mr. Finn to be objecting he would have had every reason to appear, having regard to the fact that he is the moving party in very substantial litigation, and he has not chosen to bring the alleged matters of oppression before me. As to whether the petitioner ought itself have identified allegations of shareholder impropriety in the application before me, I do not consider that such an obligation arises, in the first place because the company is denying any such impropriety, and in the second place because I consider that a certain degree of litigation privilege must be said to exist in regard to that litigation which is current and fully contested, such that the company cannot be expected to now show its hand to me in the

examinership process. The position could, as I say, have been different had Mr. Finn chosen to appear on the petition.

86. Counsel for the petitioner suggests that the factors operating in my decision in *Step One Permanent Solutions Ltd* may be distinguished, and I agree. There I took the view that the company was in essence a "phoenix" company, and was using Revenue as a bank of last resort, and I considered that discretionary factors were engaged having regard to significant non-disclosure. The factors operating in that petition were quite different, and the matters not disclosed went to the heart of the way in which the company operated, and its prospect of survival were linked to using its tax and levies collected from employees as a form of working capital.

87. I consider the decision of Costello J. in *Re Bookfinders* [2015] IEHC 769 to be more appropriate. Having held that there was a breach of the requirement of s.518 of the Act of 2014, she set out in her judgment at para. 28 the appropriate consequence of non-disclosure:

> *"Therefore the court had power on that basis to decline to hear the petition. The question then is to determine the appropriate consequences for the breach of the duty of utmost good faith and material non-disclosure. If this were simple inter partes litigation, I am of the opinion that non-disclosure such as those that occurred in O'Flynn Construction Company Ltd. would disentitle the offending party from obtaining equitable relief such as an interlocutory injunction and would justify the discharge of an interim injunction.*
>
> *But the first relief sought here has ramifications and implications for many persons other than those concerned directly with the hearing of the Petition…. After all, a primary, if not the primary, focus of the examinership jurisdiction is the preservation, where possible, of jobs that may otherwise be lost by the failure of that company. It is the basis for the justification of impairing the rights of creditors of the company."*

88. I adopt that clear description of the role of discretion in the process before the court. The court in considering whether to refuse to hear a petition or to continue a hearing, must weigh all of the factors, and this brings me back to the first principles of examinership outlined in one of the earliest cases, *Re Antigen Holdings Ltd*, which I quoted above at para. 20, that the court looks to all of the factors, bearing in mind the relative importance of those factors and noting too of course that recent case law places considerable emphasis on the protection of jobs in the local economy.

The argument of Mr. Killeen

89. Mr. Killeen swore a long affidavit which contained somewhat inflammatory language, and to some extent the approach of Mr. Killeen is unusual. He accepts that the companies have a reasonable prospect of survival, so one could to that extent consider that he is supporting the petition. He describes the petition as being "an unnecessary intrusion", and he puts forward the argument that there is a genuine alternative to examinership, namely "certain proposals" which he says he is in a position to put in place to fully maintain Claremorris as a profitable hotel, retain all of the jobs and put it on "a secure footing going forward", and that this could all be done without the necessity for an examinership. He argues that the cost of an examinership could "do the company only harm."

90. Mr Killeen has close knowledge of the affairs of the company and I regard some of his evidence as being supportive of the petition, although noting that he argued the examinership is unnecessary. I have regard to the fact that he says on affidavit that he is in a position to put forward financial proposals, but has not yet brought to light proposals which might have the effect of protecting the companies from the immediate risk of their creditors. I am satisfied that there is an immediate risk, so that the delay by Mr. Killeen in putting his cards and proposals clearly on the table to the relevant persons has itself highlighted the need for an examinership.

91. Mr. Killeen however goes further and he argues that there has been "criminal offences" committed by the directors and/or by the companies, and he points to matters that he describes as "fraudulent" with regard to land transactions and other payments made by the companies.

92. I do not accept his averment that the examinership process would have the effect of "allowing" the directors, and in particular Damien Prendergast, "to avoid a revenue commissioner's investigation and prosecution," and I consider that the opposite is more likely to be the case for a number of reasons. First Revenue has appeared on the petition and its position is now well clarified and in the open. Mr. Wallace the interim examiner is an experienced insolvency and rescue practitioner who has an obligation to the court, as well of course to the creditors, to critically examine the affairs of the companies, including Revenue affairs, and if necessary other matters which Mr. Killeen highlights. Furthermore I reject the suggestion by counsel for Mr. Killeen that the interposition of an examinership would make it impossible or more difficult to negotiate with creditors and in particular with the bank. In general the examinership process makes it easier to negotiate with a bank, and the extensive power of the court in examinership does allow the rights of the secured creditor to be impacted as is clear in the judgment of Clarke J. in *Re McSweeney Dispensers 1 Limited* [2011] IEHC 494. In considering the difference between a trading receivership and examinership, at para. 6.6, he said the following

> *"The difference between a trading receivership and a restructured company after the confirmation of a scheme of arrangement arising out of an examinership is that, in the trading receivership, the bank concerned will remain able to make decisions based solely on its own interests and to the exclusion of the interests of other creditors. Under a scheme of arrangement, and provided that that scheme is not unfairly prejudicial, the rights of all creditors are as per the scheme of arrangement. It does not necessarily follow that the rights of other creditors will not, therefore, be impaired in the context of the trading receivership as opposed to the position which those creditors might hope to achieve under a possible scheme of arrangement."*

93. Having regard to the expressed view of the secured creditor that it will appoint a receiver if the examinership process is not continued, I consider that Mr. Killeen is incorrect in his view that negotiations are likely to be more successful with Coney outside examinership, than within its unique and very broad protection, and where the interests of a broad range of creditors can be more fully balanced and weighed, and where one creditor can not "trump" the interests of other creditors or stakeholders, as described by McCarthy J. in *re Atlantic Magnetics Ltd* at 578.

94. I reject the argument of counsel for Mr. Killeen that the evidence points to the likelihood that any receiver appointed by Coney would continue to trade, and that the proposals that Mr. Killeen suggests he is in a position to put to the lender can be explored in the context of the receivership. I do not consider the correspondence from Coney of the 12th October, 2015 to suggest that a receiver appointed by it would continue to trade, and there is no requirement under the debenture that the receiver would be obliged to do this. It seems to be more likely that the jobs of the persons currently employed by CTL will be lost in the short term if a receiver is appointed.

Conclusion and summary

95. I am satisfied taking all of the evidence before me that the companies have a reasonable prospect of survival should an examiner be appointed. I am not satisfied that I have sufficient information or argument that would suggest that Coney as the primary and secured creditor would be prejudiced by the examinership process. I accept entirely that MOPB would not be an appropriate entity to which an examiner would be appointed, but I consider that there is a significant degree of connectedness in the complex financial arrangements between it as holding company and the trading company CTL to warrant that the protection be afforded to MOPB as a related company. I do this however noting the assurance from Mr. Wallace in his interim report that he will return to the court should he consider that MOPB ought not to continue to avail of court protection. I am satisfied that there is an immediate risk to the business and enterprise of CTL and that the demand from Ulster Bank of 12th October, 2015 was a serious demand and could have had catastrophic and immediate effects on the company's day-to-day business. I was also informed in the course of the hearing that Coney had on the day before the petition was heard demanded payment of the full capital sum of €1.8 million said to be owed by CTL in respect of the fit out loan.

96. Further, the range of options available to an examiner to deal with the lease, and to seek a means to resolve the clearly difficult question as to the true nature of the right of CTL to occupy that hotel premises, is a factor that influences my decision.

97. I cannot ignore the fact that CTL has a before tax turnover of €894,000.00 in the calendar year 2014. Also have what I regard as a fulsome liquidation statement of which shows in my view that the prospect for creditors is likely to be much less advantageous in the context of liquidation than examinership.

98. Finally, while I do accept that there is some deficiency in the reports, I do not consider the undertaking or business of CTL to be complicated, and while there is considerable complexity in the security arrangements, the general business of each of these companies is readily understood, and the economic context in which the hotel operates has been well established to my satisfaction. I take comfort from the fact that although Mr. Killeen opposes the petition he does believe that CTL has a reasonable prospect of survival as a going concern, and he does not even make that assertion in the context of a paired down company. Therefore I consider that it is appropriate, and have regard in particular to the number of persons whose employment would be directly impacted by a liquidation or receivership, having regard also the evidence that I have heard as to the role CTL in particular plays in the local and small economy of a relatively small town in the west of Ireland, noting too the support of local businesses and the chamber of commerce, I would confirm Mr. Wallace as examiner and will so order.