

## THE HIGH COURT

[2015 No. 349 COS]

**IN THE MATTER OF PART 10 OF THE COMPANIES ACT 2014  
AND IN THE MATTER OF LODGEWOOD ENGINEERING LIMITED**

**JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 28th day of January, 2016**

1. The examiner in this matter has presented his report under s. 534 of the Companies Act 2014 (*"the Act"*) and it has been submitted to the court for consideration under s. 541 of the Act. The court has been asked by the examiner to confirm his proposals for a compromise and scheme of arrangement. At least one class of creditors whose interests or claims would be impaired by implementation of the proposals has accepted the proposals but two creditors (the Revenue Commissioners and Carlow Hire and Sales Limited) oppose the confirmation by the court.

2. In considering the proposals and the objections, the approach of the court has to be that set out by the Supreme Court in *McInerney Homes Limited v. The Companies (Amendment) Act 1990* [2011] IESC 31. At para. 33 of his judgment, O'Donnell J. considered the wording of s. 24 of the 1990 Act (which is in similar terms to s. 541(4) of the 2014 Act) stated:-

*"The court is specifically prohibited from approving a scheme unless it is satisfied that it is not unfairly prejudicial to any creditor. If the end point of the argument between a company, the examiner and a creditor is that the Court cannot say that it is satisfied that the proposal is not unfairly prejudicial to any interested party, then it cannot approve the scheme, whether or not that party has objected or appeared at the hearing. In practical terms, it follows that the person who seeks to have a scheme approved will seek to persuade the court that the scheme is not unfairly prejudicial, and in that sense can be said to bear the burden of proof..."*

3. The objections of the Revenue Commissioners were set out in an affidavit of Ms. Catherine Shivanan, sworn on 15th January, 2016, and by counsel for the Revenue at the confirmation hearing. The other creditor, Carlow Hire and Sales Limited, did not file an affidavit but was represented by counsel who supported the objections of the Revenue Commissioners and made submissions to the court.

4. The objecting creditors drew the court's attention to the fact that the bank debt of the company is not being written down and that the scheme does not provide for any certainty on the question as to whether or not agreement will be reached with the bank on the restructuring of the company's debt. On 18th December, 2015, the bank wrote to the examiner confirming the following:-

*"• AIB consents to the sale of the property from which the company trades and the release of the charge over the freehold property registered in the name of William Plummer and Margaret Plummer on the basis of receiving the net proceeds in reduction of the company's debt to AIB.*

*• AIB are agreeable to amalgamate the existing working capital facilities with the loan facilities and place on an interest only basis for twelve months. In that timescale, AIB through our Financial Solutions Group colleagues will engage with the company to assess the level of debt that the company can sustain and agree a customer strategy/re-structure.*

*• AIB will release the debtor book from our existing debenture in order to enable the company to avail of working capital facilities through Close Brothers Invoice Discounting or another funder..."*

5. Of particular concern to the objecting creditors is the statement in that letter that the bank will engage with the company *"...to assess the level of debt that the company can sustain and agree a customer strategy/re-structure"*. Currently, the company debt stands at €782,786. It is anticipated that a new facility will be agreed between the bank and the company but this is not certain. The court was urged by the objectors not to approve proposals which contain such vague and uncertain information concerning the future prospects of the company in circumstances where the preferential creditors will be paid 6% of their debts and the unsecured creditors 3% while the secured bank creditor will be repaid in full.

6. In the case of Carlow Hire and Sales Limited, it is entirely understandable that it feels disgruntled at the disparity between what it will recover in percentage terms compared to the bank. The objecting creditors also argue that the examiner is being unduly optimistic in stating that the company has a reasonable prospect of survival under the scheme.

7. Before I can approve the proposals, I have to be satisfied that the scheme is not unfairly prejudicial to the interests of any creditor which has not accepted the proposal or that the proposals are not unfairly prejudicial to the interests of any interested party. It appears that between 1997 and 2009, the company traded profitably although the extent of such profits was modest. The examiner has presented cash flow projections for the company to December 2017 and they appear to show profits which are sufficient to service its bank debt on either an interest only basis or a capital and interest basis. So far as the uncertainty surrounding the restructuring of the bank debt is concerned, I accept the evidence furnished by the examiner in his affidavit of 19th January, 2016, sworn in response to the objections of the Revenue Commissioners. I am satisfied that the bank has shown a positive commitment to supporting the company and there is a reasonable basis for believing that the company's facilities will be restructured during 2016 to a sustainable level. The bank has committed to an interest only repayment for a twelve month period during 2016 while it assesses the situation.

8. There is no doubt that the deficit of the company on a going concern basis is significantly less than on a winding up basis and the outcome is likely to be better for creditors in an examinership than in a winding up. I cannot ignore the fact that the bank debt is far greater than any other debt of the company and that the bank is a secured creditor. Having considered the evidence and the submissions in this case, it does not seem to me that there is any unfairness in the treatment of the different categories of creditor. The different treatment of the various classes of creditors does no more than reflect the position that would arise on a winding up having regard to the fact that some are secured and some are unsecured. In a winding up, the unsecured creditors would have recovered nothing.

9. The court has been asked to consider the position if the examinership fails and the company goes into liquidation. It is argued that in that event the bank – having cleared off all the other debtors – would find itself in a better position than before, absent the examinership. While this is theoretically possible, the evidence would suggest that this is unlikely to happen and therefore I do not

regard it as a factor which I should take into account in coming to my decision. There is no evidence to suggest that the bank's statements in support of the company cannot be taken at face value.

10. If the scheme is approved, it will ensure the continued employment of at least sixteen employees of the company and this is a factor which I am entitled to take into account in reaching my decision. Insofar as some of the projected turnover has not been achieved in the final months of 2015, this can be attributed to the very mild weather and drop in sales of stoves manufactured by the company.

11. I have had regard to the matters outlined in the replying affidavit of the examiner sworn on 19th January, 2016, in response to the objections of the Revenue Commissioners. The affidavit addresses the concerns of the Revenue Commissioners and I accept the explanation of the examiner as to why the company has a reasonable prospect of survival under the proposed scheme and that it does not unfairly prejudice any particular creditor.

12. While there are some issues to be resolved between the company and the bank, I am satisfied that the bank is supportive of the company. I do not have to be certain that the scheme will achieve its purpose. But I am satisfied that the scheme, if approved, offers the company a reasonable prospect of survival. Accordingly, I approve the modified scheme presented to the court.