

THE HIGH COURT

2009 212 COS

IN THE MATTER OF FATE PARK LIMITED

AND IN THE MATTER OF CASTLEBAR OIL COMPANY LIMITED

AND IN THE MATTER OF HUGHES AND O'BOYLE FUEL OIL LIMITED

AND IN THE MATTER OF FINN VALLEY OIL (LISCOOLY) LIMITED

AND IN THE MATTER OF HI-WAY OIL (TUAM) LIMITED

AND IN THE MATTER OF O'GRADY OIL LIMITED

AND

IN THE MATTER OF THE COMPANIES (AMENDMENT) ACT 1990 AND THE COMPANIES (AMENDMENT) (NO. 2) ACT 1999

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 29th day of July, 2009

1. Mr. William O'Riordan ("the Examiner") was appointed as examiner to Fate Park Limited ("the Company") and, *inter alia*, the related companies named in the title by order of the court made on 6th May, 2009.
2. By notice of motion issued on 27th July, 2009, (with leave of the court given late in the day of 24th July, 2009), and made returnable for 28th July, 2009, he seeks an order pursuant to s. 9(4) of the Companies (Amendment) Act 1990 (as amended), granting to the Examiner all or any of the powers that he would have if he were a liquidator of the Company. In particular, he seeks the powers of a liquidator pursuant to s. 290 of the Companies Act 1963, to disclaim, with the sanction of the court, what is alleged to be an unprofitable contract between Mr. Kevin Thomas Cunniffe and the Company, dated 7th September, 2008 ("the Contract"). He also seeks further orders, all of which are dependent upon obtaining the primary order sought.
3. The application is grounded upon the affidavit of Mr. Ray Dardis, who is a director of the firm, PricewaterhouseCoopers, of which the Examiner is a partner, and who has worked with the Examiner in these examinations. The application is on notice to Mr. Cunniffe who was represented by counsel at the hearing. Mr Cunniffe, in the time available, has not filed an affidavit but does not accept all the facts set out in Mr Dardis's affidavit.
4. The following is the factual background to this application. The Examiner has formulated proposals for a scheme of arrangement in respect of the Company. Those proposals have been sent to creditors and meetings of creditors and, presumably members, are called for tomorrow, 30th July, 2009. Those proposals were not disclosed to the court as part of this application. Those proposals are based upon a proposed investor agreeing to invest in the Company. Any written agreement between the investor, the Company and the Examiner has not been disclosed to the court.
5. Mr. Cunniffe is the owner of 49% of the shares in Hi-Way Oil (Galway) Limited. The Company currently holds 51% of the issued shares in that company. Pursuant to clause 2.2 of the Contract, Mr. Cunniffe is entitled, during the period beginning 15th and ending 31st August, 2009, to require the Company to purchase his 49% shareholding in Hi-Way Oil (Galway) Limited in consideration of €416,764. Mr. Dardis exhibits a balance sheet of Hi-Way Oil (Galway) Limited prepared by management as of 30th June, 2009, showing net assets of €107,846.38. The Examiner has formed a view that the Contract is an unprofitable one for the Company.
6. Mr. Dardis, in his affidavit, indicates that the Examiner's solicitors have been in correspondence with the solicitors for Mr. Cunniffe since 26th May, 2009, but state that it has not proved possible for a negotiated termination of the Contract to be achieved. The last letter exhibited is that of 8th July, 2009.
7. The basis given by Mr. Dardis in the affidavit for this application is twofold. First, that whilst he has been advised that there is at least "a strong argument" that any claim that Mr. Cunniffe might have, pursuant to or arising out of the Contract, could be made the subject of a write-down in any proposals for compromise or scheme of arrangement, that "in the interests of prudence", an application should be made to the court for an order granting the Examiner the power which a liquidator would have, pursuant to s. 290 of the Companies Act 1963, to disclaim the Contract. Second, he states that, in addition, it is a requirement of the proposed investor, in advance of making the necessary investment, that the Contract be disclaimed, and that therefore it is imperative to the success of the proposals for a compromise or scheme of arrangement that this be done.
8. The application is made to the court pursuant to s. 9 of the Companies (Amendment) Act 1990. This provides:

"(1) Where it appears to the court, on the application of the examiner, that, having regard to the matters referred to in subsection (2), it is just and equitable to do so, it may make an order that all or any of the functions or powers which are vested in or exercisable by the directors (whether by virtue of the memorandum or articles of association of the company or by law or otherwise) shall be performable or exercisable only by the examiner.

(2) The matters to which the court is to have regard for the purpose of subsection (1) are—

(a) that the affairs of the company are being conducted, or are likely to be conducted, in a manner which is calculated or likely to prejudice the interests of the company or of its employees or of its creditors as a whole, or

(b) that it is expedient, for the purpose of preserving the assets of the company or of safeguarding the interests of the company or of its employees or of its creditors as a whole, that the carrying on of the business of the company by, or the exercise of the powers of, its directors or management should be curtailed or regulated in any particular respect, or

(c) that the company, or its directors, have resolved that such an order should be sought, or

(d) any other matter in relation to the company the court thinks relevant.

(3) Where the court makes an order under subsection (1), it may, for the purpose of giving full effect to the order, include such conditions in the order and make such ancillary or other orders as it sees fit.

(4) Without prejudice to the generality of subsections (1) and (3), an order under this section may provide that the examiner shall have all or any of the powers that he would have if he were a liquidator appointed by the court in respect of the company and, where such order so provides, the court shall have all the powers that it would have if it had made a winding-up order and appointed a liquidator in respect of the company concerned."

9. The first legal dispute between counsel for the Examiner and counsel for Mr. Cuniffe is whether s. 9(4) gives the court a distinct jurisdiction to make an order that an Examiner have all or any of the powers that he would have if he were a liquidator appointed by the court, as submitted by counsel for the Examiner; or whether s. 9(4) only gives the court jurisdiction to give to an examiner such additional powers where the court determines to make an order under section 9(1).

10. Counsel for the Examiner referred to the decision of Finlay C.J. in *Re Holidair Limited* [1994] 1 I.R. 416, and submitted that it supported the contention that s. 9(4) conferred a separate and distinct jurisdiction on the court not dependent on an order being made under sub-section 9(1).

11. In *Holidair*, an order had been made in the High Court pursuant to s. 9(1) and (3) of the Act of 1990, directing that the powers of the directors of the companies in relation to borrowing and the giving of securities be exercisable only by the Examiner, up to a specified limit. *Holidair* and its subsidiaries had, prior to the appointment of the Examiner, given a debenture to certain banks, under which it was provided that so long as monies were owing to the banks that "none of the companies shall borrow or agree to borrow additional funds secured by existing mortgages or charges" without the prior consent, in writing, of the trustee appointed under the debenture. In the High Court, Costello J. had determined that s. 9(3) of the Act of 1990, did not permit the court to make an order to permit borrowing in breach of the terms of the debenture. The companies and Examiner appealed, *inter alia*, that decision. There were a significant number of other issues the subject of the appeal which are not relevant.

12. The passage relied upon by counsel for the Examiner is at p. 440, where Finlay C.J. considered the extent of the jurisdiction given to the court by s. 9 of the Act of 1990, in the context of the submissions made. He stated:

"... I accept the contention made on behalf of the banks to the effect that s. 9 of the Act of 1990 grants to the court a power to transfer to the examiner any of the powers of the directors but does not except for subs. 4 give to the court any authority to grant to the examiner a power which was not exercisable by the directors. It is clear that subs. 3 of s. 9 was intended to and should be interpreted as giving a very wide discretion to the court in regard to the form of order which it would make under the section. The authority of the court is nonetheless confined in my view by the provisions of subs. 1 of s. 9, as I have indicated, to a transferral of powers exercisable by the directors to the examiner. I have carefully considered the submission made on behalf of the appellants to the effect that the provisions of subs. 4 of s. 9, and in particular the opening words of that sub-section, namely "without prejudice to the generality of sub-sections 1 and 3", and the fact that subs. 4 then goes on to give to the court a very clear authority to give to the examiner the powers which he would have if he were a liquidator, should be interpreted as meaning that an order made pursuant to s. 9, subs. 1 and 3 could include powers not exercisable by the directors. In a sense there is an inconsistency between the precise terms of subs. 4 and the terms of subs. 1, but in my view this inconsistency cannot be resolved other than by interpreting subs. 4 as an additional authority vested in the court to give to the examiner additional powers over and above those exercisable by the directors [emphasis added]. That has not been done in this case nor was it sought in the High Court and therefore the order made under s. 9, which was clearly made under subs. 1 and 3 thereof does not in my view dispense the examiner from the necessity to obtain the consent provided for in the debenture."

13. The Chief Justice went on to determine that the Examiner did have a power to dispense with the necessity of obtaining consent of the debenture holders to borrowing, having regard to s. 7(5) of the Act of 1990. That consideration is not relevant to the first issue in this case and s. 7 was subsequently amended by the Companies (Amendment) (No. 2) Act 1999, s. 18, which may alter the effect of that part of the judgment.

14. Particular reliance was placed by counsel for the Examiner on the sentence emphasised in the above extract from the judgment in *Re Holidair*. In my view, it does not indicate that s. 9 should be construed as conferring on the court a jurisdiction to grant to an Examiner powers he would have if he were a liquidator, in circumstances where the court is not making any order pursuant to s. 9(1) that a function or power vested in, or exercisable, by the directors of the company, is to be performed or exercisable only by the Examiner. Whilst the former Chief Justice refers to an inconsistency between the precise terms of subs. 4 and the terms of subs. 1 and indicates that this can only be resolved by interpreting subs. 4 as "an additional authority" vested in the court to give the Examiner additional powers over those exercisable by the directors, he is making this observation in a context where orders had been made under s. 9(1) and (3), and the issue before the Supreme Court was whether or not such orders could include powers not exercisable by the directors. There was no issue before the Supreme Court in *Re Holidair* as to whether or not the Court could make an order under s. 9(4) independently of making an order under section 9(1).

15. Construing subs. 9(4) in accordance with the ordinary meaning of the words used by the Oireachtas in the context of s. 9, it appears only capable of meaning that where an order is made under subs. 9(1) that that some or all of the functions or powers of the directors be performable or exercisable only by the Examiner, the court, in addition to including an order under subs. (3) (limited in accordance with the decision of the Supreme Court in *Re Holidair*, i.e. that it may not include powers not exercisable by the directors), may also provide pursuant to subs. (4) that an Examiner have all or any of the powers that he would have if he were a liquidator appointed by the court. Such powers may, of course, be additional to powers exercisable by directors.

16. Having formed this view on the submissions made by counsel and a consideration of the terms of s. 9 in the context of the Act of 1990 and the Supreme Court decision in *Re Holidair Limited*, I was comforted to find that the former Chief

Justice Keane, writing extra-judicially in the 4th edition of '*Company Law*' at paragraph 37.58, appears to take a similar view. He there states:

"The court, may, in circumstances set out in s. 9 of the 1990 (No. 1) Act vest all or any of the directors' powers exclusively in the examiner on his application. The court may only make such an order where it considers it just and equitable to do so, having regard to any of the following considerations:"

He then sets out paragraphs (a) to (d) of subs. 9(2) and continues:-

"Where such an order is made, the court may also order that the examiner is to have the same powers as a liquidator in a compulsory winding-up." [Emphasis added].

17. In this application, the Examiner has not sought an order under s. 9(1) that any of the functions or powers vested in or exercisable by the directors of the Company shall be performable or exercisable only by the Examiner. Counsel on his behalf did submit, in the alternative, if his primary construction of subs. 9(4) was not accepted, that the court would now have jurisdiction to make such an order, having regard to the matters referred to in subs. (2) and then add the power of a liquidator to disclaim pursuant to s. 290 of the Act of 1963.

18. This submission was strongly opposed by counsel for Mr. Cunniffe who submitted that there was no evidence before the court of any of the matters set out in subs. (2)(a) or (b) or (c). He further submitted that there was no matter which the court could consider relevant within the meaning of subs. 2(d) for the purpose of the type of order for which it is given jurisdiction under section 9(1).

19. Counsel for the Examiner relied upon the evidence in Mr. Dardis's affidavit that the investor required the Contract to be disclaimed and that this was imperative to the success of the proposals for a scheme of arrangement. He submitted that the court should have regard to this, having regard to the purpose of the statutory scheme of the Act of 1990, according to which the primary duty of the Examiner is to formulate a scheme of arrangement which, if approved, would enable the company to survive as a going concern. Whilst I accept, of course, that such is the primary purpose of the scheme of arrangement, it does not appear to me that I could consider this requirement of the investor alone as a "matter in relation to the company" which appeared relevant within the meaning of subs. 9(2)(d) for the purposes of subsection 9(1). Whilst s. 9(1) enables the court to make orders transferring powers of the directors to an Examiner the power to do so is not a general power. It must be exercised having regard to the matters referred to in subsection (2). They primarily relate to the manner in which the directors have been, or are conducting, the affairs of the company, or any perceived necessity in the interests of the company, its employees or creditors, that the exercise of those powers be curtailed or regulated or, indeed, where the directors resolve to support the examiner seeking an order for the transfer of certain of their powers. Insofar as subs. 9(2)(d) permits the court to have regard to any other matter which it considers relevant in relation to the company, it appears to me that such matter would normally relate to how the affairs of the company were or were not being conducted by the directors so as to make it just and equitable to transfer some or all of the directors' powers to the Examiner. The fact that the proposed investor is stated to require that the Contract be disclaimed does not appear to me to be such a relevant matter in the absence of any evidence as to what the directors of the Company did or did not do or were prepared to agree to in the context of such a request. There is no suggestion, for example, that the directors were requested by the Examiner to procure that the Company obtain the approval of the court to repudiate the Contract pursuant to s. 20 of the Act of 1990 and that they refused to do so.

20. Accordingly, I have concluded that the Examiner has not made out any grounds which would enable the court exercise a jurisdiction under section 9(1). Further he has not made out a ground that it is just and equitable that the court make an order that any powers of the directors should be performable or exercisable only by the Examiner. In the absence of the court making an order under s. 9(1), for the reasons already set out, the court has no jurisdiction to make any order granting the Examiner the powers of a liquidator appointed by the court.

21. It is unnecessary having regard to the conclusions reached to consider the further submissions in relation to s. 290 of the Act of 1963.

22. The application of the Examiner is refused.