

**THE HIGH COURT**

[2022] IEHC 217  
[2021 No. 302 COS]

**IN THE MATTER OF PREMIER PERICLASE LIMITED**

**AND**

**THE COMPANIES ACT 2014**

**EX TEMPORE Judgment of Mr. Justice O'Moore delivered on the 21st day of March 2022**

1. On the 16th of December 2021 I appointed Neil Hughes as interim examiner to Premier Periclase Limited ("the Company"). The Petition seeking the appointment of an examiner was listed for hearing on the 12th of January 2022. This application was not opposed, and Mr. Hughes was confirmed as examiner. The Company, in seeking the appointment of Mr. Hughes as interim examiner and examiner, relied upon the Independent Expert Report of Cormac Mohan. The considerations identified in that report included the following;

*In forming an opinion on whether the Company has a reasonable prospect of survival, I considered the implications arising from the current energy market volatility coupled with escalating gas price increases, the Covid-19 pandemic for the Company's future trade and the Company's solvency pre current energy costs spikes. I address both these matters in detail in the repost and have relied on market sector expertise from MHA MacIntyre Hudson, a copy of which is enclosed at Appendix G hereof.*

2. The report of MHA McIntyre Hudson, to which Mr. Mohan refers, describes a 400% increase in gas prices in the 12 months to November 2021. As described by Mr. Hughes in the current application, gas is the essential raw material for the business of the Company. That business is the manufacture of magnesium in various forms. MHA McIntyre Hudson explained this rise in gas prices in this way;

**Supply Issues;**

*Russia supplies approximately 50% of the EU's natural gas imports while much of the rest coming from Norway and Algeria. Russia sends gas to Europe through several main pipelines - such as the Nord Stream, the Yamal-Europe and the Brotherhood.*

*The gas is collected in regional storage hubs, and then distributed to different countries across the continent During the pandemic, overall gas exports from Russia dropped due to less demand as economic activity shrank. Although it has picked up again in Europe, this downward trend has been continuing - with lower supply this year, especially via the Ukraine and Belarus pipelines. This has led to stocks across Europe being depleted, which in turn is driving up prices. There is speculation in the media that Russia could increase its supply of gas if it wanted to and there could be an element of political games being played Some analysts have suggested Russia could be holding back supplies to speed up approval of the newly built Nord Stream 2 pipeline running directly from Russia to Germany. This bypasses Ukraine but has been met with objections on geo-political as well as environmental grounds.*

### **Demand Factors**

*The economic rebound in the wake of the Coronavirus pandemic has caused factories to ramp up production, pushing up demand for energy. Europe is also facing increased competition for gas from other parts of the world. Demand for gas in some regions like Asia and the Middle East has risen sharply. This has knock-on effects on the market for liquified natural gas (LNG). which makes up about a quarter of Europe's imports. When demand for LNG is high, supplies tend to be diverted to Asia to take advantage of rising prices.*

*In addition. Russia has been expanding its gas exports to China, and in June inaugurated a gas processing plant in the far east of the country, which is predicted to become one of the biggest in the world.*

3. The conclusion of the MHA report was;

### **Conclusion**

*European gas prices have hit all-time highs, having gone up around 400% this year.*

### **Short-term expectations**

*The natural gas market in Europe is expected to remain tight over the winter months, as Russia continues to cap supply into Europe. According to Reuters. Gazprom had booked only a third of its available supply capacity through the Yamal-Europe pipeline for October. A colder than normal winter may result in further upsides for the prices of gas.*

### **Medium/Long-Term**

*The start-up of the Nord Stream 2 pipeline is expected to balance the European natural gas market in 2022. Over the long term, the development of Asian markets and the transition from coal to gas is likely to spur demand for natural gas. LNG demand is likely to contribute significantly to the growth of the natural gas trade. The accuracy of any such forecasts could be also impacted by the tension which has escalated recently with Russia. Should the tension escalate into a Russian invasion of Ukraine, we could see a significant change to the future of natural gas supply and therefore change in future prices.*

Mr. Mohan nonetheless concluded that the Company had a reasonable prospect of survival, though this was dependent on a number of factors including the stabilization of energy prices in the medium to long term and the acceptance of an appropriate scheme of arrangement by the creditors and by the Company's membership. The price of gas was, however, from the outset of this process a critical issue for the Company

4. On the 18th of February 2022 the period of protection of the Company was extended to the 25th of March 2022.. Six days later, the Russian Federation invaded Ukraine. That act, and the ensuing war, has had a profound effect on the Company and on the progress of the examinership.

5. These effects are set out in the evidence of Mr. Hughes, grounding the current application (which is to extend the period of court protection from 100 days to 150 days).
6. At paragraphs 6, 7 and 8 of his affidavit, Mr. Hughes swears;

*"In my Second Report, which was exhibited to my affidavit sworn on 18 February 2022, I set out for this Honourable Court a timetable which envisaged for the concluding the investment process and filing my Section 534 Report. As set out in my Second Report, I had hoped to be in a position to select preferred bidder by 3 March 2022 and enter into an investment agreement by 11 March 2022. This was with a view to issuing notices together with proposals for a scheme of arrangement to the members and creditors of the Company by 21 March 2022, being day 96 of the examinership..."*

*The Company's primary input is natural gas and, as set out in my Previous Reports, natural gas has been the subject of considerable volatility over the past few months as a result of, inter alia, the war in Ukraine. As explained in the Petition, the fluctuations in the price of natural gas has been a source of ongoing difficulties for the Company and has had a significant impact on the cash flow of the Company as well as production costs. In this regard, the Company (and I) are dealing with issues as and when they arise and are having to make decisions in very short timeframes. By way of example and as mentioned in my Previous Reports, since the Company entered examinership decisions have had to be taken by the Company to either reduce or suspend production with a crew to ensuring that it can meet its liabilities as they fall due during the examinership period. Against this ever changing backdrop, my team and I have continued to engage with the remaining potential investors in the hope of securing a suitable investment that would enable me to formulate proposals for a compromise or scheme of arrangement in respect of the Company..."*

*Due to volatility in natural gas prices we have had to keep (and have kept) the potential investors abreast of any decisions taken by the Company as regards production in circumstances where decisions taken by the Company in the short to medium term could have implications for their appetite to invest. In this regard, this volatility of the natural gas market cannot be overstated. The price of gas rose to 800 pence (Stg) a therm last Monday but has since come down to around 300 pence (Stg) a therm. The decision was previously taken by the Company to suspend production in March. Based on these most recent price fluctuations, the Company is not expecting to recommence production in March. Whether production commences again in April is still under review and is very much dependent on whether a suitable investment can be secured."*

7. At paragraph 12, Mr. Hughes summarises his evidence;

*"I am advised and therefore believe that this Honourable Court may extend the period of protection beyond the 100 day period from the date of the presentation of*

*the petition (by a further maximum 50 day period) where it is satisfied that certain conditions (as prescribed by the Companies (Miscellaneous Provisions Covid-19) Act 2020, which amends section 534 of the 2014 Act) are satisfied. I am further advised and therefore believe that the conditions are as follows:*

- (a) Where an examiner has been unable to present his report pursuant to Section 534 of the Act within the initial 70 day period, which is the case in this instance.*
- (b) Where, having obtained an order extending the period within which the examiner is required to present his report beyond day 70 of the examinership, the examiner would be unable to report within the 100 day period. For the reasons set out above, I am of the view that it will not be possible for me to present my Section 534 Report within the limited time that remains.*
- (c) That the examiner would be able to report to the Court if the period was extended beyond day 100. In this regard, I believe that if this Honourable Court were to extend the protection afforded to the Company up to and including Friday, 13 May 2022 , that there is a reasonable prospect that I would in that time be able to conclude a binding investment proposals and engage with the prospective investors and will update the Honourable Court in relation to developments on Monday, 21 March 2022.*
- (d) That exceptional circumstances exist in respect of the company the subject of the application. In this regard, the relevant statutory provision expressly provides that "exceptional circumstances " include (but are not limited to) the nature and potential or actual impact of the Covid-19 pandemic on the company. The Company (like other operators in its sector) is undoubtedly faced with significant challenges as a result of the impact of the war in Ukraine on the gas and oil industry. The disruption which the war in Ukraine has had on the Company's operations and business is unprecedented and, indeed, is ongoing. I am satisfied that the war in Ukraine is negatively impacting on my ability to source the required investment in a timely manner, in circumstances where those who are interested in investing in the Company are understandably proceeding cautiously in light of the obvious uncertainty surrounding the availability and price of natural gas. Due diligence also takes on a greater level of importance. Even with this uncertainty, however, I do believe that there continues to be a genuine interest to invest in the Company, as evidenced by the fact that two separate investment proposals have been received."*

8. Counsel for the examiner made the stark submission that, if the period of protection for the Company was not extended, it would be impossible for Mr. Hughes to deliver his report by the 25th of March. The examinership would therefore fail, with the likelihood that the Company would immediately be placed in liquidation, 82 full time jobs would be lost, and a promising (if troubled) business would go to the wall.
9. The legal issue which I must consider is whether it is permissible for me to extend the period of protection in circumstances where the examiner accepts that the Covid 19

pandemic is not the cause of the request for such extension. This requires a brief analysis of the Companies (Miscellaneous Provisions) (Covid-19) Act 2020.

10. The long title of the Act reads;

*"An Act, having regard to the risk to human life and public health posed by the spread of the disease known as Covid-19 and, in response to the economic difficulties caused by that disease, to make exceptional provision in relation to the operation of certain provisions of the Companies Act 2014 and the Industrial and Provident Societies Act 1893 for a certain period and such further period (if any) as may be specified by order of the Government and, for that purpose to amend the Companies Act 2014 and the Industrial and Provident Societies Act 1893 ; to further amend the Companies Act 2014 ; and to provide for related matters."*

11. Inasmuch as the long title has any relevance to the interpretation of the relevant provisions of the 2020 Act, it suggests that the legislation was enacted in order to address the inevitable adverse effects on businesses caused by a global pandemic. It does not suggest that the body of the Act is to be read as being confined to commercial challenges presented by Covid-19. Equally, section 12 A ( which provides for the extension of the "interim period" for which certain of the aspects of the 2020 Act apply) does not require the relevant provisions to be limited to considering the effect on undertakings of the pandemic alone, to the exclusion of all other circumstances. It is worth setting out Section 12 A, which reads;

*"12A. (1) The Government may, at the request of the Minister made after consultation with the Minister for Health, from time to time, by order extend the interim period, either generally or with reference to any particular purpose or provision, for such period as they consider appropriate if they are satisfied that, having regard to—*

- (a) the threat to public health presented by Covid-19,*
- (b) the highly contagious nature of that disease,*
- (c) the need to restrict the movement of persons in order to prevent the spread of the disease among the population and the effect that such restriction may have on travel and meetings, and*
- (d) the need to mitigate the economic effects arising from Covid-19,*

*the making of such order is in the public interest."*

12. The interim period is that time within which certain elements of the ordinary legislative regime for companies are varied, in the main to accommodate the exigencies imposed by the pandemic. It is a striking, and possibly unique, aspect of the 2020 Act that there is requirement for consultation with the Minister for Health before the Minister for Enterprise even requests the Government to extend the period within which certain requirements of

the Companies Act 2014 are modified. Company law is not often an area in which the Minister for Health features. This emphasises, if emphasis were needed, the fact that many (and possibly all) of the legislative interventions in the 2020 Act are driven by the Covid 19 emergency. It does not, however, follow that these provisions are confined to dealing with situations arising from that emergency alone.

13. The most relevant provision of the 2020 Act, for the current application, is section 13 which inserts a new sub-section 3A in section 534 of the 2014 Act. Put simply, the new provision allows the Court to extend the period of protection for a company to 150 days (but no more). This extension can only be ordered if certain strict conditions are met. The first of these is that the application is made during the interim period. Necessarily, given the terms of Section 12A, this means that the application is made at a time when it is in the public interest that some or all of the relevant provisions of the 2020 Act remain in force in light of a series of considerations; all of these relate to Covid 19.. Secondly, certain other more formal conditions apply (namely the inability of the examiner to report within 70 days, the consequent extension of the reporting period to 100 days, and the examiner establishing an ability to report within a further extended period). Finally, the examiner must satisfy the Court that "exceptional circumstances exist in respect of the company the subject of the application..."
14. Critically, sub-section 3A (c) of section 534 of the 2014 Act (as inserted by the 2020 Act) states;  
  
*(c) In paragraph (b), 'exceptional circumstances' include (but are not limited to) the nature and potential or actual impact of Covid-19 on the company."*
15. Even if one confines oneself to the wording of the new sub-section, the intention of the legislature is plain. The "exceptional circumstances" required to justify a further extension of the period of protection may be circumstances which have nothing to do with Covid-19. They could be circumstances which "exist in respect of the company" that arise otherwise than by reference to the pandemic.
16. This interpretation of the sub-section is also the one which is reached when the provision is viewed in its full and proper context. It will be remembered that an application for an extension beyond 100 days can only be made when the interim period is in place. The decision to extend that period is to be made by reference to considerations which exclusively relate to Covid-19. In those circumstances, sub-section 3A could have been plausibly construed as limiting "exceptional circumstances" to those arising from Covid-19. The inclusion of the words "(but are not limited to)" is deliberately done to make it perfectly clear that the circumstances justifying such an extension are not in any way circumscribed, except for the fact that they must be exceptional.
17. The Oireachtas has made special provision for companies for as long as it is in the public interest to do so, having regard to the progress of the Covid-19 pandemic and to its economic effects. However, the legislature has also provided for the possibility that (during such a period) a range of circumstances may justify the extension of an

examinership. In that regard, the Oireachtas has considered the prospect that companies might, to paraphrase Evelyn Waugh, suffer a blow upon a bruise. Already weakened by the pandemic (or other developments) companies in examinership should have the chance to have their period of protection further extended while the interim period applies if this is justified by any type of exceptional circumstance. This is so whether the relevant circumstance arises from the pandemic, or from some completely different source.

18. In legislating to deal with a global health emergency, of a type not seen here for a century, the Oireachtas clearly wished to provide an extended period of court protection during any interim period should a company be adversely effected by exceptional circumstances even if these were not in themselves circumstances caused by Covid-19. It is singularly unlikely that the legislature contemplated that, as the pandemic retreated, a land war in Europe would erupt. That is what has happened.
19. I am therefore satisfied that ;
  - i) *Mr. Hughes' affidavit describes the sort of exceptional circumstances contemplated by s. 534 (3A) of the Companies Act 2014, as amended;*
  - ii) *these exceptional circumstances have affected the business of the Company and the progress of the examinership;*
  - iii) *in light of these circumstances the examiner has established in evidence the conditions required to allow me to exercise a discretion to extend the period of court protection. The other requirements set out at sub-section 3A (a) and (b) are undoubtedly met.*
20. In exercising my discretion, I take into account the likely loss of full time jobs, the likely failure of a potentially profitable business, the fact that a preferred investor (represented at the hearing) has been recently identified by the examiner, and the unequivocal recommendation of Mr. Hughes that the protection of the Company be extended. I also take into account the positions taken by the various notice parties which appeared before me.
21. The first notice party, Bord Gais, supported the application. The second notice party, Revenue, was neutral in respect of the application. Solicitors for a secured creditor, the Environmental Protection Agency, did not have instructions to attend Court and instead communicated a position by email. That stance was essentially one of neutrality, though the email from the EPA's solicitors also sought that any extension be "conditional upon the Company complying with..." what were described as "obligations..." I did not impose any such conditions on the extension of the period of examinership. If these obligations are in any event required to be met by the Company, there was no purpose in specifying them as conditions. If these obligations were not ones which the Company had to discharge, no case was made out to me as to why the extension should be made conditional in the way sought in the email from the EPA's solicitors. Finally, I understand that the Company supported the application.

22. I conclude that I should exercise my discretion to extend the period of protection for 50 days. Given the uncertainty surrounding the critical issue of the cost of gas to the Company, I have decided that it is appropriate to direct the maximum permissible extension. However, I will list the matter for mention on the 8th of April 2022. At that time, on the basis of the information provided to me by the examiner, the prospects for the Company should be much more clearly visible. In addition, I am conscious of the examiner's repeated references to his obligation to return to seek to have Court protection lifted should he feel that it will not be possible for him to formulate proposals for a compromise or scheme of arrangement in respect of the Company. I would nonetheless emphasise that, in the event that the chances for survival of the Company materially diminish for the reasons described by the examiner, Mr. Hughes must return to Court without delay.