THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 247

Record No. 2017/463

Finlay Geoghegan J.
Peart J.
Hogan J.

IN THE MATTER OF KH KITTY HALL HOLDINGS LIMITED

IN THE MATTER OF ML MEYRICK LIMITED

IN THE MATTER OF MT MONO TRADING LIMITED

IN THE MATTER OF EDWARD LEISURE ASSETS UNLIMITED COMPANY

IN THE MATTER OF NICHE HOTELS UNLIMITED COMPANY

IN THE MATTER OF STYLE CITY LIMITED

IN THE MATTER OF RADICAL PROPERTIES UNLIMITED COMPANY

AND IN THE MATTER OF THE COMPANIES ACT 2014

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 4th day of October 2017

1. Where a creditor and corporate debtor arrive at a binding agreement as to how the excessive debt levels of the company should be dealt with by means of asset sales and, if necessary, debt re-structuring, to what extent (if at all) is the existence of such an agreement a consideration to which the court ought to have regard in determining whether to appoint an examiner under the provisions of Part 10 of the Companies Act 2014 ("the 2014 Act")? This is, in many ways, the principal issue which arises in these appeals and cross-appeals.

2. Given that the system of examinership has been part of our law since the enactment of the Companies (Amendment) Act 1990 ("the 1990 Act"), one might have thought that this question would have been fully considered in the considerable jurisprudence on the topic of examiners that has built up over the years. Rather surprisingly, however, in the case-law to date this issue has been at best but imperfectly explored. This Court is now as a consequence called upon to determine this difficult question which – despite the apparent paucity of case-law – is nonetheless of very considerable practical importance for lenders and corporate borrowers alike. It is, however, first necessary to set out the background to the present appeals and cross-appeals.

The background to the present appeals and cross-appeals

3. On the morning of Saturday, 19th August 2017 the seven petitioning companies ("the companies") mentioned in the title of these proceedings applied *ex parte* to the High Court for an order appointing an interim examiner pursuant to the provisions of Part 10 of the 2014 Act. A receiver had been appointed to five of these companies by Deutsche Bank AG ("Deutsche") on the previous day. Following a hearing which lasted about 90 minutes, Meenan J. made an order appointing an interim examiner to the companies in question. One of the complaints made by Deutsche is that there was material non-disclosure of certain facts at that *ex parte* hearing and I propose presently to consider that contention.

4. There then followed a further hearing in the High Court on 12th September 2017 where the companies applied for the appointment of an examiner pursuant to s. 509 of the 2014 Act. The application was opposed by the major secured creditor, Deutsche, while the Revenue Commissioners adopted a neutral position. The other unsecured trade creditors indicated by letter that they supported the application for examinership. On 15th September 2017 O'Connor J. delivered an *ex tempore* judgment in which he ruled in favour of the appointment of an examiner to three of the companies, namely, KH Kitty Hall, ML Meyrick Ltd. and MT Mono Trading Ltd., but he refused to make an order in respect of the other petitioning companies. These four other companies, namely, Edward Leisure Assets Unlimited Company ("ELAU"), Niche Hotels Unlimited Company, Style City Ltd. and Radical Properties Unlimited Company, have all appealed against the decision not to appoint an examiner, whereas Deutsche have in turn appealed against the order appointing an examiner to Kitty Hall, Meyrick and MT Mono Trading.

5. It is next necessary to say something about the companies themselves. They are part of a group of some 36 companies controlled by Mr. Gerry Barrett (and members of his family), a Galway-based entrepreneur and the group owns assets in both Galway, Louth and elsewhere. There are three principal trading assets held by the companies, namely: (a) the Meyrick Hotel; (b) the G Hotel; and (c) the Eye Cinema. The Meyrick Hotel is owned by ML Meyrick and is leased to and operated by MT Mono. ML Meyrick and MT Mono are in turn are wholly owned subsidiaries of Kitty Hall, which company is controlled by members of the Barrett family.

6. The G Hotel is owned by ELAU, but it is operated by Niche Hotels, under a lease from ELAU. Niche Hotels is owned by Gerry Barrett (1 share), and by ELAU (99 shares). The Eye Cinema is part of Wellpark Retail Park, which is one of several assets owned by Radical Properties. It would seem that Radical Properties provides administrative services to other companies in the group. The Eye Cinema is leased to and operated by Style City.

7. It is understood that Kitty Hall, ML Meyrick and ELAU have no employees. Kitty Hall is simply a holding company and the other two companies (Meyrick and ELAU) are property-owning companies who receive rent from the other group companies in respect of those properties. Radical Properties has seven employees who are involved in the provision of group administrative services to the companies, along with services to members of the Barrett Group of companies that are not the subject of the petition. There is, however, no doubt but that the other companies which are the subject of the present appeals are themselves significant employers in their own right. Thus, MT Mono has 127 employees (including 42 full time); Niche Hotels has 163 employees (including 57 full time) and Style City has 36 employees.

8. It is plain that the staggeringly large legacy debts incurred by the companies are at the heart of their present financial difficulties. The companies were originally indebted to Anglo Irish Bank, but this debt was acquired by the National Asset Management Agency. This debt was ultimately sold by NAMA to Deutsche in July 2015 for an undisclosed sum. The petition presented by the companies acknowledges a combined debt to Deutsche from the Group companies of approximately €698m. As the companies' tax affairs appear to be up to date, this figure represents approximately 98% of the companies' total liabilities. In perfect fairness it should be recorded that the combined debt of the petitioning companies – while still extraordinarily large – is admittedly somewhat less than this figure at some €412m., since some €286m. of the total Group debt is in the name of other companies who are not the subject of the present petition.

9. One is hardly surprised to learn that the market value of the assets held by the companies is insufficient to cover the full value of the Deutsche debt. As I have, however, already hinted at the outset of this judgment, one unusual feature of the present case at least so far as the experience of examinership petitions is concerned is that an agreement had already been put in place in December 2016 ("the 2016 agreement") by the parties to provide for the orderly disposal of certain key assets for the purposes of the reduction of the Deutsche debt and, ultimately, to address the unsustainable nature of the companies' debt by providing at the conclusion of that process for a form of debt write-down. It is next necessary to describe the nature of that agreement.

The 2016 Agreement

10. The 2016 agreement provided for the refinancing of certain core assets and the orderly disposal of other non-core assets and, critically, the assignment by the Deutsche of any residual debt to a Barrett nominee for the nominal consideration of €100. The 2016 agreement thus effectively provides for a mechanism of effectively writing down the Deutsche debt once certain assets were disposed of and the proceeds transferred to Deutsche.

11. In this period the Barrett Group have re-financed the Deutsche debt in relation to the Scotch Hall Shopping Centre and has sold assets including the D Hotel and a site in Waterford City to repay part of the Deutsche debt. The aggregate sum repaid to Deutsche from the re-finance and realisation of these assets is just under €38m.

12. There is no doubt but that the settlement agreement (which was executed on 22nd December 2016) was arrived at after lengthy deliberations and each side was represented by professional advisers of the highest calibre. Clause 5 of the 2016 agreement provided for what was described as a consensual sales programme, including the sale of ML Meyrick. By virtue of clause 5.1 of the agreement the companies irrevocably undertook "to effect the consensual disposal of all non-core assets as soon as practicable after the date of this agreement" and, in any event, no later than 31 October 2017.

13. In that regard it should be noted that clause 5.2 of the 2016 agreement provided that:

> "each of the Meyrick Companies hereby irrevocably and unconditionally undertakes to the Bank that it will use best endeavours to have in place executed and legally valid, binding and enforceable agreements (to include a contract for sale in respect of the freehold and leasehold interests of the Meyrick Companies in the Meyrick Hotel together with a business transfer agreement relating thereto) for the sale of the Meyrick Hotel (and the associated trade on a going concern and vacant possession basis) to Shinebur Limited for a consideration of not less than €16,700,000 (the 'Meyrick sale') as soon as practicable after signing this agreement."

14. Clause 5.3 provided that the companies irrevocably undertook to remit the net sales proceeds of each of the non-core assets into a nominated account in reduction of the Deutsche facilities. Under clause 5.6 the parties agreed to cooperate and act in good faith with each other with regard to the operation of clause 5.

15. Between January and August 2017, there was further extensive correspondence between Deutsche and Mr. Barrett regarding the sale of the non-core assets, the details of which need not trouble us. Mr. Barrett indicated that he wanted to advance a proposal for the refinancing of non-core assets. Deutsche was concerned at the delay, particularly in relation to the sale of the Meyrick Hotel, and, in a letter of February 2017, it objected to Mr. Barrett's marketing for refinancing of non-core assets, as it contended that this was likely to have an adverse effect on value. In June 2017 Deutsche rejected a refinancing proposal, again expressing concern that Mr. Barrett was marketing assets for refinancing, without its consent. It was at this time that Mr Barrett raised an additional – and, it would seem, previously unanticipated - taxation issue concerning the sale of the Meyrick Hotel, since there was reason to believe that the company would have to suffer a large VAT clawback in the event that the hotel asset itself was sold separately.

16. By August 2017 matters had deteriorated to the point where Deutsche was accusing Mr. Barrett of not acting in good faith to complete the consensual sales programme and reserved its right to appoint a receiver to effect a sale of the non-core assets. On 17th August 2017 Deutsche stated it would appoint a receiver to the non-core assets under the 2016 agreement. On 18th August 2017 Shane McCarthy of KPMG was appointed by Deutsche as receiver of certain assets of several of the companies. The present petition for the appointment of an examiner was presented to Meenan J. on the following day.

The jurisdiction to appoint an examiner under Part 10 of the 2014 Act: whether there is a reasonable prospect of the company as a going concern

17. The first question which this Court must consider is whether the companies themselves (or any of them) have a reasonable prospect of survival in the event that that an examiner is appointed. This is a key jurisdictional proviso, because it is clear from the provisions of s. 509(2) of the 2014 Act that the court is positively precluded from appointing an examiner unless this pre-condition is satisfied. This is not only clear from the statutory wording ("..the court shall not make an order this section…."), but this point had, in any event, been confirmed by the Supreme Court in several key cases in relation to the corresponding provisions of the earlier 1990 Act: see, e.g., *Re Gallium Ltd.* [2009] IESC 9, [2009] 2 I.L.R.M. 11 and *Re Tivway Ltd.* [2010] IESC 11, [2010] 3 I.R. 49.

18. Under s. 509 of the 2014 Act an examiner may be appointed to a company where: (i) the company is, or is likely to be, unable to pay its debts; (ii) no resolution for the winding-up of the company subsists and no order has been made for the winding up of the company; and (iii) the Court is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern. It is accepted that the first two conditions have been satisfied in the present case: the dispute here concerns the question of whether the companies can show that they have a reasonable prospect of survival as a going concern.

19. Section 517 provides for the appointment of an examiner to a "related company", under conditions which include the Court's satisfaction that there is a reasonable prospect of the survival of that related company, and the whole or any part of its undertaking, as a going concern (s. 517(3)).

20. What constitutes a reasonable prospect of survival as a going concern for this purpose? As Murray C.J. explained in *Re Vantive*

Holdings Ltd. (No.1) [2009] IESC 68, [2010] 2 I.L.R.M. 156, 172-173:

> "In order to be satisfied that a company has a reasonable prospect of survival as a going concern the Court must have before it sufficient evidence or material which will permit it to arrive at such a conclusion on the basis of an objective appraisal of that evidence or material. Mere assertions on behalf of a petitioner that a company has a reasonable prospect of survival as a going concern cannot be given significant weight unless it is supported by an objective appraisal of the circumstances of the company concerned and an objective rationale as to the manner in which the company can be reasonably expected to overcome the insolvency in which it finds itself and survive as a going concern.
>
> The opinion of the independent accountant as set out in the report which a petitioner is required to provide to the Court under the provisions of the Act, must be given due weight. Again, the weight to be attached to the accountant's opinion will depend on the degree and extent to which he supports that opinion by his or her own objective reasoning and the appraisal of material or factors relied upon for reaching his or her conclusions.
>
> Since, the court may not make an order appointing an examiner unless it is satisfied that there is a reasonable prospect of the survival of the company as a going concern, it follows that there is an onus on the appellant to satisfy the court that such a reasonable prospect exists. The applicant must provide objective evidence to satisfy the court of this fact. Examinership is a process designed to facilitate the rescue or survival of companies in financial difficulties. Whether the appointment of an examiner is supported by creditors of the company and the extent and reasons for that support is a relevant consideration but not determinative in considering whether there is a reasonable prospect of survival.
>
> It is not necessary, at the stage of application for the appointment of the examiner to show that the company will probably survive…"

21. To this one may add the comments of Clarke J. in *Re McSweeney Dispensers Ltd.* [2011] IEHC 494 that in practical terms what a court needs to be satisfied is "that there is some realistic prospect of an investor being prepared to put up enough money to generate a scheme of arrangement which might arguably avoid any unfair prejudice" to the secured creditor.

22. In the High Court O'Connor J. observed that he was sceptical "that each and every one of the companies will secure such investment and that a proposed scheme of arrangement will emerge that can improve on the settlement agreement." This seems to have been a factor which weighed heavily with him, since he refused to make an order for examinership in the case of four of the petitioning companies.

23. For my part, I take a different view of this question. It is clear that the trading companies are potentially viable in their right, provided that the enormous legacy debt can be written down. If these companies are potentially viable, the same can be of the various property companies (and the holding company, Kitty Hall) whose financial health is itself entirely dependent on the viability of the trading companies. Indeed, I might break off here to observe that at the hearing none of the parties seriously disputed that the seven petitioning companies should be treated differently for the purpose of appointing an examiner: there was either a reasonable prospect of success in the case of all the petitioning companies or in none of them.

24. Writing down debt is, of course, a legitimate – and, some might say, in many instances, an inevitable – feature of the examinership process, provided, of course, that any scheme of arrangement involves proposals which are "not fairly prejudicial to the interests of any interested party": see s. 542(4)(b)(ii) of the 2004 Act and the comments of O'Donnell J. in *Re McInerney Homes Ltd.* [2011] IESC 31 and those of Clarke J. in *McSweeney Dispensers*. As Baker J. put it in *Re Regan Developments Ltd.* [2017] IEHC 156:

> "There is nothing in principle wrong with a scheme of arrangement which might have the effect that debt, whether secured or unsecured, is refinanced, subject to the overriding requirement that the scheme of arrangement must be one which does not unfairly prejudice the creditors or class of creditors. A refinancing on more advantageous terms can have an impact on the prospects for the survival of a company and its enterprise, and is often a factor explored by an examiner."

25. It is clear from the reports of the independent expert and, indeed, the report of the interim examiner of 25th September 2017 (which was supplied without objection to this Court) that the trading companies may be capable of generating sufficient cash which would be sufficient to remunerate capital and to service loans, provided, of course – and it is an admittedly critical proviso - that the debt was written down sufficiently and that this could be done in a manner which was not unfair to the owner of that debt, Deutsche. Both the independent expert and the interim examiner have expressed confidence in the capacity of these companies to survive should an appropriate scheme of arrangement be ultimately put in place.

26. While counsel for Deutsche, Mr. Gallagher S.C., was critical of what he submitted were various omissions and errors in the report of the independent expert which – or so the argument ran – undermined its utility and cogency, there was no expert report from Deutsche such as might have undermined the general thesis of the petitioning companies, namely, that they had a reasonable prospect of survival as going concerns provided that the legacy debt could be written down. Deutsche have also made it clear that it was intended that the receiver which it appointed was going to operate as a trading receiver, i.e., to permit the companies to continue to trade pending asset sales and possible re-structuring. As Clarke J. observed in *McSweeney Dispensers*, this in itself a strong indicator of the existence of a reasonable prospect of survival as absent special or unusual circumstances, it seems unlikely that "a bank would favour a trading receivership where the bank did not consider that the company had a reasonable prospect of survival."

27. To all of this one may add that the various testimonials exhibited in the High Court from employees, trade creditors and others all attest to the fact that both the G Hotel and the Meyrck Hotel are well run and well known hotels in Galway. The Eye Cinema is itself an important cinematic venue in Galway city and its nine theatres cater for both popular and art house cinema taste alike. The interim examiner has further confirmed that the companies enjoy strong support from trade creditors and suppliers alike and he has further informed the Court that Niche, Style City, Radical and Mono Trading are all trading successfully with cash surpluses which are "in excess of the projections for the protection period to date."

28. It is true that all of this is contingent in the present case on the existence of potential investors who are prepared to inject sufficient capital into some or all of these companies. The interim examiner supplied both the High Court and this Court with a list of 17 potential investors who had expressed interest in some or all of these companies, all bar one of whom had signed the non-disclosure agreement and who had been given the information memorandum. None of the potential investors have withdrawn interest even though the investment process has been temporarily suspended pending an appeal to this Court.

29. At this juncture it would be premature to express a view as to what might materialise, save to say that these developments cannot be viewed as otherwise than promising. One must accept, of course, the possibility that no satisfactory offers will come to hand and, if so, any examinership process would thereby end in failure. As, moreover, I have already observed, the High Court cannot confirm the scheme of arrangement unless it is satisfied that it is fair to all classes of creditors, not least, in this instance, the rights and interests of Deutsche.

Conclusions in respect of the reasonable prospect of survival as a going concern issue

30. Summing up, therefore, on this point, I consider that in the light of all of these considerations that the statutory test of reasonable prospect of survival as a going concern has been satisfied so far as all of these petitioning companies are concerned. Insofar as O'Connor J. took a different view in the case of ELAU, Niche Hotels, Style City Ltd. and Radical Properties, I find myself in respectful disagreement with this conclusion.

31. For all of the reasons I have already expressed, I think that having regard to the facts of this case the Court is at this stage at least faced with what amounts to a binary choice, namely, that either all of the petitioning companies have a reasonable prospect of survival or that none of them do so. For the reasons which I have already set out I am of the view that the statutory test has been satisfied in the case of all of the petitioning companies.

32. Even if this jurisdictional threshold has been satisfied, Deutsche argue that this Court nonetheless should not exercise its discretion to appoint an examiner by reason of the existence of the prior settlement agreement. It is accordingly necessary next to consider the issue of discretion regarding the appointment of an examiner.

The discretionary nature of the jurisdiction to appoint an examiner

33. The language of s. 509(1) of the 2014 Act is admittedly permissive in nature ("…may appoint an examiner…"). Indeed, the contrast between the discretionary character of this language and the positive prohibition contained in s. 509(2)("…shall not…") simply underscores the discretionary character of s. 509(1).This very point was made by Fennelly J. in *Re Gallium Ltd.* [2009] IESC 8, [2011] 2 I.L.R.M. 11, 21:

> "A petitioner does not, by getting over that threshold*, acquire a right to have an order made*. I still think it is fair to say that the section confers a "wide discretion" on the court, or alternatively, that the court should take account of all the circumstances. The establishment of a reasonable prospect of the survival merely triggers the power, which remains discretionary." (emphasis supplied)

34. There are, of course, cases where the court might refuse on discretionary grounds to appoint an examiner even where the jurisdictional threshold prescribed by s. 509(2) of the 2014 Act has been satisfied. These include cases where there has been a manifest fraud on the creditor: see, e.g., *Re Missford Ltd.*[2010] IEHC 11, [2010] 3 I.R. 755. There may also be other cases, for example, where the very act of appointing an examiner might have the effect of frustrating a sale of assets by a receiver for the benefit of a secured creditor which was otherwise just on the point of completion. In such circumstances the appointment of an examiner might well be regarded as unfairly prejudicial.

35. In view, however, of the statutory requirement contained in s. 512(4) of the 2014 Act to the effect that a petition for examinership must be presented within three days of the appointment of a receiver, in practice the main prejudice to a secured creditor is generally like to be brought about by the inevitable delays and postponement of debt while the company remains under court protection (s. 520) and the often burdensome costs associated with examinership. Inasmuch as Deutsche will be prejudiced by the appointment of an examiner, it will be by reason of the costs associated with examinership as well, doubtless, by the fact that the companies will remain under court protection during the relevant statutory period.

36. It is clear, therefore, that while the discretion is a broad one, but the exercise of that discretion will normally be measured against the underlying objective of the examinership system, namely, that of rescuing potentially viable enterprises and protecting employment, so that the potentially prejudicial effects of debt postponement and the extra costs associated with the examinership process will rarely in themselves be dispositive so far as the exercise of discretion is concerned. Accordingly, it remains true to say that, as I put the matter in *Re Pelko Holdings Ltd.* [2014] IEHC 226:

> "…..in the vast majority of cases the courts have exercised the jurisdiction to appoint an examiner where these threshold requirements have been met. This is doubtless because of the public policy imperative of endeavouring to save as many viable outlets and businesses as possible. Yet it is equally clear that the court has a discretion not to make an order where creditors have been defrauded and where no real prejudice would otherwise be caused to the employees (*Re Missford Ltd.* [2010] IEHC 11) or where there has been a lack of candour on the part of the petitioner (*Re Wogans (Drogheda) Ltd.*, High Court, 7th May 1992, *Re Belohn Ltd. (No.2)* [2013] IEHC 157, [2013] 2 I.L.R.M. 407). Nevertheless, the overall tendency of the courts has been to appoint examiners in the light of these policy objectives: [see] *Re Traffic Group Ltd.* [2007] IEHC 445, [2008] 3 I.R. 253, 261….."

37. Against this background, how, then, should this discretion be exercised in the present case? Several grounds have been advanced as to why the court should not on discretionary grounds make an order providing for the appointment of an examiner. First, it is said that the examinership petition is tainted by an improper motive on the part of Mr. Barrett and, specifically, that it is all part of a stratagem on his part to retain control some or all of these companies. Second, it is suggested that there was material non-disclosure on the part of Mr. Barrett when moving the initial *ex parte* application before Meenan J. on 19th August 2017. Third, Deutsche point to the inevitable delays and costs associated with the examinership process. Fourth, it is said that it would amount to an abuse of process on the part of the companies to apply for examinership in the face of the binding agreement of December 2016 whereby the creditor and the debtors agreed a mechanism for resolving the debt issue and that, in any event, given the importance of the courts upholding settlement agreements, the Court should refuse in such circumstances to appoint an examiner on discretionary grounds. It is probably fair to say that it was the latter argument which was the one which was pressed most vigorously at the hearing before this Court on 26th September 2017. I propose now to consider each of these arguments in turn.

38. Before doing so, however, it is necessary to observe that abuse of process operates independently of any statutory matrix, since this a fundamental and judicially-created doctrine designed to maintain control of the court system and its processes. The control of court process may ultimately be viewed as an inherent feature of the courts' duty to uphold the integrity of the administration of justice in accordance with the judicial mandate prescribed by Article 34.1 of the Constitution. In strictness, therefore, this duty accordingly operates independently of any discretion conferred by s. 509(1) of the 2014 Act, although, of course, any question of actual or potential abuse of process in practice also has a bearing on the exercise of that discretion.

Mr. Barrett's motives

39. There seems to be little doubt but that one of the reasons why Mr. Barrett has now elected to present this petition is to seek to preserve his control over the petitioning companies. In the light of the difficulties that subsequently emerged in relation to a potentially large VAT clawback, along with a potential capital gains tax liability in the event that the Meryck Hotel were to be sold, he appears now to have concluded that the 2016 agreement was not perhaps as advantageous to him and his companies as he might first have thought. Put bluntly, he seems to have concluded that examinership now seemed a better option than the 2016 agreement.

40. It must be stressed, of course, that the present petition concerns an application to the High Court to request it to exercise a statutory discretion conferred by an Act of the Oireachtas. There is, admittedly, some authority for the proposition that even in the case of a judicial exercise of a statutory power, the motives of the applicant may nonetheless be relevant if the object of the proceedings is to ensure that the statutory power is exercised for collateral or even improper purposes.

41. Thus, for example, in *Leen v. Aer Rianta* [2003] 4 I.R. 394 – a case where the applicant had sought a planning injunction pursuant to s. 160 of the Planning and Development Act 2000 – McKechnie J. considered that the motives of the applicant were relevant to the exercise of his discretion as to whether to grant mandatory relief against the respondent. The essential complaint in that case was that a particular building in Shannon Airport was being operated in a manner contrary to the terms of its planning permission. McKechnie J. nonetheless considered it relevant that the applicant's real motive did not concern the planning status of Shannon Airport at all, but rather that the proceedings were simply an opportunistic vehicle whereby he could make it difficult for the Airport to operate, thereby advancing his real objective, which was to prevent or hinder the use of these transport facilities by US troops on their way to theatres of war in Afghanistan and Iraq respectively. One can find similar traces of a potential abuse of rights/good faith doctrine in other s. 160 cases, such as where developers have the invoked s. 160 process in order to prevent or delay their competitors finishing other developments which might be in competition with the applicants' own projects: see, e.g., the comments of O'Sullivan J. in *Altara Developments Ltd. v. Ventola Ltd*. [2005] IEHC 312.

42. The decision of the Supreme Court in *Re Bula Ltd.* [1990] 1 I.R. 440 is perhaps even more germane. In that case a particular company, Munster Base Metals Ltd. ("MBM") had secured a judgment against Bula Ltd. which was itself hopelessly insolvent. MBM then proceeded to register a judgment mortgage against certain properties of Bula thereby becoming a secured creditor in the process. The other secured creditors sought to forestall this by applying to the High Court to have Bula wound up. In these special circumstances the Supreme Court held that the presentation of the petition was abusive in that the conduct of the secured creditors was tainted by their improper motives of seeking to defeat MBM's status as a secured creditor as distinct from seeking to recover the banks' debts: see [1990] 1 I.R. 440, 447, *per* McCarthy J.

43. In my view, however, it is unnecessary to explore for present purpose the extent to which – if at all – there is a general abuse of rights doctrine in our law or the extent to which motive can be relevant to the exercise of statutory power such as in the present case. This is because so because in the first instance it was the companies – and not Mr. Barrett – who were the petitioners. But even if the subjective motives of Mr. Barrett can be ascribed to the companies (a point on which it is unnecessary to express any view) and even if Mr. Barrett was indeed principally actuated by the motive of ensuring that he and his family retained control of his companies, this could not be regarded as objective collateral to the entire examinership process. It is true that, as Clarke J. observed in *Re Traffic Group*, the principal object of the examinership system is to rescue otherwise viable enterprises - thereby safeguarding employment and the general economic welfare of the community in the process – and not to protect shareholders from the consequences of poor business decisions. But the Oireachtas is not so naïve as to believe that the examinership process is triggered for purely altruistic motives by disinterested petitioners who are simply anxious to save the jobs of employees or to protect the general economic welfare of the community. It is to be expected instead that all those involved in the examinership process – whether it be the directors of insolvent companies, unsecured trade creditors or secured credit institutions such as banks – will all be actuated by the ordinary commercial instincts of making a profit and avoiding a loss. This is all part and parcel of the ordinary commercial and business life.

44. It is, perhaps, possible to envisage circumstances where the examinership process was indeed triggered for an improper purpose, such as, for example, where the process was initiated in a spiteful and malicious fashion for the sole and exclusive purpose of damaging a business rival. Indeed, the decision of the Supreme Court in *Bula* may well be regarded as an example of where an application for a winding-up was improperly made for the purpose of disadvantaging a rival creditor. By definition, however, the facts of such a case would have to be exceptional. It is, in any event, unnecessary, to consider this question any further because nothing of the kind arises in the present case.

45. Baker J. took a similar view of this question in her judgment in *Re Regan Developments Ltd.* [2017] IEHC 156 where she rejected the argument that the fact that the owners of the petitioning companies wished to retain family ownership of at least some of the business was itself evidence of some ulterior or improper motive. In any event, as she observed, the wishes and expectations of the family could not be:

> "…central to the considerations of the examiner who must engage with the financial difficulties facing these companies in the light of reasonably available investments and restructuring, and in the context of the statutory role."

46. I entirely agree with this analysis which is readily applicable to the present case. It is sufficient to say, therefore, that even if Mr. Barrett was prompted by his anxiety to retain control of the companies, this could not in itself be regarded as an improper motive which was relevant to the exercise of a judicial discretion as to whether to appoint an examiner under s. 509(1) of the 2014 Act.

The allegation of on-disclosure

47. It is clear that there is a duty of utmost good faith on both petitioner and independent expert in the preparation and presentation of the petition and in the preparation of the independent expert report. Such an obligation is inherent in any *ex parte* application (see, e.g., *The State (Vozza) v. ó Floinn* [1957] I.R. 227, 251 per Kingsmill Moore J.) and this is also true of the examinership process as well (see, e.g., *Re Wogans (Drogheda) Ltd. (No.3)*, High Court, 9th February 1993; *Re Bookfinders Ltd.* [2014] IEHC 769). In any event, s. 518 of the 2014 Act expressly imposes such an obligation of utmost good faith on both the petitioner and the independent expert.

48. So far as the allegation of non-disclosure is concerned, Deutsche contend that there was material non-disclosure in the following respects

> (a) Mr Barrett failed to disclose his significant personal liabilities to the Bank and those of Talebury (a related company) and the security granted by them.
>
> (b) It was not disclosed that the Bank agreed to the majority of the requested amendments to the settlement agreement, which included an increased provision of funding for Head Office expenses and the redemption of some of Mr Barrett's

existing director's loans.

(c) It was not disclosed that, although the settlement agreement provided for a long-stop date for the re-financing of core assets , the Bank acceded to a request for an extension, enabling the core assets to be refinanced.

(d) There was a failure to disclose that the settlement agreement provided significant benefits to the companies and to Mr Barrett, which cannot be replicated through an examinership process, including effectively limiting the Bank's recourse to the secured assets, with the possibility of the release of certain secured assets.

(e) It was not disclosed that the Bank had agreed to assign any residual debt (which inevitably will be substantial) to a nominee of Mr Barrett for nominal consideration, thereby effectively eliminating the Bank as a secured lender.

(f) The fact that there was nothing more than an oral and uncertain offer to refinance the Meyrick Hotel was not disclosed.

(g) It was also (wrongly) suggested that there was an obligation on the Bank to engage in dialogue with Mr Barrett regarding the sale of the Meyrick Hotel, which suggestion was contrary to the provisions of clause 5.2.

49. In his judgment O'Connor J. said that he considered that:

> "… the petitioners should have been more forthcoming about the considerable latitude already given by Deutsche and could have engaged with Deutsche in advance of the petition to obtain Deutsche's view and assurances about preserving jobs. The primary motivation of Mr. Barrett and his companies to retain control was not alluded to specifically."

50. The judge added that that there was a lack of candour on the part of the petitioners and that the breach of s. 518 of the 2014 Act (the good faith obligation) was not saved by an application of a proportionality test.

51. Some of these suggested omissions cannot be regarded as material or relevant. Thus, for example, the fact that Deutsche may have agreed to the majority of Mr. Barrett's requests in respect of the draft settlement agreement is immaterial, given that what the parties agreed counted was the agreement itself. The fact that the Bank agreed to an extension of the long stop date (thereby facilitating re-financing) is at most a detail in the context of the overall agreement. While O'Connor J. considered that the failure to allude to Mr. Barrett's motivation in presenting the petitions on behalf of the companies to be the most material omission of all, yet for the reasons set out elsewhere in this judgment, I do not, with respect, consider that the issue of motive of the petitioning companies was a dispositive, at least so far as the present case is concerned.

52. But beyond all of this it is clear that in a highly complex matter such as the present application, the essential features of the history of the inter-action between the parties were fully disclosed to Meenan J., not least if all due allowances are made for the exigencies of the situation having regard to the urgent and out of hours nature of the *ex parte* application, It is clear from the transcript of the digital audio recording of that hearing before Meenan J. that counsel for the petitioner was at all times acutely conscious of his obligations to make proper disclosure to the Court and to alert the judge to possible or potential arguments which Deutsche might be expected to make if the matter were later to proceed to an *inter-partes* hearing. It is only fair to record that in the course of the appeal hearing Deutsche fully acknowledged that counsel for the petitioners had fully discharged that professional duty before Meenan J.

53. The petition which was presented to the High Court was itself a relatively lengthy document. It was accompanied by verifying affidavits along with detailed exhibits. Critically, however, the 2016 agreement was exhibited, along with some – admittedly not all – of the extensive correspondence which had been exchanged between the parties in the wake of that settlement. It would, of course, be difficult for any judge to absorb all the details and nuances of a highly commercial dispute of this in the course of even an extended *ex parte* hearing such as the present one. In the aftermath of such hearings it is almost always possible to point to the existence of other issues which might with advantage have been explored at greater length or in respect of other arguments might have raised.

54. Taken in the round, therefore, it is nonetheless clear that the substance of the dispute and the issues likely to be raised were fairly disclosed to Meenan J, at that *ex parte* hearing, I would accordingly reject the argument that there was a lack of candour or failure to make proper disclosure.

Whether the court should decline to appoint an examiner by reason of the prior settlement agreement

55. The principal argument advanced by Deutsche regarding the exercise of the discretion argument is that the parties had already entered into what amounted to a freely negotiated scheme of arrangement to address the legacy debt issue by reason of the provisions of the December 2016 agreement. It submits that in these circumstances the Court should not, in effect, permit the companies to walk away from that agreement through the mechanism of the examinership process simply because that agreement is no longer perceived to be quite as advantageous as had been previously thought, whether by reason of the subsequent emergence of the VAT clawback issue and capital gains tax liability in relation to the potential sale of the Meyrick Hotel on a stand alone basis in the manner provided for by that agreement or otherwise. It points to the importance which the courts routinely attach to settlement agreements of this kind.

56. There is no doubt but that in this respect Deutsche have raised a very important and weighty point. As I indicated at the outset of this judgment, the fact that – with one possible exception - this precise issue does not appear to have featured in the otherwise extensive examinership jurisprudence is perhaps somewhat surprising. The issue is, however, squarely presented by these appeals and cross-appeals. One of the reasons why this issue is so troubling is that the Court is effectively faced with a clash of important policy values, namely, the importance of upholding settlement agreements on the one hand and the effective operation of the examinership process as embodied in the 2014 Act on the other. It does not seem possible – at least so far as the present case is concerned - to achieve a resolution of these issues without at least to some degree compromising one or other of these principles.

57. The importance of upholding settlement agreements is obvious and does not require any real elaboration. This was recognised by O'Connor J. in his judgment in the High Court as a ground for refusing the appointment of an examiner on discretionary grounds:

> "Applications for the appointment of examiners should not be encouraged by professionals or the Court to undermine the terms of debt settlement agreements for groups of companies or to initiate renegotiations of such agreements."

58. The decision of Baker J. in *Re JJ Red Holdings Ltd.* [2016] IEHC 524 is, however, perhaps the only other case to date where this

question has been explored in the context of the examinership process. In *JJ Red Holdings* the petitioning company was a tenant which had ran up substantial arrears of rent. The landlord's interest was then acquired by a new investor, who then sought to forfeit the lease. This prompted a spate of litigation, which was compromised with the tenant agreeing to pay a reduced sum in respect of arrears, an acknowledgement of the passing rent, and various provisions in relation to enforcement. Baker J. held that in these circumstances the presentation of the examinership petition by the company amounted to an abuse of process. She said:

> "I consider that In *re Vantive Holdings (No. 2)* [2010] 2 I.R. 118 is authority, not merely for the propositions that there not be successive unexplained and unjustified petitions seeking the protection of the court in respect of the same company, but also that *if the presentation of the petition has the effect of re-opening an issue between parties which had already been determined that it may be an abuse of process to permit that to happen.*" (emphasis supplied)

59. Baker J. went on to comment that a court would have cause for concern if the sole purpose of examinership were to protect shareholders. If it were:

> "to protect the company from being required to perform obligations freely, and [the landlord] says irresponsibly, entered into only three weeks before the petition was presented, then the motive for the presentation of the petition could be seen as one by which the company seeks to avoid those obligations and is less focused on the protection of the enterprise than on a desire to reschedule or renegotiate that agreement."

60. With great respect to Baker J., I fear I cannot agree with her reasoning in this case. It is true that in *Vantive Holdings (No.2)* the Supreme Court held that the presentation of a second examinership petition amounted to an abuse of process. But that was in a context of where the petitioner had omitted key information in the first unsuccessful petition for examinership. It is clear from the Supreme Court judgments that the Court considered it necessarily implicit in the statutory scheme that an applicant for examinership would normally put the entirety of its case in the first petition and not litigate in a piecemeal fashion. Viewed thus, *Vantive Holdings (No.2)* can be regarded as a classic example of what is sometimes described as litigation misconduct.

61. Contrary to what O'Connor J. suggested in the present case and what Baker J. said in *JJ Red Holdings*, I do not think that the presentation of an examinership petition in the face of a prior settlement or agreement can *in itself* be regarded as an abuse of process properly so called, since the petition was presented for entirely proper motives and objectives. If, however, the existence of such a settlement agreement were to operate as either precluding the presentation of a petition on the one hand or as justifying on discretionary grounds the non-appointment of an examiner on the other, it could only be by reason of what amounted to a contractual commitment on the part of the petitioning company that it would not seek to have an examiner appointed.

62. In considering this question it is first necessary to examine whether the 2016 agreement precluded the companies from the presenting the petition in the first instance. It is only in the event that the 2016 agreement did not have this effect that it will then be necessary to go to consider the question of whether the court should, in any event, decline to exercise its discretion to appoint an examiner by reason of the existence of the prior agreement.

Whether the 2016 agreement precludes an application for examinership

63. For my part, I do not consider that the 2016 agreement has the effect of precluding an application for examinership. First, it does not seek positively in terms to exclude or to prevent applications for examinership, although it might have sought to do so. Indeed, clause 1(j)(ii) of the 2016 agreement contemplates that this might occur, since it provides that an application for examinership is to be regarded as a "terminating event" which would in principle entitle the Bank to terminate the agreement. Second, great emphasis was laid by the Bank on the wording of clause 2.4 whereby the companies agreed "not to take any legal action of any nature*….against the Bank* in respect of the total liabilities or in connection with the loan documents." (emphasis supplied) Yet, as Murray C.J. made clear in *Vantive Holdings (No.2)*, an application for examinership cannot be regarded as inter partes litigation of the traditional kind, so that such an application cannot be regarded as an action against the Bank as such.

64. There is, of course, in any event, a constitutional right of access to the courts: see, e.g., *Macauley v. Minister for Posts and Telegraphs* [1966] I.R. 345. Given the importance of that right, it would be necessary to ensure that any exclusion of that right by contract would have to be done in the clearest of terms. Moreover, as Finlay Geoghegan J. observed in her judgment in *Treasury Holdings v. National Asset Management Agency* [2012] IEHC 297, for such a contractual waiver of the constitutional right of access to the courts to be effective, it would, in the words of Walsh J. in *Murphy v. Stewart* [1973] I.R. 97, be necessary to show that the companies "had a clear knowledge of what [they were] doing and with that knowledge, deliberately and freely decided to make such a surrender or waiver."

65. In *Treasury Holdings* one of the issues was whether an agreement not to contest the validity of the appointment of a receiver. Applying *Murphy v. Stewart* principles, Finlay Geoghegan J. then observed:

> "As the non-contest undertaking may constitute a waiver or surrender of Treasury's right of access to the courts to challenge the decision appointing receivers, it appears to me that to be enforceable the Court must be satisfied that Treasury had knowledge of what it was doing and freely decided to make such waiver."

66. Applying these principles here, it seems to me that even if it were to be accepted (contrary to my view) that the 2016 agreement excluded the companies' statutory right to apply for examinership, it would also have been necessary to show that such a right of access to the courts had been waived with full knowledge on the part of these self-same companies for such a clause to be effective. Deutsche has not, to my mind, advanced evidence such as would have enabled this Court to be so satisfied as to the existence of any such waiver.

67. In these circumstances it is unnecessary to explore any wider questions which might be thought to arise, such as, for example, whether a company can validly contract out of its right to apply for examinership. That issue was not directly before the Court and it would be inappropriate in these circumstances to express any view on this question.

Is the fact that an application for examinership would be inconsistent with the performance of the 2016 agreement a relevant factor which the court should weigh in exercising its discretion whether to appoint an examiner under s. 509(1) of the 2014 Act?

68. Even if the 2016 agreement did not have the effect of excluding the right of the petitioning companies to apply for examinership, a related question is whether by reason of the existence of that settlement agreement this Court should decline on discretionary grounds to make an order appointing an examiner in this case in view of the general importance of upholding agreements of this kind.

69. It must first be accepted that, as Deutsche strongly argue, examinership would be inconsistent with the orderly and timely

performance of the companies' obligations under the 2016 agreement. Instead of a consensual disposal of various assets for the benefit of Deutsche by reference to an agreed time-table, the process is thereby changed to a court-supervised process with a somewhat different time-frame. The entire process involves a consideration of the rights of third parties such as unsecured trade creditors and employees and it may ultimately involve a scheme of arrangement which cuts across key provisions of the 2016 agreement. Most fundamentally of all, the process is transformed from the realm of contract involving two parties to a judicial process governed by Part 10 of the 2014 Act.

70. Is this fact, then, a relevant consideration which the court should take account in considering whether to exercise the discretion to appoint an examiner conferred by s. 509(1) of the 2014 Act?

71. In assessing this issue, it must be recalled that the courts must ensure that the effective operation of Part 10 of the 2014 Act is not stultified. It is, perhaps, easy to overlook the fact that the 2014 Act is, in many respects, quite radical in its method of operation. While lawyers and judges alike frequently speak of the importance of upholding contracts and consensual agreements, no one will get very far with an examinership system if this principle – which is otherwise of first importance in the operation of the rest of the legal system – were to be applied rigidly within the confines of Part 10 of the 2014 Act.

72. The system of examinership contained in Part 10 of the 2014 Act involves in the first instance debt postponement during the currency of the examinership period and the court protection thereby entailed (ss. 520 and 521) and, in the event that a scheme of arrangement is judicially approved under s. 541, this will inevitably involve debt abatement, debt restructuring and debt write-offs as part of any such scheme. After all, the entire premise of the scheme of arrangement provisions of s. 541 is that some or all classes of creditors will suffer debt impairment as part of the end result of the examinership process. The very act of the confirmation of the scheme of arrangement in turn entails a significant variation – and, in some instances, the effective destruction - by judicial decision of a variety of contracts, loan agreements and debentures, all of which contain the obligation – many expressed in solemn form - to pay or to repay money in a timely fashion.

73. In passing I might observe that none of this is to offer any view as to whether any scheme of arrangement will, if proposed, ultimately receive judicial approval under s. 541. The requirement, however, contained in s. 542(4)(b)(ii) of the 2014 Act that any such proposal must be fair to all classes of creditors is the ultimate statutory safeguard for creditors such as Deutsche. At that hearing, it will be able to point to the fact to a range of factors such as that it is the owner of significant debt, to its existing security, the agreement of 2016 coupled with the fact that its appointment of a receiver was overtaken by the appointment of an interim examiner along with such other factors as it may wish to marshal in support of its argument that any such proposed scheme would be unfair to it. I stress again that it would, of course, be entirely premature to offer a view on any of these arguments: I mention this point simply to observe that the statutory requirement that any such proposal must be fair to all classes of creditors is the ultimate safeguard for creditors such as Deutsche.

74. Returning now to the issue at hand, for my part, however, I do not think that the comments of Baker J. in *JJ Red Holdings* can be taken quite literally so far as the rest of the examinership system is concerned. Take the following not untypical example: let us suppose that company A sues company B for €2m. Company B disputes the debt on a variety of grounds and is perhaps even partially successful in defending the proceedings, so that the High Court ultimately gives judgment against company B for €1.5m. Company B realises immediately that it cannot survive if it has to pay this debt, but it is clear that it otherwise has a viable business if the debt is partially written-off or otherwise re-structured. Is to be suggested that company B could not successfully apply to have an examiner appointed *merely* because the examinership could only be successful if a High Court judgment for a money sum was somehow varied, negated or set aside in any proposed scheme of arrangement that it might ultimately be proposed under s. 539 of the 2014 Act? That question answers itself, because if it were to be answered otherwise than in the negative, it would mean that examinership system envisaged by the 2014 Act simply could not function effectively.

75. Against that background it seems to me that it is all a question of degree. Take the present case: if Deutsche had sued the companies to recover the legacy debt, could it matter for examinership purposes that the companies had acknowledged the debt in correspondence or that they had submitted to judgment or, indeed, purported to dispute the debt in judicial proceedings before judgment was ultimately entered against them following a judicial determination? Again, all these questions must in principle also be answered in the negative if the examinership system is to work at all.

76. It is true that the present case there was an express agreement as to how the debt issue would be addressed and nor do I overlook the fact that the agreement had been freely entered into by both parties in recent months. It is clear that the companies gained valuable time as a result of this agreement and that some of the Barrett Group companies who are not the subject of the petition successfully re-financed during this period. It is also true that it could be contended that an application for examinership would be inconsistent not only with the performance of that agreement in good faith as required by clause 5.6 of the 2016 agreement, but also with many other features of that agreement.

77. Yet even if all of this is so, much the same could also have been said if, for example, the 2016 agreement provided for a debt re-financing agreement with a promise by the companies to repay a particular sum by a given date. Neither the fact that the companies would have benefited from such an arrangement nor the existence of an agreement to repay debt by a given date could be regarded as precluding the companies from either applying for examinership in the first instance or justifying a court not appointing an examiner on discretionary grounds.

78. Measured, therefore, against the statutory objectives of Part 10 of the 2014 Act, I can accordingly see no real difference in principle between the two types of contractual agreements so far as the appointment of an examiner is concerned. Of course, it may be said that such an application for examinership is inconsistent with prior contractual agreements and commitments on the part of the petitioning company or companies, but, as I have already sought to explain, this is true almost by definition of every application for examinership.

79. Putting this another way, I cannot find anything in the 2014 Act which enables a court considering an application for examinership to distinguish between the inevitable breach of a loan agreement (with, for example, a promise to repay a loan by a given date) on the one hand and a breach of the obligations contained in a debt settlement agreement regarding the orderly disposal of assets for debt reduction purposes on the other. One cannot really beautify by fancy words or nice phrases that which for some - and for secured lenders in particular - must be an unpalatable feature of the examinership process, namely, that it involves the judicial variation and dishonouring of all types of commercial contracts.

80. The fact, therefore, that an application for examinership would be inconsistent with the performance of the obligations imposed on a company under the terms of a settlement agreement cannot in itself - and I stress these words - be a dispositive consideration for a court determining whether to appoint an examiner under s. 509(1) of the 2014 Act, precisely because the entire examinership

system is premised on the assumption that pre-existing commercial contracts (of whatever kind) will be overridden, varied, negated and dishonoured in the wider public interest of rescuing an otherwise potentially viable company.

81. Once it is accepted that these companies have a reasonable prospect of survival as going concerns if admitted to the examinership process, then the existence of a prior debt settlement is not in itself a reason to refuse to appoint an examiner on discretionary grounds. Some may think that desirable that debt settlement agreements of this kind should fall outside the scope of Part 10 of the 2014 Act since the very possibility of examinership at a later date may well be thought to undermine the clear public policy objective of encouraging and facilitating the resolution of disputes by the parties themselves. I will merely say that if this case is considered to have to exposed a weakness in the manner in which the examinership system can operate that is ultimately a matter of policy for the Oireachtas to address.

Conclusions
82. Summing up, therefore, I am of the view that the:

83. First, the companies have demonstrated that they have a reasonable prospect of survival as going concerns in the sense envisaged by the Supreme Court in *Re Vantive Holdings*. As the reports of the independent expert and, indeed, the report of the interim examiner of 25th September 2017 demonstrate the trading companies are well capable of generating sufficient cash which would be sufficient to remunerate capital and to service loans, provided, of course – and it is an admittedly critical proviso - that the debt was written down sufficiently and that this could be done in a manner which was not unfair to the owner of that debt, Deutsche. Both the independent expert and the interim examiner have expressed confidence in the capacity of these companies to survive should an appropriate scheme of arrangement be ultimately put in place. The prospects of survival of the other companies stand or fall with the prospects of survival of the trading companies.

84. Second, for all the reasons set out in the judgment I do not think that there was any lack of candor or failure to make appropriate disclosure when moving the original *ex parte* application before Meenan J.

85. Third, the fact Mr. Barrett may subjectively wish to retain control or some of the assets of his group is not a material consideration so far as the exercise of the s. 509 discretion is concerned.

86. Fourth, while it is true that the present application for examinership is inconsistent with the performance of the obligations imposed on the companies under the terms of the 2016 settlement , this fact cannot *in itself* - and I stress these words - be a dispositive consideration for a court determining whether to appoint an examiner under s. 509(1) of the 2014 Act, precisely because the entire examinership system is premised on the assumption that pre-existing commercial contracts (of whatever kind) will be overridden, varied, negated and dishonoured in the wider public interest of rescuing an otherwise potentially viable company. None of this, of course, is to express any view whatever as to whether any scheme of arrangement (if one should be proposed) should ultimately be confirmed: it is simply to say that the existence of the present 2016 debt settlement arrangement cannot *in itself* preclude the appointment of an examiner, whether on some *ex ante* basis on the one hand or as to the exercise of discretion on the other.

87. It follows, therefore, I would appoint an examiner to all of the petitioning companies pursuant to s. 509(1) of the 2014 Act. I would accordingly allow the appeals of the companies and dismiss the cross-appeal of Deutsche.