

THE HIGH COURT

[2022] IEHC 157

Record No. 2022/25 COS

**IN THE MATTER OF MALLINCKRODT PLC.
AND IN THE MATTER OF PART 10 OF THE COMPANIES ACT 2014**

Judgment of Mr. Justice Quinn delivered the 22nd day of March 2022 (Section 509)

1. On 14 February 2022, the directors of Mallinckrodt plc. ('the Company') presented a petition to this court for the appointment of an examiner to that company pursuant to s. 509 of the Companies Act 2014 ('the Act').
2. On that same day, an application was made for certain directions regarding service and advertisement of the petition and the court fixed the hearing of the petition for Monday 28 February 2022.
3. Also on 14 February 2022, the court appointed Michael McAteer of Grant Thornton, Dublin, as interim examiner of the Company pending the hearing of the petition.
4. On 28 February 2022, the court heard the petition. Counsel and solicitors appeared on behalf of a number of creditors and claimants. Certain representations were made for the most part in support of the petition. A number of creditors indicated that they were neutral or reserving their positions in relation to the proceedings generally. No party opposed the petition. This court made an order appointing Mr. McAteer examiner of the company. This judgment summarises the reasons for the decision to appoint the examiner.
5. The petition was verified by an affidavit sworn on 9 February 2022 by Mr. Stephen Welch, Chief Transformation Officer of the Company.
6. The petition was accompanied by the following: -
 - (a) As required by s. 511 of the Act, a report of an Independent Expert, in this case Mr. Mark Degnan, partner in Deloitte LLP, Ireland and;
 - (b) As required by s. 512 (2) (b) of the Act, proposals for a scheme of arrangement in relation to the company's affairs.
7. In circumstances described in more detail below, on 12 October 2020 the company and many of its subsidiaries and affiliates ("the Group") filed a case pursuant to Chapter 11 of the US Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. On 3 February 2022, the court (Judge John T. Dorsey) delivered a ruling finding that the Fourth Amended Plan of Reorganisation ("The Plan") satisfied the statutory requirements of the US Bankruptcy Code and overruling a number of objections made to the Plan, with one exception which is not directly relevant to this decision. The opinion of the court was delivered after hearings held over the course of 16 days in November 2021 and January 2022 having considered evidence and submissions made in opposition to the Plan.

8. It was a condition of the confirmation of the Plan and its implementation that a scheme of arrangement under Part 10 of the Act consistent with the Plan be confirmed by this Court and implemented.
9. The court has been informed that an appeal has been filed from the ruling of Judge Dorsey.

The Company and the Group

10. The Company is the parent company of a group which comprises approximately 104 companies directly or indirectly owned or controlled by the Company. These include companies incorporated and trading in Ireland, the UK, Luxembourg, Switzerland, Bermuda, France, the Netherlands, Germany, Canada, Poland, Spain, Sweden, Belgium, Italy, Australia, Japan, and a number of states with the USA including Delaware, Massachusetts, New Jersey, California, and New York.
11. The Group has its origins in a business established in 1867 in St. Louis, Missouri when two brothers founded G. Mallinckrodt & Company for the purpose of supplying local pharmacists with medications. The group designs, manufactures and sells medical and pharmaceutical products. The subsidiaries of the Company are divided into two principal business segments, namely the "Speciality Brands Division" and the "Speciality Generics Division".
12. The Speciality Brands Division focuses on autoimmune and rare diseases in speciality areas such as neurology, rheumatology, nephrology, pulmonology and ophthalmology, as well as immunotherapy and neonatal respiratory critical care therapies and non – opioid analgesics. Speciality brands are promoted directly to physicians, hospitals and surgical centres and the division has its own direct sales team of approximately 300 persons.
13. Branded products include Acthar, Inomax, Ofirmev, Therakos, and Amitiza. In the year 2020, this division was responsible for generating net sales exceeding \$2 billion. The most valuable product in the specialty brands division was Acthar, which is a gel used for a variety of treatments including treatment of infantile spasms in infants and children under two years of age.
14. The Speciality Generics Division offers a portfolio of over 20 generic product families, most of which are controlled substances, including opioids, regulated by the Drug Enforcement Administration (DEA). This division operates one of the largest controlled substance pharmaceutical businesses in the United States and its products include generic products for pain management, substance abuse disorders and active pharmaceutical ingredients. It is the only producer of Acetaminophen/paracetamol in the North American and European regions. The division manufactures both finished dosage products and ingredients sold to and used by third parties to create finished products.
15. Unlike the brands division, the generics division does not promote its products and ingredients, including opioid, directly to physicians, hospitals, or others but instead sells finished products primarily to distributors and intra group.

16. For the year 2020, net revenues generated by the generics division were in excess of \$689 million.
17. The research and development function represents a significant and valuable portion of the Group's resources, consisting of highly qualified individuals holding PhD., Pharm. D. or Medical Doctor degrees.
18. The group functions in a highly regulated environment under oversight by governmental agencies and entities around the world which regulate the development, testing, manufacturing, distribution, marketing and selling of pharmaceuticals and medical devices. The agencies to which the group are subject include but are not limited to the following: -
 - (a) In the United States, the FDA, the Department of Health and Human Services, the Drug Enforcement Administration, the Environmental Protection Agency, the Customs Service and State Boards of Pharmacy;
 - (b) Health Canada;
 - (c) The Medicines and Health Care Products Regulatory Agency in the United Kingdom;
 - (d) The Health Products Regulatory Authority in Ireland;
 - (e) The European Medicine Agency, and agencies established in Member States of the EU;
 - (f) The Pharmaceuticals and Medical Devices Agency in Japan.
19. The group has production and research facilities located in Ireland, the United Kingdom, the United States and Japan.
20. The global enterprise headquarters of the group is situated at Blanchardstown Dublin, in a facility owned by a wholly – owned subsidiary Montjeu Limited. Another Irish incorporated subsidiary, Mallinckrodt Pharmaceuticals Ireland Limited ("MPIL"), owns the equipment, fixtures and fittings at that facility.
21. The facility at Blanchardstown also operates as a manufacturing and R&D facility for the speciality brands division which manufactures Acthar, and which conducts research and development.
22. The Company does not have any direct employees. The group as a whole employs approximately 2,795 persons worldwide. Of that number, 2,470 are employed in the United States and 325 outside of the United States, which includes 110 employees resident in Ireland.
23. MPIL provides day to day services to the Company, including audit, human resources, finance, legal, marketing and IT services. MPIL has a total of 103 employees, all of whom are resident in Ireland.

24. According to the petition and the affidavit of Mr. Welch, the Company is the “nerve centre” of the Group and is central to its worldwide operations. It is the principal body controlling the governance of the group. Through its board of directors, it is responsible for making or approving strategic decisions and actions taken by the business of the Group. It is the vehicle through which all investor and shareholder relations are conducted. The activities of the company range from operational and administrative matters through to strategic direction, finance and, most importantly in the context of the events of recent years, restructuring discussions and negotiations with key stakeholders. All these activities are undertaken under the supervision of the Company’s directors and senior management team.
25. The board has a number of standing committees through which these matters are dealt with including an audit committee, a governance and compliance committee, human resources and compensation committee, and a science and technology committee. In addition, there was established a strategic review committee, focused on the strategic options in the context of the group’s liabilities generally, including direct and indirect financial obligations, and its litigation and other contingent liabilities.

Financial indebtedness of the company

26. The petition describes the financial indebtedness of the Group in excess of \$5.1 billion. Approximately \$3.5bn of this debt is secured and \$1.695bn is unsecured.
27. The Company is not the principal borrower or issuer of notes, but has guaranteed all of the financial indebtedness except for sums of circa \$15 million due under certain “legacy debentures”, issued by subsidiaries.
28. Much of the debt is long term debt, with the exception of a revolving credit facility of \$900m. However, amounts due in respect of certain senior notes include a sum of \$617 million due in August 2022 and \$529m due in October 2023. A term loan of \$1.4bn is due for repayment in September 2024.
29. Whilst the Group had been “servicing” its debt in the ordinary course, with the benefit from time to time of certain extensions and restructurings, the combined effects of debt and the litigation described below were the drivers for a restructuring in recent years and the Chapter 11 filing in October 2020.
30. The commencement of the Chapter 11 proceedings in Delaware had the effect that all of the obligations of the Company as guarantor were immediately and automatically accelerated and became due and owing as at the Chapter 11 filing date. However, any enforcement proceedings in respect of debt stand postponed as a result of the automatic stay conferred by the Chapter 11 proceedings.

Litigation

31. The Group, including the Company, is from time to time subject to legal proceedings and claims including government investigations, environmental matters, product liability matters, patent infringement claims, personal injury, employment disputes, contractual disputes and other commercial disputes. This is not unusual for a global business of the

kind owned and operated by the Group. In circumstances where the business of the group has been generating revenues exceeding \$2.7 billion per annum, in the ordinary course the Group has sufficient revenues and resources to manage the risk of such litigation and at the same time service financial indebtedness and generate profits. However, in the period of three years prior to the Chapter 11 filing, a number of companies in the group have been named as defendants in significant numbers of what are described as "out of the ordinary" legal proceedings commenced in the United States.

32. There are broadly two categories of such litigation namely as follows: -

(i) The opioid litigation;

(ii) The Acthar litigation.

Opioid Litigation

33. In the opioid litigation, claims are made by multiple states, counties, a territory, and other governmental persons or entities, private plaintiffs and other industry participants. The claims relate to sales, marketing, distribution, reimbursement, prescribing and dispensing of prescription opioid medications. In excess of 3,000 such cases are pending against the Company. The vast majority of claims, namely 2,614, are cases filed by counties and cities in the United States, various native american tribes and other US – Government related persons or entities. Claims have been filed also by hospitals, health systems, unions, health and welfare funds, and by attorneys general for numerous individual states. The claims are based on alleged misrepresentations and/or omissions in connection with the sale and marketing of prescription opioid medications. It is claimed that the practices of the Group led to increases in the sales of prescription opioid products and that *"the failure to take and maintain effective steps to prevent the diversion of medications from their intended lawful usage was a substantial cause of the opioid crisis which still prevails in the US."*

34. Between 2017 and the filing date the Group incurred in excess of \$100 million defending opioid litigation. Prior to the filing the Group was incurring legal expenses alone in excess of \$1 million per week defending opioid litigation.

35. The petitioners say that they have meritorious defences to these claims but the extreme cost risk and the uncertainty of litigating thousands of such cases across the United States caused the group to seek bankruptcy protection in order to address *"runaway costs, eliminate the uncertainty associated with those cases, and prevent a proverbial race to the courthouse that would come at the expense of all the debtor's stakeholders"*.

The Acthar litigation

36. These proceedings have their roots initially in certain disputes between one of the companies in the group, Mallinckrodt ARD LLC, incorporated in the state of California, and the Centre for Medicare and Medicaid Services of the United States Department of Health and Human Services. The dispute concerns pricing and rebate claims. Certain adverse judgments have already been made against Group companies. Claims are made by federal and State authorities, by individuals persons and other industry participants

alleging anti-competitive practices, violation of consumer protection laws, and unjust enrichment.

37. One element of the Acthar litigation is sounded in certain claims under the False Claims Act, again referable to pricing arrangements. It is said that due to provisions in the False Claims Act for treble punitive damages, certain companies in the group are exposed to a potential liability of more than \$1.9 billion.
38. Again, the petitioners say that the Group has meritorious defences to the claims, but that the scale of the litigation has become untenable and triggered the need to file for Chapter 11 protection and for a full restructuring.

Restructuring

39. During 2019 and into 2020 the Group engaged with lenders, noteholders and representatives of litigants with a view to reaching a consensus to facilitate a resolution of all the disputes faced by the group as a result of the litigation and, in parallel, to restructure its financial indebtedness.
40. Significant settlements were achieved during the course of 2020 with representatives of opioid claimants and Acthar related plaintiffs. These settlements involved economic provisions, through funded trusts which would assume liability for the claims and provide for settlements over a stipulated number of years and what are described as *“go forward operational parameters for the conduct of the company’s business with a view to reducing the risk going forward arising from the events the subject of the litigation”*.
41. In February 2020 the first opioid settlement was concluded with representatives of plaintiffs which provided for the establishment of a trust comprising assets of \$1.6 billion and the provision of warrants for 20% of the equity in the company.
42. Later iterations of the opioid settlement provided for the enhancement of the amount of that trust to the level of \$1.725 billion and the addition of other assets.
43. In September 2020, a settlement was concluded in principle with the Department of Justice which it was said would resolve most Acthar related claims against the group.
44. In tandem with these discussions negotiations were ongoing with the company’s financial creditors.
45. Ultimately, a Restructuring Support Agreement was negotiated. The initial participants in this were the companies, the holders of substantial majorities of noteholders, 50 United States Attorneys General, and the Executive Committee representing opioid plaintiffs. After the filing for Chapter 11, further parties joined in the Restructuring Support Agreement including numerous multi – state governmental entities which are plaintiffs in the opioid litigation, and term lenders to the Group.
46. The Restructuring Agreement envisaged implementation through a combination of the confirmation and consummation of a Chapter 11 plan and an Irish law scheme of

arrangement, based on the Chapter 11 Plan, which would be proposed by an examiner appointed to the Company.

47. The essence of the opioid settlement as refined is the establishment of a series of trusts for the benefit of different categories of opioid claimants, funded with \$1.725 billion in structured cash payments, contributions from the Group's interests in certain claims against third parties, and warrants to acquire 19.99% of the shareholding of the Company. Opioid claims will be processed in the relevant trusts and the rules of the trusts will govern the admission of claims and distributions of the assets established in those trusts.
48. The settlement of what were referred to as the federal/state Acthar claims is based on a payment of c. \$260 million to the Department of Justice over a period of seven years in return for releases by the relevant agencies of their Acthar related claims.
49. The Chapter 11 Plan itself is complex and treats 26 classes and subclasses of creditors.
50. As regards financial indebtedness, the Plan envisages no or limited impairment of certain categories of secured creditors, and the restatement of certain unsecured facilities and notes. A principal feature is that the existing share capital of the Company would be cancelled and 100% of the new shareholding will be issued to the holders of certain guaranteed unsecured notes in a form of debt for equity swap, subject to the provisions for the opioid trusts to acquire warrants representing 19.99% of the restructured share capital of the Company.
51. It is not necessary in this judgment to describe the details of the restructuring plan, save to note that it was a condition of the confirmation of the Plan that this Court make an order pursuant to s. 541 of the Act confirming the draft scheme of arrangement appended to the petition "without material modification" and that such scheme should become effective in accordance with its terms.
52. It is acknowledged by the petitioners that any examiner appointed to the Company would be required to form an independent view of the draft scheme of arrangement or any other proposals he may formulate with respect to the Company. This is of central importance because the Act confers on an examiner appointed by this Court the duty of formulating proposals for a scheme of arrangement and making his recommendation to this Court in respect of them.
53. Because the Company is registered in Ireland, it is necessary to invoke Part 10 of the Act to give effect to the proposed debt for equity swap in favour of the guaranteed unsecured notes claims and to effect the necessary ancillary steps for that process. These steps include the cancellation of existing equity and extinguishment of equity interests including unexercised equity interests, the issuance of new equity and the amendment of the company's constitution. Whilst these steps form a key part of the restructuring, it is said that they cannot be implemented solely through the United States Chapter 11 Plan.

54. It is important to emphasise that nothing I say in this judgment is an endorsement or approval of the terms of the Chapter 11 Plan or of the draft scheme of arrangement annexed to the petition. The function of the court on this hearing is confined to the question of the appointment of the examiner. The assessment of the merits of a proposed scheme of arrangement will be a matter for any hearing to confirm such proposals pursuant to s. 541 of the Act.

Representations

55. Counsel for Deutsche Bank Trust Company Americas, the indenture trustee for unsecured guaranteed noteholders stated that his client was neutral on the petition.
56. Counsel for a group of first lien term noteholders supported the petition.
57. Counsel for an ad hoc group of unsecured guaranteed noteholders supported the petition.
58. Counsel for the Revenue Commissioners confirmed that Revenue are not a creditor of the Company, but applied to be a notice party in the proceedings having regard to the trading status of the Company and certain subsidiaries in the State. Revenue had no objection to the petition.
59. Counsel for the US Department of Justice, described as the “settled federal state Acthar claims” adopted a neutral position.
60. Solicitor for the official Committee of Opioid Related Claimants and their Future Claims representative said that her clients support the petition and are anxious that the restructuring proceed and be implemented as early as possible.
61. A Solicitor appeared for the Governmental Plaintiffs Ad Hoc Committee, which is a group of US States and a Plaintiffs Executive Committee and supported the petition.
62. A Solicitor for the Official Committee of Unsecured Creditors supported the petition.
63. A Solicitor for two institutions (Dearfield Partners LP and Dearfield Private LP) holding the majority of the second lien notes supported the petition.

Avon Holdings I LLC and Attestor Limited

64. Counsel for Avon and Attestor indicated that his clients, being non-governmental entities, had made a number of claims against companies in the Group arising from the sale of Acthar gel. The claims are based on allegations of anti-competitive, illegal and fraudulent activity, sale of products at anticompetitively inflated prices, deceptive trade practices, state insurance fraud, tortious interference and unjust enrichment. The quantum of their pre-petition claims is \$6.2bn. The quantum of their claims in respect of the period after the Chapter 11 filing, referred to as “administrative claims”, is \$265m.
65. Under the Plan, admitted administrative claims are paid in full. In the Chapter 11 proceedings the Hon. Judge John T. Dorsey has made rulings against the Avon proofs of debt and their administrative claims. These rulings are under appeal. Counsel submitted that when it comes to consideration of a scheme of arrangement under Part 10, such a

scheme should reflect or recognise the possibility that these appeals would be successful. He said that if proposals for a scheme of arrangement under Part 10 of the Act were presented, which did not provide for the eventuality of admission in respect of his claims in the event of the appeal from Judge Dorsey's decision succeeding, he would object to such proposals.

66. Counsel acknowledged that the threshold for the appointment of an examiner is met on the petition and supporting evidence before this court. Therefore he was not opposed to appointment of an examiner. However, he wished the petitioners, the examiner and the court to note that he may have fundamental objections to make to proposals for a scheme of arrangement under the Act if it reflects the treatment of his client in the manner upheld by Judge Dorsey.

Jurisdiction and centre of main interests

67. Section 509 of the Act provides: -

"(1) Subject to subsection (2), where it appears to the court that—

- (a) a company is, or is likely to be, unable to pay its debts,*
- (b) no resolution subsists for the winding up of the company, and*
- (c) no order has been made for the winding up of the company,*

the court may, on application by petition presented, appoint an examiner to the company for the purpose of examining the state of the company's affairs and performing such functions in relation to the company as may be conferred by or under this Part.

- (2) The court shall not make an order under this section unless it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern.*

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

- (a) it is unable to pay its debts as they fall due,*
- (b) the value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities, or*
- (c) the circumstances set out in section 570 (a), (b) or (c) (deemed inability to pay debts by reason of failure to meet a statutory demand or to satisfy the amount of any judgment, decree or order of any court in favour of a creditor) are applicable to the company.*

- (4) In deciding whether to make an order under this section, the court may also have regard to whether the company has sought from its creditors significant extensions*

of time for the payment of its debts, from which it could reasonably be inferred that the company was likely to be unable to pay its debts”.

68. The company is incorporated and registered in Ireland under the Act and is a company for the purposes of s. 509.
69. S. 1002 of the Act extends to a public limited company the provisions of Part 10 relating to examinership.
70. Article 3.1 of Council Regulation EC No. 2015/848 on Insolvency Proceedings (the ‘Regulation’) provides that the place of the registered office of a company is presumed to be its centre of main interests in the absence of proof to the contrary. That presumption applies to the Company, and no evidence to the contrary has been proffered.
71. Having regard to the extensive international interests of the company Mr. Welch has given evidence which demonstrates that since July 2020 the centre of main interests has been located in Ireland. In 2015 the company had located certain principal executive functions to the United Kingdom. This was reversed in 2020. The evidence is that since that time its principal activities have been conducted in Ireland. In particular, in August 2020 the Company entered into a services agreement with MPIL, its Irish subsidiary, whose employees perform much of the administration of the Company’s affairs.
72. Having regard to the difficulty for directors in travelling to Ireland since March 2020 board meetings of the Company have taken place virtually with directors dialling in from the United States and other locations outside of Ireland. The evidence is that were it not for the effects of the Covid-19 pandemic the board would have travelled to Ireland for all meetings held since July 2020. The petitioners say that, up to 31st January, 2022 at least, the Irish Revenue have disregarded, for Irish corporation tax purposes, the fact of the presence of directors outside of Ireland when they would have been present in Ireland but for the pandemic. No meetings of the board have been held in the United Kingdom since February 2020.
73. Having regard to the presumption contained in Article 3.1 of the Regulation and the evidence of Mr. Welch I find that the company has its centre of main interests in the State and accordingly these are main proceedings for the purpose of the Regulation.

Parallel proceedings

74. In *Re Sean Dunne (A Bankrupt)* [2015] IESC 42 the debtor was adjudicated a bankrupt in the US and a creditor later petitioned for his bankruptcy in Ireland. The Supreme Court affirmed the jurisdiction of this Court to open bankruptcy proceedings where the statutory preconditions in the Bankruptcy Act 1988 were met, and notwithstanding the extant proceedings in the US concerning the debtor. Although that decision concerned the bankruptcy of a natural person I am satisfied, taking into account all the information before the court as to the objectives of the proceedings in this case, that there is no reason in principle why the “Dunne” approach should not be followed in an appropriate company case.

75. There is also precedent for this court appointing an examiner and confirming a scheme of arrangement in parallel with Chapter 11 proceedings (see *Re Weatherford International plc* (ex tempore, 12 December 2019) [Record No. 2019/348 COS])
76. In reaching this conclusion I am also informed by the consideration that certain of the key features of the proposed restructuring cannot be implemented through the Chapter 11 plan, notably the provisions concerning the cancellation of shares, the issue of new shares and warrants and amendments to the constitution of the Company.

Section 509(1)(a)

77. Section 509(1) requires that the company “is or is likely to be, unable to pay its debts”.
78. The financial status of the company, both on a balance sheet basis and on a cash flow basis, is detailed extensively in the petition, the verifying affidavit of Mr. Welch and in the report of the Independent Expert. Key features of this information may be summarised as follows: -
- (1) The Company has guaranteed substantially all of the financial indebtedness of the Group standing at almost \$5.2bn. The guarantee obligations have crystallised as a consequence of the Chapter 11 filing and are therefore due and owing by the company, subject only to the Chapter 11 moratorium.
 - (2) The balance sheet of the company itself, on a standalone basis without consolidation by reference to the Group, shows that as at the period ended 31 December, 2021, even on a going concern basis, the company had a net asset deficiency of \$162.2m.
79. It is clear therefore that the company meets the test of being “unable to pay its debts” within the meaning of s.509(1)(a).

Reasonable prospect of survival

80. Section 509(2) provides that the court shall not appoint an examiner “unless it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern”.
81. The first question which this raises is the identification of the “undertaking” of the company. It is well established that a pure holding company which does not itself perform any undertaking, cannot demonstrate that it operates a going concern which is capable of survival as such. (See *Re Tivway Limited* [2010] 3 IR 49, *Re Vantive Holdings (No. 2)* [2009] IEHC 409 and *Re Tuskar Resources* [2001] IR 668).
82. The uncontroverted evidence of Mr. Welch is that the Company is central to the worldwide operations of the Group. He describes its operational role, its responsibility in terms of strategic direction of the group, its role in relation to shareholder and investor engagement and communications, and its central role regarding the implementation and stewardship of the restructuring of the Group, both on its own behalf and on behalf of the group as a whole.

83. Mr. Welch refers to the company's direct role in communications and commercial negotiations with stakeholders, retention and instruction of advisers, and representation of the company and the group before the US Bankruptcy Court. He says that the business assets and affairs of the group are all managed under the direction of the board of directors of the company. Mr. Welch has detailed the frequency of meetings of the board, both in person and telephonically, and the participation of its members in meetings of the full board and of the relevant standing and *ad hoc* committees.
84. I am satisfied from the un-contradicted evidence of Mr. Welch, and the contents of the Independent Expert's report on the subject, that the company has an undertaking in its own right and it is therefore appropriate to assess whether the company and all or part of its undertaking has a reasonable prospect of survival as a going concern.

Report of the Independent Expert

85. The report ("IER") of the Independent Expert Mr. Degnam prepared on 9 February, 2022 accompanies the petition as required by s.511 of the Act.
86. The IER examines the trading history and background to the filing for examinership and the restructuring measures which have been undertaken prior to the presentation of the petition. He has examined financial projections prepared by the petitioners for each of the years to December 2025. These illustrate a steady albeit moderate growth in net sales and consistent gross profit figures over that period. The expert says that he has examined the assumptions around the growth and turnover figures which are contained in the projections, by reference to each of the market sectors in which the Group operates. He has identified and taken into account certain challenges which will continue to face the company including the uncertain rate of recovery from the Covid-19 pandemic, increased competition across all of the group's product lines and the necessary costs of maintaining strategic long term investment in research and development.
87. The expert refers to the provisions of the Chapter 11 plan relating not only to the financial settlement with lenders, note holders and with opioid related and other litigation claimants, but also the requirement that the company and the Group comply in the future with what is referred to as the "opioid operating injunction order". This is an order with respect to the future operation of the group's opioid business, which will bind not only the group itself but any subsequent purchaser of the group's opioid business. The expert states that his opinion as to whether the company has a reasonable prospect of survival is based on the historic performance and future projections of the group post restructuring and his discussions with management in respect of each of these matters and an in depth review of the plan of reorganisation which has been formulated. He says that the trading and cash flow position of the group over the last three years has been "materially and negatively impacted by litigation and claims relating to opioid, Acthar and other matters with net losses (including extraordinary, one time charges) of nearly \$2 billion incurred during this period". The expert continues "without settlement or resolution, future liabilities relating to these claims which cannot be reliably quantified are broadly estimated to be in the region of billions or trillions".

88. The expert notes that the Covid-19 pandemic continues to present risks and challenges and uncertainties but he notes that the group has continued to manufacture supply and deliver its products without major interruptions and that it is engaged in a number of initiatives to support the fight against Covid-19.
89. Having analysed all of these matters the independent expert expresses the opinion that the company and its undertaking has a reasonable prospect of survival as a going concern.
90. The expert then identifies the essential conditions which he believes would need to be satisfied before the company had its undertaking to survive as a going concern as follows:
- (a) The appointment of an examiner to the company pursuant to Part 10 of the Act.
 - (b) The formulation and confirmation by the High Court of Ireland of a scheme of arrangement with respect to the company that is materially consistent with the terms of the Chapter 11 plan, and the satisfaction or waiver of all other conditions precedent specified in the Chapter 11 plan and
 - (c) The consummation of the Chapter 11 plan and the transactions contemplated thereby.
91. In his conclusion the expert states as follows.

"8.17 A liquidation of the company would result in a significant deficiency in the region of \$5.239 billion. When comparing the estimated outcome position, the reorganised debtors which emerge as a going concern, which is one of the key assumptions in which the valuation analysis is based, is more advantageous to the creditors of the company as a whole."

The expert continues:

"The members of the company shall receive no distribution on account of the existing issued share capital of the company prior to the effective date under the plan. On the effective date the existing shares and all and any rights attaching or relating thereto will be cancelled. Notwithstanding that the rights of the members and their respective shareholders are cancelled under the plan I have concluded that based on the above information and the proposals put forward by management, an attempt to continue the whole or part of the undertaking would likely be more advantageous to the creditors as a whole than a winding up of the company."

92. The report of the Independent Expert is a comprehensive analysis of the Company's financial and trading history and its current status and prospects. I accept it as evidence that the company and all or part of its undertaking has a reasonable prospect of survival as a going concern.

93. The conditions identified by the Independent Expert for such survival relate principally to the processes envisaged by this petition including the formulation and confirmation of a scheme of arrangement and consummation of the Chapter 11 plan "*and the transactions thereby contemplated.*"
94. The evidence at the date of the hearing of this petition is that the bankruptcy court in Delaware has approved the plan. Whilst certain elements of that court's ruling remain under appeal, the evidence of the status of those proceedings and of the widespread support for the plan before that court is sufficient to establish that there is no reason to believe at this time that the conditions identified by the Independent Expert cannot be complied with.
95. Two further aspects of the information before the court are of assistance in arriving at this conclusion which I shall refer to briefly. These are the judgment of the bankruptcy court in the state of Delaware, and the report of the interim examiner.

Opinion of the Honourable Judge John T. Dorsey 3 February, 2022

96. In the context of the assessment of whether the company and all or part of its undertaking has a reasonable prospect of survival, it is noteworthy that the Opinion was delivered following a consideration of evidence and submissions at a lengthy contested hearing. A number of objections had been raised regarding such matters as classification of claims releases and exculpation provisions, the application of the "best interests of creditors test" test and the "unfair discrimination" test, a proposal for a management incentive plan, and, importantly for this court's decision under s.509, a question regarding the feasibility of the Group.
97. S. 1129 (a) 11 of the US Bankruptcy Code provides that confirmation of a plan must not be "likely to be followed by the liquidation, or the need for further financial reorganisation of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganisation is proposed in the plan". This is commonly referred to as the "feasibility" requirement. One creditor objected to the plan's feasibility. Judge Dorsey analysed the evidence of the company itself, by reference to financial projections, EBITDA projections and a sensitivity analysis performed on the projections. He accepted the evidence and found that the plan was unlikely to be followed by liquidation or a need for further reorganisation. It is not necessary for me to compare or contrast the "feasibility" test with the requirement in s. 509 (2) that there be established a "reasonable prospect of survival". Nonetheless I am informed by the findings of that court, on a contested hearing, regarding feasibility which are consistent with the evidence before me that the Company has a reasonable prospect of survival as a going concern.

The interim examiner

98. On 14 February, 2014 Mr. McAteer of Grant Thornton was appointed interim examiner. Before the court on the hearing of the petition was an affidavit of the interim examiner sworn 24 February, 2022 to which there was exhibited his interim examiner's report.
99. It is well established that the evidence of the person proposed to be appointed examiner cannot be regarded as conclusive for a decision to appoint him. That does not preclude

the court from considering his report, made to the court as an officer appointed by the court. In particular, in this case it is clear from the report of the interim examiner that he recognises, as he must, that if appointed his function under the Act will be to act independently in formulating proposals for a scheme of arrangement in accordance with Part 10.

100. The interim examiner states his opinion that the company has a reasonable prospect of survival. Having noted that the chapter 11 plan confirmation ruling is under appeal he makes the following comment: *"In my view the Chapter 11 Plan formed a viable basis for formulating a scheme of arrangement which would:*

- *Restructure the company's liabilities in a sustainable way;*
- *Give the company reasonable prospect of trading on a sustainable basis in the future;*
- *Treat creditors fairly;*
- *Produce a better outcome for creditors, employees and other stakeholders than insolvency, and*
- *satisfy the requirements of Part 10 of the Companies Act, 2014."*

101. The interim examiner states that he does not believe it would be in the interests of the creditors, employees or other interested stakeholders for him to formulate new proposals which were materially different to or inconsistent with those approved by the US court and he does not believe that such an approach would be viable. He concludes by stating *"I expect that the scheme of arrangement will be very similar to the draft scheme exhibited by the company to the petition and will be consistent with and give effect to the Chapter 11 plan"*.

102. Counsel for Avon and Attestor expressed concern at the above statement, having regard to the potential objections it identified regarding the treatment of its claims in the Chapter 11 Plan (see paragraph 65). However, counsel acknowledged that these issues are not for determining on the hearing of the petition.

103. The core function of an examiner appointed by this court is to perform his own independent examination of the affairs of the company, where possible to formulate proposals for a compromise or a scheme of arrangement for consideration by the members and creditors and ultimately by this court and to make his recommendations to the court.

104. Although it is clear from the petition, the affidavit of Mr. Welch and the report of the independent expert that the fundamentals of a restructuring plan for the Company and the Group are at an advanced stage, it remains the duty of the examiner to perform his functions independently in pursuance of the objectives of Part 10. I find the report of the

interim examiner of assistance and it is consistent with the evidence before the court as to the prospects for the survival of company.

Conclusion

105. The uncontradicted evidence is that a successful examinership and successful implementation of a scheme of arrangement, in combination with implementation of the Chapter 11 plan are likely to produce a better outcome for creditors of the Company and the Group than the most likely alternative of a winding up of the Company.
106. The majority of impaired classes of claimants in the Chapter 11 process voted in favour of the Plan and it is informative that the US Bankruptcy Court has sanctioned the Plan as fair and equitable, not unfairly discriminatory and feasible. A proposal for a scheme of arrangement will still require to be tested in this court by reference to the established principles of Irish law, but it is informative that the Plan has been so widely supported in the Chapter 11 proceedings. None of the creditors or interested parties who voted against confirmation of the plan or who objected at the hearing before Judge Dorsey have objected to the appointment of an examiner.
107. The evidence is that a successful outcome will safeguard the employment of the Groups 2,890 employees including the 116 who are resident in the State of whom 110 are employed by Irish subsidiaries of the company.
108. Although s. 512(2)(b) of the Act requires that a petition be accompanied by any proposals for a compromise or scheme of arrangement which have been prepared, it is relatively unusual for proposals in such an advanced form to accompany a petition. Nonetheless there is precedent for such good practice, notably in *Re Eircom Limited* (2012), where the restructuring had been advanced even before the presentation of a petition to the point of voting by certain classes, and securing "lock in" and voting agreements with significant participants.
109. I am satisfied that the Company is unable to pay its debts, that it and all or part of its undertaking has a reasonable prospect of survival as a going concern, and that the appointment of an examiner and the formulation of appropriate proposals for a scheme of arrangement will facilitate such survival. I have therefore confirmed the appointment of the examiner.