

HIGH COURT

2010 53 COS

IN THE MATTER OF SLYNE PROPERTIES LIMITED
AND IN THE MATTER OF BLACK SHORE HOLDINGS LIMITED
AND IN THE MATTER OF SWEENEY OIL RETAIL LIMITED
AND IN THE MATTER OF SWEENEY OIL (MOYCULLEN) LIMITED
AND IN THE MATTER OF SWEENEY OIL SERVICES
STATIONS LIMITED
AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 11th day of February, 2010

1. Slyne Properties Limited ("the company") has presented this petition for the appointment of Mr. Michael McAteer as Examiner of the Company, pursuant to the provisions of s. 2 of the Companies (Amendment) Act 1990 ("the Act"). The Company also petitions for the appointment of Mr. McAteer as Examiner of the following companies, namely, Sweeney Oil Retail Limited (SOR), Sweeney Oil (Moycullen) Limited (SOM), and Sweeney Oil Service Stations Limited (SOSS), pursuant to the provisions of s. 4 of the Act. The company had also petitioned for the appointment of an Examiner to Black Shore Holdings Limited ("the holding company"), but that petition was withdrawn and I made an order for the winding-up of the holding company.
2. The petition is opposed by Anglo Irish Bank plc. who is by far the largest creditor. The other creditors either support the petition or are neutral.
3. The principal activity of the company is the operation of the Courtyard/Marriott Hotel on the Headford Road in Galway. The hotel has an associated spa and car park. It also owns and operates a service station. The management of the forecourt shop has been licensed to a third party. The company owns and manages retail and office space close to the hotel.
4. The petitioning company and the related companies which are included in the petition are all wholly owned subsidiaries of Black Shore Holdings Limited.
5. "SOR" is the retailer of petroleum products and the operator of a Spar forecourt convenience store and an Esso filling station. It is also landlord of a property in Clifden, County Galway.
6. "SOM" is the owner of an Esso filling station in Moycullen, County Galway, and the owner of an Esso filling station at Oranmore, County Galway, in which it also acts as retailer.
7. "SOSS" operates an Esso branded forecourt and Spar shop in Moycullen, County Galway, and also in Westport, County Mayo.
8. Anglo Irish Bank plc. ("Anglo") are creditors of the company, SOR and SOM. Their opposition does not extend to SOSS.
9. In this case, the criteria for the presentation of a petition have been met. A report has been presented by an independent accountant who states that, in his view, each of the companies has a reasonable prospect of survival as a going concern, subject to conditions which he has set out in his separate reports in respect of each of the companies. He is supported in this view by the interim Examiner who was appointed by the court on 28th January, 2010. In *Re Gallium Limited* [2009] 2 I.L.R.M. 11, Fennelly J. stated that the test required to be met in the examinership process has a reasonable prospect of survival and that the test "*does not require probability of survival to be established*". In that case, the Supreme Court also held that even if a reasonable prospect of survival is established, it does not entitle the petitioner to have an Examiner appointed, but it merely triggers the power of the court to appoint an Examiner. The court is given a wide discretion and should take into account all of the surrounding circumstances.
10. The sums due to Anglo arise, not out of loans to the relevant companies, but on account of cross-guarantees and inter-company liabilities. I have been informed that the inter-company guarantees are for sums in excess of €20 million.
11. Counsel for Anglo bases his objection on two grounds. In the first place, he argues that there is not a reasonable prospect of survival. The court has been informed that Anglo intends to appoint a receiver at the first available opportunity. The second argument is that the court should decline to exercise its discretion, having regard to the purpose of the Act. Counsel states that there is nothing in a receivership which would achieve a different result so far as the preservation of jobs is concerned and the benefit to the economy as a whole. It is claimed that whatever happens, the refinancing of the indebtedness to the bank is essential.
12. Counsel for the company says that no details of the charges in favour of Anglo have been furnished which are sufficient to enable the court to exercise its discretion against the appointment of an Examiner at this stage. He argues that the points raised by Anglo are more properly matters to be dealt with in a s. 24 hearing to confirm a scheme of arrangement. Each of the companies concerned is EBIDTA positive and can meet their interest payments as they trade.
13. In the *Vantive Holdings* case [2009] IESC 68, the Supreme Court held that:

"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." (Pages 19 and 20). (See also *Re Fergus Haynes (Developments) Limited* [2008] 1 IEHC 327). I am satisfied that in the present case, the independent accountant has provided evidence which is sufficient to meet that test, and that the companies do have a reasonable prospect of survival if the conditions set out in the report of the independent accountant are met.

14. So far as the second leg of the argument made on behalf of Anglo is concerned, it seems to me that I must apply the test set out by the Supreme Court in *Re Atlantic Magnetics Limited* [1993] 2 I.R. 561. In that case, McCarthy J. said that the purpose of examinership is the ". . . protection of the company and consequently of its shareholders, workforce and creditors". He stated at page 578:

" . . . it is clear that parliament intended that the fate of the company and those who depend upon it should not lie solely in the hands of one or more large creditors who can, by appointing a receiver, pursuant to a debenture, effectively terminate its operation and secure, as best they may, the discharge of the monies due to them, to the inevitable disadvantage of those less protected. The Act is to provide a breathing space, albeit at the expense of some creditor or creditors."

15. I do not accept the argument of counsel for the bank that it makes little difference whether a receiver is put in by the bank or an Examiner is appointed. It is now well established in our jurisprudence that the purpose of the legislation governing the Examinership Procedure is to enable enterprises to continue in existence for the benefit of the economy as a whole, and must take into account a number of matters such as the preservation of jobs. On the other hand, the primary responsibility of the receiver is to protect the interests of the security holders and to realise the charged assets for their benefit. The Act in no way ignores the rights of debenture holders. Where an Examiner brings before the court a proposal for a scheme of arrangement, a confirmation hearing has to take place soon after the Examiner's report is received, and the court cannot confirm the proposals unless they have been accepted by at least one class of creditors whose interest would be impaired by the implementation of the proposals. The court must also be satisfied that the proposals are fair and equitable in relation to any class of member or creditors who have not accepted them and whose interests would be impaired, and that they are not unfairly prejudicial to any interested party.

16. If an Examiner is appointed in this case and prepares a scheme of arrangement, it will be open to the bank to object to confirmation of the proposals put to the court by the Examiner if it feels that the proposals are not fair and equitable, or are unfairly prejudicial to it. One portion of the evidence before me which is of significance in weighing up the difference between a receivership and examinership concerns the manner in which the company is running the hotel in Galway. The hotel seems to be bucking the trend somewhat in that it has reasonably high occupancy rates and is performing quite well. Fáilte Ireland has expressed the view that this is due to the management style of Mr. John Sweeney and his employees, and it is easy to see how this could change dramatically in a receivership where Mr. Sweeney would lose effective control over the hotel.

17. At this stage, I have to be satisfied that there is a reasonable prospect of survival of the companies. I am satisfied on that point, and I am also satisfied that in the circumstances which have been outlined to me, and argued before me, that I should exercise my discretion in favour of confirming the appointment of the interim Examiner, having regard to the purpose of the Act.

18. Accordingly, I confirm the appointment of Mr. Michael McAteer of Grant Thornton, 24-26 City Quay, Dublin 2, as Examiner, and I direct that he furnish his separate reports in respect of each of the companies named in the title, with the exception of the holding company which is now in liquidation.