THE HIGH COURT

[2023] IEHC 641

[Record No. 2023/196 COS]

IN THE MATTER OF BIO MARINE INGREDIENTS IRELAND LIMITED

AND

IN THE MATTER OF PART 10A OF THE COMPANIES ACT 2014

JUDGMENT of Mr. Justice Michael Quinn delivered on the 17th day of November 2023

1. Part 10A was added to the Companies Act 2014 by the Companies (Rescue Process for Small and Micro Companies) Act 2021 which was commenced on 7 December 2021. Its purpose is to provide a framework for the restructuring and survival of financially challenged but viable small companies. The process is broadly similar to that of examinership, which is governed by Part 10 of the Act, but with differences which are intended to limit costs, *inter alia*, by minimising the requirement for court applications.

2. Part 10A comprises sections 558A to s. 558ZAJ. It provides for the appointment of a "process adviser" whose principal function is to formulate a rescue plan to secure the survival of the company, and the whole or any part of its undertaking, as a going concern. The process is available only to companies which fall within the definition of a *"small company"* or a *"micro company"* in accordance with ss. 280A and 280D of the Act.

3. A small company is a company which in respect of a relevant financial year fulfils two or more of the following requirements:-

(a) The amount of turnover of the company does not exceed €12 million;

(b) The balance sheet total does not exceed €6 million;

(c) The average number of employees does not exceed 50.

4. A micro company is a company which fulfils two or more of the following requirements:-

(a) The amount of turnover of the company does not exceed €700,000;

(b) The balance sheet total does not exceed €350,000;

(c) The average number of employees does not exceed 10.

5. Part 10A provides that, in respect of a company which is insolvent or likely to be insolvent, and where certain other conditions are met, and where it has been demonstrated that there is a reasonable prospect of survival of the company and the whole or part of its undertaking as a going concern, a rescue plan if approved by appropriately convened statutory meetings can be rendered binding on the company and all its members and creditors.

6. A rescue plan will become binding where the following conditions are fulfilled:-

(a) It is accepted by at least one class of impaired creditors;

(b) A period of 21 days passes after filing notice of the acceptance with the Registrar of Companies and with the "relevant court"; and

(c) No objection is filed within 21 days of the notice (s. 558Y).

7. Unless objections are made to court, the plan becomes binding after the expiry of the above 21 days.

8. Where objections are made to the plan the court will hear and determine those objections. It may confirm the plan, modify the plan or refuse confirmation and make such orders as are appropriate.

9. The key steps in the process are as follows:-

(1) The company consults a process adviser and must provide him with a statement of affairs and other such information as he requires (the process

adviser is a person eligible to act as a liquidator of the company, meeting required criteria as to qualifications and independence);

(2) The process adviser determines whether there is a reasonable prospect of the survival of the company and the whole or part of its undertaking as a going concern and if so he makes a statutory declaration to that effect;

(3) The process adviser makes a report to the directors (s.558D). This report is not unlike that of an independent expert which accompanies a petition for the appointment of an examiner. It is a comprehensive report which addresses the company's affairs and finances, a statement of the conditions which he considers are essential to ensure that the company would have a reasonable prospect of survival as a going concern and certain important opinions on his part as to whether the preparation, approval and taking effect of a rescue plan would offer a reasonable prospect of the survival of the company, and recommendations as to what course he thinks should be taken;

(4) The process adviser is also required to address such matters as details of the extent of the funding required to enable the company continue trading during the rescue period and recommendations as to liabilities incurred before his appointment which should be paid and other information;

(5) If the directors decide to proceed, they must, within seven days of receiving the process adviser's report, pass a resolution appointing the process adviser to move to the next stage. No court order is required to confirm this appointment and it has the effect of commencing a formal "rescue period".

(6) The process adviser is then charged with the function of preparing a rescue plan and convening statutory meetings of members and creditors.

10. Part 10A contains provisions prescribing the contents of the process adviser's report, the contents of a rescue plan, the grounds on which a rescue plan can be objected to and provisions for other matters such as the treatment of executory and other contracts, and of parties liable for the company's debts.

11. The role and responsibilities of a process adviser are onerous. Some of his duties correspond to the duties and functions of an examiner appointed pursuant to Part 10. Others correspond to the duties of an independent expert, whose report accompanies a petition for the appointment of an examiner. The "part merging" of these functions is one of the methods by which it is intended that costs savings will be achieved, and this imposes on the process adviser a series of important duties and obligations.

12. The commencement of the process does not carry with it any automatic stay or court protection, such as is conferred where a company presents a petition for the appointment of an examiner pursuant to Part 10. Instead, s. 558N provides that where the court is satisfied having regard to the report of the process adviser and other matters that there is a reasonable prospect of the survival of the company and the whole or part of its undertaking as a going concern, it may make orders which have the effect of staying further proceedings or other enforcement measures against the company for the rescue period.

13. If no contentious matters arise, it is possible for this entire process to be completed without any hearing before a court. The Act requires that notice of the process be filed with the Registrar of Companies and with the *"relevant court"* at a number of stages, namely at commencement by the appointment of the process adviser, the approval of the plan at the required statutory meetings and the filing of any objections to confirmation of the plan.

14. The most likely occasions on which a Part 10A matter could require a court hearing include the following:-

(a) Any application for a stay pursuant to s. 558N;

(b) Applications for repudiation of executory contracts (although an alternative procedure is permitted whereby repudiation would form a part of a rescue plan and the counterparty may object to confirmation of the plan);

(c) the hearing of objections to confirmation of the plan.

This case

15. On 20 October 2023, the directors of Bio Marine Ingredients Limited ("**the Company**") resolved to appoint a process adviser pursuant to Part 10A, the appointment to take effect on 23 October 2023.

16. The matter came before the court as an application for a stay pursuant to s. 558N. Notice of the application was served on eight creditors which had threatened legal proceedings against the Company. Submissions were made at the hearing on behalf of the landlord of the company's operating premises at Lough Egish Food and Business Park, Castleblayney, and on behalf of the Revenue Commissioners. No party opposed the grant of a stay. After hearing affidavit evidence by the Company and the process adviser, and the submissions of parties notified, the court was satisfied that there is a reasonable prosect of survival of the company and all or part of its undertaking as a going concern, and that it was appropriate to make an order restraining enforcement measures against the Company pursuant to s. 558N.

17. The application was heard and determined on 1 November 2023. The reasons for the decision to grant the stay were given in an *ex tempore* judgment delivered by the court on that day. This judgment relates only to the question of the appropriate court in which to bring these proceedings.

The relevant court

18. At the outset of the hearing, a preliminary question arose as to the appropriate jurisdiction in which to commence these proceedings. I determined that this was an appropriate case in which to commence the proceedings in the High Court and I gave reasons for this determination. As this question had not previously arisen before this court and is of general importance I stated that I would deliver a reasoned judgment which I now do.

19. One of the functions vested in the process adviser is the duty to determine whether any proceedings under Part 10 A shall be brought in the Circuit Court or the High Court.

20. Section 558 H (2) provides that in making his determination as to the court in which the proceedings should be brought, the process adviser shall have regard to the matters identified in subsection 3 of that section which provides as follows: -

> *"3) The matters referred to in subsection (2) are—*
>
> *(a) the need to minimise costs by refraining from bringing proceedings in the High Court unless there are good reasons for doing so,*
>
> *(b) the need for an efficient and expeditious conclusion to any proceedings brought under this Part, and*
>
> *(c) any other relevant matter".*

21. The process adviser is obliged to consult with the directors before making his determination.

22. Section 558 J provides that after a process adviser has been appointed, he shall give notice of his appointment to the Registrar of Companies and to the "relevant court". Where the process adviser has determined that the proceedings should be brought in the High Court, the notice must include a statement of the reasons for that determination (558 J (2) (b) (iii)).

23. Order 74 C, r. 3 provides that where the process adviser is notifying the High Court, he is obliged to file an affidavit verifying his report to the directors and stating the reasons for his determination that the proceedings should be brought in the High Court.

24. The decision as to the selection of a court is entirely a matter for the process adviser and not, at least in the first instance, for the court. However, the court has a power of remittal to the Circuit Court pursuant to s. 558 ZAF which provides as follows: -

> *"(1) This section applies where the process adviser determines under section 558H that any proceedings under this Part relating to an eligible company shall be brought in the High Court.*
>
> *(2) In any proceedings under this Part relating to the eligible company, the High Court may, where it considers that it would be reasonable for the proceedings to be dealt with in the Circuit Court, remit the proceedings to the Circuit Court.*
>
> *(3) Where the High Court is minded to remit proceedings under subsection (2), it may elect to deal with the application immediately before it where it considers that it would be more efficient for it to do so.*
>
> *(4) Notwithstanding subsection (3), the High Court may take into account whether it was reasonable for any proceedings under this Part to be brought in that court in making a costs order in relation to the proceedings concerned.*
>
> *(5) In deciding for the purposes of subsection (2) whether it would be reasonable for proceedings to be brought in the Circuit Court, the High Court shall have regard to all the circumstances, including in particular the need to minimise costs and promote efficiency".*

25. It is clear from all of these provisions that the scheme of the Act is that proceedings in relation to small and micro companies pursuant to this Part should be brought in the Circuit Court unless there are good reasons for proceeding in the High Court.

26. In this case, the process adviser has duly addressed these requirements. In his report pursuant to s. 558 D, he recommended that proceedings in this matter be brought in the High Court.

27. The process adviser stated four reasons for proceeding in the High Court. The first three are stated in para. 18.2 of his report, where he identifies the "matters considered" as follows: -

1. *"The Company has its registered office and main place of business in Co. Monaghan.*
2. *The company has received final demands before issuing proceedings, including notices pursuant to s. 570 Companies Act 2014, from solicitors acting for a number of creditors. It may become necessary for the company or the process adviser to apply to the court for the protection afforded by s. 558N of the Act.*
3. *The quantum of the company's share capital, indebtedness and deficit are at a level where it appears to me that it be appropriate for the High Court to be the relevant court".*

28. In an affidavit sworn by the process adviser on 24 October 2023, he recites the considerations referred to in his report and adds the following fourth reason in para. 6: -

"In addition to the above, I am mindful of the need for an efficient and expeditious conclusion to any proceedings brought under Part 10 A of the Act as set out in s. 558 H(3)(b) of the Act. In my view, should an application pursuant to s. 558 N be required, the case management orders often directed in the High Court in applications made under the Act provide a means to an efficient and expeditious conclusion to any such application".

<u>The good reason</u>

29. Only one of the four reasons identified above constitutes a good reason for these proceedings being brought in the High Court, namely the third reason, which is the process adviser's reference to "the quantum of the company's share capital, indebtedness and deficit

at a level where it appears to me to be appropriate for the High Court to be the relevant court".

30. The report of the process adviser described in detail the trading and financial history of the Company and the manner in which finance has been raised to date. As at the end of the year 2022, the company had accumulated losses of €30 million. It had raised finance, both in terms of share capital and debt finance, in an amount of €40.6 million since its establishment. This comprised share capital and premium at €20.2 million, related party loans of €7.1 million, "EIIS share capital" of €6.2 million, collateralised loan notes of €6.2 million and funding from Enterprise Ireland at €750,000.

31. The statement of affairs prepared by the directors and submitted to the process adviser in accordance with the terms of the Act disclosed assets having a book value of €11.3 million, but estimated to realise €2.9 million, including its interest in a freehold property at Stonehill, Donegal, and a leasehold property at Egish Food Park, Castleblayney, Co. Monaghan, which is its principal trading location.

32. The statement of affairs discloses the company having 91 unsecured creditors owed a total sum of €9.5 million. These include amounts ranging from small trade balances to significant debts owed to Killybegs Seafoods (€1.6m) and Enterprise Ireland (€871,000). A number of creditors had invested through an entity known as KFO Investments, said to be part of the Killybegs Fishermans' Organisation. The estimated overall deficit described in the statement of affairs was €15.5 million.

33. The Company's business was the processing of raw whole fish into speciality fish protein products used as ingredients in human and animal foods. It had expended more than €8.1 million on research and development. It has a series of valuable domestic and international contracts and is engaged in contract negotiations with significant multinational food producers.

34. The capital and debt structure involved a blend of share capital, related party loans, Enterprise Ireland contributions and other investment arrangements and it is anticipated that any rescue plan will address all aspects of the balance sheet.

35. In light of the scale of these matters and their complexity the court was satisfied that there were good reasons for the proceedings in this case being commenced in the High Court.

The bad reasons

36. The other matters proffered as reasons to proceed in the High Court were not of themselves good reasons for doing so, namely the following: -

(a) the fact that the Company has its registered office and main business in Co. Monaghan;

(b) the fact that multiple demands had been received from creditors which would necessitate an application for a stay;

(c) a need for efficient and expeditious case management (this of course is a desirable objective, but not, as discussed below, a reason not to proceed in the Circuit Court).

37. The Act intended that the appropriate Circuit Court would be capable of managing these matters. In response to questions from the court, counsel for the Company cited also, as a fifth reason, the deadline of 49 days for the process adviser to report on the outcome of statutory meetings to consider and approve a rescue plan. Again, the Act clearly contemplated such a timetable being within the capacity of the Circuit Court if a case warranted court intervention.

***Rathmond Ireland Limited* [2017] IEHC 273**

38. In the case of examinership, s. 509 provides that for a small company, proceedings under Part 10 may be brought either in the High Court or in the Circuit Court.

39. In *Re: Rathmond Ireland Limited* a petition for the appointment of an examiner was presented to the High Court. The business of the company was the operation of two restaurants, one of which had closed at the time of presentation of the petition.

40. Costello J. decided to appoint the examiner but remitted the case to the Circuit Court for all further hearings. In doing so she observed that there was no good reason why the Circuit Court would not be capable of progressing the proceedings and she stated the following: -

> " *. . . this petition could have been brought in the Circuit Court. It was clearly the intention of the Oireachtas in providing for examinerships to be dealt with in the Circuit Court that this should occur in the case of small companies. It would appear that as a matter of practice, practitioners are not bringing applications before the Circuit Court. It was indicated that there are practical difficulties in so doing, related to the perception that Circuit Court judges are less available to deal with both the petition and the subsequent applications which may require to be made to the court on an urgent basis. I am by no means convinced that this is indeed the case. The Circuit Courts sit, or are capable of sitting, in like manner to the High Court. If there in fact is a difficulty in this regard this should be brought to the attention of the President of the Circuit Court. I have every confidence in his ability to ensure that the legislative intent will not be frustrated by any procedural obstacles which may, inadvertently, exist and that appropriate steps will be introduced if required to ensure that practitioners can have the same access to judges of the Circuit Court as they enjoy in relation to judges of the High Court for the purposes of examinership applications*".

41. That case was different from the present case in two respects. Firstly, the company was of a smaller and simpler scale than the company the subject of these proceedings.

Secondly, the scheme of Part 10 relating to examinerships is different in several important respects. However, it has in common with Part 10 A the option to bring proceedings either in the Circuit Court or the High Court. I respectfully adopt the comments of Costello J. regarding the appropriate court in which to proceed and I believe they are as relevant to Part 10A as they are to Part 10.

42. I share the view that the Circuit Court is capable of hearing and managing cases of this nature. It is clear that the Oireachtas intended that where a company is eligible as a small company the matter should proceed in the Circuit Court unless there are good reasons for doing so. The onus is on the process adviser in making his determination to consider these reasons and to record them, as he has done in this case.

43. In this case I was persuaded that the scale and complexity of the affairs of the Company were such as to warrant proceeding in the High Court and I granted the stay pursuant to section 558N. I did not consider it necessary to remit the matter to the Circuit Court, a course permitted by section 558ZAF. Nonetheless, it is appropriate to emphasise that the fact that a company has its registered office in a location outside Dublin, and the fact that a company may need to avail of the provisions of s. 558 N to apply for a stay, and other time pressures associated with the process, are not reasons of themselves for proceeding in the High Court. It is clear, as identified by Costello J. in *Rathmond*, that the Oireachtas intended that the resources of the Circuit Court should be availed of in appropriate cases.