Neutral Citation: [2017] IEHC 156

THE HIGH COURT

[2017 No. 25 COS]

IN THE MATTER OF REGAN DEVELOPMENT LIMITED AND IN THE MATTER OF THE COMPANIES ACT 2014

IN THE MATTER OF MCGETTIGAN LIMITED AND IN THE MATTER OF THE COMPANIES ACT 2014

JUDGMENT of Ms. Justice Baker delivered on the 1st day of March, 2017.

1. On 23rd January, 2017, a petition was filed in the High Court seeking the protection of the court pursuant to s. 512 of the Companies Act 2004 ("the Act") and Neil Hughes was appointed an interim examiner of the two companies, Regan Development Limited ("Regan") and McGettigan Limited ("McGettigan"). This judgment is given on the application, pursuant to s. 509 of the Act that Mr. Hughes be appointed as examiner of Regan, and pursuant to s. 517 that he be appointed examiner of McGettigan, a related company. The petition is opposed by the first secured creditor, OCM EmRu Debtco DAC ("OCM") which is owed the sum of approximately €25m by the companies pursuant to various loan facilities and guarantees which OCM had acquired from National Asset Loan Management Limited.

2. Regan owns and operates the Regency Hotel, which incorporates a convenience store and restaurant, from premises on the Swords Road in the County of Dublin, and McGettigan owns and operates a licensed premise on Queen Street, Dublin 7 and four retail units in Bray, Co. Wicklow.

3. On 19th January, 2017, OCM served letters of demand on the two companies and on the following afternoon, a Friday afternoon, appointed Anne O'Dwyer of Duff & Phelps as receiver. At the hearing of the petition, an order was made pursuant to s. 522 of the Act that Ms. O'Dwyer shall cease to act as receiver pending further order of the court.

4. The petition for the appointment of an examiner was first presented before the High Court on Saturday, 21st January, 2015, but the order made by Murphy J. on that day was subsequently vacated on Monday, 23rd January, 2017, following legal argument, and the order restraining the receiver from acting was also vacated. The petition was then presented later in the afternoon of 23rd January, 2017, and that petition now stands for determination in this judgment.

Grounds of objection

5. OCM objects to the appointment of an examiner on two grounds:

> (a) It argues that there was a material omission from the petition and verifying affidavit of James McGettigan sworn on the 23rd January, 2017 in regard to certain conversations that were had with the receiver on the evening of the 20th January 2017, at the Regency Hotel premises.
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> (b) It argues that the petition for the appointment of an examiner has been presented for improper motive, and that the purpose of the petition is in truth the protection of the McGettigan's family interest in the various business enterprises of the companies.

Financial background

6. Regan is a private company limited by shares incorporated on 11th May, 1960 and its directors and shareholders are various members of the McGettigan family, and it operates a substantial hotel premises at the Regency Hotel, a three-star hotel with leisure and conference facilities, a bar and restaurant, and employs 109 persons on a full and part-time basis. Its turnover in the year ending 31st July, 2016 was €7.5 million, and that was an increase from €6.6 million for the year ending 31st July, 2014. The EBITDA of the company has been in excess of €1 million in the three accounting years 2014, 2015 and 2016.

7. The primary source of difficulty experienced by Regan which has led to it becoming insolvent is two-fold: The business of the hotel has been severely negatively impacted by a well-publicized shooting of a member of the public in the hotel in February, 2016. The company had significant liabilities to AIB which were transferred to NAMA and ultimately sold by NAMA to OCM. The company also has other substantial and secured liability, the next largest one being a debt to Carval of €635,400.00 which has a second ranking fixed charge over the assets of Regan. The company was, as were many businesses in the sector, adversely impacted by the financial crisis, and, as a result of limited cash flow in the years between 2008 and 2013, limited expenditure was committed to refurbishment and upgrading of the hotel. Regan accepts that the further prospects of the hotel are more likely to be positive should sufficient capital expenditure be employed to increase the standing of the hotel to a four-star hotel at minimum.

8. McGettigan is a guarantor of the liabilities of Regan, and would be solvent and able to show positive trading apart from this. It operates a public house on Queen Street in Dublin City Centre, and owns four retail units in Bray, Co Wicklow. The business is described as "relatively stable".

9. The two companies have operated on a revenue compliant basis save for recent tax liabilities. Revenue does not oppose the petition.

Agreed facts

10. It is agreed that the companies are insolvent, and for present purposes that they have a reasonable prospect of survival, subject only to the securing of investment to support the further working capital and investment requirements of Regan and the restructuring or resolution of existing secured debt. The only creditor who opposes the petition is OCM, but it would be fair to say that it is most substantial creditor by far, and the other secured debt ranks second behind it.

11. OCM opposes the appointment of an examiner on the overlapping but separate discretionary factors identified in the Act.

Bad faith/material non-disclosure

12. Section 518 of the Act, formerly s. 4A of the Companies (Amendment) Act 1990, states as follows:

> "The Court may decline to hear a Petition presented to it, or, as the case may be, may decline to continue hearing such Petition if it appears to the Court that, in the preparation or presentation of the Petition or in the preparation of the report of the independent expert, the Petitioner or independent expert –

(a) 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; or

(b) has in any other way failed to exercise utmost good faith."

13. These provisions are a statutory recognition of the common law duty of good faith explained by Costello J. in *Re Wogans Drogheda Ltd. (No. 3)* (Unreported, High Court, Costello J., 9th February, 1993) as follows:

> "When an application is made by a company for a protection order under the 1990 Act it seems to me that the directors and all those associated with the application (including their professional advisers) are obliged to exercise the utmost good faith and that the statutory duty exists not just on an ex-parte application to appoint an interim examiner but also on the application itself.
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> This is because (a) of necessity the Court must depend to a considerable extent on the truth of what it is told by the company and (b) because of the potential injustice involved in the making of a protection order when the proper course is to wind up the company. This duty involves an obligation to disclose all relevant facts material to the exercise by the Court of its discretion. A fortiori, it involves a duty not to deliberately mislead the Court by false evidence.
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> Not every breach of duty to exercise good faith will amount to an abuse of the Court's processes. But where an application for a protection order is made on evidence which is known to be false this amounts to an abuse of the process. When an application is made for an improper reason, this also amounts to an abuse of the process of the Court".

14. Clarke J. quoted that dicta with approval in his judgment in *Re Traffic Group Ltd.* [2007] IEHC 445, [2008] 3 I.R. 253 in which he considered it was possible to make an order by which the wrongdoing of the petitioner was recognised and suitably dealt with, and in that context he accepted an undertaking by the petitioners not to be involved in the business of the company for a period of time after the conclusion of the examinership process.

15. Irvine J., in *O'Flynn v. Carbon Finance Ltd. & Ors.* [2014] IEHC 458, emphasised the extent of the duty on all persons associated with the presentation of a petition to exercise the utmost good faith and disclose all relevant information to the court hearing the petition, and that the test at that stage of the process does not engage the question of whether the company is likely to emerge successfully from examinership. She said the following at para. 113:

> "In this regard the behaviour of the petitioner in relation to disclosures is highly relevant. It is not a defence to a failure to exercise the utmost good faith to say that the companies are suitable for the examinership process in any event. Suitability for examinership is a separate issue to the standard of disclosure required both by the nature of an order granted ex parte and the specific statutory requirement under Section 4A of the 1990 Act."

16. The matters in respect in which it is argued that full disclosure was not made arose following a number of meetings between Mr. McGettigan and the receiver on the evening of 20th January, 2017. The receiver says on affidavit that Mr. McGettigan was "hostile" and aggressive towards her, and made what she regarded as a threat to remove the IT facilities including IT platforms, telephone systems and email which operated the hotel booking system, on the basis that it was asserted that this system was owned by another company within the McGettigan group, McGettigan Management Services Limited ("MMSL"). Ms. O'Dwyer says on affidavit that Mr. McGettigan threatened to remove all the equipment on that Friday evening and that he had a team of people travelling to the hotel to do so.

17. The issue before me is not whether adequate evidence is established as to the ownership of the booking system, but whether Mr. McGettigan, who swore the grounding affidavits on behalf of both petitioners, ought to have disclosed this conversation and the threat he made, in the affidavit sworn by him for the purposes of supporting the petition on 13th February, 2017.

18. Mr. McGettigan in his second supplemental affidavit sworn on 17th February, 2017, does not deny that he did make the threat to remove the equipment and system, but says that he did not consider it necessary or appropriate to mention those matters in his affidavit grounding the petition, or instruct his counsel to mention them in the course of the hearing, because he did not "actually carry out the threat" and "had no intention of carrying out the threat". He says in those circumstances the threat was an immaterial and empty threat, and that that he did not deliberately withhold information.

19. I reject the assertion by Mr. McGettigan that the threat was not material on account of the fact that he never had any intention to carry it out. I consider that it was material that Ms. O'Dwyer believed, that equipment essential to the carrying out of the business of the hotel was to be removed, and that a doubt existed as to its true ownership. Her affidavit in this context is not controverted, and she was sufficiently concerned to try to achieve an accommodation at a meeting later in the evening, sometime after 10:15pm, between herself and Mr. McGettigan and his brother.

20. Ms. O'Dwyer exhibits in her affidavit sworn on 13th February, 2017 an attendance note prepared by colleague Declan Taite of that meeting and on the last page identifies that agreement was reached. The petitioner says that the agreement was that a further meeting would be held, but OCM argues that the agreement was clearly one that the items of equipment would not be removed and that a further meeting would be held on the following day. Ms. O'Dwyer does not in the narrative of her affidavit explain what she believed was the essence of the agreement reached at 10:30pm following the third and last meeting. In those circumstances, I cannot conclude or draw an inference as to what was agreed at this last meeting, save to note that the IT equipment was not removed and remains in *situ*.

21. I regard the omission as material because at the date of the swearing of the grounding affidavit to support the petition, Mr. McGettigan had not made it clear to Ms. O'Dwyer that he was no longer asserting that Regan did not have ownership of the equipment and system, and Ms. O'Dwyer herself was acting under the apprehension that the threat to remove the equipment and system was still live. The hotel could never have hoped to trade without a sophisticated and functioning booking system, and its possible loss was likely to have been a matter of grave concern to Ms. O'Dwyer, and would have been of concern to the court in the context of an application to appoint an interim examiner unless some assurance could have been obtained from MMSL that the equipment would be left in place pending the resolution of an examinership process. Therefore, this was a matter to which a court would have had regard had it been disclosed, and it was therefore a matter material to the presentation of the petition.

22. However not all non-disclosure will result in the court exercising its jurisdiction to dismiss a petition, and in that regard I adopt the approach of Costello J. in *Re Bookfinders Limited (In Interim Examinership) [*2015] IEHC 769 at para. 34:

> "In this case I believe that a refusal by the court to hear the Petition would be a draconian response to the particular failures in this case. It would be disproportionate to the gravity of the offence. It would have the result of imperilling the employment of 49 people who were in no way responsible for the offending behaviour. I therefore refuse the application to refuse to hear the Petition pursuant to s. 518".

23. The matter not disclosed at the presentation of the petition in that case was the fact that personal guarantees had been called in a few days earlier, a floating charge had crystallised and a receiver appointed to the undertaking of the company. Costello J. held that there was a breach of the requirements of disclosure contained in s. 518 as a result of which the court had jurisdiction to decline to hear the petition.

24. I consider in the present case that the failure to disclose that a dispute had been raised with regard to the ownership of the booking equipment and system was one that was material, and of great relevance to the independent expert who prepared the IER, whose figures undoubtedly were predicated on an assumption that potential customers of the hotel would be able to book through the existing booking platform.

Conclusion on the first ground of objection
25. This is a petition to preserve the undertaking of two companies which employ well over a hundred people and where the underlying business is profitable. The prospects of a company coming through the examinership process is not one that is relevant to the exercise of my discretion to refuse to hear a petition on account of non-disclosure, but I adopt the approach of Costello J. that the prospects of a successful examinership is relevant to the consideration of what consequence should flow from a breach.

26. Costello J. concluded that to refuse to hear the petition on account of non-disclosure would be "draconian". The non-disclosure in the petition regarding the Bookfinders Company was of matters which were highly and directly relevant to the petition, and it would be difficult to envisage a matter more relevant than the fact that a receiver had been appointed to the undertaking of the company and a floating charge had crystallised in the days prior to the presentation of the petition. In the present case the extent of non-disclosure was less egregious than that found by Costello J, in *Re Bookfinders Limited* (In Interim Examinership).

27. This petition is not of the exceptional nature identified by Irvine J. in *O'Flynn Construction v. Carbon Finance Ltd. & Ors.*, and she considered that the dismissal of the petition "does not of itself pose a threat to the survival of the companies. Rather, it places the prospects of survival in the hands of the party who has so recently petitioned the court in this same matter." The present petition is brought by the companies, and the prospects of the survival of the companies is intrinsically linked to the petition.

28. I consider that the non-disclosure is not of an extent and nature that would warrant that I refuse to further hear the petition.

True purpose of the petition
29. Counsel for OCM argues that the primary purpose for which the petition was presented was to ensure that the existing ultimate beneficial shareholders would retain ownership and control of the companies, and in particular of the business of the hotel. It is argued that as the affidavit evidence is that it is intended that the receiver appointed by OCM will continue to trade, that jobs will be preserved in a receivership as well as in examinership.

30. The affidavit of Tony Noonan, a director of OCM, sworn on 10th February, 2017 avers to the intention of OCM, and of the receiver, to "continue the hotel in operation as a trading receivership". It is clear from the affidavit evidence that the receiver has already appointed a new operator to manage the hotel, Choice Hotels Limited, and that the immediate intention of the receiver is to continue to maintain the existing jobs and the existing hotel business.

31. The receiver too expresses on affidavit her intention to continue to trade.

32. In those circumstances, there is no immediate risk to employment.

33. Mr. McGettigan in his verifying affidavit, sworn on 23rd January, 2017 narrates discussions that he has had with banks and other financiers with a view to raising finance. At para. 28 he acknowledges that any examiner appointed by the court "may have to invite proposals from other unconnected parties". It is argued by OCM that these averments point to the conclusion that the Mr. McGettigan family are attempting to arrange matters so that they do not lose control of the companies.

34. At para. 2.31 of the IER, under the heading "the future for the companies", while it points to a future restructuring of the companies, it suggests that a business plan prepared post restructuring would involve "a very extensive programme of upgrading the hotel and relaunching and rebranding it as part of a larger group of hotels owned by the McGettigan Group".

35. It is argued in those circumstances that in essence the purpose of the present application is to give the companies breathing space in which they can refinance the loans to OCM, and that the legislation was never intended to provide what counsel described as a "statutory standstill" to enable a company to negotiate a debt swap. The purpose of examinership is to give a company breathing space to restructure its undertaking and not merely to refinance its borrowings.

36. OCM relies on the dicta of Clarke J. in *Re Traffic Group Limited*, as follows:

> "5.4 It is important to note that the Companies (Amendment) Act 1990 is not designed to immunise the principles or shareholders of a company from the consequences of the company concerned getting into financial difficulties. The value which shareholders may have in a company (whether they are involved in its management or not) may, in practice, be extinguished or greatly diminished by bad judgment in investing in the company in the first place, by bad management (either on the part of the investors themselves or those whom they trusted to run the company) or, indeed, plain bad luck. Whatever may be the cause, it does not seem to me that it is any part of the purpose of the Act to solve the difficulties of such shareholders howsoever those difficulties may have arisen. If the Act were so designed it might well give some truth to the verse penned at the time of the introduction of limited liability companies into our legal scheme, which suggested that such companies amounted to a conspiracy by gentlemen (and at the relevant time it almost always would have been gentlemen or those who claim to be such) whereby they met together to decide by how much they would not pay their debts.
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> 5.5 It is clear that the principal focus of the legislation is to enable, in an appropriate case, an enterprise to continue in existence for the benefit of the economy as a whole and, of equal, or indeed greater, importance to enable as many as possible of the jobs which may be at stake in such enterprise to be maintained for the benefit of the community in which the relevant employment is located. It is important both for the Court and, indeed, for examiners, to keep in mind that

such is a focus of the legislation. It is not designed to help shareholders whose investment has proved to be unsuccessful. It is to seek to save the enterprise and jobs."

37. This dicta of Clarke J. is often quoted in examinership matters, and correctly represents the legal position. The particular emphasis of OCM is the observation by Clarke J. at the end of the quote that examinership is not designed to help unlucky or unsuccessful shareholders. It is important in that context that what Clarke J. was considering was an argument that the court hearing an application in the examinership jurisdiction is required to engage with the interests of all persons concerned with the company including employees and creditors generally. It is not the function of the statutory scheme to enable shareholders to hold onto control of a company by virtue of the restructuring or forgiveness of debt. The context in which the dicta of Clarke J. was made was one where the proposals involved a very significant write-down of debt.

38. The observations of Clarke J. in Re Traffic Group Limited have been quoted with approval in the numerous subsequent judgments of the High Court including *Re Laragan Developments Limited* [2009] IEHC 390 (per Clarke J.), *Re Missford Limited* [2010] IEHC 11 (per Kelly J. at p. 16), *Re Camden Street Investments Limited* [2014] IEHC 86 (per Finlay Geoghegan J. at para. 59) and *Re Pelko Holdings Limited* [2014] IEHC 226 (per Hogan J.). In each of these cases, the court pointed to the overriding consideration in an examinership as being to preserve jobs and not to help shareholders whose investment have proven to be unsuccessful.

39. OCM also relies on the judgment of Clarke J. in *Re McSweeney Dispensers Limited* [2011] IEHC 494, where, having quoted from his judgment in *Re Traffic Group Limited*, he made the following observation at para. 4.5:

> "The jurisprudence thus appears to make clear that the examinership regime does not have as its purpose the saving of shareholders from their unsuccessful investments; that said, the legislation is equally designed to prevent the interests of any single creditor being advanced above those of the creditors as a whole or indeed those of the other interested parties."

40. The judgment in *Re Traffic Group Limited* was given at a confirmation hearing, and the judgment of Clarke J. in *Re McSweeney Dispensers Limited* was given in a precisely similar context to that arising in the present case, where there was objection to the appointment of an examiner.

41. The petitioner objects to the characterisation of the application as being one to protect the interests of the shareholders, or the ultimate beneficial ownership of the McGettigan family in the group of companies, and especially in the hotel business. The petitioner argues that the purpose of the examinership jurisdiction is not merely to preserve jobs but to preserve the company and its enterprise.

42. Counsel for the companies points to a dicta in my judgment in *Re Claremorris Tourism Limited* [2015] IEHC 796, where I said as follows:

> "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." (para. 18)

Discussion

43. The present application brings into sharp focus the practical and legal differences between a trading receivership and an examinership. The evidence is that at the present time, OCM intends that the receiver will continue to trade from the hotel premises, and that the hotel business and the jobs there and in the associated businesses will be preserved. It is argued that in those circumstances there is no real or practical difference between an examinership and a trading receivership, and that the examinership process ought not to be used when the effect of the appointment of an examiner would be to deny a secured creditor the benefit of its security, unless some difference is to be noted with regard to the prospects for employment by taking the examinership course.

44. OCM contends that the receivers will continue to trade from the hotel with a view to ultimately selling it as a going concern and that this result is to be preferred to one where the ultimate aim of the process is to preserve the McGettigan family control and ownership of the companies.

45. In *Re McSweeney Dispensers Limited*, Clarke J. considered at some length the difference between a trading receivership and a successful examinership where it was also contended that both options would broadly speaking secure the same survival of the enterprise and jobs. At para. 6.6 of his judgment he identified the primary difference between a trading receivership and a restructured company after the confirmation of a scheme of arrangement as being that in the former "the bank concerned will remain able to make decisions based only on its own interests and to the exclusion of the interests of other creditors".

46. A court, when exercising its jurisdiction in examinership, must have regard to all relevant interests, including the interests of the secured creditors of the enterprise and undertaking itself, of the employees and of all other creditors including unsecured trade creditors, and, of the local economy. The legislation requires that examinership may be engaged when the undertaking and enterprise of an insolvent company may be rescued in the process. The imperative is stated in s. 509(2) of the Act:

> "(2) The court shall not make an order under this section unless it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern."

47. The examinership process is intended to work towards the achieving of a scheme of arrangement which is fair to the interests of all parties, including creditors, employees and the undertaking as a whole. The examiner is obliged to perform his or her function with independence, transparency and professionalism, and in the light of an obligation to the process, and not to any one interested party or group.

48. The exercise engaged by an examiner is to explore all possibilities with a view to preserving the undertaking and enterprise of a company or companies. The examiner must seek expressions of interest from outside the shareholders, and that this is so derives from the obligation on the part of the examiner to achieve fairness to all parties concerned. Fairness to the employees and to the creditors, whether secured or unsecured, will mandate that the examiner be in a position to objectively advise the court that following his or her engagement with the company and exploration of possible scenarios for investment that the scheme is the best one that could be achieved in all of the circumstances.

49. The examiner in the present case will not be confined to considering the extent to which the members of the McGettigan family,

or their associates, are in a position to refinance the existing secured loans, and it is quite clear from the evidence already presented in the report of the interim examiner, and the IER, that considerable investment in refurbishment is also required in order that the hotel enterprise can be preserved and enhanced. Therefore even if it is, as is argued by OCM, the intention of the McGettigan shareholders that they will use the examinership process as a *moratorium* within which they can explore the possibility of refinancing the debt of OCM, the intention of the shareholders cannot prevail, as it is clear on the evidence that the survival of the companies requires not merely that they would be in a position to deal with secured debt but that they can raise sufficient investment or finance to engage with a refurbishment and development of the hotel business.

50. Thus, while OCM is concerned that the purpose of the examinership is not one which I should treat as *bona fide* for the preservation of jobs, I consider that its concerns are misplaced. The preservation of jobs is not the only function of the examinership process, albeit in the course of the years of the recession the preservation of jobs usually played a very large role in the exercise of the court's discretion. Equally legitimate is a concern to improve and strengthen the enterprise of a company with a view to improving its standing and business for the benefit of the economy.

51. 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.

Decision

52. Therefore, having regard to the evidence, and noting that this is an application to appoint an examiner and not a hearing to confirm a scheme of arrangement, I propose confirming the appointment of Mr. Hughes as examiner of the companies. I am satisfied that there was material non-disclosure, but not at a level which would engage my discretion to refuse to hear the examinership petition. I am not satisfied that the evidence points to an ulterior or improper motive for the presentation of the petition, and whilst it may be the wish of the McGettigan family to retain ownership of the companies, or at least of the core hotel business, their wishes and expectations are not, nor can they 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.