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In the Matter of
the Companies (Amendment) Act 1990 as amended
And
in the Matter of
Kilashee Schools Company Limited Faxhill Homes Limited Craigfort Taverns Limited Marchford Limited
Judgment of Mr Justice Peter Charleton delivered on the 9th day of May 2014

These are applications under the Companies (Amendment) Act 1990 to appoint an examiner to these four related companies, Kilashee, Faxhill, Craigfort and Marchford. The Revenue Commissioners have appeared and offered no opposition in respect of any company. National Assets Loan Management Limited opposes the appointment of an examiner to Faxhill. An interim examiner is already in place for Craigfort and Marchford but not for Faxhill or Kilashee; though there is no opposition to appointing an examiner to Kilashee.

Under the Act of 1990, creditors and members are entitled to oppose the appointment of an examiner. Here the interest of the opponent comes from it managing a loan to Faxhill originally made by AIB Bank plc which was taken over by the National Assets Management Agency following the banking crisis of 2008. The dimensions of the loan are disputed but the probability is that it is in the sum of €77 million. It was made directly to Faxhill. This is a property development company. It also owns the shares in the other companies, directly or through intermediary companies. Kilashee, Craigfort and Marchford guarantee these loans. In addition these companies may have mortgage obligations, though these do not require analysis in this judgment. There has been some discussion as to whether the objector has behaved reasonably in managing the loan and guarantee obligations. This has been brought into the case by way of argument as to the discretion of the Court should a case for the survival of some or all of the companies be made out. In so far as it is necessary to express a view on the limited evidence before the Court, the debt obligations appear to have been managed reasonably by the objector. Issues as to planning permission, unauthorised expenditure of funds and proper communication by the borrower Faxhill with the objector have also been debated. It is clear, however, that any issue as to discretion is minor compared to the difficult issue as whether an examiner should be appointed to any of the companies but particularly to Faxhill.

The central question is the extent to which a company may bring down another in a group through debts or be saved through having an examiner appointed to a related company. Here the company most challenged by debt is Faxhill. In that company's case there is no chance of any write down, but the corporate guarantees of Kilashee, Craigfort and Marchford may potentially be the subject of a scheme of arrangement. Often, guarantees of a company's debts are by directors and authorising a scheme of arrangement following on examination of a company has no effect on those personal obligations. This may be different because the guarantors are corporate. But, that is for another day.

A brief explanation of how these companies interact is called for. Faxhill has two directors and shareholders. Kilashee, Craigfort or Marchford share the same directors. There are no shareholders in those companies save for Faxhill or its corporate nominees. Faxhill also employs a chief financial officer who oversees the companies as a group and the management structures of Faxhill are claimed to be supplied to the other companies from it; this despite the directors of all the companies being the same two people.

There are valuable assets in the various companies. Faxhill holds a property portfolio and part of that portfolio is shares in the other companies and their assets. Central to all of this is the Kilashee House Hotel and Spa. This hotel is in a beautiful location between Kilcullen and Naas in County Kildare. In Naas town there is a related establishment called Lawlor's Hotel, an urban hotel controlled by Marchford. The landowning of the Kilashee hotel and surrounding grounds is complex. This map assists in understanding it:

The Kilashee hotel is on land owned by Craigfort and this amounts to about 15 acres; deep blue. Craigfort also runs the hotel and employs about 182 staff in that regard. Close by are lands used by the hotel to draw water from wells and for car parking and for quiet walks by guests and this is in the ownership of Kilashee and the area here is about 25 acres; light blue. So 40 acres in all are in use by the hotel through Craigfort and Kilashee. Contiguous and to the East are 223 acres of agricultural land which has planning permission for a golf course, about 90 acres, and the rest housing developments and this is in the ownership of Faxhill; white colour. In addition and completely seperatly, Faxhill holds two further sites and three residences in its property portfolio: a site at Dublin Road in Naas; 3.5 acres near Newbridge in County Kildare; a nice mews house at Morehampton Lane in Donnybrook; a partially completed residence in Athgarvan in County Kildare; and a 4 bedroom dwelling on Dublin Road in Naas. There has been an expression of interest dated 28th April 2014 in this portfolio but with no figures crystallising at this point. Finally, to complete the employment picture, Lawlor's Hotel in Naas employs just over 60 people who take their contracts from Marchford and Faxhill employs the group managing director and the group financial officer; just 2 people.

Appointment of an examiner

The test for appointing an examiner is set out in section 2 of the Companies (Amendment) Act 1990 as amended:

> (1) Subject to subsection (2), where it appears to the court that—
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> (a) a company is or is likely to be unable to pay its debts, and
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> (b) no notice of a resolution for the winding-up of the company has been given under section 252 of the Principal Act more than 7 days before the application hereinafter referred to, and
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> (c) no order has been made for the winding-up of the company, it may, on application by petition presented, appoint an examiner to the company for the purpose of examining the state of the company's affairs and performing such duties in relation to the company as may be imposed by or under this Act.
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> (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.

The other subsections deal with proof of a company's insolvency. Section 3 allows such a petition to be presented by the company, its directors, a creditor or prospective creditor or members holding at least one tenth of the share capital voting rights. Where a company is an insurer, only the relevant Minister may present the petition and where the company is a bank, only the Central Bank

may do so. Under section 3(7) an interim examiner may be appointed prior to the formal application on notice to major creditors, and more widely through newspaper advertisements. This happened here for two of the companies, Craigfort and Marchford, ostensibly to provide comfort in respect of wedding bookings over the next year and the need to deal with energy companies etc.

Prior to the Companies (Amendment)(No 2) Act 1999, the task of the courts in deciding whether a company had a prospect of survival was a difficult one, dependant as the courts solely were on the candour of petitioning affidavits, usually from directors or investors. Key provisions were then introduced into the Act of 1990 whereby section 3 was amended by the introduction of two additional subsections as follows:

> 3A In addition to the matters specified in subsection (4), a petition presented under section 2 shall be accompanied by a report in relation to the company prepared by a person (in this Act referred to as 'the independent accountant') who is either the auditor of the company or a person who is qualified to be appointed as an examiner of the company.
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> 3B The report of the independent accountant shall comprise the following:
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> (a) the names and permanent addresses of the officers of the company and, in so far as the independent accountant can establish, any person in accordance with whose directions or instructions the directors of the company are accustomed to act,
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> (b) the names of any other bodies corporate of which the directors of the company are also directors,
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> (c) a statement as to the affairs of the company, showing in so far as it is reasonably possible to do so, particulars of the company's assets and liabilities (including contingent and prospective liabilities) as at the latest practicable date, the names and addresses of its creditors, the securities held by them respectively and the dates when the securities were respectively given,
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> (d) whether in the opinion of the independent accountant any deficiency between the assets and liabilities of the company has been satisfactorily accounted for or, if not, whether there is evidence of a substantial disappearance of property that is not adequately accounted for,
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> (e) his opinion as to whether the company, and the whole or any part of its undertaking, would have a reasonable prospect of survival as a going concern and a statement of the conditions which he considers are essential to ensure such survival, whether as regards the internal management and controls of the company or otherwise,
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> (f) his opinion as to whether the formulation, acceptance and confirmation of proposals for a compromise or scheme of arrangement would offer a reasonable prospect of the survival of the company, and the whole or any part of its undertaking, as a going concern,
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> (g) his opinion as to whether an attempt to continue the whole or any part of the undertaking would be likely to be more advantageous to the members as a whole and the creditors as a whole than a winding-up of the company,
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> (h) recommendations as to the course he thinks should be taken in relation to the company including, if warranted, draft proposals for a compromise or scheme of arrangement,
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> (i) his opinion as to whether the facts disclosed would warrant further inquiries with a view to proceedings under section 297 or 297A of the Principal Act,
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> (j) details of the extent of the funding required to enable the company to continue trading during the period of protection and the sources of that funding,
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> (k) his recommendations as to which liabilities incurred before the presentation of the petition should be paid,
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> (l) his opinion as to whether the work of the examiner would be assisted by a direction of the court in relation to the role or membership of any creditor's committee referred to in section 21, and
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> (m) such other matters as he thinks relevant.

Section 4 of the Act of 1990 allows for the appointment of an examiner to a related company and under section 4(3) such company shall be deemed to have the protection of the court in the same way as the petitioning company from the date of making such order. The text for the authority of the court in relation to a related company is set out in section 4(2):

> In deciding whether to make an order … the court shall have regard to whether the making of the order would be likely to facilitate the survival of the company, or of the related company, or both, and the whole or any port of its or their undertaking, as a going concern and shall not, in any case, make such an order unless it is satisfied that there is a reasonable prospect of the survival of the related company and the whole or any part of its undertaking as a going concern.

One of the points argued here was whether this section had any application given that all four companies have petitioned individually to have an examiner appointed.

Related company

Section 4 was considered by Clarke J in *Re Vantive Holdings* (No. 2) [2009] IEHC 409. The issue in that case concerned the survival of the group of companies as a whole and is thus of assistance. In that case, Clarke J noted the "clear interdependence" between the companies in the group. In particular, he was satisfied that in cases where some companies in the group were solvent but had given cross-guarantees for other companies in the group "that the failure of the group as a whole would lead, inevitably, to insurmountable difficulties" for the solvent companies as well. In assessing the prospects of survival of the individual companies in the group, the court was required to consider "the survival prospects of the group as a whole" as well as assessing the prospects of survival of each individual company. In that case, he was not satisfied there were reasonable prospects of survival of the group of companies as a whole and considered dismissing the petition as such, but proceeded to consider the position of each individual company to which it was sought to appoint an examiner. Clarke J concluded that in respect of two of the related companies was the court to appoint an

examiner to them that there would have been reasonable prospects of survival; but not of the related companies. For that reason an examiner could not be appointed to those related companies. As to a further two related companies Clarke J could find no reasonable prospects of their survival. Clarke J expressed the view that if he had formed the view that the group of companies as a whole had reasonable prospects of survival he would have been prepared to appoint an examiner to the three remaining related companies, but that as their prospects were linked inextricably to the survival of the group of companies as a whole, an examiner could not be appointed.

Here, the companies are related but the biggest debt rests with Faxhill but without any substantial prospect of being dealt with so as to enable that company to survive. As regards the other there, the corporate cross guarantees seem to hold out at least some prospect of a debt write down being considered.

Re Tivway Limited [2010] 3 IR 49, makes it clear that an examiner may be appointed to a mere holding company. But, in that case the Supreme Court made it clear that the circumstances whereby a holding company came under examination may be adjudged to have a reasonable prospect of survival must be dependant on a precise factual examination of the circumstances as to the survival of the holding company as a trading entity and its interrelationship with the other companies to which it is related. Thus, it is appropriate to quote paragraphs 60-64:

> 60. It has been held by the courts that a holding company may have an examiner appointed. It may be highly desirable where there is a group of companies trading that a holding company in that group be part of an examinership: see McCracken J. in In Re Tuskar Plc [2001] 1 I.R. 668 at p.679.
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> 61. The Court was provided with a diagram of the Fleming Group, which showed the position of the three companies within the group. In this case and similar situations it is necessary to consider the three companies and not a holding company in isolation. I am satisfied that the Court has jurisdiction to admit a holding company, a related company, to examinership, to enable companies in a group obtain the protection of the court – if they comply with the Act of 1990. However, the position of a holding company is dependent upon whether the Court is satisfied that there is a reasonable prospect of survival of the related companies as a going concern. Thus in this case the issue is whether the Court is satisfied that under the proposed Schemes of Arrangement that there is a reasonable prospect of the survival of Construction and/or Tivway as a going concern. If there is, then Holdings may also proceed in examinership.
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> 62. The position in which Construction would be left has been described earlier in this judgment. The engine of the company is to be sold. The dormant property aspect of the company is to remain.
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> 63. Tivway owns the shell Sentinel Building and two thirds of the Aldi site. The Court was referred to a letter of the 16th December, 2009, issued while this appeal was at hearing. Reference was made to the letter earlier in this judgment. Stress was laid on the fact that it showed the support of Anglo Irish Bank for the scheme. However, when one considers what the letter proposes, it may be seen that capital of €361,943 was approved by the bank. But what for? It was to fund site security, insurances and overheads. These are clearly costs relating to the maintaining of a site. They do not relate to any build out – or any operational work – or any evidence of the company operating as a going concern. The sum sought in relation to planning consultant fees, while approved in principle, requires detailed submissions (when the need for funds arises) in respect of each planning permission intended to be sought. This letter illustrates a holding situation – maintaining a site - with an aspiration or dream of future business – not a company operating as a going concern.
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> 64. It was contended on behalf of the examiner that under examinership, and the protection from its creditors which that would provide, the companies in question would survive as a going concern insofar as they would over a period of two years or so benefit from the sale of completed units, continue to receive rental income and be engaged in the maintenance and care of existing properties. Such business activity, it was submitted, was sufficient to constitute 'a going concern' within the meaning of the Act of 1990. However, sales over a limited period would be of minimal value in relation to the liabilities and activities of the companies and any rental income must be applied towards outstanding interest. Thus the so called business activity of the companies would be essentially passive; they would remain insolvent but protected by the examinership. The low level business activity referred to would not alter the fundamental character of the proposed schemes of arrangement as providing no more than a holding position over a long period pending the resurgence of the property market when and if that occurs. Accordingly the very limited and passive business activity in which it is claimed that the companies could engage during an examinership would not alter its fundamental characteristics which I have described so as to mean that it was surviving as a going concern.
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> 65. The Schemes of Arrangement in this case envisage a holding plan, the continued survival of the companies, who would continue insolvent. As ACC submitted, correctly in my view, the companies would be effectively dormant. Also, any future business in Tivway and Construction would be entirely dependent on future decisions of the banks.

Thus, in considering the survival of a company due to its interdependence on another company one needs to look at a related company from the point of view of whether it is trading; at what level; whether it holds assets that may contribute to the relevant local economy in the short term; whether it is a mere property development company where the asset side of the balance sheet may readily be transferred on liquidation to another developer with better prospects of movement on plans; whether there is in reality any day-to-day economic activity ongoing; and whether a holding or related company contributes positively or negatively to the economic activity and prospective survival of any associated companies. Finlay Geoghan J commented on this issue while considering *In the Matter of Belohn Limited* [2013] IEHC 151. Her views at paragraphs 55-57 add to the analysis required under the relevant sections of the Act of 1990:

> 55. In accordance with the decision of the Supreme Court in *Re Tivway Ltd.*, it appears that s. 4(2) should be construed as including a holding company whose only undertaking with a potential going concern is the continued holding of shares in the subsidiary company. As pointed out by Denham J., the prospect of survival of the holding company is dependent upon whether the Court is satisfied that there is a reasonable prospect of survival of the subsidiary company as a going concern.
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> 56. On the facts of this application, in addition to holding shares in the subsidiary, there is a debt in the holding company to the Bank and the only potential source of income in Merrow for its discharge is the payment by The Belohn of what is described as a "management charge" and the prospect of a dividend if The Belohn were to become profitable. However this does not appear to me to change the approach indicated by the Supreme Court *in Re Tivway Ltd*.

> 57. For the purposes of s. 4(2) the court must be satisfied that there is a reasonable prospect of the survival of the Merrow as the holding company of The Belohn as a going concern. I am so satisfied because I am satisfied that there is a reasonable prospect of survival of the subsidiary company, The Belohn, as a going concern. I also consider that the appointment of Mr O'Keefe as examiner to Merrow is likely to facilitate the survival of The Belohn. The introduction of a new investor for the purposes of a scheme of arrangement in The Belohn may require changes to shareholdings. Further the relationship between The Belohn, Merrow and their liabilities to the Bank are so intertwined that it is desirable, in seeking to propose a scheme of arrangement in The Belohn acceptable to the Bank, that Mr O'Keefe be in a position to examine the affairs of both companies.

It is clear from these cases that the general consideration in section 2 of the Act of 1990 is key to the appointment of an examiner over a related company. Section 4 does not stand apart but must be considered according to the same fundamental test. Among the considerations, and despite there being separate applications here these seem apposite, are the potential for such a related company to work out of its difficulties should a scheme of arrangement be approved; whether its indebtedness will operate as a mill stone that drags down the companies to which it related; whether such links as are established between companies are beneficial or not; whether key assets or services are only to be sourced, or reasonably so in a business sense, from the related company; and a precise analysis of the condition and prospects of each company individually and as related to each other. Further, the general considerations for survival and the discretion of the court apply equally to a related company or to a group of companies as where individual companies, as in these 4 petitions, are applying on an individual basis.

General considerations

In that regard, it is clear that the Act of 1990 exists not for the benefit of investors who have put their money into corporate structures but for the good of the more general economy. As the decision in *Tivway* makes clear, there is no general interest in the community in preserving a dormant company that is insolvent and is not otherwise contributing in terms of employment or to buoying up other enterprises through its trading activity. Nor is asset stripping regarded as in any way within the scope of competence that will enable the courts under the legislation to at least consider an attempt to save companies.

In considering the appointment of an examiner, the court is exercising the same test as ultimately will determine whether a scheme of arrangement is to be sanctioned; which is the last stage of the examination process under the Act of 1990. At that ultimate stage, however, the addition of fairness to creditors following on the statutory meeting and approval, in part at least, of the scheme comes into play. The difference, however, can be stark since at this early stage of considering the appointment of an examiner, the court is considering a somewhat less wide ranging test in the context only of what information an independent accountant can supply, together with any affidavit in support of the petition, and sometimes perhaps a report from an interim examiner if appointed, as to the potential viability of a company in whole or in part. That test for appointing an examiner is dependant on the same criterion set out in section 2, as for later approval of a scheme of arrangement, and carries the self-same discretion, but the decision to continue the protection of the court automatic on the valid presentation of a petition through the appointment of an examiner also enables a genuine scrutiny to be conducted over the company and of its prospects for survival. This remains so notwithstanding that the introduction of the requirement of an independent accountant's report in 1999 brought more information to bear on the task of the court. It therefore means that an informed decision can be reached at this stage and not only, as some of the pre-1999 decisions put it, only when the examiner had been in place for some weeks; see the judgment of the Supreme Court in *In the matter of Tuskar Resources plc* [2001] 1 IR 668 . While the court has to be satisfied as to the prospects of survival, this statutory imperative is not a requirement to show that a company will probably survive as to the whole or any part of its undertaking. As McCracken J put the issue in *Tuskar Resources* at page 676:

> In re Atlantic Magnetics… Finlay C.J. also stated there cannot be an onus of proof on a Petitioner to establish as a matter of probability that the Company is capable of surviving as a going concern. It seems to me that this is no longer the position under the Act of 1999 by reason of the wording of the new sub-section 2. Under the Act of 1990 as originally enacted there would appear to be a wide discretion given to the Court. However, the new sub-section prohibits the Court from making an Order unless they are satisfied there is a reasonable prospect of survival. If the Court is to be "satisfied", it will have to be satisfied on the evidence before it, which is in the first instance the evidence of the Petitioner. If that evidence doesn't satisfy the Court, the order cannot be made, and in my view this is tantamount to saying that there is an onus of proof on the Petitioner at the initial stage to satisfy the Court that there is a reasonable prospect of survival. For this reason, the Court has to view the evidence in a different matter to that applicable prior to the Act of 1999.

Overall, the approach of the court to this difficult task, upon which the employment of many in a challenged economy is dependant, is as put by Fennelly J for the Supreme Court in *In re Gallium Limited* [2009] IESC 8 at paragraphs 46-48:

> 46. McCracken J was undoubtedly correct to say that there is an onus of proof on the petitioner. However, the statutory requirement is to show that "*there is a reasonable prospect of the survival of the company…"* 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. The view of Lardner J, as expressed *In re Atlantic Magnetics* could be described as pragmatic: he asked whether it "*seems worthwhile to order an investigation by the examiner into the Company's affairs*." The court has the power to appoint an examiner if satisfied that there is a reasonable prospect of survival of the company.
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> 47. The entire purpose of examinership is to make it possible to rescue companies in difficulty. The protection period is there to facilitate examination of the prospects of rescue. However, that protection may prejudice the interests of some creditors. The court will weigh the existence and degree of any such prejudice in the balance. It will have regard to the report of the independent accountant.
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> 48. The Court has to take account of all relevant interests. The independent accountant must consider whether examinership would be "*be more advantageous to the members as a whole and the creditors as a whole than a winding-up of the company…"* This does not limit the range of interests to be taken into account by the court under section 2. The interests of employees cannot be excluded. In the case of an insolvent company, it is natural that the creditors will have the greatest interest in the future, if any, of the company. The court will take a balanced approach, as suggested by the reference to *the creditors as a whole*.

The Court therefore turns to the prospects for survival of each of these four companies and of Faxhill and its interrelationship with its three related corporations.

These companies

Strong reasons of policy suggest that there should be an examination of Craigfort. The papers presented to the court indicate that this company offers an attractive hotel product in a rural setting within the hospitality sector, sustains employment locally on a large scale and, unlike many hotels, the Kilashee House Hotel and Spa currently operates on a profit. It is not one of the so-called "zombie hotels" about which there is so much concern these days. The Kilashee House Hotel and Spa has bookings well into the future. Weddings are particularly buoyant with at least two a week coming in over the next year. Contiguous to the hotel are the lands owned by Kilashee and used to provision the hotel with water and for access car parking. Is there a genuine interrelationship that is necessary to be preserved for the survival of the companies? It is possible to see Kilashee and Craigfort as separate from the point of view of company law analysis; but as a campus containing 40 acres between the two companies, there are strong reasons for thinking that guests will enjoy an enhanced experience of leisure activities through being able to roam widely in these extensive grounds. Therefore, both companies can legitimately be considered as interdependent. Whereas an argument is made that paintballing and other martial play-for-grown-ups activities together with driving of off-road vehicles would only be possible should there be a larger area of grounds available to the hotel, in this context available from Faxhill, in the context of companies that are clearly insolvent thought must also be given in a balanced way to what is reasonably possible having regard to the rights of creditors. It is claimed that this additional land can only be made use of if Faxhill survives with Kilashee and Craigfort. Much, however, can be done on 40 acres and it is clear that there is that degree of interdependency between Craigfort and Kilashee that justifies considering their survival together. According to the independent accountant's report there are considerable grounds for optimism that these companies may survive as a going concern. Looming over them, of course, is the aspect of Faxhill's debt of €77 million that is cross guaranteed as regards each of them and by Marchford. These are not, however, as has been noted, personal guarantees by directors but corporate guarantees which may be the subject of a scheme of arrangement. But what can be said about that? Too little is known at this stage to be able to make any firm prediction. It is not yet clear as to what entitlements National Loan Management Limited, as holder of the loan, has over the properties or as to how that agency may see matters proceeding over the next few years.

What is immediately clear, however, is that this branch of the National Assets Management Agency has supported the hotel enterprise and cooperated with the management in a way that has preserved employment and which, on the figures presented, has resulted in slight but definite upturn in turnover from the market falls apparent from 2009. The relevant figures for Craigfort show turnover in this rural hotel of €13.1 million in 2008, €10.2 million in 2009, €8.2 million in 2010, €8.1 million in 2011, €8.8 million in 2012 and €9.6 million in 2013. The case law does not preclude the court from reaching a preliminary decision that reasonable prospects for survival have been shown in relation to Craigfort and Kilashee. Further, with the appointment of an examiner, or in the case of Kilashee the continuation of the interim examiner, more will be known. What matters is that at this stage there are shown to be reasonable grounds for deducing that these companies can survive to the benefit of the community and of employment as a going concern. Any question as to restructuring can only be considered at a later stage. The Court also has the comfort that the involvement of the National Assets Management Agency. This yields the likely result that the figures presented in the independent accountant's reports for these companies are based on management figures that are not likely to be anything other than objective.

In the case of Marchford, the operating accounts of Lawlor's Hotel has thrown up a similar pattern of figures in terms of turnover to that of Craigfort and of Kilashee; a massive fall that has been succeeded by a good start at recovery. But, again, the problems are the same, centring on the guarantee in respect of the massive debt of Faxhill. But as a trading enterprise the Lawlor's Hotel in Naas is shown to be doing well. In part, this may be due to spill-over business from the related hotel in Killashee or it may be due to its proximity to Dublin. Again, the management accounts are likely to have been similarly scrutinised. The projections based upon current trends again show a slight upward curve following falls in turnover over four years. The relevant figures show turnover for this urban hotel of €3.8 million in 2008, €3 million in 2009, €2.6 million in 2010, €2.3 million in 2011, €2.7 million in 2012 and €3.2 million in 2013. Of themselves the figures are becoming increasingly healthy, but the wider issue remains that of the debt. Problems have emerged in relation to fire certificates for some of the bedrooms. This is an issue which the interim examiner must take very seriously. In the event that the bridge solution installed by the current management is found to fire compliant, every effort must be made to examine the premises from an objective point of view and to secure retention permission through honest interaction with the planning authority. The appointment of an examiner is therefore appropriate in relation to Marchford.

Turning to Faxhill, the prospects for the survival of that company are very small without it being saved through the services it provides to Craigfort, Kilashee and Marchford. The crucial issue is the degree of interdependence between that company and the three others. That interdependence is not immediately apparent. There is nothing to indicate that any reasonable prospect for the survival of the Killashee House Hotel and Spa depends upon it becoming yet another golf resort. The contiguous land that belongs to Faxhill is doubtless heavily charged in relation to that company's debts. Further, in the event that there is interest in investing in that hotel, the affidavit supporting the petition indicates that the company "has been for some time agreeable for the disposal of surplus property assets". In the event that an investor sees prospects of returning that hotel to the turnover levels equivalent to 2008 and better only through investment in a golf course, it is apparent that there is nothing to stop the purchase of contiguous land. That case is, in any event, more than difficult to make as a probability because the plans for a golf course have been put on hold. These are not likely to be revived in the current state of oversupply for golf amateurs in the Dublin area. Even were that not to be so, the case is not convincingly made that only by having Faxhill in examinership will there be interest in investing in the nearby hotel.

Then it is said that management expertise is available to Craigfort and Kilashee only through Faxhill. Again, that case is not convincingly made. The companies have co directors. The chief financial officer employed on a group basis by Faxhill has requested to leave but has stayed on and there is an issue in relation to his entitlement to an earned sum upon retirement. On this no comment is made. Faxhill only employs 2 staff, being the group managing director and the financial officer. Whereas it is claimed that this company is "inextricably linked to the management of the [other] companies and the success of the hotel business", this is not demonstrated. Faxhill is, in reality, a property holding company. It is very difficult to make the case at any stage since the end of 2008 that a property holding and development company in Ireland is an enterprise which exists for the benefit of the economy in terms of jobs and the independent expenditure of funds to meet its needs. Its debts are huge. Its assets, even at the most optimistic valuation, account for perhaps 10% asset to debt ratio, but more likely 5%, given that inter company loans have not been shown to be supported by structures that make them preferential in any scheme of arrangement for Craigfort, Kilashee or Marchford.

It is claimed that the directors of Faxhill are the face of the Kilashee House Hotel and Spa. That may be so. There is nothing, however, to stop the examiner seeking the services of any of the employees of Faxhill on the open market. Further, as directors of each of the other companies, apart from the chief financial officer who is an employee, duties of care and fidelity are owed by these directors to each of the companies which are stringent in the context of more recent amendments to the code of company law. These cast older authorities on the lackadaisical nature of directors' duties into considerable doubt. An example of this is *Re Brazilian Rubber Plantations and Estates Ltd* [1911] Ch. 425 at 437, where Neville J memorably stated in a person may enter the business of a rubber company "in complete ignorance of everything connected with rubber, without incurring responsibility for the mistakes which may result from such ignorance". That can no longer be considered to be indicative of the duties of company directors.

The common directors of Faxhill, Craigfort, Marchford and Kilashee, owe to each of those companies a duty of care and fidelity. Considering Faxhill entirely independently of the other three companies is possible because, unlike in the case of *Re Vantive Holdings*, that exercise is possible. Furthermore, even if considered as a related company, section 4 of the Act of 1990 requires the court to consider whether Faxhill has any reasonable prospect of survival in whole or in part as a going concern. This is so were Faxhill merely to be considered as a related company and not, as here, through a separate petition. As a company, at the present time Faxhill is not developing any property but is merely holding property pending an upswing in the market which if it is like that of the years 2000-2008 will not at all be to the benefit of the Irish economy. In the medium term, there are prospects for selling some of the assets of Faxhill but those prospects cannot expect to realise anything close to the value of the loans. Nor could it genuinely be claimed that Faxhill is a company that operates in the marketplace supplying expertise in hotel management through its 2 employees. There is no doubt that these employees have a wealth of experience that would considerably benefit the two hotels in question here. Nothing in the paper suggests, however, that this expertise would not be otherwise available on the open market for a reasonable consideration or that it is so tied into Faxhill that it cannot be unlinked from it.

Result

The decision of the Court is therefore to appoint an examiner to Craigfort, Kilashee and Marchford but not to Faxhill.

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