APPROVED **[2024] IEHC 437**

THE HIGH COURT

Record No.: 2024/144 COS

BETWEEN:

IN THE MATTER OF MAINLINE POWER LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT 2014

JUDGMENT of Mr. Justice Rory Mulcahy delivered on 16 July 2024

Introduction

1. On 17 June 2024, I made an order appointing Mr Nicholas O'Dwyer as interim examiner to Mainline Power Limited ("**the Company**") on foot of a petition ("**the Petition**") presented by the Company. This judgment concerns the application for the confirmation of that interim appointment.

2. At the hearing of the application for confirmation on 11 and 12 July 2024, there were appearances on behalf of two creditors of the company, Structive Civil Engineering Limited ("**Structive**") and VTG Entrepenad AB ("**VTG**"), as well as the Revenue Commissioners. Structive takes a neutral position on the application, as did the Revenue Commissioners. VTG, however, vigorously opposes the appointment of an examiner and asks that the court, instead, make an order winding up the Company.

3. No issue was raised regarding a number of the statutory requirements for the appointment of an examiner. It is accepted that the Company is insolvent and that no winding up order has been made in respect of the Company. Nor does it have any obligations to NAMA. An independent expert's report accompanies the Petition, and a suitably qualified person, Mr O'Dwyer, has consented to act as examiner. It is also accepted that Ireland is the centre of main interests of the Company.

4. The two bases for VTG's objection are as follows. First, it argues that the court cannot be satisfied that there is a reasonable prospect of survival of the Company if an examiner is appointed based on the evidence before it. Second, it contends that the court should, in any event, exercise its discretion to refuse to appoint an examiner having regard to the conduct of the Company.

5. For the reasons set out below, I am satisfied that it is appropriate to confirm the appointment of Mr O'Dwyer as examiner and to make certain directions in relation to the conduct of the examinership.

Background

6. The Company provides specialised engineering services in the energy, particularly renewable energy, and aviation sectors, including the design and build of substation and grid connection services. It is also a market leader in cable pulling services. It has 83 employees.

7. The Company is part of the Mainline Group and is 100% owned by Mainline Utilities Group Limited, which in turn is 100% owned by holding companies which are 100% owned by Mr Jamie O'Rourke, the CEO and a director of the Company. Mainline Utilities Group Limited ("**Mainline Utilities Group**") is also the 100% owner of another Irish company, Mainline Utilities Limited ("**Mainline Utilities**"), which specialises in water metering infrastructure and installing fibre optic cables. It has 24 employees and is not the subject of the Petition.

8. The Company has two wholly owned subsidiaries, a UK company, Mainline Power Ltd ("**Mainline UK**") and a Swedish company, Mainline Power Nordic AB ("**Mainline Sweden**").

9. The Company has previously operated profitably, but since at least 2020 has been loss-making and therefore balance sheet insolvent. It has, however, had the support of group companies and appears to have been cash flow solvent and able to pay its debts as they fell due. There were no liabilities to Revenue at the date of presentation of the Petition.

10. The Company attributes its financial difficulties to a number of causes, including Covid, delayed and cancelled contracts, contractual disputes, and costs inflation. However, the Company contends that, as counsel put it, the straw that broke the camel's back was an arbitral award made on 27 May 2024 in favour of VTG against Mainline Sweden and the Company in the sum of €6.8 million. The circumstances leading to that award and the Company's conduct prior to it being made are a significant focus of VTG's opposition to this application.

The Nordex Contract

11. Mainline Sweden entered a contract with Nordex Sverige AB ("**Nordex**") in November 2019 to carry out works on a 73-turbine wind farm in Sweden. Mainline Sweden engaged VTG as a sub-contractor on that project. The Company provided a guarantee to VTG for Mainline Sweden's liability under that contract.

12. Mainline Sweden was involved in contractual disputes about payments with both the main contractor, Nordex, and the sub-contractor, VTG. The dispute with Nordex was ultimately resolved by agreement in December 2023, with a payment of €5 million by Nordex to Mainline Sweden in full and final settlement of the dispute. The dispute with VTG, however, was referred to arbitration which was heard over 8 days in September/October 2022.

13. On 27 May 2024, the arbitral tribunal issued a 362 page award. The tribunal determined that the Company and Mainline Sweden were jointly and severally liable to VTG in the sum of €6.8 million.

14. Mainline Sweden has been placed in the Swedish equivalent of liquidation, known as bankruptcy and a liquidator (bankruptcy trustee) has been appointed.

15. On 12 June 2024, VTG issued proceedings in the High Court seeking to enforce the award made in Sweden against the Company and its subsidiary. On 11 July 2024, the High Court (Barniville P) made an order recognising and enforcing the arbitral award pursuant to section 23 of the Arbitration Act 2010, and entered judgment against the Company in the amount of approximately €6 million.

Independent Expert's Report

16. As required by section 511 of the Companies Act 2014, as amended ("**the Act**"), the Petition was accompanied by an independent expert's report ("**the IE Report**") which addressed the matters specified in s. 511(3). The IE Report was prepared by Mr Shane McCarthy, a chartered accountant with KPMG, and he gave his opinion that the Company had a reasonable prospect of survival as a going concern subject to a number of identified conditions.

17. The IE Report explained, at section 1.14, the basis of his preparation of the report. It explains that he had:

> "*... undertaken a review of the recent performance and current financial position of the Company and [has] considered management's plans, proposals, and projections for the Company."*

18. He identified the sources of information contained in the report, being the books and records of the company, together with discussions with, and information and explanations from, the directors and management of the Company. He sets out in detail the steps he had taken during the course of preparing the report. These include reviewing "*Management's*

proposals and projections for the periods ending 30 September 2024 and 30 September 2025." It appears that the "projections" which he had reviewed were projections prepared in the course of a proposed sale of the Company, a sale process which was suspended following the delivery of the arbitral award. Notably, the projections were not attached to the IE Report and have not been put before the Court by the Company as part of this application. As discussed below, VTG attaches particular significance to this omission.

19. At section 6 of the IE Report, Mr McCarthy sets out the basis for his opinion, noting that he and his team had considered the historical trading performance, recent management accounts and the Company's financial projections for the 12 months ending 30 September 2024 and 30 September 2025. The reasons for his opinion were addressed under seven headings, as follows:

- Strong pipeline of work;
- Strong reputation and quality service;
- High growth market;
- Quality client base;
- Dedicated and skilled workforce;
- Interested parties/investment in the Company;
- Group commitment and confidence in the business.

The Petition

20. The Petition and grounding affidavit of Mr O'Rourke set out the matters detailed above. Mr O'Rourke describes the arbitral award in favour of VTG as "*wholly unexpected by the directors of the Company, in light of legal advice received as to the strength of the Company's case in the arbitration proceedings.* " There is a discrepancy in the Petition regarding the Company's position and the legal advice it received, the Petition appearing to suggest that the Company had the benefit of legal advice that no award would be made against it. In subsequent affidavits, Mr O'Rourke clarifies that it was the Company's view that there would be no award made against the Company in the arbitration based on, *inter alia*, legal advice that it had a strong case. The Petition sets out that the Company and Mainline Sweden intend to challenge the award in the Court of Appeal in Sweden, although

it is accepted that, under Swedish law, the award can only be challenged on procedural grounds.

21. The Petition also explains what was done with the settlement sum received from Nordex. It is explained that Mainline Utilities and Mainline Utilities Group had supported Mainline Sweden during the period of its dispute with Nordex in the aggregate sum of €2.85 million, and that Mainline Utilities Group had obtained funding from Bank of Ireland in the amount of €1.75 million, secured by a fixed charge over the assets of Mainline Utilities Group and Mainline Utilities to "*augment its cashflow position*". It was a term of that loan that €500,000 was required to be paid upon receipt of a monetary award or settlement from Nordex. Mainline Utilities Group and Mainline Utilities also obtained a further €465,000 in third-party funding.

22. As at 30 September 2023, the Company had intercompany liabilities to the Mainline Utilities Group and Mainline Utilities in excess of €12 million. Mainline Sweden owed the Company €3.38 million. Following receipt of the settlement monies from Nordex, Mainline Sweden transferred €4.7 million to Mainline Utilities. This was treated as a discharge of Mainline Sweden's debt to the Company, and as a reduction of the Company's debt to Mainline Utilities. It was reflected in the Company's accounts as a payment of a dividend of €1.411 million from Mainline Sweden. Mainline Utilities repaid the €500,000 to Bank of Ireland and all of the other third-party funding.

23. The Petition says that "*having obtained legal advice and other professional advice*", the directors of Mainline Sweden agreed to apply the settlement sum in the manner set out on the basis that Mainline Sweden was solvent and had a strong defence to the VTG's claims in the arbitration and that no award would be made against the Company or Mainline Sweden.

24. The proprietary of these transactions and the credibility of the Company's assertion that it believed that no award would be made against it in the arbitration are hotly disputed by VTG.

VTG's Evidence

25. Three affidavits have been filed on behalf of VTG by Ulf Niklas Eriksson, managing director of VTG, in opposition to the examinership. The affidavits include two reports from Mr Luke Charleton of EY ("**the EY Reports**") and two legal opinions from a Swedish lawyer providing his opinion on certain matters of Swedish law. I address the EY Reports separately below.

26. The main subject of the VTG affidavits is the circumstances which led to the arbitral award in its favour. VTG contends that it is simply not credible that the directors of the Company or Mainline Sweden believed that no, or a minimal, award would be made in VTG's favour. The suggestion is that the decision to transfer almost the entirety of the Nordex settlement sum from Mainline Sweden to Mainline Utilities was done in order to frustrate VTG's recovery of an anticipated award and was thus fraudulent.

27. In subsequent affidavits filed by Mr O'Rourke, he vigorously disputes this assertion and sets out the various factors which he says led the Company to believe that there would be no award in the arbitration or, at least, that the award would be for a much less significant sum. In the exchanges between Mr O'Rourke and Mr Eriksson, emphasis is placed on the failure by the Company to disclose the legal advice on which it relied in forming the assessment that there would be no award in the arbitration and that it was, accordingly, appropriate to transfer the Nordex settlement sum to Mainline Utilities.

28. Mr Eriksson exhibits a report from a Swedish lawyer, Niklas Emthén of Lindskog Malmström on the transaction whereby the Nordex settlement monies were transferred to Mainline Utilities. Mr Emthén opines that the transaction breached Swedish law as an "unlawful value transfer" and that Mainline Utilities has a duty of restitution. In addition, he gives his opinion that the payment would be subject to a clawback pursuant to the Swedish Bankruptcy Act. He also considers that the transfer was a criminal act, contrary to the Swedish Criminal Code.

29. The Company has provided its own legal opinion in response to Mr Emthén's opinion, from Joakim Hedström of DLA Piper Sweden. He points out that, under Swedish law, the

lawfulness of the transaction falls to be assessed by reference to what was known at the date of the transaction. He says that the outcome of the arbitration should not affect that assessment. In other words, the fact that Mainline Sweden and the Company were ultimately found to have a significant liability to VTG is not determinative of whether it was known at the time of the transaction that there would be such a liability. He argues that Mr Emthén's opinion is insufficiently substantiated and should be disregarded. In a brief reply, Mr Emthén seems to accept that the result of the arbitration proceedings is not determinative of what was known at the time of the transaction, but says that, in the present case, the question is what conclusion a reasonable person would have drawn who had the same information as the arbitral tribunal. In this regard, I pause to note that the impugned transaction occurred more than a year after the hearing in the arbitration. Mr Emthén stands over his original opinion.

30. It is worth noting that the Bankruptcy Trustee in Sweden has commenced proceedings in Sweden against the Company and Mainline Utilities seeking repayment of the settlement monies transferred. A freezing order has been obtained on an interim basis from the Gothenburg District Court. It appears, therefore, that the Bankruptcy Trustee shares the view of Mr Emthén that the impugned transaction is capable of being reversed.

The EY Report

31. In addition to the opinion of the legal expert, Mr Eriksson's first affidavit is accompanied by a report from Luke Charleton of EY. The report notes that the Company has been balance sheet insolvent since 2020, relying on the support of group companies. He surmises that it is the withdrawal of group support which has precipitated the examinership application.

32. He raises queries about intra-group transfers when the Company was insolvent and also about the transfer of the Nordex settlement monies. He points out that if this latter transaction were reversed, VTG would benefit from increased recovery in the Swedish liquidation.

33. Of particular significance is his conclusion at 1.5 of the Report:

"*The IER states that Mainline Power has a reasonable prospect of survival but does not support this statement with detailed financial and cash flow projections as would be expected nor does it provide any detail as to what the current pipeline of projects is or whether they are profitable or not. It would be reasonable to expect the Independent Expert to undertake an analysis on whether such contracts will be profitable given the Company's history of incurring significant losses and document this in the IER. Furthermore, the IER does not provide any reliable explanation as to what will change in the Company's approach to its operations that will make it a profitable enterprise in the future. Given this lack of information in the IER it is impossible to properly evaluate if Mainline Power has a reasonable prospect of survival.*"

34. The independent expert, Mr McCarthy provided a response to the EY Report. He accepts that at the time of the inter-company payments, the Company was balance sheet insolvent, it didn't have sufficient assets to meet its liabilities, but argues that it was cash flow solvent, it was able to pay its debts when they fell due.

35. More importantly, he rejects the suggestion that it is impossible to properly evaluate the Company's reasonable prospects of survival based on the IE Report, and addresses various issues raised in the EY Report and in correspondence from VTG's solicitors, William Fry. He maintains that he "*strongly believes*" that the Company has a reasonable prospect of survival and can return to profitability based on its trading performance before Covid and its future growth prospects.

36. There is a further brief reply from EY in which Mr Charleton expresses the view that the clarifications provided by the Independent Expert are welcome but "*the fact remains that no financial information nor any detailed analysis has been provided which would allow me to properly assess or comment on the assertions made*." He clarifies that he is not dismissing the assertions made by the independent expert, rather he is asking for further financial information to be able to understand his assertions. He reiterates his concerns about the propriety of the inter-company transfers.

Interim Examiner's Report

37. Following the appointment of the interim examiner, he prepared two reports for the Court, the first dated 28 June 2024, the second dated 9 July 2024. In his second report, the interim examiner makes clear that he has considered the issues raised in the affidavits exchanged between VTG and the Company on this application. He says that he continues to believe, as stated in his first report, that the Company has a reasonable prospect of survival if certain conditions are met. One of those conditions is investment in the Company and he notes that there have been 19 expressions of interest in investing in the Company since his appointment, several from well established competitors in the industry. The report contains a detailed assessment of the current trading position of the Company and potential future contracts.

38. In relation to the transfer of the Nordex settlement monies, he indicates that he intends to carry out an investigation in relation to all relevant circumstances surrounding that transaction and has already commenced a fact gathering exercise. He says that he intends to engage with VTG as part of that process. He sets out a series of steps he intends to follow if his appointment is confirmed.

VTG's objection to the examinership

39. In substance, VTG opposes the examinership because it believes that it will recover more of the arbitral award if the Company is placed in liquidation. This is because it believes that if the Company is in liquidation, steps will be available to it, or to the Bankruptcy Trustee in Sweden, to reverse the transaction whereby the Nordex settlement monies were transferred to Mainline Utilities. If this can be achieved, then those sums will be available to pay Mainline Sweden and/or the Company's creditors and VTG will see a greater return.

40. As noted by counsel for the Company, in effect, VTG opposes examinership because it will do better in the Swedish liquidation if the Company is wound up rather than because it considers that liquidation offers a better outcome for the creditors of the Company as a whole. It isn't contended in VTG's affidavits, or in the EY Reports on which it relies, that

an examiner should not be appointed because it is clear *at this stage* that the creditors of the Company will fare better in a liquidation than in an examinership. In fact, the EY Reports do not state that the Company does not have a reasonable prospect of survival, rather that more financial information is required in order to assess the independent expert's conclusion that it does.

41. VTG, therefore, oppose the application on two related grounds. First, that the court cannot be satisfied, as it is required to be by section 509 of the Act, that the Company has a reasonable prospect of survival, based on the information before the Court. In this regard, particular emphasis is placed on the absence of the projections referred to in the IE Report.

42. Second, VTG contends that, even if satisfied that there is a reasonable prospect of survival, the court should exercise its broad discretion to refuse to appoint an examiner because of, what it contends is, misconduct by the Company. The misconduct is said to consist of the wrongful transfer of the Nordex settlement monies from Mainline Sweden and the Company to Mainline Utilities with the intention of defrauding their creditors, in particular, VTG; the failure to put before the court the legal advice that it had a strong case in the arbitration, which the Company says it relied on in concluding that it was appropriate to transfer the settlement sums; and the failure by the Company to put before the Court the projections relied on by the independent expert in forming his view that the Company had a reasonable prospect of survival.

Applicable law

43. In addition to the matters set out at paragraph 3 above, the court must be satisfied that there is a reasonable prospect of a company's survival as a going concern in order to appoint an examiner and afford the company the protections that such an appointment provides (see s. 509(2) of the Act).

44. What this requirement involves has been addressed in a number of cases. In *In Re Vantive Holdings (No. 1)* [2009] IESC 68, the Supreme Court (Murray CJ) stated as follows (at p. 20):

"*Since, the court may not make an order appointing an examiner unless it is satisfied that there is a reasonable prospect of the survival of the company as a going concern, it follows that there is an onus on the appellant to satisfy the court that such a reasonable prospect exists. The applicant must provide objective evidence to satisfy the court of this fact. Examinership is a process designed to facilitate the rescue or survival of companies in financial difficulties. Whether the appointment of an examiner is supported by creditors of the company and the extent and reasons for that support is a relevant consideration but not determinative in considering whether there is a reasonable prospect of survival.*"

45. In *In Re Claremorris Tourism Limited* [2015] IEHC 796, Baker J noted that the bar for showing a reasonable prospect of survival was a low one:

"*17. That the bar has been set at a relatively low level might be said to come from the primary purpose of the legislation identified with admirable clarity by McCarthy J in one of the first cases brought under the Companies (Amendment) Act of 1990,* Re Atlantic Magnetics Limited *1993 2IR 561 that;*

> "The Act is to provide a breathing space albeit at the expense of some creditor or creditors."

18. It is clear that such breathing space however is available only to a company that can show some prospect of surviving as a going concern, and that the period of protection is likely to lead to the preservation of some or all of its undertaking. The protection was identified by McCarthy J as being for its "shareholders, workforce and creditors", and it is clear form the authorities that one large creditor should not by virtue of exercising a power to appoint a receiver, have the power to determine the fate of the relevant interested parties."

46. Discussing a subsequent stage in the examinership process, the confirmation of a scheme of arrangement, Clarke J (as he then was) in *In Re Tony Gray & Sons* [2009] IEHC 557 concluded that the prospects of saving the company in that case were not "*remote, unlikely or unreal*" and therefore it would not be appropriate to refuse to confirm the scheme on the basis that the examiner's assessment may have been over-optimistic.

47. Even where satisfied that the criteria in section 509 are met, the court retains a discretion to refuse to appoint an examiner. This is clear from the authorities and from the statutory provisions. Section 518 of the Act provides:

> *The court may decline to hear a petition presented to it or, as the case may be, may decline to continue hearing such a petition if it appears to the court that, in the preparation or presentation of the petition or in the preparation of the report of the independent expert, the petitioner or independent expert—*
>
> > *(a) has failed to disclose any information available to him or her which is material to the exercise by the court of its powers under this Part; or*
> >
> > *(b) has in any other way failed to exercise utmost good faith.*

48. That a court retains a discretion to refuse to appoint an examiner even where the evidence is sufficient to establish a reasonable prospect of survival has been made clear in a number of cases. In *Re Missford Limited* [2010] IEHC 11, Kelly J (as he then was) stated as follows (at p. 15/16):

> "*As was made clear by Fennelly J. in* In Re Gallium Limited *[2009] IESC 8 at para. 46:-*
>
> > "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."
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> *In exercising its discretion, the court is entitled to take all of the circumstances into account. In doing so, it should bear in mind the principal purpose of an examinership. That was expressed in the following terms by Fennelly J. in the* Gallium *case and by Clarke J. in* In Re Traffic Group Limited *[2008] 2 ILRM 1.*
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> > *Fennelly J. said "*the entire purpose of examinership is to make it possible to rescue companies in difficulty*."*

> *Clarke J. said:- "*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*."*
>
> *I would add that neither is it the purpose of the legislation to provide directors with a ready form of absolution in respect of corporate wrongdoings*."

49. As noted in *In Re Rathmond Ireland Limited* [2017] IEHC 273, where there is wrongdoing, or a breach of the duty of good faith, a court must balance that wrongdoing with the potential benefits of examinership:

> "*34. It follows that the court must assess the level of wrongdoing established and then weigh it in the balance with the legislative purpose of saving enterprises and jobs for the benefit of employees and the economy as a whole. If the level of wrongdoing is very egregious, notwithstanding the prospects of saving potentially viable enterprises and jobs, the court cannot condone what would amount to an abuse of the court's process if it were to either appoint an examiner or approve a scheme of arrangement. It therefore follows that it must refuse the petition or refuse to authorise the scheme as the case may be. (See* Missford Limited *and* J.J. Red Holdings Limited *[2016] IEHC 524)*
>
> *35. If the established wrongdoing is less egregious in the assessment of the court, then the balance lies in favour of saving the jobs and the enterprise in order that the purpose of the legislation may be fulfilled. (*Traffic Group Limited *and* Irish Car Rentals Limited*)*."

Reasonable prospect of survival

50. As noted above, VTG does not positively assert that there is no reasonable prospect of survival of the Company, rather it maintains that there is not sufficient evidence before the court to establish that to the necessary standard. It is accepted that the Court does not need to be persuaded that the Company's survival is "probable", but it is argued, in reliance on the EY Reports, that in the absence of the projections referred to in the IE Report, the court cannot, at this stage, be satisfied even to the low standard required of the Company's prospect of survival. I cannot agree.

51. The first thing to observe is that EY's conclusion that it is impossible to be satisfied that the Company has a reasonable prospect of survival is belied by the fact that both the independent expert and the interim examiner have expressed their expert and independent view that the Company does have a reasonable prospect of survival. In *In Re Gallium Limited* [2009] 2 ILRM 11, the Supreme Court (Fennelly J) referring to some early case law on examinership noted that in those early cases the court did not have the benefit of an independent accountant's report "*upon which it is now natural, depending on the standing and expertise of its author, for the court to place particular reliance.*"

52. The independent expert is given a statutory role and the opinion of that expert, when supported by appropriate analysis, ought to be given significant weight absent compelling grounds to discount it; that is clearly what the statutory scheme envisages. It remains, of course, for the court to determine whether a company has a reasonable prospect of survival, but the legislature clearly intended that the court would be assisted in that task by being provided with expert, independent evidence.

53. It is worth noting that Mr McCarthy is required by statute to act independently, and his report is statutorily mandated. Mr Charleton's role was clearly non-statutory, and his report was not proved on affidavit, nor did it contain any express declaration of independence. It was, in fact, not prepared for the court at all (though it does contain a section on matters which should be brought to the court's attention), rather it was prepared "*to assist [VTG] in connection with assessing any analysing [its] options in [its] capacity as a creditor in the examinership*." This is not to denigrate Mr Charleton or his opinion in any way, rather it is

to highlight one of the reasons that it would not be appropriate to discount Mr McCarthy's report simply because there was another expert report querying its conclusions.

54. The IE Report has been of considerable assistance to the court in this case. Mr McCarthy's Report, together with his clarifications, explains in clear terms the difficulties the Company has faced and the reasons that he thinks that those difficulties can, subject to certain conditions being met, be overcome, bringing the Company back to profitability. Nothing he says in the Report has been identified, or seems to me to be, implausible. In this regard, I note that in *In Re Missford*, Kelly J warned of the over optimism of independent experts, but there is no reason to suspect an excess of optimism here. There is nothing "*remote, unlikely or unreal*" about his conclusion that the Company has a reasonable prospect of survival.

55. VTG and Mr Charleton are entitled to argue that the reasons for the Company's difficulties pre-date the arbitral award and query whether the Company will be in a position to address those difficulties in the future, having failed to deal with them in the past. However, the most that Mr Charleton says about the IE Report is that there isn't sufficient information for him, and therefore the court, to determine whether the Company has a reasonable prospect of survival.

56. This is not a sufficient basis to invite the Court to reject the independent expert's opinion for four reasons.

57. First, it is almost inevitably the case that the independent expert will have greater insight into the financial outlook of a company seeking to enter an examinership than will a creditor or, for that matter, the court. This is certainly the case here. The independent expert has had an opportunity to discuss the business in detail with the directors and management and to understand how the business works "on the ground". Mr Charleton's opinion is largely confined to a review of Mr McCarthy's work; he doesn't, for instance, provide a contrary view on the outlook for the industry. Nor is it a case, unlike *Missford*, where the independent expert's opinion on the outlook for the industry runs counter to the court's recent experience.

58. Second, the approach advocated by VTG (and Mr Charleton) implicitly demands a higher threshold for the appointment of an examiner than that mandated by the Act and the

authorities. The authorities make clear that the court does not need to be satisfied as a matter of probability that a company will survive if an examiner is appointed. Where Mr Charleton offers no evidence or even opinion that, notwithstanding the view of the independent expert, the Company doesn't have a reasonable prospect of survival, his conclusions amount to a contention that the independent expert hasn't proved to a sufficient degree of certainty his contention that the Company has a reasonable prospect of survival. In my view, the EY Reports have overstated what is required.

59. Third, although a significant number of matters were raised in EY's first report, in light of KPMG's clarifications, the focus of EY's hesitancy in its second report was the absence of financial projections. It seems clear that financial projections, prepared for the purpose of the suspended sale process, do exist and were reviewed by the independent expert. They were not appended to the IE Report, and were not exhibited in the affidavits verifying the petition. The Company objects to disclosing them on the basis that they contain commercially sensitive information, in particular, in relation to the margins the Company charges.

60. The question of whether the projections should have been put before the Court is separate from, though connected to, the issue of whether it is necessary for the court to review them in order to determine, for the purpose of deciding whether to appoint an examiner, whether the Company has a reasonable prospect of survival. In my view, it is not. There is nothing in section 511 of the Act, which mandates what an IE Report must include which is so prescriptive, nor has VTG, nor EY, set out any evidential basis for the contention that it is not possible to determine whether a company has a reasonable prospect of survival without such projections. It seems to me that simply because they are not before the court, and not available to VTG (or EY), that the projections have been afforded a significance by them which is simply not warranted.

61. As counsel for VTG points out, the Company's audited accounts for the last number of years have referred to the existence of projections which showed the Company returning to profit, all of which proved to be incorrect. The projections, therefore, have no special predictive power. If particular reliance had been placed on projections which had historically been shown to be unreliable, then that might be a matter to which the court would have paid particular attention in considering whether the statutory threshold was met,

but there is nothing to suggest that here. Though the projections are referred to, it is not apparent from the IE Report that the independent expert afforded them any special weight. More importantly, it is clear from his report that he considered in detail the Company's existing contracts and its potential future contracts in forming his opinion. This, in my view, was more likely to have afforded Mr McCarthy an opportunity to realistically assess the Company's prospects of survival than a review of projections prepared by the Company for the purpose of a proposed sale.

62. Fourth, and related to the foregoing, is the fact that the interim examiner has also expressed the opinion that the Company has a reasonable prospect of survival. He has done so without seeing the projections, which clearly indicates that he did not consider them essential to enable him to form an opinion. His report contains a detailed examination of the Company's trading position. He has had 19 expressions of interest in investing in the Company.

63. If, as I consider to be the case, the independent expert's opinion should carry significant weight in determining whether there is a reasonable prospect of survival, having regard to the statutory significance of that opinion, then *a fortiori*, the interim examiner's opinion must carry even greater weight. As counsel for the interim examiner pointed out, it would be inappropriate for the interim examiner to agitate for his own appointment, and I don't believe that he has done so in this case. The expression of his opinion must, therefore, be taken to be a truly independent assessment of the Company's position as appears to him at this stage of the examinership. Although early in the examinership process, he has clearly had significant engagement to date.

64. Faced with the evidence contained in the IE Report and the interim examiner's reports, and their opinions that the Company has a reasonable prospect of survival, it would, I think, have taken something exceptional for me to have concluded that the Company did not meet the threshold required for the appointment of the examiner. The measured observations of EY that there is a dearth of information, an opinion provided prior to delivery of the second examiner's report, falls far short of that.

65. In the circumstances, I am satisfied that the Company has established to the sufficient standard that it has a reasonable prospect of survival as a going concern.

Discretionary Factors

i. Unfair preference

66. VTG contends that the transfer of the Nordex settlement sums to Mainline Utilities constituted an unfair preference, which would be contrary to section 604 of the Act in a winding up situation, or the Swedish equivalent. As noted above, it has provided an opinion from a Swedish lawyer to this effect, and that the monies are subject to a potential clawback. Simply put, VTG's position is that the Company transferred the sums out of the Company and Mainline Sweden in order to frustrate VTG's recovery of an anticipated award in the arbitration.

67. VTG identifies several factors which support its contention, relating to the timing of the transaction. Primarily, it relies on the fact that the transfer was made after all the evidence was heard in an arbitration in which it ultimately recovered almost 95% of the amounts it had claimed. In those circumstances, VTG contends that it must have been obvious to the Company that it was facing a significant award when it transferred the settlement sums to Mainline Utilities, and that accordingly, it was improper to have made that transfer. It notes that there is no adequate explanation for why almost the entirety of the settlement monies were transferred to Mainline Utilities, no pressing requirement for that transfer having been identified. The only amount which was required to be paid was €500,000 to Bank of Ireland, and, as VTG notes, the obligation to repay that amount out of any settlement sum received from Nordex only arose two days before the settlement monies were paid, adding to VTG's suspicion that the entire transaction was a device to frustrate its recovery.

68. In response to VTG's assertions, Mr O'Rourke has averred repeatedly that it was the Company and the directors' belief that no, or no significant, award would be made in the arbitration and therefore it was considered appropriate to make the transfer to Mainline Utilities. He suggests that explicit consideration was given to whether Mainline Sweden was in a position to make the transfer prior to the transfer, in light of the pending arbitration, and that the Company and Mainline Sweden relied on legal advice that they had a strong case in the arbitration in so doing.

69. In his second affidavit, Mr O'Rourke addresses some of the arguments which it had deployed in the arbitration which it believed would be successful. These included the Company's contention that the contract contained a "cumulative account" mechanism, whereby all payments under the contract were treated as interim payments, and thus the fact that payments had been made to VTG on account couldn't be taken as evidence that the works the subject matter of the interim payment had been performed. In addition, the Company disputed that the guarantee it had provided was a joint and several guarantee.

70. VTG say that it was abundantly clear from the contract terms that it was a "unit price contract" whereby once a payment was made it was treated as final. Similarly, it contends that it was obvious that the guarantee was a joint and several guarantee.

71. It questions the credibility of the Company's contention that it relied on legal advice that it had a strong case, noting that the arbitral tribunal rejected the main planks of the Company's defence, including those described above. It points out that neither of the two contemporaneous internal documents on which the Company relies to evidence that it believed at the time of the transfer that it would be successful in the arbitration, a detailed internal memo from Adrian Farry, Senior Commercial Manager, prepared post the arbitration hearing, and an email from Jill O'Reilly, Chief Financial Officer, reference legal advice. Most significantly, VTG argues, the Company has failed to put that legal advice before the Court, despite it having served a Notice to Produce and thus the court should infer that the advice does not support the Company's position as stated in these proceedings. The question of whether the failure to put the advice before the court is itself a basis for refusing to appoint an examiner is considered below.

72. In *In Re Traffic Group Limited* [2009] IEHC 445, the High Court (Clarke J) was asked to refuse to approve a scheme of arrangement because there had been a failure to disclose details of a transaction which was argued to involve what would have been regarded as a fraudulent preference in a winding up situation. Although the court concluded that there had been a lack of candour, it did not make a finding that the transaction was improper:

> "*6.4 Except in a very clear case it will never be possible for a court, in the context of the limited timescale within which a final decision in respect of an examinership is required, under the Act, to be taken, to reach a conclusion as to whether certain actions*

might have amounted to a fraudulent preference in the event that the alternative of a winding up of the company had been adopted. While I was satisfied that those matters should have been disclosed by the petitioners, it did not seem to me that I could reasonably reach a conclusion that the actions themselves were wrongful."

73. Similarly, it would be improper for me to reach such a conclusion here, certainly at this stage of the examinership process. First, it would involve me rejecting the sworn evidence of Mr O'Rourke in circumstances where that evidence hasn't been tested in cross-examination. As is apparent from *RAS Medical Limited v Royal College of Surgeons* [2019] IESC 4, it is typically not permissible to invite a court to doubt the credibility of evidence given on affidavit without seeking to cross-examine the deponent of that affidavit. This, VTG has not done.

74. Nor does it seem to me that the position of Mr O'Rourke on affidavit is so manifestly incredible or at odds with established facts that it should be discounted notwithstanding the absence of cross-examination. VTG has certainly raised legitimate concerns about the transaction which, as discussed below, merit further investigation, but they have not been established to be improper. Although the arguments relied on by the Company and Mainline Sweden in the arbitration were rejected, from a review of the arbitral award, it is not clear that they were so obviously ill-founded that the Company could not have had a belief that they would succeed. Of course, the arguments weren't successful. But the Swedish law experts seem to agree that that is not determinative and the question of the appropriateness of the transaction will be assessed by what a reasonable person would have known at the relevant time. Given that the hearing had concluded, the Company should have known everything that the arbitral tribunal knew. However, by way of example only, it appears that the guarantee did not use the terminology typically used in Sweden to identify that the guarantor assumes joint and several liability for the guaranteed sums. In those circumstances, it may not have been implausible that the Company believed that the arbitral tribunal would conclude other than as it did.

75. The Company has referred to legal advice received that it had a strong case. Had it put such advice before the court, that would no doubt have bolstered its case that the transfer was made in the *bona fide* belief that it would succeed in the arbitration. Although not made clear in the Petition or Mr O'Rourke's first two affidavits, the advice, it is now said, was

given verbally, although it appears there may be some internal Company documentation which refers to the content of that advice. I think that VTG is entitled to suggest that the failure, indeed refusal, to put this material before the court does give rise to a reasonable concern about the credibility of the Company's evidence that the advice supported the Company's belief that there would be no award in the arbitration, or at least no award large enough to render the transfer of the settlement sums improper. However, that reasonable concern is not sufficient to justify rejecting the Company's evidence at this stage, or to reach a firm conclusion that the transfer was improper. The most that can be said is that it is a transaction which gives rise to serious questions about its legitimacy. In this regard, it seems clear that the Swedish Bankruptcy Trustee is already pursuing answers to those questions.

ii. Failure to disclose legal advice

76. As noted above, VTG served a Notice to Produce on the Company in relation to the legal advice referred to in Mr O'Rourke's affidavits and the Petition. At the time it served the Notice to Produce, it understood that the advice given was in writing, it was only subsequently stated to have been given verbally. At the hearing, VTG sought an order directing the Company to disclose any internal documents evidencing or recording the legal advice. It argued that it was entitled to these documents because the Company had "deployed" the legal advice, relying in this regard on the recent decision of the High Court (O'Donnell J) in *Elsharkawy v Minister for Transport* [2023] IEHC 672.

77. The Company denies that it has deployed the legal advice, arguing that it does not bear the burden of proof in this application in relation to the propriety of the transaction impugned by VTG, and that it had, appropriately, disclosed details of the transaction in the Petition.

78. The only legal advice which is exhibited is a letter written by the Company's Swedish lawyers after the arbitral award. As counsel for VTG notes, it is an unusual letter, reading as if it is addressed "to whom it may concern". The letter does support the Company's contention that the result in the arbitration was surprising – the award described the lawyers as having been "*perplexed*" by the award – but it does not suggest that the lawyers were expecting, still less that they had advised that no, or a minimal, award would be made against the Company.

79. In my view, it is at least arguable that the Company did "deploy" the legal advice within the meaning of that phrase in *Elsharkawy* and has therefore waived privilege over it; it is arguable that it relied on the existence and content of the advice – "a strong case" – as a pre-emptive defence of its conduct in transferring the Nordex settlement sums. However, these are not proceedings *inter partes*, and the subject matter of the proceedings is not the impugned transaction. I would have taken some further persuasion that I should make an order directing the Company to produce that advice to VTG for the purpose of this application had it been in writing. It is important not to lose sight of the fact that, despite VTG's elegant arguments, this is not, and couldn't be, an inquiry into the propriety of the transfer of the Nordex monies. At most, production of the legal advice might serve to further bolster (or, indeed, undermine) VTG's belief that the Company knew, or ought to have known, that it was not appropriate to transfer those monies in light of an impending arbitration award.

80. In any event, it now appears that there was no written advice. I am not persuaded that VTG is entitled, by a sidewind, to be furnished with discovery of any Company documents referring to oral legal advice given on the strength of the Company's case in the arbitration by virtue of the Company's deployment of that oral advice, nor that it constitutes misconduct, or a breach of section 518 of the Act, for the Company to have failed to put any such internal documents before the court.

iii. Failure to put projections before the court

81. VTG argues that the Company was under an obligation to put the projections before the court, quite apart from those projections being necessary to enable the court to determine whether the Company has a reasonable prospect of survival. It contends that the projections are information which is "*material to the exercise by the court of its powers*" under Part 10 of the Act, within the meaning of section 518, and that failure to provide that material constitutes grounds for the court refusing to entertain the Petition. VTG suggests that the court should infer from the failure to put the projections before the court that they do not support the Company's position that it has a reasonable prospect of survival.

82. The Company argues that such an inference would, in effect, impugn the independent expert, who has reviewed the projections and yet expressed a positive opinion as to the

Company's prospects of survival. I agree that it would be improper to draw such an inference in those circumstances. The real question is whether the Company was obliged to put the projections before the court for the purpose of enabling VTG and the court to test them.

83. As noted above, my conclusion was that it was not necessary for the court to review the projections in order to determine at this stage whether the Company has a reasonable prospect of survival. It seems to me that the evidence which *is* before the court, including the detailed assessment of the Company's current and future trading performance by reference to individual contracts, provides what is likely to be more robust evidence on which to base that opinion than would have been provided by projections prepared for an intended sale, or even projections prepared for the purpose of an application for examinership. It is, of course, the case that the information could have been put before the court and that projections of the type described would typically be helpful. But they were not essential in this case. Section 518 does not require that all information available to a company seeking examinership be put before the court. As noted by counsel for the Company, if that was required, it would be necessary to place before the court a record of all discussions between, for instance, the independent expert and management upon which the independent expert relied in forming his opinion before the court. I don't believe that that is what section 518 requires.

iv. Assessment of discretionary factors

84. VTG argues that in light of the various discretionary factors, the appropriate course is for the Company to be wound up now rather than placed in examinership so that the Irish examiner and the Swedish Bankruptcy Trustee can work together to fully investigate the issues raised in these proceedings. It contends that it will be prejudiced if an examiner is appointed since it may be subjected to a scheme of arrangement which prejudices its interests. It contends that the powers of the examiner to investigate the matters it has raised are inadequate.

85. Although I accept that VTG has raised significant issues for the Company to address, the discretionary factors it relies on fall far short of justifying a refusal to confirm the

examiner's appointment in circumstances where I have concluded that the Company does have a reasonable prospect of survival.

86. The authorities establish that when considering the exercise of discretion, the prospect of saving the jobs of employees should weigh heavily in the balance (see *Rathmond Ireland*). It is only in the case of the most egregious *established* wrongdoing that the prospect of saving jobs would not tip the balance in favour of appointing an examiner. In this case, the alleged non-disclosure falls short of being the type of egregious conduct contemplated in *Rathmond.* If, as VTG believes, the transfer of monies from Mainline Sweden to Mainline Utilities was done as part of a concerted effort to frustrate an award which it was known, or should have been known, would be made in VTG's favour, then this could be considered egregious misconduct, but, of course, those allegations haven't been established at this juncture.

87. Therefore, the prospect of saving as many as 55 jobs in the Company weighs heavily in favour of confirming the examiner's appointment and allowing the Company the breathing space necessary to see if it can put in place the necessary measures to return to profitability. The fact that there have been 19 expressions of interest in investing in the Company also suggests that there is a real benefit in confirming the appointment. VTG is entitled to look at matters from its own perspective, in light of its belief that it may do better in a winding up than in a scheme of arrangement put in place following an examinership, but the court must look at matters in the round.

88. In any event, I do not accept that VTG will be prejudiced simply because an examiner is appointed. Counsel for VTG argues that it will not be in as strong a position to protect its interests in the event the examiner proposes a scheme of arrangement as it is now in when seeking to object to the appointment of an examiner. I cannot see why this would be so. If an examiner is appointed and proposes a scheme of arrangement, VTG will be entitled to oppose the approval of that scheme. Under section 541 of the Act, the court cannot approve a scheme of arrangement unless satisfied that it is not unfairly prejudicial to the interests of any interested party. VTG will be able to object to a scheme of arrangement, should it wish to do so, on the grounds it advances to oppose the appointment of an examiner. In particular, it will be able to argue that it will do better, if that is the case, in a liquidation, where certain transactions may be reversed, than in any proposed scheme of arrangement. The

consideration of whether to approve the scheme will necessarily be made in light of more information than is available to the court on the hearing of the Petition. VTG did not identify any other prejudice it would suffer by any delay in the Company being wound up, if that is what ultimately occurs.

89. In this regard, I note that the interim examiner has undertaken to carry out investigations into the matters raised by VTG and the circumstances surrounding the transfer to Mainline Utilities of the Nordex settlement monies. The Company has undertaken to co-operate with that investigation. I do not share VTG's concern that the examiner's investigation will, in effect, serve no useful purpose because of the limited time available to him. The interim examiner has set out what he proposes to do in order to investigate matters. It seems to me that if those steps are taken, then there is every possibility that the court will be in a better position to assess the merits of VTG's objections if and when a scheme of arrangement is proposed.

Conclusion

90. I am satisfied that the Company has established that it has a reasonable prospect of survival as a going concern, subject to certain conditions being met. In addition, I am satisfied that the other statutory criteria for the appointment of an examiner detailed in section 509(1) and (2) of the Companies Act 2014 have been met.

91. Although VTG has properly raised issues of concern in relation to transactions entered into by the Company and its wholly owned subsidiary Mainline Sweden in the period shortly before the Petition was presented, which merit further investigation, it has not been established that the Company was guilty of misconduct in relation to those transactions.

92. Although the matters raised by VTG are relevant to the exercise of the court's discretion to refuse to appoint an examiner, it has not raised any matter which, by itself or taken together, would warrant the refusal to appoint the examiner having regard to the potential saving of jobs which an examinership might be able to achieve.

93. I will, therefore, confirm the appointment of Mr Nicholas O'Dwyer as examiner to the Company pursuant to section 509(1) of the Act.

94. In addition to the matters which the examiner will be required to address in the discharge of his statutory duties, I will direct Mr O'Dwyer to carry out the steps set out at page 18 of his second report and to prepare a separate report for the court on the progress of those steps, to include a report on the degree of co-operation provided by the Company and its directors in that investigation.

95. I will hear the parties regarding any further orders which may be required.