THE HIGH COURT

[2023] IEHC 395

Record No. 2023 90 COS

IN THE MATTER OF MAC – INTERIORS LIMITED

AND

IN THE MATTER OF PART 10 OF THE COMPANIES ACT 2014

Judgment of Mr. Justice Michael Quinn delivered the 11th day of July 2023

1. On 30 May 2023, Mac Interiors Limited ("the Company" or "the petitioner") which has its registered office in Newry, Co. Down, Northern Ireland, presented a petition for the appointment of an examiner to itself pursuant to s. 509 (1) of the Companies Act 2014 ("the Act") in main proceedings in accordance with Article 3.1 of the EU Insolvency Regulation Recast, EU 2015/848 ("the Regulation").

2. On the same day the Company applied to court, as required by O. 74A of the Rules of the Superior Courts, for certain directions and for the appointment of an examiner on an interim basis pending the hearing of the petition.

3. Dignam J. appointed as interim examiner Mr. Kieran Wallace of Interpath (Ireland) Limited, trading as Interpath Advisory, Fitzwilliam Square, Dublin 2, and made directions for the service and advertisement of the petition and listed the petition for hearing before the court on 14 June 2023.

4. The petitioner duly complied with the directions of the court made on 30 May 2023 and this Court heard the petition on 14 June 2023.

5. No party opposed the petition.

6. The Revenue Commissioners, whose debt at the time of the presentation of the petition was estimated at €12,302,306 stated that they had no objection to the appointment of an examiner.

7. A solicitor appeared on behalf of Joseph Chamberlain College and Staffordshire County Council, both of whom are contract employers of the Company. The court was informed that these parties may be regarded as a contingent creditor. They adopted a neutral position on the petition.

8. After hearing the evidence of the petitioner and other parties and submissions of counsel, I made the order appointing Mr. Wallace examiner.

9. There was brought to my attention a significant and previously undecided point regarding the jurisdiction of the court to make the appointment. I therefore indicated that I would deliver this judgment stating the reasons why the court was satisfied as to its jurisdiction and that on the evidence submitted this was an appropriate case in which to exercise the discretion to appoint an examiner.

10. The Company is incorporated and has its registered office in Northern Ireland, which of course is outside the State and outside the EU. It is not a "company" within the meaning of that term as defined in s. 2(1) of the Act. The Company submitted that it has its centre of main interests ("COMI") in the State, within the meaning of that term for the purpose of the Regulation, and that this Court has jurisdiction by virtue of Article 3.1 of the Regulation to open these proceedings and appoint the examiner.

11. Article 4.1 of the Regulation provides that a court seised of a request to open insolvency proceedings "shall of its own motion examine whether it has jurisdiction pursuant to Article 3". Therefore, notwithstanding the absence of any objection to the petition, it was necessary to examine the evidence supporting the assertion of jurisdiction pursuant to Article 3.1.

12. In this judgment I have considered the following matters:

i. the jurisdiction to open main insolvency proceedings conferred by Article 3.1 of the Regulation.

ii. The evidence establishing that the Company has its centre of main interests in the State.

iii. The eligibility of the Company for the appointment of an examiner.

iv. The evidence supporting the assertion that there is a reasonable prospect of the survival of the Company and all or part of its undertaking as a going concern.

v. Discretionary considerations.

The Companies Act 2014

13. Part 10 of the Act (section 508-558) contains the framework by which a company which is or is unlikely to pay its debts and in respect of which it can be shown that there is a reasonable prospect of the survival of the company and all or part of its undertaking may on certain conditions avail of the protection of the court, commonly referred to as a moratorium, whilst a court–appointed officer, the examiner, formulates proposals for a compromise or a scheme of arrangement to facilitate the survival of the company. If the conditions for such an appointment are fulfilled, and the court is satisfied to exercise its discretion to make the appointment, the examiner formulates proposals for a scheme of arrangement which is then put to votes at meetings of members and creditors. If the proposals are approved by at least one class of creditors, and subject to other conditions identified in the Act, the proposals may be submitted to the court for confirmation. Certain conditions must be fulfilled before the court will consider confirmation. They include requirements that the proposals be fair and equitable in relation to any class of members or creditors which has not accepted the proposals, the proposals must not be unfairly prejudicial to any interested party and they must satisfy the "best interests of creditors test" as defined in Directive EU 2019/1023, the Preventive Restructuring Directive.

14. Where the necessary preconditions are fulfilled the court has discretion to confirm the proposals. A confirmation order renders the scheme binding on all classes of members and creditors including dissenting classes. This is referred to as the "cross-class cram down" effect.

15. Section 508 is the interpretation section of this part of the Act and provides at subs. 2 as follows: - *"(2) This Part is subject to the Insolvency Regulation"*.

16. Section 509 contains the power to appoint an examiner and provides as follows: -

> *"509. (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*
>
> > *(a) 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.*
> >
> > *(b) the individual to be appointed as examiner has, in cases including cross – border elements, in addition to meeting the requirements of s. 519 (General provisions regarding the qualification of a person to be appointed examiner) sufficient experience and expertise to perform the role, having due consideration to the examiner's experience and to the specific features of the case.*
>
> *(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 (other circumstances in which a company is deemed unable to pay its debts) are applicable to the company".

17. Section 510 identifies the parties who may present a petition, which includes the company, as in this case.

18. Section 511 provides that a petition must be accompanied by a report of an independent expert, and stipulates in detail the information which must be contained in such a report. Such a report is before the court on this application, and I shall return later to its contents.

The jurisdiction

19. The term "company" is defined in s. 2(1) of the Act to mean *"a company formed and registered under this Act, or an existing company".* An "existing company" means a company formed and registered under previous Companies Acts.

20. The Petitioner does not fall within this definition. Therefore, *prima facie*, the court has no jurisdiction under s. 509.

21. By contrast, for the purpose of section 517, which provides that where the court appoints an examiner to a company, it may extend his appointment to a related company, the term "related company" includes a company "liable to be wound up" under the Act, which includes certain companies incorporated and registered outside the State provided certain conditions are met (see s. 2(10), 2(11) and Part 22 of the Act).

22. There are a number of precedents, notably Re: Arctic Aviation Assets DAC [2020] IEHC 664, for the appointment of an examiner to a related company, incorporated outside the state, pursuant to s. 517 of the Act, in reliance on the extended definition of a "related company" to be found in s. 2(10) and s. 2(11) of the Act. However, there is no reported precedent for a petition pursuant to s. 509 of the Act for the appointment of an examiner to a company which

is not formed and registered under the Act or an existing company incorporated in the State. It is in these circumstances that the petitioner invokes the direct application of Article 3.1 of the Regulation.

Insolvency Regulation

23. Article 3 of the Regulation provides as follows: -

"3.1. The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings".

24. Article 4.1 provides as follows: -

"1. A court seised of a request to open insolvency proceedings shall of its own motion examine whether it has jurisdiction pursuant to Article 3. The judgment opening insolvency proceedings shall specify the grounds on which the jurisdiction of the court is based, and, in particular, whether jurisdiction is based on Article 3.1 (main proceedings) or 3.2 (secondary or "territorial" proceedings)".

25. Article 7 governs applicable law and provides as follows: -

"1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened (the 'State of the opening of proceedings').

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the following:

(a) the debtors against which insolvency proceedings may be brought on account of their capacity;

(b) the assets which form part of the insolvency estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;

(c) the respective powers of the debtor and the insolvency practitioner;

(d) to (m): [provisions relating to the administration and effects of insolvency proceedings]".

26. Article 2 defines "insolvency proceedings" by reference to the proceedings listed in Annex A, which includes, as regards Ireland, examinership. Similarly, the persons who are defined as "insolvency practitioner" are listed in Annex B which includes, for Ireland, an examiner.

27. The recitals to the Regulation are of assistance in considering its application to this petition. Recital 23 provides: -

"This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of its main interests".

28. Recital 25 provides: -

"This Regulation applies only to proceedings in respect of a debtor whose centre of main interests is located in the Union".

29. Recital 26: -

"The rules of jurisdiction set out in this Regulation establish only international jurisdiction, that is to say, they designate the Member State the courts of which may

open insolvency proceedings. Territorial jurisdiction within that Member State should be established by the national law of the Member State concerned".

30. Recital 27: -

"Before opening insolvency proceedings, the competent court should examine of its own motion whether the centre of the debtor's main interests or the debtor's establishment is actually located within its jurisdiction".

31. Recital 28: -

"When determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests".

32. Recital 30: -

". . . the presumptions that the registered office is the centre of main interests should be rebuttable, and the relevant court of a Member State should carefully assess whether the centre of the debtor's main interests is genuinely located in that Member State. In the case of a company, it should be possible to rebut this presumption where the company's central administration is located in a Member State other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State".

33. In Re: Eurofood IFSC Limited, Case – 341/04, the Court of Justice considered the meaning of the term "centre of main interests": -

". . . the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and

foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with Article 4(1) of the Regulation (now Article 7 of the Recast Regulation), *determination of the court with jurisdiction entails determination of the law which is to apply.*

34. It follows that, in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect".

Direct effect of the Regulation

34. The Regulation has direct effect in the State. The implications of direct effect in the context of Article 3 were considered in Moss, Fletcher and Issacs on the EU Regulation on Insolvency Proceedings (3rd Ed., OUP, 2016) at para. 215 where they state: -

"Member States are not only under the negative obligation to ensure that the domestic legal order does not contain legislation that contradicts the Insolvency Regulation, they are also, as a matter of EU law, under a positive obligation to ensure that the Regulation will be applied in practice. This obligation now derives from Article 4.3 of the Treaty of the European Union which requires Member States to "take any appropriate measure, general or particular, to ensure the fulfilment of obligations arising both under the treaties and resulting from the acts of the institutions of the Union". The significance of this obligation from the point of view of the Insolvency Regulation is that it falls not simply on national governments, but on all organs of the State. These include the courts as well as administrative and government authorities.

That is to say that English courts are bound, as a matter of EU law, to ensure that the Insolvency Regulation is observed and applied. This means that where for example the Insolvency Regulation is contradicted by domestic law or administrative and judicial practices, the English court are bound as a matter of EU law to disapply those domestic law or practices, without waiting for them to be set aside by legislative or other means".

35. The doctrine of direct effect of the Regulation was considered and applied by Laffoy J. in Re Harley Medical Group (Ireland) Limited [2013] I.R. 596 ([2013] IEHC 219), to which I will return later.

36. If there were any doubt as to the question of the direct application, s. 508(2) removes any such doubt by specifically stating that Part 10 of the Act must be read subject to the provisions of the Insolvency Regulation.

Re BRAC Rent-a-car International Inc [2003] EWHC 128 (Ch) [2003] 1 WLR 1421

37. This judgment concerned a petition for the appointment of an administrator pursuant to the Insolvency Act 1986 to a company which was incorporated in the USA, but which conducted its operations almost entirely in the United Kingdom. The company never traded in the United States and its operations were conducted almost entirely in the United Kingdom. The company had for a long time been registered under the Companies Act as an overseas company. It had no employees in the US and all its employees worked in England, with contracts of employment governed by English law, apart from a small number in a branch office in Switzerland. All of the contracts governing its trading activities and in particular contracts with subsidiaries and franchisees were governed by English law.

38. The court adopted the principle of the direct effect of the Insolvency Regulation.

39. Lloyd J. said the following at para. 24:

"…the Regulation gives jurisdiction to the courts of a Member State to open insolvency proceedings in relation to a company incorporated outside the community, if the centre of the company's main interest is in that Member State. As a matter of textual interpretation, it seems to me that this is the effect of the Regulation. It defines the scope of its application only in terms of the location the centre of the debtor's main interests…If it had been intended that, as regards legal persons, only debtors incorporated in a relevant Member State should be affected by the Regulation, it would have been easy to say so. It seems to me that, if such a limitation was intended, it is surprising that it does not appear at all in the rather discursive recitals, let alone in the substantive provisions of the Regulation."

40. Lloyd J continued at para. 31:

"According to the literal reading of the Regulation the only test for the application of the Regulation in relation to a given debtor is whether the centre of the debtor's main interest is in a relevant member state, and not where a debtor which is a legal person is incorporated. This is supported by the purposive interpretation. For those reasons I held that the Regulation does give the courts of a member state jurisdiction to open insolvency proceedings in relation to a corporate debtor incorporated in Delaware, such as the company, if the centre of the debtor's main interests is within that Member State, as is the case in this instance."

41. The "purposive interpretation" referred to by Lloyd J. was that *"a reading of the Regulation which limited it, as regards legal persons, to debtors who are incorporated in any of the member state would prevent the Regulation from achieving some of the purposes which are described in the recitals and would leave it open to avoidance, providing an incentive for artificial operations as regards the status of debtors comparable to those which, according*

to Recital (4) it is part of the purpose of the Regulation to avoid. It would allow those who use corporate bodies to arrange that although their business assets and operations are based in a member state the relevant corporate body is incorporated outside the Community so that the provisions of the Regulation would not apply to it or its assets."

Re Harley Medical Group (Ireland) Limited & the Companies Act 1963-2012 [2013] IEHC 219 [2013] 2 IR 596

42. In this case the company presented a petition for a winding up order in respect of itself on the grounds that it was unable to pay its debts. The order was sought under the provisions of the Companies Act 1963-2012 and it was submitted that the Insolvency Regulation did not apply.

43. The company was registered and incorporated in the British Virgin Islands and in 1999 had registered at the Company's Registration Office as an external company with a branch in the State. The evidence accepted by the court was that its activities assets and management were all located within the State. The company had never traded in any jurisdiction other than Ireland; all its employees were located in Ireland, it was not tax resident in any other jurisdiction and it had an Irish bank account and did not operate a bank account in any other jurisdiction.

44. The petition was opposed by a number of contingent creditors who argued that the Insolvency Regulation did not apply, because the company's centre of main interests was not in this jurisdiction or in any member state of the EU.

45. Laffoy J considered that the court should be guided by the approach adopted by Lloyd J in *Re BRAC Rent-a-car International Inc*. Having concluded that by reason of the direct effect of Article 3 of the Regulation, the court had jurisdiction to do so, it examined the evidence as to the company's centre of main interests and found that the centre of main interests was in the State and made an order for the winding up of the company.

46. The petitioning company relied not on the Insolvency Regulation but on the jurisdiction of the court to wind up an unregistered company conferred by s. 345 of the Act of 1963 (now contained in Part 22 of the Act of 2014). Laffoy J found the reliance on that jurisdiction to be misconceived on the facts of the case and continued as follows:

> *"On the evidence presented by the company to the court, the centre of main interests of the company is, as I have found, undoubtedly in this jurisdiction. Therefore Article 3 of the Insolvency Regulation governs international jurisdiction. In this case in my view para. 1 of Article 3 applies. Accordingly, the High Court in this jurisdiction has jurisdiction to open insolvency proceedings, which are main insolvency proceedings, in accordance with para. (1)."*

47. The judgment of Laffoy J in *Re Harley Medical* is the clearest authority and places beyond doubt that this Court should regard Article 3.1 as having direct effect and as conferring on this Court jurisdiction to open main insolvency proceedings where the centre of main interests is in the State. Taken together with s. 508(2) which clearly extends the application of the Regulation to examinership proceedings, this jurisdiction extends to the appointment of an examiner.

Article 7

48. Counsel for the petitioner fairly drew the court's attention to Article 7.2 of the Regulation which provides that the law of the State of the opening of the proceedings shall determine the conditions for the opening of the proceedings, their conduct and their closure including in particular *"(a) the debtors against which insolvency proceedings may be brought on account of their capacity"*. Arguably, this sub-paragraph could have the effect that the term "company" in s. 509 may only be construed by reference to the definition section in the Act as meaning a

company "formed and registered under this Act or an existing company" (section 2(1) of the Act) (See paras 19 and 20 above).

49. On this approach, it could be argued that, as a matter of domestic law, the Company is outside the definition of "company" and cannot avail of s. 509. The petitioner submitted that the Insolvency Regulation has direct effect and must prevail, and that Article 3 establishes a harmonised rule conferring jurisdiction by reference to the location of the centre of the main interests and does not permit of distinguishing companies on the basis of their place of incorporation. That approach is consistent with the rationale adopted by Lloyd J. in *BRAC* and I adopt it.

50. It would be strangely anomalous if the limited definition of a company in s. 2(1) of the Act could be invoked to exclude a company having its centre of main interests in the State but registered outside the State.

The Company

51. Having determined that Article 3 confers on this Court jurisdiction to open insolvency proceedings by the appointment of an examiner, where the centre of the company's main interests is situated in the State, the court is required by Article 4 to examine the evidence relied on to demonstrate that the company has its centre of main interests in the State.

52. The Company submits that the presumption that the COMI is at the place of its registered office is rebutted in this case. An analysis of this question is informed by two considerations as follows. Firstly, two of the recitals to the Regulation are relevant. Recital 28 provides that in determining whether the centre of the debtor's main interests is ascertainable by third parties:

-

> *"special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests".*

53. Recital 30 provides that the presumption that the COMI is located at the location of the registered office may be rebutted: -

> *"…where the company's central administration is located in a Member State other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State".*

54. Secondly, the question was considered by the Court of Justice in Re: Eurofood IFSC (Case No. 341/04) where the Court said the following: -

> *"...in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect."*

55. The evidence before the court on this application is contained in the following: -

(a) the petition;

(b) a verifying affidavit of the company's chief executive officer and director Mr. Paul McKenna sworn 30 May 2023;

(c) the report of the independent expert, Mr. Luke Charlton, of Ernst and Young ("EY") made on 30 May 2023 which accompanies the petition as required by s. 5(11) of the Act;

(d) A supplemental affidavit of Mr. McKenna sworn 12 June 2023.

56. The company was incorporated in Northern Ireland on 30 August 2002. On 26 September 2002, it registered a branch in the State. The company is the principal trading company in a

group of which the parent company is MAC Holdings Limited, also incorporated in Northern Ireland. It has one wholly owned subsidiary in the State, being MAC – Skystone Limited and two associated companies in the State, namely MAC – Rockfield Holdings Limited and MAC – Rockfield Limited. The business of the company grew significantly in the years 2013 to 2020 and it became well known in the market.

57. The group has three companies incorporated in the United Kingdom, namely MAC Exteriors Limited, MAC Interiors (London) Limited and MAC Contracts (UK) Limited. The group has one subsidiary incorporated in Belgium, MAC Interiors Belgium SRL.

58. The principal activity of the Company since its foundation has been interior fit-out of commercial facilities in Ireland. In recent years the Company expanded into the general construction sector in Ireland and in the UK.

59. The Company employs 41 persons who are construction and project management specialists. Its clients include such international brands as Barclays, Citi Group, Microsoft, Ryanair, and Global Banking Corporation. The Company has won awards for office remodelling and fitout projects at George's Quay Plaza, Dublin 1, and at Finsbury Avenue in Central London.

60. The company has current tenders submitted for projects in Dublin at George's Dock, Dawson Street, Sir John Rogerson's Quay, Malahide and projects at Belfast.

61. The evidence relied on to demonstrate that the Company's COMI is in Ireland includes the following: -

(a) the Company's administrative and marketing headquarters is located at 4th Floor, South Block, Rockfield, Dundrum, Dublin 16. The company leases that office from MAC Rockfield Limited pursuant to a lease dated 1 March 2019 for a term of fifteen years;

(b) With some exceptions, which have been disclosed, all physical board and management meetings take place at the Dublin office. In his supplemental affidavit Mr. McKenna explains that a number of such meetings are held in the Dublin office and by "Teams", the Microsoft Teams videoconferencing software application. He explains that Teams is used to facilitate the attendance of members of staff as required where it is considered important that more of their time should be spent at project sites outside Dublin on the same day as relevant meetings. Mr. McKenna explains that one of the meetings, in respect of which minutes has been exhibited, was held in Newry and by Teams. This was a one off meeting in circumstances where a number of the leadership team members were attending also important meetings and a function in Belfast on that day;

(c) The Company registered a branch in Ireland on 26 September 2000;

(d) The Company is tax resident in Ireland and files tax returns only in Ireland;

(e) The Company has had a substantial business presence in the fitout market in Ireland for in excess of 20 years;

(f) The Company historically carried out most of its trade in Ireland. The last set of financial statements filed for the year ended 30 June 2021 confirm that its entire turnover of €136,005,647 for that reporting period was generated in Ireland;

(g) Approximately 66% of the Company's creditor base by value and 65% in number are based in Ireland, representing 405 creditors with a combined liability of €17,635,604;

(h) All of the Company's 41 employees are resident in Ireland and work from the Dublin office or on other sites located throughout Ireland;

(i) All employees have entered into employment contracts governed by Irish law;

(j) The Company's banking and administrative functions including IT equipment servers, sales, marketing and general operations including distributing and purchasing are all conducted from the Dublin office;

(k) The Company has banked with Bank of Ireland in Ireland for the last 21 years and operates Irish bank accounts at the Swords (Dublin) branch of Bank of Ireland.

(l) A number of the contracts in England have been subcontracted to the English registered subsidiaries, but importantly, the main contracts are with the company itself.

62. This evidence is corroborated by the verifying affidavit of Mr. McKenna, in which he exhibits, *inter alia*:

(a) The lease of the Dublin headquarters.

(b) Extracts from minutes of board and management meetings.

(c) Correspondence with Revenue Commissioners.

(d) Correspondence from Inland Revenue (Northern Ireland) confirming the move of the Company's central management and control to the Republic of Ireland, as far back as 1 September 2003.

(e) The creditors' list.

(f) A sample employment contract.

(g) Bank statements.

63. The evidence presented demonstrated that third parties, notably creditors, regard Dublin as the centre from which the Company trades and where its affairs are administered. I am satisfied from the evidence advanced that the presumption in favour of the place of the registered office has been rebutted in this case and I find that the Company has its centre of main interests in the State.

<u>Pre-conditions for the appointment of an examiner</u>

64. Section 509 of the Act prescribes the conditions which must be met before an examiner may be appointed. Those conditions are as follows: -

> *"509(1) (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."*
>
> *(2) The court shall not make an order under this section unless it is satisfied that –*
>
> *(a) there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern, and*
>
> *(b) the individual to be appointed as examiner has, in cases including cross-border elements, in addition to meeting the requirements of section 519, sufficient experience and expertise to perform the role, having due consideration to the examiner's experience and to the specific features of the case."*

65. No resolution subsists for the winding up of the Company and no order has been made for the winding up of the Company. The evidence before the court, in the form of an affidavit of qualification of Mr. Kieran Wallace sworn 30 May 2023 and an affidavit of suitability sworn by Mr. Craig Sowman, solicitor, on 30 May 2023, establishes that the proposed examiner is a person having the requisite expertise and experience of cross-border insolvency and restructuring.

Insolvency

66. The independent expert's report summarises the historical trading and financial performance of the Company based on financial statements for the years 2018 onwards including management accounts dated 30 April 2023 (Some of the information is recorded in Sterling because the statutory returns were made in Northern Ireland).

67. Revenues peaked in the year 2019 at STG£121.7m and fell to STG£95.94m in 2022. For the period of four months to April 2023 revenues generated were recorded at £32.5m.

68. In the year 2019 the company's gross profit was £5.7m, and operating profit was 1.1m.

69. In respect of the four months until April 2023 the gross profit recorded was £2.6m, generating a breakeven position after administrative expenses and before tax.

70. The balance sheet as recorded in the management accounts to 30 April 2023 show the Company having net assets of £18.7m, compromising assets valued at £39m and liabilities at £20.4m. However, the principal assets on the balance sheet comprise trade receivables of £5.8m and "amounts due from Group Undertakings" of £29.4m. The petitioner and the Independent Expert state that the intercompany receivables are not expected to be recovered. When the balance sheet is adjusted to reflect this it records an excess of liabilities over assets of approximately €9m.

71. The amounts owing to creditors are £20.4m. Of this debt the majority is due to the Irish Revenue Commissioners in an amount of circa €12m. The debt due to Bank of Ireland stands at €200,000 and the balance of debt is due principally to a spread of trade creditors, subcontractors and bond providers.

72. As required by s.5(11) of the Act and by the European Union (Preventive Restructuring) Regulations 2022, the independent expert provided a comparison of the potential outcome of a liquidation of the company against an outcome for creditors in an examinership.

73. His analysis reveals that in a winding up, the funds available for unsecured creditors would be in the order of €1.5m, yielding a net deficit for unsecured creditors of €23.9m.

74. By contrast the independent expert projects that after making certain adjustments the net value of assets on a going concern basis would be €14.7m and that funds available for unsecured creditors would be €12.5m, leaving a deficit as regards unsecured creditors of €12.9m.

Creditors

75. The Company has a long-term facility with Bank of Ireland and the amount outstanding as at 30 April 2023 is €206,000.

76. There are two elements to the company's indebtedness to Revenue. In respect of taxes accrued since January 2023 for VAT, PAYE, PRSI, USC, local property tax and Construction Industry Scheme Tax, the balance owing is said to be in the order of €1,048,521.

77. The Company had also secured the benefit of the Revenue Commissioners debt warehousing scheme associated with the Covid – 19 pandemic. This was renewed and extended from time to time and on 17 May 2023, the Company received confirmation that a sum of €11,263,785 relating to the period 1 January 2021 to 31 December 2022 stood warehoused. On the presentation of the petition for the appointment of an examiner, the warehousing agreement stands rescinded. Accordingly, this amount falls due for payment, and when added to the amount due in respect of taxes for 2023, the total amount due to Revenue is estimated at €12,312,306.

78. On 23 May 2023, the Revenue Commissioners issued proceedings in the High Court seeking recovery of a sum of €208,854 in respect of outstanding VAT payments.

79. The Company has received of a number of other notices and demands requesting payments by subcontractors and other creditors, in some cases threatening the issue of legal proceedings or a petition for the winding up of the company. At the date of presentation of the petition demands of this nature in the sum of €1,638,169.03 had been received.

80. The independent expert has prepared cashflow forecasts on the basis that the Company would continue to trade without the benefit of the protection of this Court. That forecast shows that the Company would run out of cash by 11 June 2023 and accordingly does not have sufficient cash to pay its liabilities as they fall due and is cashflow insolvent.

Reasons for insolvency and actions taken

81. The key factors which have led to the financial difficulties of the company are said to be the following: -

(i) the effect of the Covid-19 pandemic;

(ii) losses attributable to a construction and fitout project at the Liverpool Echo building in Liverpool. This involved the conversion of an 18-storey former Liverpool Echo tower into a hotel with offices and retail units. Issues on the project included the identification of asbestos in the building, the liquidation of the principal demolition contractor, who had to be replaced at significant cost, delays associated with the Covid-19 pandemic, and the liquidation of the principal electrical contractor. Losses of £14 million were incurred on this project;

(iii) the Company's declining financial position following the Liverpool project meant that it was unable to obtain bonding in Ireland, which is a prerequisite to securing new construction contracts.

(iv) the disruption to global supply chains since late 2021 led to shortages of materials and significant price inflation for construction materials and in particular steel, timber and insulation projects. The impact of construction price inflation has been significant, particularly having regard to the number of fixed price contracts which it had entered into before the inflation spike.

82. Attempts have been made by the Company to resolve financial difficulties including the following measures which have been attempted without the necessity to resort to a formal restructuring process: -

- Engagement with key suppliers and creditors to renegotiate payment terms and payment plans;

- Reduction in staff and director salaries were applied during the period April–August 2022 but the company reinstated those salaries after reopening following lockdowns;
- A reduction in the number of direct employees from 85 to 41;
- Pursuing options to raise external funding through finance companies and equity investors;
- Sales of commercial properties held at Sandyford Industrial Estate and Leeson Street, Dublin;
- A freeze on marketing and business development spending.

83. In relation to the Liverpool project the Company explored with its external legal advisors whether it had any contractual entitlement to compensation for additional costs incurred and losses suffered and engaged with key suppliers to agree payment dates to help improve cashflows.

Does the company have a reasonable prospect of survival?

84. The petitioner asserts that it has a viable future as a going concern if an appropriate scheme of arrangement with its creditors is implemented. The evidence advanced to support this belief is the following:

(a) The Company had a successful trading record before the Covid-19 pandemic and had a strong balance sheet since its incorporation in 2002.

(b) The historical financial performance of the Company under normal pre-Covid trading conditions shows the Company to have been consistently profitable and a market leader in the commercial fitout sector in Ireland.

(c) The Company has observed improvements in market conditions in recent months and has tendered for a number of significant projects in Ireland.

(d) The Company is hopeful of exchanging contracts in the near future for projects at George's Dock, Dublin, at Dawson Street, Dublin, and two Belfast projects. It believes that if its financial difficulties can be addressed in the context of a scheme of arrangement, thereby restoring its balance sheet to a stronger position, it will be well placed to pursue those and other profitable contracts.

(e) The Company believes that a strengthened financial position will enable it to obtain bonding for significant Irish projects.

(f) Despite recent difficulties the Company has retained its skilled professional team and expects that its investment in expert staff will stand to it.

(h) The Company believes that it will be necessary to renegotiate or repudiate certain lossmaking English contracts as may be required to facilitate its survival as a going concern.

85. The independent expert has scrutinised the Company's projections for a period of four years after examinership. Those projections assume that normal trading will resume after examinership and that the Company will be profitable. The independent expert observes that these projections are based on the current pipeline of opportunities in both the commercial fitout and general construction sectors. He says that the economic outlook for Ireland which will be the Company's primary target market is positive and that the favourable economic outlook supports a positive outlook in the commercial fitout sector and the general construction sector in Ireland.

86. The petition indicates that based on its relationship with existing Irish clients the Company estimates there to be at least €95 million worth of future construction and fitout work that will be coming up for tender in Ireland by the Company's existing clients in the near future. In recent years, the company has sought additional work in England where it is said that the

financial prequalification requirements for certain projects are less onerous. It currently has nine contracts in England for works which have commenced on various dates between February 2021 and March 2023.

Conditions for survival of the Company

87. Having scrutinised the current status of the Company and both its individual circumstances and market conditions the independent expert expresses the opinion that the Company and the whole or parts of its undertaking has a reasonable prospect of survival as a going concern. He identifies the conditions which he believes are necessary for such survival as follows:

(i) That the Company be granted the protection of the court.

(ii) That the Company is able to attract new investment which will strengthen its financial position which should enable the company to obtain bonding for Irish construction projects.

(iii) That the Company reduces its existing non-essential liabilities through a scheme of arrangement, reduce its monthly overheads and manages projects appropriately to avoid incurring further losses.

(iv) That the Company is able to renegotiate or repudiate non-profitable contracts.

(v) That the Company is able to continue trading with its key suppliers and subcontractors. The independent expert observes that any scheme of arrangement must ensure that the potential write offs in amounts due to key suppliers and subcontractors will not detrimentally impact the Company's reputation and its ability to deal with those parties going forward.

(vi) That the Company collects the majority of its trade receivables and retentions which fall due for payment in the protection period.

(vii) That suppliers and subcontractors continue to trade with the Company on substantially the same commercial terms as present.

88. The independent expert concludes by stating that based on his discussions with management he believes it is reasonable to assume that these conditions will be met.

89. The independent expert expresses the view that if an appropriate level of funding is made available to creditors by a scheme of arrangement then an attempt to continue the whole or any part of the undertaking meets the best interests creditors test and would likely be more advantageous to the members as a whole than a winding up of the company.

90. As in all cases there can be no certainty as to long term viability. However the evidence adduced by the Company, and the analysis contained in the report of the independent expert are sufficient to demonstrate that the Company and all or part of its undertaking has a reasonable prospect of survival as a going concern.

The Interim Examiner

91. At the hearing of the petition the court had the benefit of a report dated 13 June 2023 by the appointed interim examiner Mr. Kieran Wallace. It is not the function of an interim examiner to advocate either way in respect of his proposed appointment as examiner, and he did not do so. Nonetheless, he is an independent officer appointed by the court and it seemed to me to be appropriate to have regard to the contents of his report based on his initial work in the period of two weeks since his appointment.

92. The interim examiner reports that he has engaged extensively with the senior management team of the Company in relation to its trading history, financial position and the prospect of its survival. He and his team have met with the Company to understand the current financial position, the cashflow projections and the position in relation to the Company's ongoing projects. Based on this engagement and his enquiries he states that he has no reason to disagree

with the conclusion reached by the independent expert that the Company has a reasonable prospect of survival as a going concern.

93. The interim examiner reports that both the Company and he have been approached by several interested parties around the prospect of investing in the Company. He has provided non-disclosure agreements to those interested parties and has issued a process letter and information memorandum with a view to expediting the process.

94. The interim examiner also expresses the view that the conditions for survival identified in the independent expert's report are either in the process of being achieved or are capable of being achieved during the examinership period. He refers to such matters as the continuance of trade as normal and retaining the support of key clients, suppliers and subcontractors. He observes that there are some potential or current clients who have failed to support the Company through the examinership period but this has not been at a sufficiently material level to jeopardise the viability of the examinership and the survival of the Company as a going concern, although he states that he will keep this under review.

95. The interim examiner states that the Company is currently engaged in construction projects in Ireland with a contract value of circa €29m and fitout projects in Ireland with a contract value of €46m. He refers to the Company's engagement on construction projects in the UK with a contract value of £93m, although a number of those projects are in negotiation for termination.

96. The interim examiner refers also to management having identified a €350m pipe line of work across Ireland and the UK comprising in excess of twenty-five individual projects and having the potential to generate revenues in excess of €350m. He observes that with a stronger balance sheet the Company should be in a better position to obtain bonding for Irish construction projects with a view to re-establishing its position as a leading contractor in the market.

Discretion

97. The power to appoint an examiner is discretionary. No special considerations have been drawn to my attention as to the exercise of discretion in this case. On the evidence presented, the Company is a suitable candidate for the process of examinership. Its trading and financial history show that it is at least capable of returning to profitability and future growth.

98. The case law has always placed the saving of employment at the centre of the objectives of Part 10 of the Act (see Re Traffic Group Limited [2008] 3 I.R. 253 and Re KH Kitty Hall Holdings Limited [2017] IECA 247). That objective is clearly served in this case by the continuance of the Company as a going concern under the conditions provided in Part 10 of the Act and the attempt to restructure its affairs in accordance with the Act.

Conclusion

99. Section 509 of the Act provides that the court may appoint an examiner to a company provided that certain conditions are fulfilled and the court is satisfied to exercise its discretion to make the appointment.

100. The term "company" is defined in s. 2(1) of the Act as a company formed and registered under the Act.

101. The Company is not a company within the definition contained in s. 2(1) and, *prima facie*, the provisions of s. 509 do not apply to it.

102. Section 508(2) of the Act provides that Part 10, which governs examinerships, is subject to the Insolvency Regulation. Article 3.1 of the Regulation provides that the courts of a Member State within the territory of which the centre of a debtor's main interest is situated have jurisdiction to open insolvency proceedings, referred to in Article 3.1 as "main insolvency proceedings".

103. Insolvency proceedings are defined by reference to Annex A to the Regulation and include examinership.

104. The Regulation has direct effect in the State. See s. 508(2) of the Act and Re Harley Medical Group (Ireland) Limited [2013] IEHC 219; [2013] I.R. 596 and Re BRAC Rent a Car International Inc [2003] EWHC 128 (Ch); [2003] 1 WLR 1421

105. Article 3.1 provides in the case of a company, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. Having considered the evidence adduced in the petition, verifying affidavits and the report of the independent expert, I have found that the evidence establishes that the presumption contained in Article 3.1 is rebutted in this case and that the company has its centre of main interests in the State. Accordingly, this Court has jurisdiction to appoint an examiner.

106. The Company meets the conditions identified under s. 509 of the Act for the appointment of an examiner. It is insolvent (both on a balance sheet basis and cashflow basis) and the evidence demonstrates that there is a reasonable prospect of the survival of the Company and all or part of its undertaking. The independent expert has identified the conditions which he believes are necessary to ensure such survival and has expressed the opinion that the formulation, acceptance and confirmation of proposals for a scheme of arrangement supports that prospect. The Company has satisfied the court that these conditions are capable of being met, and therefore, I made the order appointing the examiner.