[2020] IEHC 644

**THE HIGH COURT**

**2020/344 COS**

**IN THE MATTER OF**

**INA'S KITCHEN DESSERTS LIMITED**

**AND**

**IN THE MATTER OF THE COMPANIES ACT 2014**

**JUDGMENT of Mr. Justice Quinn delivered on the 9th day of December, 2020**

1. Ina Broderick made chocolate desserts in her kitchen. She built a successful business producing and selling chocolate products. In 1994 Ina's Kitchen Desserts Limited ("the Company") was established by Ina and her husband, Michael Broderick. Over the following 26 years, the business of the Company developed and expanded. Its turnover for the year ended 31 December, 2019, exceeded €12 million and the Company employed over 100 persons.

2. The Company's customer list includes airlines and retail chains such as Aldi, Insomnia, Starbucks, Circle K and Musgraves. Its products are exported to over 20 countries.

3. In February 2019, the shareholding of the Broderick family was reduced from 100% to 25% in circumstances which were and remain contentious. The petitioner Barry Broderick, as the holder of 10.45% of the ordinary shares in the Company, presented a petition for the appointment of an examiner to the Company on 30 October, 2020. The petition was opposed by the Company and its majority shareholder Starkane Limited ("Starkane"), which holds 75% of the ordinary shares and is its largest creditor. The remaining 14.55% of the ordinary shares are held by the petitioner's brother and parents. The petitioner says that they support the petition.

4. I have concluded that the appointment of an examiner is not an appropriate remedy for the matters described in the petition, and accordingly that the petition should be dismissed.

**The background**

5. The Company traded initially from the Broderick's family home. In or about 1998 it moved to a factory located at Walkinstown, and in 2016 to a new location in Tallaght.

6. In 1994, the petitioner joined the business and in 2002 his brother Bernard joined.

7. In 2008, the Company was in need of more space and the Broderick family acquired and rented to the Company a second building at Walkinstown.

8. By 2015, the Company had continued to grow its pipeline of orders and its turnover, and had a history of profitable trading. The growth resulting from its success caused more capacity issues. The Company identified the need, in order to expand its business, to move to a new production facility. The family also recognised the need to introduce additional retail expertise to grow the business and to identify and pursue new retail channels. By this time, the Company had developed a longstanding relationship with Enterprise Ireland ("EI").

9. In 2016, the Company identified a potential new property located in Tallaght, and eventually moved to that location, with the benefit of significant new funding arrangements entered into in February 2017.

10. The February 2017 funding arrangements comprised the following: -

    (1) EI support totalling €800,000 being €450,000 in cash, €150,000 of a capital grant for the building, and a further €200,000 in employment grants, to be paid over time.

    (2) Ulster Bank agreed to lend the Company €2.4 million comprising an overdraft, a term loan and a second term loan to clear the Company's existing debt with AIB. The term loan was secured by way of first legal charge over the property at Tallaght.

    (3) Starkane advanced a sum of €3.2 million by subscription for cumulative convertible redeemable preference shares. Starkane is a special purpose vehicle established by BDO Capital Development Fund ("the Fund").

**Starkane**

11. The Company was introduced to the Fund in late 2015. The Fund was interested in providing development and growth capital support to small and medium enterprises having growth opportunities, particularly those with export markets, which required funding to expand their businesses.

12. In February 2017, the Company and Starkane entered into an Investment Agreement. Pursuant to this agreement, Starkane agreed to subscribe the sum of €3.2 million for the issue of cumulative convertible redeemable preference shares ("CCRPS"). The CCRPS carried an annual dividend of 4% and the agreement provided for an internal rate of return ("IRR") of 8% where revenue growth was less than 100% and escalating to 10% and ultimately 12% if higher growth was achieved.

13. The agreement conferred on Starkane the right to nominate two persons as directors of the Company and the right to participate in general meetings and voting in the Company on an "as converted" basis.

14. On 27 February, 2017, Andrew Bourg, a director of Starkane (and of the Fund), was appointed a director.

15. In December 2017, the Company encountered additional funding requirements and two further significant funding arrangements were entered into.

16. Ulster Bank agreed to restructure its existing term loans, deferring the recommencement of payments to January, 2020.

17. Starkane agreed to advance an additional €2 million to the Company.

**5% redeemable convertible secured loan notes ("The Loan Notes")**

18. On 22 December, 2017, new agreements were entered into between the Company and Starkane. The principal feature of these agreements was the issue of redeemable, convertible secured loan notes. Starkane committed to and provided a sum of €1.75 million in December 2017, and an additional €250,000 in April 2018.

19. The Loan Notes carried an interest rate of 5% per annum and conferred on Starkane the right to convert the notes for ordinary shares in the Company in accordance with a pricing formula set out in the agreement.

20. At the same time, revised shareholder agreements were entered into whereby the Broderick family members agreed to subordinate their loans to those of Starkane.

21. Pursuant to these arrangements an additional director, Peter O'Donoghue, (introduced by Ulster Bank), was appointed to the board of directors and Michael Broderick retired as a director.

22. Following the entry into these arrangements, the board of directors comprised Ina Broderick, Bernard Broderick, the petitioner Barry Broderick, Andrew Bourg, Tony Proudfoot (introduced by EI) and Peter O'Donoghue.

23. The Company continued in 2018 to experience cash flow pressures and these continued into early 2019. During this time, the relationship between the Broderick family members and Starkane came under strain.

24. On 8 February, 2019, Starkane served a Conversion Notice on the Company informing it that it intended to convert €250,000 of its existing loan notes into fully paid ordinary shares in the Company. The legal effect of such a conversion would have been to reduce the Broderick family shareholding to 3% of the ordinary shares in Company.

25. Following service of the Conversion Notice, the parties engaged and an agreement was made on 12 February, 2019, whereby the following would occur: -

    (1) Starkane agreed to limit its allotment of shares to 75% of the ordinary share capital;

    (2) The Broderick shareholders agreed to invest €250,000;

    (3) The Broderick family agreed that directors nominated by them would resign, such that only one director would be nominated by them remaining on the board;

    (4) The Broderick family shareholders would retain the right, subject to certain conditions, to increase their shareholding back to 35%.

    (5) Starkane agreed to advance a further loan of €250,000.

26. The February 2019 arrangements included a letter of undertaking by the Broderick shareholders in favour of Starkane. This letter included a commitment subordinate the loans of the Broderick's to the entitlements of Starkane. It also included a covenant that

the subordinated creditors (namely the Broderick family members) would not "*without the prior consent of the lender (Starkane) petition for or vote in favour of any resolution or take any other action whatsoever for or which may lead to, the winding up or dissolution of the, or the appointment of an examiner or an interim examiner to the borrower*".

27. At the hearing, counsel for the Company and Starkane confirmed that it was not relying on this undertaking in its opposition to the petition.

28. Following the entry into these arrangements, Ina Broderick and Bernard Broderick ceased to act as directors and Sinead Heaney, of the Fund, was appointed to the board. Thereafter, the board comprised, the petitioner, Barry Broderick, Andrew Bourg, Tony Proudfoot, Peter O'Donoghue and Sinead Heaney.

**Further management changes**

29. In March 2019, Mr. Proudfoot informed Ina Broderick that her position was being made redundant. This led to contentious communications and disagreement and ultimately an arrangement whereby she ceased to work for the Company by the end of June 2019.

30. In May 2019, the Company moved to make the petitioner redundant. He then claimed that he had been unfairly dismissed and his claim to this effect is pending before the Workplace Relations Commission. He continues to be a member of the board of directors.

31. After the events of February – May 2019, tensions between the Broderick family and the representatives of Starkane increased.

**Further Loans**

32. Thereafter, further sums totalling €900,000 were advanced by way of loan by Starkane to the Company. These comprised a loan in March 2019, of €250,000, August 2019 of €300,000 and in February 2020 a loan of €350,000.

33. This brought the total funding by Starkane to the Company by June 2020 to €6.1 million comprising the following: -

    (a) €3,200,000 for the original CCRPS redeemable shares;

    (b) €2 million for the Loan Notes;

    (c) Further loan advances totalling €900,000.

34. In June 2020, a Deed of Confirmation was executed which had the effect of extending the security held by Starkane to some or all of these further advances. One of the complaints made by the petitioner is that by this means Starkane as a major shareholder procured that security would be granted in respect of existing debt, at a time when he says the Company was unable to pay wages.

**Further events in 2020**

35. The events of 2020 are themselves the subject of much contention and two features of them are relevant. Firstly, I shall refer to the contention among the directors, and

secondly, to correspondence between Messrs Arthur Cox, solicitors for the Broderick family, and Messrs Mason Hayes and Curran, acting for the Company and Starkane.

36. There was exhibited at the hearing of the petition the minutes of meetings of the board of directors held during 2020 which record continuous contentious discussions. This starts to emerge more clearly when the minutes of the meeting of the board held on the 28 February, 2020, attended by the petitioner, record that the petitioner has brought an unfair dismissal claim against the Company.

37. The minutes record strong differences of approach in relation to funding and investment arrangements for the Company. In general, the petitioner dissents from a number of proposals which are made, including proposals relating to investment, and from approval of the budget for 2020.

38. The minutes of the meeting on 24 March, 2020, reflect a range of issues on which the petitioner had written to the chairman, including the question of the solvency of the Company itself.

39. The minute of the meeting of the board meeting on 6 May, 2020, records the petitioner as stating his belief that the Company was at that time insolvent and this led to a contentious discussion as to the basis for this belief.

40. The contentious discussions at the meetings of the board continued throughout 2020 and the petitioner says in his affidavit verifying the petition that on 22 October, 2020, he wrote to the chairman raising a series of questions which he expected to be resolved at the meeting convened for the following day, 23 October, 2020. The petitioner complained that his queries concerning the Company's finances and trading information requested by him were not addressed at that meeting.

**Correspondence from Arthur Cox**

41. On 9 March, 2020, Arthur Cox Solicitors wrote to Starkane on behalf of the Broderick family members, claiming that Starkane and the Fund had acted unlawfully in relation to their role in the Company.

42. The letter runs to 19 pages and was copied to the Company, the Fund and to EI.

43. In this letter, the family complained that in preparing the December 2017 Investment Agreement, which incorporated the CCRPS, and the December, 2017 Loan Note, Starkane and BDO had fundamentally misled the family regarding the true effect which those documents would have on their shareholding in the Company. They claimed that the family were unaware that those documents would give Starkane the opportunity to effectively take control of the Company "*at any time of its choosing, an opportunity which it has now cynically taken*".

44. They continued that the circumstances which led to the February 2019 agreement were "*highly irregular*" and unlawful and had led to a detrimental effect on the Broderick's interests and shareholding in the Company.

45. The Broderick's claim in this correspondence that they never considered the possibility that Starkane would seek to claim control over the Company "*for its own ends, using highly aggressive tactics and misrepresenting the impact which legal documents would have on the Broderick*". They claimed that they were "*shocked and appalled*" that their shareholding had been reduced to 25% and that Mr. Barry Broderick the petitioner had been dismissed from his employment with the Company.

46. Arthur Cox called on Starkane to have the relevant agreements rescinded and the shares issued to them cancelled and to confirm "*that the further investment which is being considered by the Company will not be completed while the above issues remain unresolved and that no further steps which are prejudicial to the interests of the Broderick's will be taken by Starkane, BDO and the BDO Fund or the Company, including any further conversions to equity*".

47. Arthur Cox stated that their clients had secured funding of €2 million, "*to acquire the December, 2017 Loan Note from Starkane*". They called on Starkane to confirm that they would transfer the loan note to the Broderick's in return for payment of €2 million, being the principal amount of the Loan Note, and disregarding what they described as the "*invalid conversion of February 2019*".

48. Arthur Cox warned that unless they received an appropriate confirmation as to these matters within two weeks, i.e. by Monday 23 March, 2020, High Court proceedings would be issued against BDO, Starkane and the BDO Fund and that they would seek to have those proceedings entered into the Commercial List of the High Court. Finally, they invited Messrs Eversheds, who had advised Starkane in relation to the investments, if they had authority to accept the service of such proceedings.

49. A short acknowledgment was written by Mason Hayes and Curran on behalf of Starkane on 19 March, 2020, and a further letter was written by Arthur Cox on 3 April, 2020. In this letter, Messrs Cox referred to discussions which had been taking place at the board concerning a further investment of €750,000 by Starkane, and a simultaneous investment of €250,000 which was being sought of their clients. They stated that there were a number of "*highly irregular features of the proposed further investment*". They stated that their clients considered that such further investment was a device intended to further reduce their client's shareholding in the Company.

50. This letter concluded by stating the following: -

> *"If there is to be any further investment into the Company, this requires very careful analysis by the directors of the Company as to whether it is in the best interests of the Company, including in the face of COVID-19. The Broderick's believe that any such investment, if deemed to be required following a proper consideration of the risks and merits of same, must be effected by way of a loan rather than the issuing of further shares at a 75/25 ratio which reflects the previous unlawful reduction to 25% of the family's shareholding in the Company.*

*In any event, it would be entirely inappropriate for any further investment to proceed, whether by way of a loan or the issuing of equity, while the issues which have been raised by the Broderick's remain unresolved. The Broderick's will make Starkane, BDO and the BDO Fund, and, if appropriate, the directors of the Company (other than Barry Broderick) in their personal capacities, liable for all and any losses which are suffered by the family if the proposed further investment proceeds".*

51. On 7 April, 2020, Mason Hayes and Curran wrote a substantive reply to Arthur Cox refuting all of the allegations made against Starkane and the Fund. They concluded by stating as follows: -

*"We understand that the further capital raised was dealt with at board and expect that the appropriate procedures, including the necessary shareholder capital call procedure will be followed. Any such further issues should be directed to the board".*

52. Mason Hayes and Curran confirmed that the request to transfer the Loan Note for €2 million was rejected.

53. Further letters were exchanged between Arthur Cox and Mason Hayes and Curran, and the final letter in the sequence was a letter of 3 June, 2020, from Mason Hayes and Curran repeating that Starkane and BDO would defend any proceedings issued and seek costs.

54. Although this was the end of this particular line of correspondence, the contentious issues raised by Messrs Cox were referred to from time to time by the petitioner in board meetings during the currency of that correspondence and continuously up to October 2020.

55. No proceedings were issued by the Brodericks against the parties named in this correspondence.

**The petition**

56. The petition recites the trading history of the Company and its growth almost continuously since its establishment in 1994.

57. It described 2015 as a critical year, in that the Company's growth had resulted in significant capacity issues, which caused it to engage further with EI and ultimately with the Fund.

58. Reference is made in the petition to the funding arrangements made with EI, Ulster Bank, and with Starkane.

59. The Company remained profitable in 2015 and 2016. It first encountered serious financial challenges in 2017 which were a combination of factors including the fact that it had

moved to the new property in Tallaght but still retained ownership and debt associated with the property in Walkinstown

60. In 2017 and 2018 turnover continued to rise, but increased costs in those years caused a negative EBITDA. This in turn caused cash flow pressures which continued through 2019 and in to 2020. The petitioner says that between 1 January, 2016, and 31 August, 2020, the Company lost over €5.5 million and that it was projected to incur further losses for the remainder of this year. The petitioner refers to the total debt of the Company, including its obligations to Starkane, at a sum of €8.9 million and says that the petitioner does not believe that the Company is in a position to repay that level of debt.

61. The petitioner describes the Company as having four main sources of difficulties which are described as follows: -

> *"Issue 1 – Losses and operation issues;*
>
> *Issue 2 – Cash flow pressures;*
>
> *Issue 3 – Debt and financing issues;*
>
> *Issue 4 – COVID-19 impact".*

62. The petitioner asserts that the Company is balance sheet insolvent and that as regards cash flow, the position is deteriorating. It says that "*The solvency ratio is at a critically low level and the Company is undercapitalised for its current level of trading*". The petitioner asserts that the Company's own cash flow projections predict a negative cash flow on weekly trading for the final quarter of 2020.

63. I shall return to the questions of balance sheet and cash flow insolvency when considering the report of the Independent Expert, Mr Cormac Mohan which accompanied the petition in accordance with s. 511 of the Companies Act 2014. The Company and Starkane has submitted also a report by Mr. Declan McDonald, chartered accountant and partner at PricewaterhouseCoopers, to comment on the report of Mr. Mahon.

64. The petitioner asserts that the Company has a reasonable prospect of survival. This proposition is not contradicted by the opponents of the petition. The reasons given in the petition for a reasonable prospect of survival are as follows: -

(1) The Company has been in existence for 26 years and built up a strong brand during this time;

(2) The Company has blue chip customers including Aldi, Musgraves, Palace Food and Insomnia;

(3) The Company has a history of trading profitably;

(4) Although the Company suffered losses in 2017 and 2018 its trading performance improved in 2019;

(5) Projections for the Company for 2021 showed that the Company can trade at a profit;

(6) The Company has a loyal and willing workforce of 107, many of whom have worked for the Company for a long number of years.

65. The petitioner says that he is anxious to save the jobs of the workers and ensure the best possible outcome for the Company's trade and other unsecured creditors as well as its secured creditors and the Revenue Commissioners.

66. Finally, the petitioner asserts that he has "*Had discussions with a party who, subject to due diligence, has expressed an interest in investing in the Company*".

67. The petitioner states that he recognises that an examiner if appointed will advertise for expressions of interest.

68. Before turning to the report of the Independent Expert, and the positions of the other parties, it is appropriate to identify two particular issues of controversy which are identified in the petition and by the objectors, who are the Company and Starkane.

**The Temporary Wage Subsidy Scheme ("TWSS")**

69. In March 2020, the Government announced and commenced the operation of certain schemes to support businesses in response to the trading and financial challenges presented by the COVID-19 pandemic. The TWSS was one such measures to enable employers retain workers, provided certain criteria were met.

70. The key criteria for eligibility were as follows: -

(a) that the Company's turnover for Q2 2020 would decrease by 25%;

(b) that the relevant employee was an employee of the Company on 29 February, 2020;

(c) that the employer could not pay wages in full because of the effects of the pandemic.

71. Between March 2020 and August 2020 the Company availed of this scheme, claiming subsidies totalling €599,000. Some issue was taken by the Company with the accuracy of this figure.

72. The initial application for the subsidy was made on the basis that the Company had a turnover in Q1 of €4.015 million, and a projected turnover for Q2 of €2.9 million, equating to a reduction of 27.8%.

73. The petitioner says that he believed that these turnover figures submitted were inaccurate, and that if accurate figures had been provided, the Company would not have met the criteria.

74. In essence, the petitioners' complaint, made extensively in his petition and in affidavits and addressed also in the report of the Independent Expert is that the Company "*manipulated*" the turnover information relevant to Q1 and Q2 in order to claim the subsidy. The petitioner alleges that certain sales which were made in December 2019 were recorded in January 2020 and that certain sales which were made in early April, which ought properly to have been included in Q2 were recorded within Q1 and not Q2, again with a view to distorting the turnover figures for the purpose of the application of the TWSS.

75. The petitioner also claims that the Company adjusted the definition of its accounting quarter from a period of three months to a period amounting to thirteen weeks, being a so-called, "*four weeks, four weeks, five weeks' model*", and that this had also assisted in the manipulation of the relevant figures.

76. The petitioner states, supported by the Independent Expert, that if the calculations of turnover are adjusted to reflect the true position, on his account of the matter, the Company would not have been eligible for the subsidy, and that this has the effect of creating, at least a contingency for the sum of €599,000 claimed and which may have to be refunded following enquiries by the Revenue Commissioners into the validity of the application for the subsidy.

77. The petitioner also claims that the effect of these grants was to inflate the reported EBITDA for the first eight months of 2020.

78. The expert accountants disagree as to both the accounting treatment of the sales referred to by the petitioner in this complaint, and as to whether a contingency should be recognized in respect of the amount of the subsidies.

79. I shall be returning later to the position adopted by the Revenue Commissioners in relation to this petition. In relation to the TWSS however, the Revenue Solicitor in a letter to the Company solicitor of 21 November, 2020, exhibited in these proceedings, stated the following: -

> *"Regarding the serious allegations made by Mr. Broderick on affidavit in regards 'the wage subsidy scheme' this matter is under review by Revenue. It would not be appropriate for Revenue to make any further comment until a final determination has been made, therefore Revenue are reserving its position in regards this application".*

80. The Company refutes the allegations made in relation to the benefit of this subsidy availed of by it.

81. Firstly, the Company denies that it "*manipulated*" sales information for the purpose of achieving the decline in turnover which would render it eligible. Secondly, the Company says that the entire purpose of the TWSS was to support companies to pay employee wages as a result of the impact of the pandemic on businesses. It says that to therefore

"*recalibrate*" the financials by adjusting for a contingency for the return of the subsidies would be to defeat the purpose of such a scheme, which is itself designed to enable companies to continue in business during the pandemic and to retain staff on payroll.

82. The Company also says that the realignment of the calculation of the definition of the quarterly period was planned before the end of 2019 and is common in factories.

83. The Company also claims that this matter has been introduced in the petition for the ulterior purpose of discrediting the Company or its current board of directors.

84. Somewhat unhelpfully, the Company and Mr. McDonald state that they understood that the Revenue Commissioners as the authority with responsibility for governing the operation of the TWSS carried out its own inquiries and concluded that the Company was eligible for the TWSS. It appears from the letter from the Revenue Commissioners referred to above that no "*audit*" has been undertaken and there has been no definitive outcome to this issue.

85. Revenue are on notice of this issue and are capable of undertaking their own inquiries and taking such action as they see fit following the conclusion of any such inquiries. In the meantime, if this court were to find that there has been proved the serious allegation of manipulating turnover information provided to Revenue for the purpose of availing of the subsidy, more would be required than the allegations made in the petition and affidavits and the comments on this subject by the experts. I shall return to the implications of this issue for the solvency questions.

**The Revenue Commissioners – PAYE/PRSI**

86. As of August 2020 the Company was indebted to Revenue for a total sum of €407,000 in respect of PAYE and PRSI. This related principally to such taxes deducted in the period between February 2020 and August 2020.

87. The Company entered into a "warehousing" agreement with Revenue in respect of these, which means that they stand deferred for a period of twelve months. This "warehousing" facility was a further support offered by Revenue to businesses to alleviate the effects of the pandemic.

88. The petitioner states that the effect of this agreement is also to distort the cash position of the Company for 2020.

89. The Company says in response that there was no reason why it would not avail of this form of relief provided pursuant to government support schemes since, it says, over 70,000 businesses have availed of the scheme as of October 2020. The interest rate applied by Revenue for the "warehousing" is 0% and 3% after the expiry of the warehouse period.

**Independent Expert Report**

90. The petition was accompanied by a report of an Independent Expert, Mr. Cormac Mohan, in the form required by s. 511 of the Act.

91. Mr. Mohan made his report without direct access to general Company records or to the directors of the Company. He says that reliance has been placed by him on information provided to him by the petitioner and other Broderick family members. This includes material presented at board meetings in 2020.

92. Appendix C to Mr. Mohan's report contains an estimated statement of affairs as of 31 August, 2020 in which he illustrates the estimated statement of affairs on a going concern basis and on a winding up basis.

93. The estimate on a winding up basis is for a deficit of €7.6 million, and on a going concern basis, he estimates a deficit of €3 million.

94. Mr. Mohan provides in Table 8 of his report a summary of the balance sheet position as at August, 2020 which shows fixed assets at €6.1 million, and net current assets of a negative €469,000 against liabilities totalling €9.3 million, resulting in a deficit of €3.6 million.

95. Mr. Mohan states that the Company's projected cash flows anticipate it having funds of €127,000 by 9 January, 2021, and that at this point it would be "*burning cash at €190,000 per month*".

96. Mr. Mohan says that in assessing whether the Company is cash flow insolvent he has also considered the ongoing support of Starkane and an undrawn facility of €850,000 referred to in a June 2020 agreement. Mr. Mohan states also that he does not believe that the funds available to the Company will be sufficient to meet its capital expenditure ("CapEx") requirements or to address the legacy debt issues including the deferred Revenue liability. He also says that account needs to be taken of the potential material liability, as he puts it, in respect of the TWSS.

97. In relation to the Company's prospects for survival, Mr. Mohan states that the Company is not in his view trading at capacity and that based on the current trading environment it is unlikely to require additional capacity until at least the middle of 2021. He then reviews the trading projections of the Company and expresses the opinion that they demonstrate that the Company can trade at an EBITDA surplus by 2022. He believes that these projections are reasonable and achievable subject to certain assumptions regarding the required CapEx spend.

98. Mr. Mohan states that the projected EBITDA surplus would not be sufficient to meet the Company's current finance costs and says that the current debt levels of the Company are unsustainable.

99. Mr. Mohan concludes that the Company has a reasonable prospect of survival as a going concern subject to four conditions: -

    (1) The protection of the High Court is granted to the Company;

(2) A review of the Company's overheads is undertaken with reductions identified and implemented;

(3) The securing of new investment which will provide sufficient working capital for the Company and to pay a dividend to the creditors of the Company and fund future CapEx requirements identified by the board or identified as part of any new overall strategy for the Company;

(4) The acceptance of an appropriate scheme of arrangement by the creditors and members of the Company and its approval by the Court. The scheme of arrangement should address the Company's level of the Company's legacy debt.

**Submissions of the Company and Starkane**

100. The Company and Starkane oppose the petition for the following reasons: -

(1) It is said that the Company is not insolvent because it is able to meet its debts as they fall due. They say that the statutory criteria for the appointment of an examiner have not been made out and the Court has no jurisdiction to make such an appointment;

(2) The Company is not in default of any of its payment terms with creditors and there is no "*emergency insolvency event such as would trigger the appointment of an examiner to protect the Company from threatened liquidation or other enforcement*";

(3) That insofar as it can be argued that the Company is balance sheet insolvent, this is only because of the recorded liabilities to Starkane. It is submitted that this liability does not threaten the ability of the Company to pay its debts as they fall due because it is represented by redeemable preference shares which can only be redeemed from profits available for distribution. It is stated that Starkane has "*stated and delivered on its full and unwavering support for the Company*";

(4) It is submitted that there is no basis for concluding that the Company would be "*likely*" to be unable to pay its debts in the near future. In this regard reliance is placed on committed funding in the short term both from Starkane and EI. There is considerable controversy in relation to the availability of further support from EI, which I consider later;

(5) The petition, it is said, does not serve to protect the interests of employees and unsecured trade creditors. It is submitted that in circumstances where the Company has remained in compliance with its credit terms with creditors and where all employees have been retained during the pandemic the biggest threat to the Company's survival is this petition itself;

(6) The Company submits that the petition is motivated by the personal disputes between the petitioner on the one hand and the majority shareholder and other directors. It submits that this is therefore not an appropriate process through which

to resolve those disputes or agitate the complaints, referring in particular to those made in the Arthur Cox correspondence. It submits that this is an improper attempt by the petitioner to advance arguments which he could have advanced had he proceeded with the Commercial Court proceedings threatened in the original Arthur Cox correspondence and not advanced.

101. Affidavits in reply were sworn by Mr. Tony Proudfoot, a director and the CEO of the Company, and by Mr. Andrew Bourg, a co-founder of the Fund and a director of Starkane.

102. In support of the opposition to the petition an affidavit was sworn by Mr. Declan McDonald. Mr. McDonald prepared a Report ("the McDonald Report") to address the statements and conclusions contained in the report of the IER.

103. Mr. McDonald states that he does not believe that the Company is insolvent, and that it is his professional opinion that the Company is paying and can continue to pay its liabilities as they fall due. He says that he is an experienced insolvency practitioner and he does not believe that the Company is a candidate for examinership because in his opinion it has a reasonable prospect of survival without the intervention of the court.

104. Mr. Proudfoot in his affidavit refers to the history of the Company's trading performance and he says that this history and the past role of the petitioner in operating the business is to be contrasted with what he describes as a "*turnaround in the Company's fortunes since the intervention of Starkane and the appointment of a substantially new management team*".

105. In the exchanges of affidavits which followed, there is extensive argument as to the performance of the Company at different stages in its history and strongly held views on either side as to the respective responsibilities of the parties for the state of the Company's affairs at the time of the presentation of the petition.

106. Mr. Proudfoot states that were it not for the funding provided by Starkane, and its intervention when it exercised its conversion rights, the Company would not have survived and its more than 100 employees would have lost their jobs.

107. Mr. Proudfoot states that since the conversion of Starkane's notes and further investment by Starkane, together with continuing support and expertise provided by him in his capacity as CEO having been appointed to that position in the middle of 2018 the performance of the business has been strong. He says that for the financial year ending 2018 the Company achieved approximately a break-even EBITDA compared with negative EBITDA positions in the previous two years. He refers to the continuing funding support available from Starkane, to which I shall refer later.

108. In relation to the sources of the Company's difficulties as identified in the petition, Mr. Proudfoot says that EBITDA performance had been positive for the first quarter of 2020, although it is recognised that this is negative from the second half of 2020.

109. Mr. Proudfoot says that he does not see how the mere fact that the Company has large levels of debt on its balance sheet owing to the majority owner is of itself a reason justifying the appointment of an examiner and he refers to the analysis of the subject more fully in the report of Mr. McDonald.

110. Mr. Proudfoot states that the decision of the Company to avail of the TWSS and the manner in which it made its claim was an entirely valid exercise and that if this had not been claimed the Company would have taken other different cost cutting steps.

111. In relation to the claim concerning the "warehoused" PAYE/PRSI, he states that this has been agreed with Revenue and that payments are being kept up to date since the entry into the warehouse agreement. Therefore, the amount of €407,000 is not currently repayable.

112. Mr. Proudfoot says that in as much as the Independent Expert has formed views as to particular cash flow pressures and trading challenges affecting the Company, this is a function of the fact that the Independent Expert did not speak to or engage with the directors of the Company before making his report. He says that in his view the IER does not reflect a true and fair view of the Company's business and its financial health. He says that the Company is trading in line with projections. Mr. Proudfoot refers again to the further investment available from Starkane and from EI and he says that the Company has a plan and financial backing in place to progress its business plan without the need to have recourse to Part 10 of the Act.

113. He concludes by saying that he agrees that the Company has a reasonable prospect of survival but says that the presentation of this petition is entirely unnecessary and if anything undermines the survival prospects. He says that he believes that the petition represents a threat to the success of the Company and its undertaking because the Company is not insolvent and is able to meet its payment obligations to creditors as they fall due.

**Starkane Limited**

114. The position of Starkane is set out in an affidavit sworn by Andrew Bourg, who is a director of Starkane and of the Company.

115. At the outset Mr. Bourg rejects the allegations made as against the Fund and Starkane. He states that it was the deterioration in the Company's trading and financial position following the initial investment by Starkane and through 2018 which caused Starkane to convert part of its convertible loan note into the 75% shareholding in February, 2019. He says that this conversion enabled the Fund to effect more day to day involvement in the management and strategic direction of the business. He says that because the shares at the date of conversion had a nil equity value Starkane would have had the ability under the Investment Agreement to acquire the entire shareholding but elected not to dilute the family shareholding below 25% at that point in time.

116. Mr. Bourg states his view that the petition is motivated by a desire by the petitioner to "wrestle back ownership of the Company into the hands of the Broderick family". He exhibits the correspondence exchanged with Arthur Cox and refers also to exchanges at meetings of the Board throughout 2020.

117. Mr. Bourg states that the management team now led by Mr. Proudfoot have delivered on a business plan with significant progress made. He concludes by saying the following:

(1) That the Company's payment obligations to its creditors, including trade creditors, are currently within terms, whereas a scheme of arrangement, which would be unlikely to detrimentally affect secured or preferential creditors would instead expose trade creditors to a "*liquidation type dividend*". He says that this would be entirely unnecessary and "*inimical to the Company's prospects of survival*".

(2) Mr. Bourg says that the basis for contending that the Company is balance sheet insolvent is premised entirely on the debt owed to Starkane. He says that the debt owed to Starkane has been treated in the management accounts of the Company, with the knowledge of Starkane, as equity and as Starkane is a majority shareholder it is not appropriate to treat Starkane as if it were simply a regular lender in the market place.

(3) Mr. Bourg states that having regard to the improvements in the Company's fortunes under its current management, by contrast with its performance under the Broderick's, the appointment of an examiner represents "*an existential threat to the very survival of the Company and puts the livelihood of its employees at risk.*"

118. In a second affidavit sworn by Mr. Bourg he exhibits a letter from Starkane dated 18 November, 2020, confirming its commitment to maintaining its investment in the Company.

119. The contents of this letter are of central importance when it comes to considering the availability of funding and investment to the Company generally. In this letter, Mr. Bourg states the following:

> *"Based on the tangible progress made by you and the management team since Starkane took majority control in February, 2019,, Starkane is committed to this journey with you and indeed it is the Company's financial success which will result not only in delivering on the stakeholder's equity in the business but will also mean the repayment of Starkane via its preference share investment. It is on this basis, that as a majority shareholder in the Company, we view all our investment instruments (being our preference, loans and equity) as being aligned to our collective object which is to increase the Company's equity value by generating strong and consistent EBITDA, a key measure in determining the Company's value.*
>
> *Insofar as any further comfort is required by the Company from Starkane over and above that already given, I can confirm, on behalf of Starkane, its commitment to*

*the ongoing financial support of the Company to meet its turnaround growth plan; commencing with the provision of a further €650,000 on or before 2t December, 2020. This as you know will enable a further €650,000 to be drawn down from Enterprise Ireland (€450,000 of which is by way of repayable advance and a €200,000 non-repayable grant). We are having our solicitors commence the preparation of that transaction documentation and will furnish that shortly.*

*In addition to the €650,000 (in 2020) Starkane is also prepared to provide a further €500,000 (in Q12021) to finance the CapEx automation agenda and enable the Company to further scale. Both of these investments have been approved by the Board of Starkane."*

120. Mr. Bourg then refers to the cash flow forecast summary for the year 2020 to 2022. He believes that the Company will have headroom in excess of €1.1m over that period. He concludes as follows:

*"Starkane has been involved in the Company since February, 2017 and, again, rest assured we have confidence in you, the management team and the Company's plans for its business, as is demonstrated by not only our willingness to advance further significant financial resources in helping the Company meet its plans, but also the deferral of dividends and interest in the monies invested to date. What is more Starkane has the ability to potentially extend the term of its investments to allow the Company further flexibility should it so be required."*

**Report of Mr. Declan McDonald**

121. Mr. McDonald expresses the view that there is no reason for the Company to seek court protection and the appointment of an examiner for the purpose of securing the Company's prospects of survival. He gives the following reasons: -

(1) He says that the Company's non-shareholder creditors are all within terms and that this includes the fixed and floating charge creditor Ulster Bank, the Revenue Commissioners and the trade creditors. He says that there is no pressing liquidity issue.

(2) That if the Board of Directors determined that there was a solvency issue the Company does not require court protection to restructure its balance sheet. He notes that the single largest affected creditor is the majority shareholder who is represented on the Board. He states that it has at all times deferred the interest payments on its secured loans and dividends on its preference shares and that the requirement to restructure these debts is neither necessary nor desirable because they do not mature until February 2022 and December 2022 respectively. He says that any restructuring of these obligations can be undertaken without court intervention.

(3) Mr. McDonald says that the Company will be marginally EBITDA positive for the year ended 2020 and its forecast generate positive EBITDA of €503,000 in 2021 and €901,000 in 2022.

(4) Mr. McDonald states that the management team is committed to a strategy to deliver the EBITDA forecast backed by a supportive majority shareholder willing to invest further new money to support the strategy.

122. Mr. McDonald analyses the financial position of the Company by reference to the balance sheet and cash flow and examines the position of the Company as regards its significant creditors namely Ulster Bank, Starkane, the Revenue Commissioners and trade creditors.

123. In relation to Ulster Bank, to whom a balance of €2.338m was owed at 30 September,, 2020 Mr. McDonald notes that the loans are secured on the Company's premises by way of a first fixed charge and says that they are well within loan to value covenants. In this regard he exhibits a letter of valuation from Messrs Savills dated 4 November, 2020, in which they advise that the current market value of the property at Tallaght on the basis of vacant possession is in the region of €5m – €5.2m.

124. The petitioners are highly critical of the Savills valuation, in circumstances where the valuer had observed that he had been unable to inspect the property and relied only on information provided by the Fund.

125. Mr. McDonald noted that the most recent arrangements with Ulster Bank are recorded in a covenant waiver agreement of 3 July, 2020, providing forbearance to the Company after the start of the pandemic. Under this agreement the Company is required to recommence monthly capital interest payments to Ulster Bank totalling €20,230 from 31 October, 2020, and the first of these payments was duly made on 3 November, 2020.

126. The Company has an overdraft facility of €145,000 with Ulster Bank which was undrawn as at 4 November, 2020. It also had an invoice discounting facility of €1.5m of which €670,000 was undrawn at 4 November, 2020.

127. Mr. McDonald notes that of the trade creditors as at 1 November, 2020, amounting to €1.435m, 91% were less than 30 days outstanding. Mr. Mohan disputes this assertion. Mr. McDonald states that from his review of creditor positions there is no pressure being exerted by any creditor for overdue payment and in circumstances where certain government backed pandemic concessions are in place he is of the opinion that the Company is paying its debts as they fall due.

**Further submissions of the petitioner**

128. In a second affidavit the petitioner rejects the allegations which have been made regarding the motivation for the petition. He says that in circumstances where the Brodericks hold a 25% shareholding in the business they have been advised and accept that the likely outcome of an examinership is that they will no longer have a shareholding in the business and that the claims of any family members against the Company are likely to be compromised under any scheme of arrangement proposed by an examiner. Mr.

Broderick says that his motivation for the presentation of the petition is to preserve the "*going concern*" and save the business and jobs of the Company. He states that the steps taken by him are designed to ensure that the Company survives and he says "*can be starkly contrasted with Starkane's wilful refusal to acknowledge the obvious insolvency of the Company*".

129. Mr. Broderick states that the approach being followed by the Company and Starkane will result in the Company entering liquidation in a short period, whereas a prudent course would have been to face the insolvency through examinership. He says that the Company has "*not turned a corner*" and is in urgent need of restructuring if it is to avoid liquidation.

130. Mr. Broderick asserts that he has been raising concerns about the solvency of the Company in meetings of the board of directors since earlier this year, at the latest by the board meeting of 24 March, 2020. He says that he has put questions to other members of the board concerning solvency and other matters and has never received satisfactory responses.

131. Mr. Broderick says that at one point in the exchanges the chairman indicated to him that he should obtain his own advice concerning the solvency of the Company. He says that he has now done so, and that he has received advice that the Company is "*clearly insolvent on a balance sheet basis and on the cusp of being insolvent on a cash flow basis*". He says that having received that advice he made further efforts to engage with the board and he says that in the absence of any real engagement or any acceptance of the position as seen by him, he was required to act on this independent advice.

132. Mr. Broderick does not say whether in any of this correspondence or in any of the meetings of the board of directors he proposed that the Company should consider liquidation or examinership. The evidence of the Company and of Starkane is that he did not do so.

**Jurisdiction**

133. The petition is brought pursuant to s. 509 of the Companies Act 2014 which provides as follows: -

> "*(1) Subject to subsection (2), where it appears to the court that—*
>
> *(a) a company is, or is likely to be, unable to pay its debts,*
>
> *(b) no resolution subsists for the winding up of the company, and*
>
> *(c) no order has been made for the winding up of the company,*
>
> *the court 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 functions in relation to the company as may be conferred by or under this Part.*

*(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.*

*(3) For the purposes of this section, a company is unable to pay its debts if—*

*(a) it is unable to pay its debts as they fall due,*

*(b) the value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities, or*

*(c) the circumstances set out in section 570 (a), (b) or (c) are applicable to the company.*

*(4) In deciding whether to make an order under this section, the court may also have regard to whether the company has sought from its creditors significant extensions of time for the payment of its debts, from which it could reasonably be inferred that the company was likely to be unable to pay its debts."*

134. The parties are all agreed that the sequence of the analysis is that the jurisdiction of the court to appoint an examiner can only be engaged if the Company is unable to pay its debts, or "*likely to be*" unable to pay its debts within the meaning of s. 509.

135. Only if the court finds that the Company is unable to pay its debts within the meaning of s. 509 does the court have jurisdiction to appoint an examiner.

136. If the court finds that the Company is unable to pay its debts, the appointment of an examiner is discretionary and the only guidance given in s. 509 as to the exercise of the discretion is contained in subs. 2, which provides that the court cannot make such an appointment: -

> *"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".*

**Issues arising from reports of experts**

137. The Company and Starkane presented the McDonald Report dated 6 November, 2020. In response, the petitioner delivered a second report of Mr. Mohan, referred to as the "*Addendum to the IER*" dated 13 November, 2020. Mr. McDonald then delivered a second report on 18 November, 2020, ("The McDonald Addendum").

138. All parties, including the experts, agree that the Company has a reasonable prospect of survival as a going concern. They differ as to whether the Company is solvent, (either on a balance sheet basis or a cash flow basis), and as to whether examinership is appropriate or necessary to facilitate the survival of the Company as a going concern.

139. The expert opinions differ as to the accounting treatment of certain assets and liabilities and the analysis of trading information and cash flow projections.

140. None of the parties sought to cross-examine either of the experts. The court therefore finds itself in a position similar to that which presented itself to Clarke J. (as he then was) in *Re McInerney Homes Ltd* [2011] IEHC 4, and McDonald J. in *Re New Look Retailers (Ireland) Ltd* [2020] IEHC 514. In each of these cases, the court noted observations made by the Supreme Court (Hardiman J.) in *Boliden Tara Mines Ltd v Cosgrove* [2010] IESC 62. In that case the court had cautioned against the challenge of reconciling contradictory evidence given on affidavit in circumstances where the deponents have not been cross-examined.

141. In the case of *Re McInerney Homes Ltd*, the court was addressing submissions made by opposing parties in relation to the fairness of a proposed scheme of arrangement. In *Re New Look Retailers (Ireland) Ltd*, the court was presented with a report of an Independent Expert and a "shadow" report presented on behalf of parties opposing the appointment of an examiner.

142. In *Re New Look Retailers (Ireland) Ltd*, McDonald J. noted that as a matter of principle cross-examination at the stage of a hearing under s. 509 should only be undertaken as a last resort. He said that he would not go so far as to exclude the possibility that in an appropriate case cross-examination might be necessary. However, he continued that: -

> *"…in the case of a hearing under s. 509, I believe that, in the vast majority of cases, the court should strive to deal with the matter, as best it can, on the basis of the affidavit evidence before the court".*

He noted that this was the approach which Clarke J. had adopted in *Re McInerney Homes Ltd*.

143. In this case there is no affidavit sworn by the Independent Expert, but his reports are exhibited to the affidavits of the petitioner.

144. Mr. Mohan states in his introduction that he makes his Report in accordance with s. 511 of the Act and that he is an expert qualified in accordance with s. 633 of the Act. Mr. McDonald states in his affidavit that he is conscious of his obligations to the court as an independent expert and that he has endeavoured to express his views "*in a candid and unvarnished fashion – both the good and the bad – for the assistance of the Court*". The court accepts that each of the experts, being experienced practitioners, understands and has endeavoured to observe his duties of candour to the court. Nonetheless, each of them have been presented with information by the parties which suffers from selectivity, such that the reports advocate for the positions of the parties in this most contentious of internal disputes. I do not fault the experts themselves for this, but the consequence is that the court is presented with an array of financial information selected in the context of such advocacy.

145. I propose to follow the approach adopted by Clarke J. and by McDonald J. and to identify the areas of difference between the experts in this case, insofar as doing so is necessary for the determination of the petition.

146. The single point of agreement between the parties and the experts is that the Company has a reasonable prospect of survival as a going concern. Therefore, I must first examine the submissions made by the parties and the opinions of the experts as to whether the Company is unable to pay its debts within the meaning of s. 509. I turn firstly to s. 509 (3)(b) which is the basis for the so-called balance sheet test, namely the question of whether the value of the assets is less than the amount of the liabilities, taking into account prospective and contingent liabilities.

**The Starkane obligations**

147. This is the area of dispute which has the largest impact on the question of solvency. In his first report Mr. McDonald incudes a "*Balance Sheet Forecast*" for December 2020. This balance sheet forecast shows the Company as having fixed assets estimated at €6.119 million and total net assets at €5.152 million. He shows this to be funded by share capital including, he says, the value of Starkane's interest at €7.6 million, and the Broderick's subordinated loan at €410,000.

148. In his second report Mr. McDonald refers to an estimated statement of affairs as at 30 September, 2020. In this estimate he includes a liability for Starkane in respect of its secured loan a sum of €3.11 million, and treats the CCRPS interest of €3.2 million as a form of "*equity*", along with the Broderick's loans and accrued dividends.

149. Mr. Mohan exhibits to his IER an estimated statement of affairs as of 31 August, 2020. In that estimated statement of affairs, he treats the Starkane secured loan at €2.9 million as secured debt and the CCRPS at €3.2 million under the heading "*Unsecured Creditors*".

150. Mr. McDonald says that the management accounts presented to monthly meetings of the board of directors treat the amount of €3.2 million invested by Starkane by way of CCRPS as share capital. He acknowledges that historically they have been treated in the statutory accounts filed at the CRO as debt, in accordance with accounting standards.

151. Mr. McDonald expresses the opinion that CCRPS, which he says are also referred to as "quasi equity" are a hybrid financial instrument demonstrating characteristics of both equity and debt. He continues by stating that both the board of directors and Starkane have always regarded these shares as equity rather than debt for two reasons: -

    (1) The CCRPS are held by Starkane, which also holds 75% of the ordinary share capital of the Company. He says that Starkane acts very much in the role of "*equity investor rather than lender to the Company*", and he says that Starkane's behaviours are aligned to increasing enterprise value through continued investment in operations;

    (2) Mr. McDonald states that the CCRPS are not redeemable until February 2022, at which point Starkane can choose from a number of options depending on the performance and value of the business at that time. He said that those options include conversion to ordinary shares or extending the redemption date. He says that Starkane is therefore not in the position of a lender solely focusing on

repayment of a debt and that its decisions will be influenced by equity considerations and underlying enterprise value.

152. Mr. McDonald states that it is not unusual for preference shares to be regarded as share capital by a board of directors "*in the day to day running and planning of a business*", and to be classified as equity in the management accounts. Mr. McDonald states that accounting rules under Financial Reporting Standards 102 require that year-end adjustments be made to reflect the shares differently in statutory accounts, and that this requires an analysis of the contractual rights of the holder of the shares. He says that the rights attaching to the CCRPS should be treated as characteristics of equity rather than debt for the following reasons: -

(1) They carry the right to appoint directors to the board;

(2) The right to appoint the independent chairman of the board;

(3) The provisions contained in the investment agreement for so-called "*tag-along*" and "*drag-along*" rights;

(4) They carry certain pre-emption rights as if they had already been converted to ordinary shares;

(5) The holder of the CCRPS is entitled to receive notice of, attend and vote at general meetings of the Company;

(6) Entitlement to dividends enjoys priority over the ordinary shares, *pari passu* with the preference shares issued to EI;

(7) On a winding up or sale of assets of the Company, the CCRPS rank *pari passu* with EI and ahead of ordinary shares, but after all other creditors;

(8) If the Company is ultimately not in a position to redeem the shares on the redemption date, then CCRPS can be converted to ordinary shares.

153. Mr. McDonald expresses the view that it is reasonable that the board and the majority shareholder believe the Company to be solvent, and in reaching this conclusion he refers to the treatment of the CCRPS in management accounts as a form of equity rather than debt.

154. Mr. Mohan refers to the fact that Mr. McDonald acknowledges that the proper treatment of the CCRPS in accordance with accounting standards is that "*they may be included as share capital in the management accounts, but that in the statutory accounts must be accounted for as debt*".

155. Mr. Mohan refers to the fact that in statutory accounts filed at the Company's registration office, the CCRPS have been treated as debt obligations and he says that it is not open to management in the course of its own accounts for management purposes to simply

"*reclassify balances in contravention of the accounting standards*". He says that he does not believe that the can be any possible interpretation of the Company's balance sheet position other than that the value of the assets is less than its liabilities.

156. Mr. Mohan refers to recent board packs in which the obligations to Starkane both in respect of the secured loan accounts and the CCRPS are treated as liabilities.

157. Mr. Mohan then quotes the International Accounting Standards 32 on Financial Instruments presentation which he says specifically addresses the equity or liability classification of financial instruments as follows: -

    *(1)* *"Classification as a financial liability or as equity depends on the substance of a financial instrument rather than its legal form. The substance depends on the instruments contractual rights and obligations."*

    (2) "*A basic principle of liability classification is that a financial instrument which contains a contractual obligation whereby the issuing entity <u>is or may be required to deliver cash or another financial asset to the instrument holder is a financial liability</u>*". (emphasis added)

158. Mr. Mohan then recites the principle of substance over form which he says requires the issuer of a financial instrument to "*measure and present the economic impact of the financial instrument and to state its commercial purpose*".

159. Mr. Mohan then identifies the questions which need to be addressed to determine whether the preference shares should be classified as a liability as follows: -

    - *"Are the shares redeemable at a fixed date? – Yes.*
    - *Are the shares redeemable at the option of the holder? – Yes.*
    - *Is the issuer obliged to make payments in the form either specific rate of interest or dividends? – Yes.*
    - *Do the terms and conditions oblige the issuer to distribute a specific percentage of profits? – Yes."*

160. Mr. Mohan refers to the fact that the preference shares contain an obligation to pay cash to the preference shareholders and that the 4% dividends are recognised as a finance cost in the profit and loss account.

161. Finally, he refers to the fact that the CCRPS include both the fixed interest rate and a fixed date for redemption.

162. Mr. Mohan says that the financial terms of the CCRPS include not only the payment of the 4% "annual coupon" but also that the agreement sets out that the redemption price payable in February, 2022 is €3.2 million plus any unpaid interest, plus an amount to give

Starkane "*the requisite IRR*". It is said that the requisite IRR ranges from 8% to 12% depending on certain scenarios.

163. In response, the Company and Starkane refer to the provisions of s. 105 of the Act which provides: -

> *"(1) A company may acquire its own shares by purchase, or in the case of redeemable shares, by redemption or purchase.*
>
> *(2) Any such acquisition is subject to payment in respect of the shares' acquisition being made out of—*
>
> *(a) profits available for distribution…"*

It submits that this restriction serves to reinforce what it describes as the absence of a threat to the Company posed by the CCRPS instruments. It submits that if the Company were to honour the redemption provisions in the CCRPS investment agreement its finances would have to be sufficiently robust to enable it to comply with s. 105.

164. Mr. McDonald refers in para. 2.1 of his first report to a form of balance sheet, referenced in the management accounts to 30 September, 2020. In those accounts the Starkane loans are treated as long term liabilities at €2.9 million, but the value of the CCRPS at €3.2 million is contained within the description of "share capital" standing at €5.198 million. On that balance sheet, the tangible fixed assets are shown at €6.161 million and net assets at €238,000.

165. Presented with the opposing opinions of the experts, it seems to me that the court must have regard to the importance in s. 509 (3)(b) of the words "*taking into account its contingent and prospective liabilities*", and to the manner in which the CCRPS has been treated in statutory accounts in accordance with international accounting standards. In that context, I consider the following features of the Starkane investment to be of central importance: -

(1) The payment obligations are financial obligations for fixed amounts, both in respect of the annual coupon and the redemption price;

(2) It is not within the gift of the Company to release or convert these obligations into ordinary shares;

(3) At a very minimum these obligations constitute contingent liabilities, which must be taken into account as provided for in s. 509(3)(b);

(4) The balance sheets presented to meetings of the board of directors during 2020 also record these obligations as liabilities;

(5) The audited financial statements returned to the CRO to the year ended 31 December, 2018, have treated these obligations as liabilities;

(6) Those statement are those on which any party viewing the company's affairs will rely.

166. Taking all these matters into account, I have no doubt that if the Company itself were to present its financial statements, both audited and more recent management accounts, in the context of a petition pursuant to s. 509, the test described in s. 509 (3)(b) would be satisfied.

**The TWSS**

167. Mr. Mohan refers to the terms of the COVID-19 TWSS published by the Government on 20 April, 2020. He refers in particular to the provision of the terms concerning "*eligibility supporting proofs*". This guidance provides as follows: -

> *"Revenue will not be looking for proof of qualification at this stage. We may in the future, based on risk criteria, review eligibility. In that context, employers should retain their evidence/basis for entering the scheme".*

168. The guidance also states in its conclusion the following: -

> *"The declaration by the employer is not a declaration of insolvency. The declaration is simply a declaration which states that, based on reasonable projections, there will be, as a result of disruption to the business caused or to be caused by the COVID-19 pandemic, a decline of at least 25% in the future turnover of, or customer orders for, the business for the duration of the pandemic, and that as a result the employer cannot pay normal wages and outgoings fully but nonetheless wants to retain its employees on the payroll.*
>
> *The Revenue does not consider that any employer will require professional advice or assistance in being able to prove to the satisfaction of Revenue that these criteria are met. Should Revenue seek to validate employer eligibility for the scheme, it will adopt a reasonable, fair and pragmatic approach in considering whether the criteria have been met".*

169. These provisions are essentially a description of the "self-assessment" nature of the Scheme, whereby Revenue reserve the ability to review any application for subsidies. The letter of the Revenue Solicitor dated 21 November, 2020, states that the matter is "*under review by Revenue*". It cannot be read as meaning that Revenue now regard the claim of the Company as false or flawed.

170. In circumstances where the purpose of the TWSS is to enable employers to retain employees with the benefit of the subsidy, it seems to me that to treat subsidies paid under such a scheme as a contingent liability for the purpose of a revision to the balance sheet, or even to revise the analysis of the cash position of the Company, would be contradictory to the scheme as a whole. If every company or business which availed of such a subsidy were to be required to account in this manner this may have the effect of defeating the benefit of the subsidy in the first place.

171. In this particular case there is clearly a controversy between the petitioner and the Company and Starkane as to whether the subsidy was validly claimed. I cannot regard the existence of that internal controversy as a basis for the assertion that in analysing solvency for the purpose of s.509 an adjustment to the extent of €599,000 should be made either to the balance sheet or the cash position of the Company as asserted by the petitioner, even by way of contingency.

**Deferred tax asset**

172. The balance sheet referred to by Mr. McDonald includes as an asset an item described as "*Deferred tax asset*" at €570,000.

173. This amount is recognised on the basis of losses incurred by the Company in the years 2017, 2018, and 2019. Mr. Mohan says that the tax adjusted profit required to realise this asset would be €4,559,936. He then refers to IAS 12 which says that a deferred tax asset is recognised for unused tax losses and unused tax credit "…*to the extent that it is probable that taxable profit will be available against which the deductible can be utilised, unless certain further conditions apply"*. (emphasis added)

174. Mr. Mohan says that the forecasts in respect of losses for the year 2020 and 2021 are such that the "prudence" concept arising under IAS 12 dictates a recognition that in circumstances where it will be a number of years before there will be sufficient taxable profit to enable this asset to be realised, it will be appropriate to remove it from the financial statements.

175. As with other features of this case, this is a difference of professional opinion of the experts, which is challenging to reconcile in the absence of a cross-examination. Nonetheless, there is force in the petitioner's submission that the inclusion of this asset in the balance sheet to the value of €570,000 in circumstances where the Company would need to generate taxable profits of €4.56 million to utilise the asset, is unsound. This item therefore introduces a further measure of uncertainty as to the solvency position on a balance sheet basis.

**Conclusion as regards balance sheet**

176. Mr. McDonald submits that the questions concerning the balance sheet and in particular concerning the treatment of the CCRPS should not be determined by reference to the strict application of accounting standards. He accepts that the CCRPS should be treated as debt for statutory accounting purposes having regard to the fixed obligations contained in them. However, he expresses the view that when "*Debating balance sheet solvency … it is not enough to consider this question solely by reference to the bottom line figure presented in the Company's statutory accounts*". He refers to discussions he has had with Mr. Bourg who is the Starkane representative of the board and other members of the board who he says were aware of their individual responsibility as directors. He concludes: -

> *"In my discussions with board members, who are experienced professionals they have no concerns regarding balance sheet solvency for all the reasons set out in my*

*first report, on the basis that the CCRPS have equity characteristics and that is how the board and the majority shareholders view them".*

177. Whilst this may be a fair and accurate description of the position adopted by a majority of the directors of the board, largely informed by the position adopted by Starkane in relation to its investment generally, I must conclude that if the Company were itself to have petitioned for the appointment of an examiner, and the balance sheet was presented in a manner consistent with statutory filings and with their presentation at recent meetings of the board, they could be relied on to demonstrate that the test in s. 509 (3)(b) of the Act is satisfied.

178. In light of this conclusion, the requirement to determine whether the Company is solvent on a cashflow basis does not arise. However, the information before me as to cashflow is important in informing the exercise of the court's discretion under s. 509.

**Cash position of the Company**

179. Mr. McDonald states in his second report that the Company held a cash balance at 30 September, 2020, of €501,000. He states that this position is scheduled to improve by reference to new funding at €650,000 from Starkane and €450,000 from EI. The position in relation to the potential investment by either of these parties is controversial and I shall return to that later.

180. Mr. Mohan states that the cash position as at the end of August, 2020 was positive at €423,000, together with the availability of an overdraft facility of €145,000 leaving available funds at €568,000. He says, however, that these figures are artificial and that there should be deducted from them the amount received from the TWSS at a value of €599,000, and the amount of the deferred PAYE at €407,000, which would leave a negative cash balance of €438,000. He then states that the projections contained in the October board pack predict a cash deficit in the period from 17 October, 2020, to 9 January, 2021, totalling €526,000 which would equate to a monthly "cash burn" of €190,000.

181. The board pack for the meeting on 23 October, 2020, referred to an available cash balance at the end of August of €423,000 together with available funds being the overdraft facility of €145,000 and €190,000 available from undrawn invoice discounting balances.

182. Mr. McDonald in his first report, refers also to a projected closing cash balance at the end of December, 2020 of €1.13 million. This includes in its projections the receipt from Starkane of €1 million and a receipt from EI of €450,000. It has been submitted by the petitioner that if these amounts are not received the projected cash balance would reduce from €501,000 to €30,000, leaving the Company with no meaningful cash resources in January 2021. As against this, the Company's overdraft facility of €145,000 must be taken into account.

183. Whichever way the cash figures are presented, it is clear that if the Company does not receive the projected investment amounts from Starkane or EI, the opening cash position in January 2021 would be, to say the least, marginal. In the context of the scale of the operations of the Company of the "*cash burn*" rate identified by Mr. Mohan of €190,000 per month were to materialise, there can be little doubt but that the Company would, as far as its own resources are concerned, become unable to pay its debts early in 2021.

184. In *Re New Look Retailers (Ireland) Ltd*, the petition was heard in September 2020. There was debate and changing information as to when the Company's cash reserves would be exhausted. Ultimately, it was found that this would occur in March, 2021, some six months after the hearing of the petition. The court considered this sufficient to find that the Company met the test of "*likely to be unable to pay its debts*" contained in s. 509. In this case the "*window*" before such a test would be met is much shorter. Therefore, I have no doubt that the Company meets the jurisdictional requirements of s. 509 (1)(a).

**Other considerations**

185. All parties are agreed that the Company and its undertaking have a reasonable prospect of survival as a going concern. Mr. Mohan states that such survival is conditional on four things happening as follows: -

    (1) The protection of the High Court is granted to the Company;

    (2) A review of the Company's overheads is undertaken with reductions identified and implemented;

    (3) The securing of new investment which would provide sufficient working capital for the Company and to pay a dividend to the creditors of the Company and fund future capital expenditure requirements;

    (4) The acceptance of an appropriate scheme of arrangement by the creditors and members of the Company and its approval by the court.

186. The position adopted by the Company and Starkane is that the survival of the Company does not necessitate the protection of the court or the formulation by an examiner of a scheme of arrangement.

187. It is not in dispute that the Company has a long and successful trading history, a strong customer base including airlines, retail multiples and other blue chip customers, and a strong brand.

188. The experts disagree as to the analysis of the state of the Company's balance sheet and its cash position and on certain trading projections. They also differ on such matters as the sustainability of the cost of funding as the balance sheet is currently structured. They of course differ radically as to the conditions required for the survival of the Company, most notably whether it is necessary to appoint an examiner and formulate a scheme of arrangement in accordance with Part 10 of the Act.

189. The experts also note that the Company is not without its challenges, both in terms of the impact on trade this year by reason of the pandemic and the impact of Brexit.

190. I turn now to consider the position regarding creditors, both in terms of their status and their attitude to this petition.

**Ulster Bank**

191. Ulster Bank advanced two term loans in December, 2017, totalling a sum of €2.3 million, and has extended an overdraft to the Company with a limit of €145,000.

192. Ulster Bank is the holder of a first ranking legal charge on the Company's premises at Tallaght.

193. The Company has availed of a form of "*moratorium*" with the bank negotiated in November 2019, and extended in April, 2020. The current arrangement is that it has recommenced monthly payments in respect of capital and interest in November 2020 at a rate of €21,000 per month.

194. Mr. Gavin Simons, solicitor, appeared on behalf of Ulster Bank and indicated that it was neutral as to the petition. He stated that the bank was not imminently considering a realisation of its security and not contemplating any precipitative action, whether or not an examiner is appointed. Obviously there would be limitations on any such action were an examiner to be appointed.

**The Revenue Commissioners**

195. By letter dated 21 November, 2020, to the Company's solicitors, Messrs Eversheds Sutherland, the Revenue Solicitor, Mr. Joseph Hughes, confirmed that the Revenue is a creditor in the amount of €544,739. Counsel for the Revenue indicated that the hearing of the petition that the balance could be lower than this as the Company is in a VAT refund position.

196. In this letter Mr. Hughes states the following:

> *"Dear Sirs,*
>
> *The affidavits disclose the existence of a shareholders' dispute involving allegations of misconduct on both sides. The appointment of an examiner does not seem to Revenue to be an obvious way to resolve those conflicts. It appears to Revenue that if this application was refused the Company would continue to trade. As such an examinership does not appear to be necessary to save employment."*

197. The letter continues by noting the amount of Revenue's claim and refers to the "*debt warehousing scheme*" which has been availed of by the Company. Revenue make the point that if the court were to appoint an examiner the Company would then have entered in an insolvency process and the scheme would no longer be available to the Company. In those circumstances the Revenue's warehoused liabilities would fall to be dealt with as part of any scheme of arrangement, and he makes the point that the standard practice

would prevail namely that the Revenue would insist that all current taxes are paid during the period of protection.

With reference to TWSS, Mr. Hughes continues:

> *"Regarding the serious allegations made by Mr. Broderick on affidavit in regards 'the wage subsidy scheme', this matter is under review by Revenue. It would not be appropriate for Revenue to make any further comment until a final determination has been made, therefore Revenue are reserving its position in regards this application".*

Mr. Hughes then makes a number of points regarding the usual standard ancillary orders to be made should the court decide to appoint an examiner.

198. It is not unusual for Revenue to adopt a neutral position on examinership petitions. It is informative however to note that Revenue express their view that the appointment of an examiner does not appear to be an appropriate way to resolve the conflicts and disputes which prevail within the Company and they state that in their view "*examinership does not appear to be necessary to save employment*".

**Starkane**

199. Starkane's total funding and exposure to the Company amounts to €6.1 million, exclusive of interest of and other charges payable pursuant to the investment agreements. This comprises the following:-

| | | |
|---|---|---|
| (a) | The initial investment pursuant to the CCRPS | €3.2 million |
| (b) | Convertible loan notes | €2 million |
| (c) | Further loan advances, March 2019, August 2019, and February 2020 | €900,000 |

200. Starkane is the largest creditor and shareholder, holding now 75% of the ordinary shares.

201. Starkane objects to the petition.

202. Starkane submits that the shareholders as a whole, of which the Broderick family are still 25%, are benefitting from an increase in the value of their shareholding as a consequence of a turnaround strategy which has been developed since Starkane converted to a majority shareholding and implemented changes in the board and management. It says that, as the largest stakeholder, its desire is to continue its investment and to support the Company into the future.

203. Starkane has stated in a letter of support dated 18 November, 2020, and in an affidavit of Mr. Bourg, sworn 19 November, 2020, that it is committed to the ongoing financial support of the Company to meet a turnaround growth plan. It states that it is committed to the provision of a further €650,000 on or before 21 December, 2020, and an additional

€500,000 in 2021 to finance the CapEx automation agenda enabling the Company to "*further scale*".

204. It states that both of these investments have been approved by the board of Starkane.

205. The petitioner has submitted that the motivation behind the objections of Starkane are that if an examiner were appointed at this time, the arrears of PAYE and PRSI running at circa €470,000 would rank as preferential and, therefore, ahead of certain claims of Starkane pursuant to its security. The petitioner submits that it is the motivation of Starkane that if an insolvency event is deferred for a year after the date on which these arrears of PAYE and PRSI have been accrued, the effect will be that such claims will no longer be preferential and, therefore, will be relegated behind the entitlement of Starkane pursuant to its floating charge. No evidence for this allegation was furnished.

206. I shall return to the position of Starkane as investor in the context of other investment discussions below.

**The Broderick Family**

207. The Broderick family have advanced working capital loans to the Company from time to time totalling €410,000. Pursuant to the agreements entered into in the context of the funding arrangements entered into with Starkane and restructuring of Ulster Bank loans, this amount ranks as subordinate debt.

208. The petitioner states that the Broderick family members support the petition.

**Trade Creditors**

209. No creditor, apart from the subordinated Broderick family creditors, supports the petition.

210. A number of trade creditors have written letters of support for the Company and sworn affidavits stating their opposition to the petition. They are Com-Plas International Limited, stated to be owed €106,627, Foxpak Flexibles Limited, stated to be owed €39,219.45, Ace Corrugated Limited, stated to be owed €89,805, and Puratos Crest Foods Limited, stated to be owed €386,404.

211. Each of these creditors state that it is important to them that the Company continues to operate within its agreed credit terms and that there should be no writing down of amounts owed by the Company, as they understand would ordinarily occur in an examinership scheme of arrangement. They each state that in the event of an examiner being appointed, they would have to reconsider whether or not to continue their trading relationships with the Company.

212. The petitioner expresses scepticism in relation to these indications of support, largely because the terms of the affidavit sworn on behalf of these creditors are in virtually identical terms.

213. Whilst the expressions of support are in virtually identical terms, they are made in sworn affidavits, the contents of which have not been contradicted.

214. Whilst these represent only a sample of creditors, they are owed balances which are not as nominal and, therefore, they are creditors with a real interest in the outcome of the petition and the fortunes of the Company. Their opposition to the petition is notable in contrast to the absence of support for the petition.

**Potential investment**

215. On any reading of the reports of the experts, it is evident that a measure of investment will be required in the Company and a restructuring of its balance sheet is likely to be required.

216. I have already quoted extensively from the letter of support and the affidavit sworn on behalf of Starkane.

217. The petitioner submits that the letter of support from Starkane does not provide any details as to the terms on which its further funding would be provided, including the cost to the Company, the duration of the loan or the conditions of such funding.

218. The petitioner also makes the observation that Starkane is a Company whose filed annual financial statements as of the year ended 31 December, 2018, show it has net assets of €2 and that its balance sheet records only the investment in the Company and the corresponding liability being a "*shareholder loan*". It submits, therefore, that Starkane has no capacity to make further lending.

219. Starkane is a special purpose vehicle Company owned by BDO Capital Development Fund. The Fund's typical sources of capital include EI, Bank of Ireland, CRH PLC, Glanbia PLC and Glen Dimplex. The petitioner submits that there is before the court no evidence of the deliberations of an investment committee of the Fund or of any binding commitment to make the advances referred to by Mr. Bourg on behalf of Starkane. It therefore calls into question the evidential value of the letter before the court and states that details of any further proposed investment by Starkane have not been laid before meetings of the board of the Company.

220. The fact that Starkane is an SPV and, therefore, the vehicle through which the Fund would make its investment, was not an obstacle to Starkane advancing the amounts of €6.1 million previously advanced by it, and the fact that the Fund structures its investments through and SPV is not in itself unusual.

221. Starkane and the Company submit that in circumstances where Starkane has made such significant investments in the Company in the first place lends credibility to the proposition that it is genuine in its statement of intention to advance the further funding necessary to maintain the Company's business and improve its performance and, accordingly, its value.

222. Finally, Starkane has made it clear that its investment intentions on the basis that no examiner is appointed.

**Enterprise Ireland**

223. EI were not represented at the hearing of this petition.

224. In his second affidavit, Mr. Proudfoot states that the Company holds a binding offer from EI for an investment of €650,000. It has been stated that of this a sum of €200,000 would be a non-repayable grant.

225. The petitioner says that he does not believe that EI would be willing to invest in the Company in its current status. Extensive reference is made by the petitioner to the general eligibility criteria applied by EI, particularly in the contents of its COVID-19 funding scheme.

226. The petitioner complains that he has not had sight of any of the information which was provided to EI in the context of an application, apparently made in August 2020, for this funding.

227. At the hearing there was controversy in relation to the information concerning EI. The offer letter from EI was not placed before the court in circumstances where the petitioner objected to its production having regard to the fact that he had not been given sight of the contents of the Company's application to EI.

228. Counsel for the petitioner submitted that the court should not have regard to the submission being made in relation to the availability of funding from EI in circumstances where this evidence was not before the court. Mr. Proudfoot has referred to the EI commitment to funding in his affidavits of 8 November, 2020, and 19 November, 2020.

229. In his affidavit of 13 November, 2020, the petitioner states that he does not believe that there is a binding commitment on the part of EI to provide the Company with this funding. He also says that he had been advised that EI would not provide a grant to an insolvent Company. He expresses his concern that any investment committee within EI may not have been aware of what he describes as the "*perilous financial position of the Company or the incorrect claim made by the Company for the TWSS*". He continued that the refusal of the Company to make available the documents supporting the application to EI compounds his concerns.

230. In circumstances where the detail of the EI letter was not exhibited to the court, I cannot determine if it is binding and if so, what conditions attach to it. Therefore, I must limit the weight which it attaching to this element of the evidence.

231. The sworn evidence of Mr. Proudfoot is that a binding offer was made, and he was not cross-examined. I also take into account the fact that EI itself is already heavily invested in the Company having advanced initially amounts in the order of €800,000 comprising cash of €450,000, a capital grant of €150,000 and €200,000 in employment grants. Furthermore, EI has not indicated any objection or support for the petition.

**Other investment prospects**

232. The only information which the petitioner has advanced in relation to investment prospects is a statement contained in para. 114 of the petition in the following terms:

*"The petitioner has had discussions with a party who, subject to due diligence, has expressed an interest in investing in the Company. Your petitioner understands that if an examiner is appointed he will advertise for expressions of interest. Your petitioner believes that other interested parties will be identified as a result of this process."*

No evidence was proffered as to the amount of any such investment or the identity of the party referred to.

**Conclusion as regards investment prospects.**

233. In response to questioning from the court about the investment, counsel for the petitioner submitted that it has never been a requirement of the hearing of a petition to require evidence of a binding commitment to make an investment. He submitted that developing an investment process and determining the most appropriate source and form of investment is a matter to be addressed during the course of the examinership, and on which ultimately the examiner makes a recommendation when formulating and presenting for confirmation his proposals for a scheme of arrangement.

234. I accept this submission on the part of the petitioner. Nonetheless the court is faced with weighing the balance between the sworn evidence of the Company and Starkane as to the intentions of Starkane and, to a lesser extent, EI regarding investment in the Company, by contrast with the total absence of any information regarding any such investment as might be available if the petition is granted. I accept the evidence of Mr. Proudfoot and Mr. Bourg. In particular, I have taken into account the statement on behalf of Starkane that its investment will not be made if this petition is granted and the risk which that presents to the viability of the Company.

**Discretion**

235. Both parties are agreed that in a case where the Company is eligible for examinership under the provisions of s. 509, the court must exercise its discretion.

236. The scope of this discretion has been addressed in many judgments, from the earliest days of examinership. In the majority, but not all, of the cases the issue in dispute is whether the company has a reasonable prospect of survival as a going concern. That is not the case here.

237. The petitioner referred the court to the judgment of the Supreme Court in *Re Atlantic Magnetics Ltd* [1993] 2 IR 561.

238. In that case, Finlay C.J. addressed the question of the discretion and said the following: -

*"Having regard to the clearly preliminary stage at which a decision under s. 2 has to be made and having regard to the phraseology contained in sub-s. 2 of that section which, in my view, provides a strongly persuasive obligation to make an order appointing an examiner where the court considers that such an order is likely to facilitate a survival of the Company, I do not see any warrant for incorporating into the exercise of the power contained in s. 2 of the Act of 1990 the necessity for*

*the establishment at that stage to the satisfaction of a court of "a real prospect of survival of the Company"."* (emphasis added)

239. S. 2 of the Companies (Amendment) Act, 1990 provided that an examiner could be appointed "*where the court considers that such an order is likely to facilitate the survival of the Company*". The court in that case indicated that there was no requirement to establish a "*real prospect of survival of the Company*". It was only in the Companies (Amendment) (No. 2) Act, 1999 that the requirement to establish a "*reasonable prospect of survival as a going concern*" was introduced. The observation of Finlay C.J. to the effect that there was a "*strongly persuasive obligation to make an order appointing an examiner*" was an observation of general application under the original legislation in which there was not a requirement to establish a reasonable prospect of the survival of the Company as a going concern.

240. It was submitted by counsel for the petitioner that this change does not diminish the influence of the judgment of Finlay C.J. in a case where there is no dispute that the company has a reasonable prospect of survival as a going concern. It seems to me that the observations of Finlay C.J. must be read in the light of the fact that, at that time, no such requirement applied as now arises under s. 509 (2). The onus of proving that the circumstances justify the appointment of an examiner rests on the petitioner. There is no general principle of a "*strongly persuasive obligation*" to appoint an examiner informing the exercise of the court's discretion.

241. Reference has also been made to passages from the judgment of McCarthy J. in *Atlantic Magnetics Ltd* which are apposite in this case, where he states as follows: -

> *"It is, I believe, of great importance to bear in mind in the application of the Act that its purpose is protection - protection of the company and consequently of its shareholders, workforce and creditors. 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."*

Counsel for the petitioner submitted that this passage means that the court should be slow to allow one large creditor, namely Starkane, dominate the considerations. McCarthy J. was describing the objective of the legislation generally, and that one of its features was to afford the Company protection from the unilateral act of the secured creditor. In this case, Starkane is not threatening any precipitative action and has stated its support for the ongoing survival of the Company as a going concern.

242. In *Re Gallium Ltd* [2009] IESC 8, Fennelly J. described the discretion in the following terms:-

*"…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.*

*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.*

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."

243. Common to many of the leading judgments is the emphasis by the court on the preservation of employment. In *Re Traffic Group Ltd* [2008] IR 260, Clarke J. (as he then was) summarised this principle: -

*"It is important to note that the Companies (Amendment) Act, 1990 is not designed to immunise the principals 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 practise, 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 purpose of the Act to solve the difficulties of such shareholders howsoever those difficulties may have arisen…*

*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 the 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."*

244. In that case, Clarke J. determined that it was appropriate to confirm a scheme of arrangement, bearing in mind the objectives of the legislation, even in a case where the court was concerned with a lack of candour on the part of the petitioner in the presentation of the petition to the court.

245. In *Re New Look Retailers (Ireland) Ltd*, McDonald J. focused on the serious consequences of the appointment of an examiner and the effect of such an appointment on creditors and others: -

*"…in the context of the court's discretion, it must be borne in mind that appointment of an examiner is a very serious step… the need for the appointment may seem so obvious that the serious nature of the remedy may not be such a significant factor. Nonetheless, the appointment must be seen in the light of the substantial curtailment of creditors' rights which flows from s. 520 (4) of the 2014 Act for the duration of the protection period. Section 520 (4) prevents creditors from taking enforcement action against a Company. No winding up proceedings can be taken. No receiver can be appointed. No process of execution can be put into force against the property of the Company. Secured creditors are not entitled to exercise their rights to realise security. No steps may be taken to repossess goods in the Company's possession under a hire purchase agreement. No proceedings of any sort may be commenced against a guarantor. Proceedings can only be commenced against the Company itself with the leave of the court. Any existing proceedings can also be affected by the power given to an examiner under s. 520 (5) to apply to the court in relation to such proceedings.*

*These effects were described by Keane J. (as he then was) in Re. Butlers Engineering Ltd (High Court, unreported, 1st March,, 1996) as a "drastic abridgement" of creditors' rights. At p. 10 of his judgment in that case, Keane J. observed…:*

> *"It is almost superfluous to point out that while the purpose of the Act is the protection of the Company and, as a result, its shareholders, employees and creditors, the court must never lose sight of the drastic abridgement that the giving of that protection effects to the rights of the last mentioned category and I do not think that the judgments to which I have referred would lend any support to the view that the court must disregard those consequences in deciding whether an Examiner should be appointed."*

McDonald J. referred also to the judgment of Fennelly J. in *Re Gallium Ltd* and of the Supreme Court in *Re Atlantic Magnetics Ltd*.

246. Of direct relevance to the case now before me, McDonald J. continued: -

> *"…it seems to me that, if the Company is to persuade the court to exercise its discretion in favour of the appointment of an examiner, it should be in a position to demonstrate that there is a real necessity to appoint an examiner at this point. Having regard to the impact of the appointment on creditors, this seems to me to be essential in the particular circumstances of this case."*

247. In that case, McDonald J. considered that the petition was premature. This finding was based on the particular facts as he determined them in that case, namely, what he described as a failure on the part of the petitioner to engage sufficiently with its landlords before availing of the process of examinership. He continued:-

> *"…if a petitioner wishes to pursue examinership on the basis put forward by the Company here, it is incumbent on the petitioner to establish that appropriate efforts were made prior to the presentation of the petition, to seek to resolve the issue in relation to "over-rents" with its landlords. That seems to me to be a basic step before invoking the more drastic remedy of examinership. That is not to say that there may not be a basis to seek the intervention of the court where insolvency may be more imminent and where the relevant parties do not have the luxury of time to enter into detailed negotiations prior to invoking the jurisdiction of the court under s. 509".*

248. While the facts of New Look were very different from those before me now, I consider that the analysis of McDonald J. to the effect that there must be shown a "*necessity*" for the appointment of an examiner is directly relevant to the exercise of the discretion in this case.

**Conclusions**

249. I have already determined that, as at the hearing of the petition, the Company is at least "*likely to be unable to pay its debts*" and therefore eligible for examinership in the sense that if the Company were to have presented a petition based on the financial information before the court, however contradictory may be the contents of the reports of the Independent Experts, the court would have jurisdiction to appoint an examiner. It is also clear that there is a reasonable prospect of the survival of the Company and all or part of its undertaking as a going concern. The more difficult question in this case is whether it is appropriate to exercise my discretion to impose examinership on the Company on the petition of one shareholder holding 10.45% of the shares who is also a director and a subordinated creditor (together with other family members).

250. The essence of an examinership is that the Company is conferred with the benefit of protection from the actions of individual creditors or others which may destroy the value of the enterprise and cause loss to creditors generally and loss of employment, whether by forcing liquidation, receivership or other remedies. See *Re Atlantic Magnetics Ltd, Re Gallium Ltd and Re Traffic Group Ltd* (op. cit.).

251. No creditor supported the petition.

252. No creditor, whether secured, preferential or unsecured has threatened any legal or other action to recover any debt due.

253. The largest stakeholder (in terms both of debt and equity) is Starkane which has invested €6.1 million in the Company, excluding interest and other charges. It opposes the petition and has confirmed by letter and in a sworn affidavit its intention to support the Company's trading, with immediate funding of €650,000 before the 21 December, 2020, and further advances of €500,000 in 2021.

254. One of the complaints which underlies the petition is that the Company is carrying too high a cost of funding. This is a reference principally to the terms attaching to the investment made by Starkane in 2017 and 2019. It has said that the price of redeeming the CCRPS could be as much as €1 million above the par amount of the investment. It is submitted that to fund such redemption the trading performance of the Company between now and the maturity of that investment in 2022 would need to exceed even the most positive projections.

255. On any view of the Company's affairs, the balance sheet of this Company may need to be restructured in the future. This may include restructuring of the funding base and the cost of the funding including the CCRPS and the Loan Notes. A restructuring would start by recognising the pre-existing rights of investors and creditors in accordance with the security and investment agreements which apply to them and identifying necessary modifications. These agreements undoubtedly confer power and influence on Starkane in the context of the future of the Company and any restructuring which may become necessary.

256. The petitioner holds strenuous objections to the terms incorporated in the legal agreements on which Starkane has made its investment. This is revealed by the correspondence from Arthur Cox earlier this year and the threat of proceedings in the Commercial Division of the High Court.

257. If the petitioner considers that the manner in which any future restructuring is undertaken breaches any provisions of the Companies Acts, is oppressive, in breach of contract, or is otherwise unlawful, he will be entitled to avail of his own remedies, whether by acting as threatened by Arthur Cox or otherwise. The intervention he now seeks by the appointment of an examiner is not the appropriate remedy.

258. It remains to be seen whether the long-term fortunes and ambitions of this Company and its stakeholders can be achieved. However, on the evidence presented I am not persuaded that the Company is at risk of enforcement actions by creditors such as would justify the intervention of the court by the imposition of the appointment of an examiner.

**Other matters**

259. The Company and Starkane go so far as to say that the greatest threat to the continued enterprise and the preservation of the position of employees and even trade creditors is presented by this petition.

260. The petitioner claims that the Company is on the precipice of insolvency and that it is "*facing a cliff*". The majority of the directors have indicated that they believe that the appropriate course is to continue the trade of the Company, with the benefit of the support which Starkane has indicated is available to it and they have expressed themselves to be confident in their ability to do so. In pursuing this course the directors do so in the full knowledge that if this plan fails and if an insolvent liquidation ultimately occurs, their actions will be scrutinised. Although I have taken account of the evidence placed before the court by directors of the Company, including the petitioner, the court is not by this judgment conferring a 'prospective blessing' on their decisions and conduct.

261. The petitioner did not engage with the board of directors as to whether a formal insolvency process should be commenced, whether that be a liquidation or an examinership. He sought to justify this by referring to the possibility that the letter of undertaking containing the non-petition covenant would be relied on to restrain him following this course of action. He may have believed, for good reason, that he would not secure the support of the board or of other shareholders. However, the step of presenting a petition for the appointment of an examiner to the Company is a very serious action which, in his capacity as a director, he ought to have tabled, even if only once, at a meeting of the board of directors before proceeding.

262. By permitting a petition to be presented by any shareholder holding in excess of 10% of the shareholding, the legislature clearly did not rule out the prospect that a shareholder, even without the support of other shareholders or of the directors could follow this course of action. However, the petitioner is a member of the board of directors and I have taken into account in making this decision his failure to bring to the attention of the board his intention to present this petition. In this way, he could have, at least, afforded his fellow directors and shareholders an opportunity to join with him in this petition if he truly believed that it was merited.

263. This reluctance may have been understandable in the light of the contentious exchanges at meetings of the board during 2020, and in the light of the disputes evidenced by the correspondence between Arthur Cox and Mason Hayes and Curran, but it is an unhelpful feature of the course which was followed by the petitioner.

264. Much has been made of the allegations by the petitioner that the Company availed of the TWSS in circumstances where the petitioner says that the Company manipulated the calculation and recording of turnover in the relevant quarters. The Revenue Commissioners are aware of the petitioner's submissions in this regard and have stated that the matter is under review. The facility to review the manner in which any Company has availed of the scheme is available to Revenue and Revenue will be in a position to pursue its own course of action should it conclude that the scheme was availed of

inappropriately. The prospect of such a review does not, in my view, demonstrate a justification for the intervention of the appointment of an examiner.

265. This judgment does not mean that a necessity for court protection and the appointment of an examiner will never arise for the Company at another time. However, I have concluded that on the evidence presented on this petition this is not an appropriate case in which the court should exercise its discretion to make such an appointment. The petition will be dismissed.