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THE HIGH COURT

2010 475 COS

IN THE MATTER OF McINERNEY HOMES LIMITED

IN EXAMINATION (UNDER THE COMPANIES (AMENDMENT) ACT 1990)
AND,

IN THE MATTER OF McINERNEY HOLDINGS PUBLIC LIMITED COMPANY

IN EXAMINATION (UNDER THE COMPANIES (AMENDMENT) ACT 1990)
AND,

IN THE MATTER OF McINERNEY CONSTRUCTION (HOLDINGS) LIMITED

IN EXAMINATION (UNDER THE COMPANIES (AMENDMENT) ACT 1990)
AND,

IN THE MATTER OF McINERNEY CONTRACTING LIMITED

IN EXAMINATION (UNDER THE COMPANIES (AMENDMENT) ACT 1990)
AND

IN THE MATTER OF McINERNEY CONTRACTING DUBLIN LIMITED

IN EXAMINATION (UNDER THE COMPANIES (AMENDMENT) ACT 1990)

AND,

IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

JUDGMENT of Mr. Justice Clarke delivered the 10th January, 2011

1. Introduction

1.1 Each of the applicant companies successfully applied for the appointment of an examiner notwithstanding opposition to that appointment coming from three banks (that is Anglo Irish Bank Corporation Limited, Bank of Ireland Plc and KBC Bank Plc) (collectively "the Banking Syndicate"). My reasons for appointing an examiner notwithstanding that opposition are set out in *Re McInerney Homes Limited & Ors and the Companies Acts* [2010] IEHC 340. The examiner has now produced his report and proposes a scheme of arrangement. The Banking Syndicate opposes the approval of the scheme of arrangement.

1.2 As a result a hearing took place on the 20th and 21st December last, for the purposes of deciding whether the court should, pursuant to s. 24(3) of the Companies (Amendment) Act 1990 ("the 1990 Act"), "confirm, confirm subject to the modifications, or refuse to confirm" the proposals contained within the scheme of arrangement. In addition, it should be noted that the Revenue Commissioners ("Revenue") opposed one aspect of the proposed scheme of arrangement. However, the opposition of the Revenue related solely to the treatment of a sum of money owed to the Revenue which, in the context of the scheme as a whole, was not material. The opposition of the Revenue did not, therefore, go to the root of the scheme and is capable of being dealt with separately from the fundamental objection taken on behalf of the Banking Syndicate. I, therefore, propose dealing with the Revenue objection at the end of this judgment.

1.3 The formal requirements specified in the 1990 Act for the approval of a scheme of arrangement were established. Save for the Revenue objection, to which I have already referred, no other party opposed the approval of the scheme of arrangement. The issue which I had to decide was, therefore, in substance, whether the objection raised on behalf of the Banking Syndicate was such as ought to lead me to refuse to confirm the scheme of arrangement proposed.

1.4 Finally, before going on to consider the issues which arose, it is appropriate to record that the proposals under consideration related solely to McInerney Homes Ltd ("Homes") and McInerney Contracting Ltd ("Contracting"), the examinership in respect of the other companies named in the title to these proceedings having been terminated at a stage prior to the hearing to which I have referred.

1.5 Against that background, it is appropriate to turn to the issues which arose so far as the Banking Syndicate was concerned.

2. The Issues

2.1 At an early stage of the hearing discussion took place involving counsel for respectively Homes and Contracting ("collectively McInerney"), the examiner, and the Banking Syndicate. There was broad agreement that the issues which needed to be addressed were as follows.

2.2 First, there was a legal issue raised on behalf of the Banking Syndicate as to whether there was jurisdiction, under the provisions of the 1990 Act, to approve a scheme of arrangement which involved imposing a reduction on the amount to which a secured creditor might be entitled. Both the examiner and McInerney argued that such a jurisdiction existed, while the Banking Syndicate contested that proposition. That issue turns on the proper construction of the 1990 Act to which I will shortly turn.

2.3 It obviously follows that in the event that the Banking Syndicate are right in their contention that no such jurisdiction exists, the scheme of arrangement in this case cannot be approved for there is no doubt but that it seeks to require the Banking Syndicate to take a very significant reduction in the amount which is owing to it. If that issue is, therefore, found in favour of the Banking Syndicate, then that is an end to the matter. However, the Banking Syndicate went on to note that, in the event that there was, at the level of principle, such a jurisdiction then any such jurisdiction was subject to the general overriding requirement under the 1990 Act that a scheme of arrangement be not unfairly prejudicial to any creditor. At the level of principle, neither the examiner nor McInerney disagreed with that proposition. However, there was a significant dispute between the parties as to whether, on the facts of the case, it could be said that the scheme proposed was unfairly prejudicial to the Banking Syndicate. The second overall issue which arises is as to whether, in the event that there be a jurisdiction to reduce the amounts due to secured creditors in the context of a scheme of arrangement, the scheme proposed in this case is unfairly prejudicial to the Banking Syndicate.

2.4 However, as part of that general issue a number of what might be called sub-issues were apparent from the legal submissions made in writing by the parties in advance of the hearing. It will be necessary to explore these issues in due course. However, in outline the questions which arose were:

> (a) What criteria were to be applied in determining whether a scheme of arrangement was unfairly prejudicial to secured creditors;
>
> (b) What the approach of the court should be in circumstances where conflicting expert evidence, relevant to the question of prejudice, had been put before the court in the form of affidavit evidence, but where no cross examination had taken place; and
>
> (c) In the light of the answers to (a) and (b) whether the scheme in this case, on the facts, is unfairly prejudicial.

2.5 As the legal issue to which I have first referred is a stand alone issue, I propose dealing with that question first. I, therefore, turn to the proper construction of the 1990 Act.

3. The Construction of the 1990 Act

3.1 Section 18 of the 1990 Act provides that an examiner shall "as soon as practicable after he is appointed, formulate proposals for a compromise or scheme of arrangement in relation to the company concerned" (subs. (1)(a)). Section 22 deals with the contents of proposals for a compromise or scheme of arrangement. However, save for the provisions of s. 22(1)(d), which require equal treatment for each claim or interest arising out of a particular class, the provisions of s. 22 do not appear to be prescriptive as to the nature of the scheme of arrangement which may be proposed. Likewise, s. 24, which deals with the confirmation of proposals, while requiring certain formal matters to be established, such as the acceptance of at least one class of impaired creditors, is otherwise principally concerned with giving the court jurisdiction to ensure that the proposals are fair and are not (as per subs. (4)(c)(ii)) "unfairly prejudicial to the interests of any interested party". To similar effect s. 25, which deals with objections to approval, are not prescriptive as to the contents of an acceptable scheme save for allowing objection on the basis of unfair prejudice.

3.2 The express terms of the 1990 Act are not, therefore, prescriptive of the types of scheme of arrangement which may be proposed and approved save in the limited way which I have indicated.

3.3 It is of some relevance, in my view, to have regard to the case law under s. 201 of the Companies Act 1963 ("s. 201"). Under s. 201 a company may enter into a compromise or arrangement with its creditors or any class of them on foot of an order of the High Court convening a meeting of the creditors or class of creditors as appropriate. Following sanction by the court of any such proposed compromise or arrangement, the scheme becomes binding on all members of the class or classes concerned. It is, of course, important to note that there are significant differences between the operation of s. 201 and the examinership process. The interests of a minority of a class of creditors (which in that context must be a minority of less than 25%) can only be impaired by the vote of a majority of the same class. The 1990 Act goes further and allows for the interests of a class of creditors who oppose the scheme to be impaired subject to the overall requirement that at least one class of impaired creditor supports the scheme and that the scheme not be unfairly prejudicial. However, there remains some similarities between s. 201 and the examinership process for both provide a statutory basis on which a non consenting creditor can, subject to the terms of the respective statutes, be required to accept a scheme of arrangement by court order. While not an express statutory criteria, the case law under s. 201 makes clear that the court will consider the fairness and equity of a proposed scheme in determining whether it should be approved. See for example *Re Colonia Insurance (Ireland) Ltd* [2005] 1 I.R. 497.

3.4 There is a significant body of case law under the English equivalents of s. 201 which makes clear that the section in question applies equally to secured creditors and that, subject to the overall requirement of fairness, a majority of a class of secured creditors can bind a minority such that the minority is required, for example, to accept a compromise which involves the relevant company paying less than the full value of the minorities entitlement. See *In Re Empire Mining Co* [1890] 44 Ch. D. 402, *In Re Alabama, New Orleans, Texas and Pacific Junction Railway Co* [1891] 1 Ch. 213 and *In Re Madras Irrigation Company*

[1891] 1 Ch. 228.

3.5 It is clear from that case law that, in concluding that the equivalents of s. 201 could be used to impose a fair scheme on a dissenting minority of secured creditors within a class, the courts viewed the status of a secured creditor as being primarily that of creditor although with the benefit of the relevant security. Even though it may be the case that the holder of a legal mortgage becomes the "owner", in a sense, of the property secured, that ownership relates principally to the legal title, for the borrower retains the equity of redemption which entitles the borrower to have the legal title reconveyed to him on discharge of the borrowed sum. The "ownership" by a lender of the mortgaged property is, therefore, a limited form of ownership subject to the equity of redemption and is, as the authorities to which I have referred point out, in the nature of a security rather than true ownership. It seems to me that all of the relevant authorities make clear that the proper characterisation of the mortgagee or debenture holder is that such parties are creditors of the company, albeit creditors who have the benefit of a security. Of course it needs to be noted that, in many cases, the secured creditor will not even have the limited ownership of the relevant asset to which I have referred for, for example, in the case of registered land, the interest of the mortgagee will simply be that of the registered owner of a charge over the property.

3.6 Counsel for McInerney argued that the language of s. 201, insofar as it relates to the persons who can be bound by a scheme of arrangement even to their detriment, is similar to the language contained in the relevant provisions of the 1990 Act. On the basis of that argument it was suggested that there was no reason to take a different view of the scope of the 1990 Act as to the possibility of binding secured creditors (subject to compliance with the other express terms of the Act) than has been established to be the case in relation to binding a minority of secured creditors in a process designed to approve a scheme under s. 201.

3.7 Attention should also be drawn to s. 11 of the 1990 Act which provides for a mechanism whereby secured property of a company in examinership can be sold subject to an entitlement on the part of the security holder to obtain the proceeds of sale (and a top up as determined by the court if the court should view the sale as being at less than market value). Counsel for the Banking Syndicate argued that the scheme contained within s. 11 of the 1990 Act implies an intention that the position of secured creditors is special.

3.8 I am not, however, sure that s. 11 casts much light on the question which I have to answer. However, to the extent that it does, it seems to me that an analysis of s. 11 favours the argument put forward by both the examiner and McInerney rather than that advanced by the Banking Syndicate. If there were no s. 11, then a company in examinership, which required to dispose of an asset which was mortgaged to a bank, would have no means of so doing without the consent of the bank. Section 11 allows the bank concerned to be required to give up its security over the asset provided it receives the value of its security. Admittedly, the bank remains an unsecured creditor for any balance outstanding, but that does not take away from the fact that s. 11, in its terms, permits a bank to be required to give up its security. Given that the bank could not be required to give up its security during the course of an examinership were

it not for s. 11, it seems to me that the section does no more than facilitate what may turn out to be a necessary asset sale in circumstances where otherwise the relevant bank would have a veto.

3.9 I am persuaded that the analogy with s. 201, though far from complete, is of some significant assistance. The description of the type of arrangement covered by s. 201 is in similar language to the relevant parts of the 1990 Act save for those aspects of the respective schemes (which have been analysed earlier) which are materially different. If, as the well settled jurisprudence of the courts shows, it is possible to deprive a minority of a class of secured creditors of its security on less than full payment as a result of the adoption of a scheme under s. 201, it seems to me to follow that the use of similar terminology in the 1990 Act implies a jurisdiction to do the same thing provided that the (admittedly different) criteria and circumstances specified in the 1990 Act are met.

3.10 At the end of the day, secured creditors are still creditors. All creditors are required to take pain (and often very significant pain) in cases where a scheme of arrangement under the 1990 Act is approved. There seems to me to be no reason in principle why the terms of the 1990 Act cannot apply equally to secured creditors. It is, of course, the case that in assessing whether a scheme is fair or "unfairly prejudicial" the court must have regard to the secured status of such creditors and the fact that that enhanced status places those creditors in an advantageous position in any alternative scenario such as liquidation or receivership. However, that is an issue going to the merits of a particular scheme rather than an issue which goes to the jurisdiction of the court to approve a scheme which involves the writing down of the debt of a secured creditor.

3.11 It should also be noted that it is not contemplated that there be, in substance, a removal of the security of the creditor as such. Rather, what is contemplated is a reduction in the amount owed to the secured creditor. The secured creditor remains secured for the reduced sum and can only have the security released on the payment of that reduced sum. On the facts of this case the scheme provides for an almost immediate payment of the reduced sum so that the security would, therefore, be released at such an early stage. The substance of a scheme of arrangement which purports to reduce the amounts due to secured creditors is no more than the substance of a scheme which purports (as virtually every scheme does) to reduce the amounts due to unsecured creditors. The position of the creditor is being impaired by virtue of the creditor concerned being required to take less than is nominally due.

3.12 Counsel for the Banking Syndicate suggested that the Act would require an express provision to permit the writing down of the debt of secured creditors. Counsel for McInerney and the examiner suggested that the Act, as drafted, would require an express provision excluding such an entitlement in order that the court not have jurisdiction. In my view, counsel for McInerney and counsel for the examiner are correct on this point. In my view, the words of Fry L.J. in *Re Alabama, New Orleans, Texas and Pacific Junction Railway Company*, are equally applicable to an interpretation of the relevant provisions of the 1990 Act. Fry L.J. suggested that if the courts "were to exclude from the arrangements or compromises to be made, an arrangement or compromise which affected the security, we should be putting a most unwarrantable restriction on the generality

of the language used in the Act". In my view, to impose a restriction on the type of scheme of arrangement which could be approved under the 1990 Act so as to exclude a scheme of arrangement which interfered with the sums due to secured creditors would likewise be to impose an inappropriate restriction on the generality of the language used in the 1990 Act.

3.13 Before leaving the authorities under s. 201, it is of some relevance to note that, while the original cases cited earlier in this judgment stem from the 1890s, that case law has been approved and applied in recent times, not least in *Re P&N Ltd & Ors and the Insolvency Act* [2004] EWHC 2361 (Ch.), where Richards J. applied the jurisprudence deriving from cases such as *Re Alabama, New Orleans, Texas and Pacific Junction Railway*. Furthermore, in *Re Lehman Brothers International (Europe) (In administration) (No.2)* [2009] EWCA Civ. 1161, the English Court of Appeal, speaking through Patten L.J. said the following:-

> "All that *In Re Empire Mining Company* (1890) 44 Ch. D 402 and *In Re Alabama, New Orleans, Texas and Pacific Junction Railway Company* [1891] 1 Ch. 216 establish is that a creditor with security is nonetheless a creditor for the purposes of the scheme jurisdiction."

On that basis it is hard to see how a creditor with security is other than still a creditor for the purposes of the 1990 Act.

3.14 In those circumstances I am satisfied that there exists, at the level of principle, a jurisdiction in the court to approve a scheme of arrangement which has the effect of reducing the amounts due to secured creditors provided that the scheme otherwise complies with the provisions of the 1990 Act. That conclusion seems to me to be entirely consistent with the early observation on the 1990 Act contained in the Supreme Court case of *In Re Atlantic Magnetics Ltd* [1993] 2 I.R. 561, where McCarthy J. said the following at p. 578:-

> "the protection of the company and consequently of its shareholders, workforce and creditors. It is clear that parliament intended that the fate of the company and those who depend upon it should not lie solely in the hands of one or more large creditors who can by appointing a receiver pursuant to a debenture effectively terminate is operation and secure as best they may the discharge of the monies due to them to the inevitable disadvantage of those less protected."

These comments were specifically approved of by Finlay C.J. in *In Re Holidair Ltd* [1994] ILRM 481 at p. 487. Insofar as material to the issues which arise in this case, the basis for a refusal on the part of the court to confirm a proposal are to be found in s. 24(4)(c) which provides that the court "shall not confirm any proposals":

> "(c) unless the court is satisfied that –
>
> > (i) the proposals are fair and equitable in relation to any class of members or creditors that ha not accepted the proposals and whose interests or claims would be impaired by implementation, and

(ii) the proposals are not unfairly prejudicial to the interests of any interested party."

and the provisions of s. 25(1)(d) which permit an impaired creditor to object to confirmation on the basis that "the proposals unfairly prejudice the interests of" the objector concerned. Therefore, the court must be satisfied that the proposals are fair and equitable and do not unfairly prejudice the interests of the Banking Syndicate who are entitled to object on the basis that the proposals are unfairly prejudicial. As pointed out earlier, there are a number of questions which arose at the hearing as to the proper approach of the court in circumstances where it is required to consider whether a proposed scheme of arrangement is unfairly prejudicial. The first of those questions is as to the criteria by reference to which unfair prejudice needs to be established. I turn to that issue.

4. The Criteria for Unfair Prejudice

4.1 As already noted, there has been a considerable body of case law built up as to the proper application of s. 201 and its English equivalents. It does not seem to me, however, that insofar as that case law relates to the concept of fairness, same is of any great assistance in dealing with the issue with which I am concerned. It must be recalled that, under s. 201, the court is concerned with a vote amongst the members of a class of creditors where a qualified majority of that class must approve of the proposal. There is no provision under s. 201 for allowing a scheme to be imposed on a class of creditors where a significant minority (or, as in this case, all) of the members of the class concerned are opposed to the scheme. However, it is clear that the provisions of the 1990 Act permit the court to approve a scheme of arrangement even though the scheme impairs the interests of many classes of creditors who oppose the confirmation of the scheme concerned.

4.2 Authorities which are concerned with unfairness as and between members of the same class are, at least in most cases, of little assistance in assessing what should be considered fair or unfair where a scheme of arrangement deals separately with members of different classes of creditors. Given that the backdrop to an examinership is that a company is insolvent, it seems to me that very significant weight indeed needs to be attached to what would be likely to be the outcome of the alternative to examinership, whether it be liquidation, receivership or a simple withering of the company without any formal insolvency process. While it is clear from *Re Antigen Holdings* [2001] 4 I.R. 600, that the court retains a discretion to approve a scheme of arrangement even though it may be that a party might do better under (say) liquidation than under the proposed scheme, it nonetheless remains the case that, as I pointed out at para. 6.10 of *Re Traffic Group Ltd* [2007] IEHC 445, a disproportionate disparity between the position of a creditor on winding up and under the scheme proposed compared with the position of other creditors under both alternatives might be a factor to be properly taken into account in ruling against confirmation of the scheme.

4.3 In that context, it needs to be acknowledged that one of the difficulties often encountered in formulating a scheme of arrangement is that the scheme requires that there be some form of compromise or arrangement between the creditors. As is clear from the authorities referred to in respect of s. 201 of the

Companies Act 1963, in order for a scheme to be properly speaking a scheme of arrangement it is necessary that there be some element of bargain between the parties. All creditors must, therefore, ordinarily get something. In many cases it will be clear that the unsecured creditors would get nothing on either a liquidation or a receivership. Where such creditors get something, it follows that they will be better off under the scheme of arrangement rather than under the alternatives. In such circumstances it seems to me that there would need to be a good reason why some other class of creditors should be worse off under the proposed scheme of arrangement than under the alternatives for a scheme not to be unfairly prejudicial to that other class of creditors. It is impossible to be prescriptive about the wide variety of circumstances that can arise in respect of companies whose position needs to be considered. One should not, therefore, rule out that there may be legitimate reasons why a scheme might not be regarded as unfairly prejudicial to a class of creditors even though that class might, at least on one view, be worse off under the scheme than under any potential alternative. However, it does seem to me that a party who will, to a material extent, be worse off under the scheme than under any alternative has at least available to it an argument of significant weight in relation to the question of unfair prejudice. When considered in conjunction with the provisions of s. 11 of the 1990 Act, to which I have already referred (which, it will be recalled, entitle a secured creditor to obtain the value of the security in the event that the secured asset is sold in the course of the examinership), it seems to me that it would require exceptional circumstances before a court could approve a scheme of arrangement where secured creditors could be shown to be worse off under the scheme than under the alternative methods by which the value of the secured creditors' security could be realised.

4.4 Indeed, this aspect of the issues between the parties may be more theoretical than real, for I did not understand either the examiner or McInerney to argue that it would, at least on the facts of this case, be appropriate for the court to approve the scheme of arrangement if the court was satisfied that the Banking Syndicate would do materially worse under the scheme of arrangement than it was likely to do under any other alternative. I, therefore, propose applying the test of comparing the respective entitlements of the Banking Syndicate under the scheme on the one hand and under any likely alternative on the other hand. In practice that alternative is, in this case, a form of receivership model to which it will be necessary to refer in due course.

4.5 It will be recalled that a further issue arose at the hearing concerning the way in which the court should assess such a comparison when presented with conflicting expert testimony on affidavit but where no cross examination took place. However, to understand the particular relevance of that issue in the context of this case it is necessary to explore the precise questions which were in issue between the experts and the relevance of those issues to the overall question of comparing the position of the Banking Syndicate under, on the one hand, the scheme of arrangement and, on the other hand, under a receivership. I, therefore, propose dealing with that issue in conjunction with the merits to which I now turn.

5. Is the Scheme Unfairly Prejudicial?

5.1 The basic parameters of the debate under this heading can be simply stated. The scheme provides for the writing down of the debt of McInerney to the

Banking Syndicate to a sum of €25,000,000.00. As pointed out in the context of the application to appoint an examiner, the liabilities of McInerney to the Banking Syndicate were well in excess of €110,000,000.00. The write down is, therefore, very substantial and much larger than was anticipated at the time of the appointment of the examiner. It will be necessary to return to this aspect of the case in due course.

5.2 It is also clear that the Banking Syndicate would have an entitlement to put in a receiver into both Homes and Construction which receiver would, at the level of principle, be entitled to attempt to exploit the assets of those companies so as to ensure the greatest possible return from those assets in favour of the Banking Syndicate. The two competing possibilities are, therefore, the scheme of arrangement under which the Banking Syndicate would receive €25,000,000.00 and a receivership in respect of which the likely returns to the Banking Syndicate was a matter of some significant dispute.

5.3 In simple terms, the case made on behalf of the Banking Syndicate was that a form of receivership (which it will be necessary to explore in some more detail), which it proposes, provides a reasonable expectation of positive cash flow over ten or eleven years in a sum of the order of €75,000,000.00. Applying what is said to be an appropriate discount rate to convert that income stream to a single current principal sum, it is said that that income stream equates to €50,000,000.00 or so today. Thus, at its simplest the Banking Syndicate asserts that, on a receivership, it can reasonably expect to receive an income stream which is the equivalent of €50,000,000.00 today, whereas under the scheme of arrangement it will only receive €25,000,000.00, more or less immediately. On that basis it is argued that the scheme of arrangement is unfairly prejudicial to the Banking Syndicate.

5.4 McInerney takes issue with the calculations put forward on behalf of the Banking Syndicate in a significant number of respects but, for the purposes of the hearing, the argument was largely confined to four principal elements of the projections.

5.5 Those elements were:-

> (a) An assertion by McInerney (supported by the examiner) that the prices which the receiver, or a vehicle established by the receiver, might hope to obtain for properties when constructed would be less than those which might be obtained by McInerney post examinership by virtue of what was said to be a reluctance on the part of purchasers to buy from receivers without some such price reduction;
>
> (b) an assertion that on one or other of a number of bases put forward it was not realistic to expect that the receiver, or a vehicle established by the receiver, would be able to construct the relevant properties as cheaply as the receiver's projection suggested;
>
> (c) a suggestion that the receiver's projections included

> (inappropriately it was said) a sum of approximately €22,000,000.00 in cash flow described as "release of work in progress"; and
>
> (d) a suggestion that the properties owned by McInerney are at risk of de-zoning, at least in some cases, in respect of which an allowance ought to be but was not, it was said, made.

5.6 On the basis of the case put forward by both the examiner and McInerney appropriate allowance for each of those four elements would reduce the cash flow which the Banking Syndicate might expect to achieve under its receivership proposal by a significant margin indeed to, on a best case scenario, €18,500,000.00 over the same timescale.

5.7 In addition, both McInerney and the examiner suggested that the discount rate used by the Banking Syndicate and their advisers was too low to reflect the risks involved in the project and that the use of a more appropriate discount rate would lead to a present value of no more than €11,900,000.00. On that basis it was argued that the €25,000,000.00 on offer was significantly greater than the Banking Syndicate might reasonably hope to achieve under its receivership proposal. On that basis it was, therefore, argued that the scheme of arrangement was not unfairly prejudicial to the Banking Syndicate.

5.8 The first difficulty in assessing the respective arguments of both parties under each of the relevant headings stems from the fact that the evidence of the experts in favour of the competing positions was given on affidavit and no cross examination occurred. In that context it is apposite to note the views of the Supreme Court in the very recent case of *Boliden Tara Mines v. Cosgrove* [2010] IESC 62, in which Hardiman J., writing for the Supreme Court, delivered judgment on the 21st December last (as it happens, the day on which the hearing in this case concluded). The issues in *Boliden* were very different than the issues which arise in this case. The case concerned the adequacy of evidence tendered in favour of a claim for rectification of a trust deed in respect of a pension fund. However, the evidence in that case in this Court was all tendered on affidavit with no cross examination. In that context, Hardiman J. stated the following:-

> "It cannot be too strongly emphasised that, where evidence is presented on affidavit, a party who wishes to contradict such evidence must serve a notice of intention to cross examine. In a case tried on affidavit, it is not otherwise possible to choose between two conflicting versions of facts which may have been deposed to. In a case where there is no contradictory evidence an attack on the evidence which is made before the court must include cross examination unless the contradicting party is prepared to rely wholly on a submission that the plaintiff has not made out its case, even taking the evidence it has produced at its height."

5.9 I am faced with a similar difficulty. Each side has presented evidence from experts to back up its contention as to the likely recovery by the Banking Syndicate on its receivership model. No cross examination of the competing experts was sought. I fully appreciate that, within the time confines of the

process contemplated under the 1990 Act, it might be difficult to mount a significant hearing where many expert witnesses were subject to cross examination. It is true that the maximum 100 day period for the continuance of an examinership is specified by reference to the date on which the examiner presents his final report containing, if appropriate, a proposed scheme of arrangement. The court is entitled to extend the period to enable the court to consider whether the scheme of arrangement should be approved. In many cases a short extension is given to allow proper notice to be given of the date of the court's confirmation hearing. In cases where there is significant opposition a further delay is likely to occur to enable the parties to prepare for a contested hearing and, if necessary, to afford the court an opportunity to consider the evidence and arguments and rule on same. However, given the clear statutory intent that a company should not be in examinership (with all of the consequences which flow from that) for too long a period, a court could not lightly contemplate a prolonged gap between the presentation at the end of a 100 day period of a scheme of arrangement and the courts decision on whether to confirm that scheme. However, that logistical difficulty does not take away from the problem with which the court is faced in having to assess the potential prejudice to a creditor where there is starkly contrasting expert evidence material to an assessment of that prejudice and where no cross examination has taken place of the experts concerned.

5.10 Indeed, one example will show just how far that difficulty goes on the facts of this case. As already noted, one of the areas of dispute stems from the inclusion by the experts retained on behalf of the Banking Syndicate of a sum of the order of €22,000,000.00 in its cash flows representing what is said to be a release of work in progress. On the Banking Syndicate's case the reason for the inclusion of that sum in the cash flows is that significant work has already been done on some of the sites owned by McInerney which sums would, in the ordinary way, be treated as work in progress in the accounts of the relevant McInerney Company until such time as the relevant housing units constructed were sold at which stage, in the ordinary way, the work in progress element in respect of the relevant units would disappear from the company's accounts and be replaced by either a profit or a loss, depending on the sale price achieved. It would appear that it is ordinary accounting practice that the value of work in progress included in a construction company's accounts is set at the cost of the work done in relation to the site concerned. It will be necessary to address this question in some more detail later. However, for present purposes counsel for McInerney drew attention to the fact that the relevant figures contained in the Banking Syndicate's cash flows had been prepared on the basis of expert input from DTZ Sherry Fitzgerald. Sherry Fitzgerald had produced a chart, which was deposed to on affidavit, which showed the value of both completely and party built houses within McInerney's portfolio. The total of these two sums was significantly below the sum of €22,000,000.00 included for work in progress in the Banking Syndicate's cash flows. On that basis it was argued that, at a minimum, the work in progress element was exaggerated.

5.11 Most work in progress is, over time, neutral. As money is spent on an asset the value of work in progress increases but when the relevant asset is sold an equivalent sum is removed from the work in progress total. The value of work in progress can affect the accounts of any given year but over time it should balance out. The inclusion of €22,000,000.00 for release of work in progress

over the lifetime of the cash flows necessarily implies, therefore, that €22,000,000.00 has been spent on the assets to date and will be released, as appropriate, as assets are sold. On the basis of the Sherry Fitzgerald chart it was argued that it was clear that a lot less than €22,000,000.00 had been spent to date. Counsel for the Banking Syndicate countered, speaking from his instructions, that a further sum (beyond those set out in the Sherry Fitzgerald chart) ought be included in work in progress as it currently stands to reflect the enhanced value of various sites on which significant construction work had not yet occurred, but where money had been expended on planning, infrastructure or the like. The DTZ Sherry Fitzgerald chart to which I have referred gives a figure for the current value of each of the sites on which no significant construction has yet occurred. It was said by counsel, speaking from his instructions, that the relevant sums would have been calculated to include any enhanced value attributable to expenditure such as that which might have been incurred in relation to planning, infrastructure and the like. Indeed, counsel went on to say that the total amount of the value of completed and partly completed properties together with DTZ Sherry Fitzgerald's assessment of the enhancement element of other less developed lands amounted to €26,000,000.00, but that a figure of €22,000,000.00 had been included in the relevant cash flows because, it was said, a figure of €22,000,000.00 appeared in certain projections prepared by McInerney and it was decided to adopt the lower figure. It should also, in passing, be noted that the €26,000,000.00 (if it be correct) given by counsel speaking from his instructions was not strictly speaking comparable to a work in progress figure, for the task with which DTZ Sherry Fitzgerald was concerned was not strictly speaking to value work in progress but rather to value the assets as they stood. The expenditure of monies on either construction, infrastructure or planning does not necessarily enhance the value of an asset by precisely the same amount. In many cases, in the past, the enhancement may well have exceeded the expenditure. In at least some cases, in present conditions, the enhancement may be less than the money spent. The total of work in progress that would appear in a company's accounts will be exactly equivalent to the total amount of expenditure. It is, of course, therefore possible that the enhancement in value which that expenditure has achieved may be a somewhat different figure.

5.12 Be that as it may, I was left with a situation where the only basis which I had for the precise manner in which the work in progress figure had been included in the Banking Syndicate's cash flows was a detailed explanation given by counsel speaking from instructions. On this particular point there was not even affidavit evidence, let alone affidavit evidence which had been tested under cross examination. Likewise, in response, counsel for McInerney indicated that if the figures had truly been presented on the basis which counsel for the Banking Syndicate had indicated, then it followed that there was a significant difference between the estimates for the average cost of construction of housing units contained in the figures produced by the Banking Syndicate on the one hand, and McInerney on the other hand. It should be noted that on the papers as filed in court it appeared that the experts on both sides broadly agreed on the average cost of construction and that this question would not, therefore, loom as a significant issue in the case. However, counsel for McInerney indicated that McInerney's figures for average cost of construction were calculated by the relevant witness (Mr. Mark Shakespeare a Senior Official of McInerney) on the basis of excluding from the calculation any expenditure already incurred. It has

to be said that that fact, if it be so, was not obvious from any of the documents which were before the court. One might have thought that the calculation of an average cost of construction would be carried out by reference to the total cost of construction, whether some of that cost had already been incurred or not. However, counsel, speaking from his instructions, said it was otherwise. Counsel for the Banking Syndicate indicated, again speaking from his instructions, that the figures contained in the Banking Syndicate's cash flows for construction costs were based on estimates compiled by DTZ Sherry Fitzgerald which related to the total cost of construction, whether that cost had already been partly incurred or not. It follows that there was an apparent significant disparity as to the basis on which the respective calculations of construction costs had been carried out with McInerney asserting that their figures were based only on taking into account expenditure yet to be incurred, while the Banking Syndicate indicated that its figures were based on the total cost of construction whether incurred or to be incurred.

5.13 At this juncture the important point to make is that the state of the evidence at the end of the hearing was that a significant volume of information relevant to an assessment of whether the very material sum of €22,000,000.00 contained within the Banking Syndicate's cash flows, in respect of release of work in progress, was properly so included, depended on attempting to extract from the materials before the court relevant information coupled with statements made by counsel on both sides, speaking from their instructions, as to the basis on which relevant figures had been calculated.

5.14 It was, in my view, bad enough that the court was being left to attempt to analyse the question of unfair prejudice on the basis of conflicting expert views without the benefit of cross examination, but much worse where some of the matters that might well have been explored on cross examination ultimately ended up being debated between counsel, with counsel putting information not on affidavit before the court on the basis of counsel's instructions.

5.15 As Hardiman J. pointed out in *Boliden*, it is, of course, open to a party to seek to argue that, even taking its opponent's evidence at its high point, same does not establish a material element of the matters needed to be established in order that the remedy sought be given by the court. While Hardiman J. was dealing with a case in which there was no contradictory evidence, it seems to me that similar considerations apply where there is contradictory evidence but where the evidence on both sides is given on affidavit without cross examination. It is, of course, open to a party in such circumstances, to say that the court can rely on uncontradicted aspects of the evidence in reaching its conclusions. Indeed, to a material extent that is what counsel for both the examiner and McInerney sought to do. However, it is impossible for the court to resolve material questions when there is a conflict of evidence on matters of significance to an answer to those questions.

5.16 Having identified that problem, I now propose to consider the individual areas of contention already identified. As the matter has already been significantly touched on I propose to deal first with the question of work in progress.

(A) Work in Progress

5.17 If the situation is, as counsel for the Banking Syndicate put it, one where the relevant figures for release of work in progress were calculated by reference to the fact that monies had already been expended of the order of €22,000,000.00 (or, indeed, perhaps, €26,000,000.00) on either planning, site development and infrastructure or partial or complete construction, and if it is also correct, as was similarly asserted by counsel speaking from his instructions, that the construction cost figures included in the cash flows are the total construction cost for the properties at issue in each year irrespective of whether those costs have already been incurred or are to be incurred, then it does, it seems to me, logically follow that the sum of €22,000,000.00 is properly included in the Banking Syndicate's cash flows. If €22,000,000.00 of the relevant construction costs has already been incurred, then it will not need to be incurred again and there will be an obvious saving of that amount in respect of the construction costs of each property. Spreading that saving in the way in which the cash flows does it over the lifetime of the project, does not seem an unrealistic way in which to include the benefit of that saving. It should be noted that the cash flows are, however, somewhat misleading in that at the top of document setting out the relevant cash flows a calculation is stated to be a "profit and loss" account. Properly speaking, when conducting a profit and loss exercise, expenditure incurred on units not sold during the accounting period concerned ought properly be treated as going into work in progress while expenditure previously incurred (in earlier accounting periods) on properties sold during the relevant accounting period ought be removed from work in progress. However, it would again appear from comments made by counsel for the Banking Syndicate, speaking from his instructions, that such a sophisticated analysis was not conducted. It follows that the cash flows, insofar as they purport to represent a profit and loss account, are not strictly speaking accurate. However, that inaccuracy would not seem to materially effect the aggregate cash flow and only marginally effect the timing of the cash receipts so that it would have little or no effect on the present value.

5.18 However, on the other side of the coin, if counsel for McInerney is correct in stating that the estimates for construction costs were compiled on the McInerney side on a different basis from that used on the Banking Syndicate's side, then there is a significant conflict of evidence as to proper construction costs which simply cannot be resolved.

5.19 In the light of all of that uncertainty, it seems to me that I can do no more, under this heading, than conclude that there is a realistic and credible basis for the contention put forward on behalf of the Banking Syndicate that the sum of €22,000,000.00 under the heading of "release of work in progress" ought to be included in the cash flows. Without evidence on the matters which were spoken to the court by counsel, let alone cross examination of the experts whose evidence was being explained in those comments, it would be impossible to put the matter any further.

(B) Sales Prices

5.20 Under this heading it is asserted on behalf of McInerney and the examiner that it is necessary to discount the likely sales prices which the receiver might

achieve by reference to the fact that a receiver is likely to have to give a significant discount to purchasers. Figures of 5 or 10% were put forward in the evidence tendered on behalf of McInerney and the examiner as being an appropriate deduction to be made. There was certainly evidence supporting such a contention. In that context it is, appropriate, to analyse the precise model of receivership which the Banking Syndicate has in contemplation. In simple terms it is suggested that a special purpose vehicle ("NewCo") should be established. It is said that that company will carry on the construction of such properties as it is considered appropriate to develop from time to time from the McInerney portfolio. It is said that it would be sought to recruit senior qualified personnel (from McInerney if possible) to head up that company. It is said that the receiver would enter into arrangements with that company to enable it to carry out construction on the properties concerned and market and sell the houses when constructed. It would appear that it is contemplated that a fairly typical model, where title remains in the existing McInerney companies, would be used so that when the sale is to complete the conveyance would be from the relevant McInerney company to the purchaser with, however, appropriate warranties and the like being given by NewCo.

5.21 The evidence on the part of McInerney and the examiner is that, historically receivers have been required to give significant discounts when selling property because of a reluctance on the part of purchasers (sometimes due to the views of their advisors) to buy from receivers. However, on the Banking Syndicate's side it is said that such a situation has pertained because receivers have tended to sell "as is" without the sort of usual warranties as to title and fitness which would be obtained from an ordinary builder. There are obvious reasons why a receiver might be either unable or unwilling to give such warranties. However, it is said on behalf of the Banking Syndicate that it is intended in this case that the arrangements which NewCo would enter into with any purchaser would be the same both as to title and as to guarantees or warranties as would pertain in respect of an ordinary builder/developer. It is said that the only involvement of the receivership would be that the conveyance would come from a McInerney company acting through the receiver. In addition, it is argued on behalf of the Banking Syndicate and its experts that, in current conditions, sales involving receivers will become much more common and that it is, in their view, unlikely, therefore, that there would be any material or significant shortfall in the price to be obtained having regard to the fact that a significant corporate entity (NewCo) would be the selling entity and that all of the usual assurances would be given to a purchaser.

5.22 It was argued that the Banking Syndicate had not really put forward any evidence to counter McInerney's contention under this heading. I am afraid I cannot agree. Taking the Banking Syndicate's evidence as a whole, it seems to me that DTZ Sherry Fitzgerald were prepared to stand behind the prices likely to be obtained and that the insolvency experts who gave evidence on behalf of the Banking Syndicate, supported the view that the DTZ Sherry Fitzgerald figures could be achieved notwithstanding the involvement of a receiver. Whether the Banking Syndicate's experts are correct is another matter. It seems to me that this is yet again a case where there is conflicting evidence but where I can do no more than conclude that the Banking Syndicate has put forward a credible case that the prices contained in their cash flows, could be achieved.

(C) Costs

5.23 As pointed out earlier under this heading it is said on behalf of McInerney and the examiner that, on a number of bases, it is unlikely that the receiver and/or NewCo could construct the relevant houses at the prices set out in the cash flows. In this regard there was a development in the state of the case as argument progressed. Much of the materials filed on behalf of McInerney and the examiner suggested that it would be necessary for the Banking Syndicate to employ a contractor to construct the properties which contractor would, it was said, require a margin and which margin was not, it was pointed out, included in the cash flows. However, counsel for the Banking Syndicate drew attention to the precise model which is set out in the Banking Syndicate's documents placed before the court. What is intended is that NewCo will be the contractor. While there are some aspects of the documents from which a different inference (*i.e*. an inference that a separate contractor might be taken on) could be taken, I am satisfied that, looking at the Banking Syndicate's documents as whole, the proper inference to draw is that urged by counsel for the Banking Syndicate which is to the effect that NewCo will be, in substance, the contractor. There does not, therefore, seem to be any basis for suggesting that a contractor's margin needs to be included as a deduction in the cash flows. However, counsel for McInerney in particular countered by saying that, if same was the proper construction to be placed on the Banking Syndicate's model, then it was strongly urged that NewCo could not operate as cheaply as the cash flows suggested. This again is a matter on which there seems to me to be a conflict. The evidence put forward on behalf of the Banking Syndicate suggests that those costs could be achieved. McInerney's evidence suggests that they represent a significant understatement of the necessary costs. That is not a dispute which I can resolve on affidavit. Again, I find myself coming to the conclusion that I can do no more than say that the Banking Syndicate has established a credible basis for its suggestion that the costs of construction contained within its cash flows can be achieved. Like under other headings, it is important to note that the Banking Syndicate may be wrong. It is just not possible to reach a conclusion as to whether they are right or wrong.

(D) Dezoning

5.24 There is a familiar refrain to the situation that arises under this heading as well. Both sides accept that the planning environment within which either McInerney post examinership or NewCo in the event of a receivership will have to operate, is likely to be significantly more stringent than that which has applied in the past. It is possible to consider such a difficult planning environment under two headings. The first is zoning. It hardly needs to be said that there is widespread public concern that the level of lands zoned for housing during the boom was excessive and it may well be that local authorities will take steps, when next considering their development plans, to rezone lands currently zoned for housing back to their earlier use, such as agriculture. Thus, there is a risk that lands currently zoned for housing may not retain that zoning after a review of the relevant County Development Plan. Secondly, even where land remains zoned for housing, it may be that the parameters relevant to the type and amount of houses which will be permitted to be constructed and for which planning permission will be made available, may be impaired from the perspective of developers. Indeed, I did not understand either side to disagree

that either or both of those eventualities might arise and that McInerney is not immune from adverse developments under either above heading. However, the Banking Syndicate say that the analysis which has been conducted by their experts as to the number of units which it might reasonably be expected could be constructed includes an appropriate allowance both for dezoning and planning difficulties, even though separate figures are not given in respect of each heading. On the other hand McInerney suggests that a further allowance or deduction needs to be made from the number of units which might be constructed by NewCo to take allowance for the prospects of dezoning above and beyond planning difficulties. There is, in my view, expert evidence on both sides. There is no basis for choosing between them. I can, yet again, do no more than say that the Banking Syndicate have established that there is a credible basis for their figures. It again needs to be said that things may turn out to be less advantageous than the Banking Syndicate estimates. It is just not possible to say. It is not even possible to choose between the competing estimates because of the absence of cross examination.

(E) Conclusions

5.25 For the reasons which I have sought to analyse I am, therefore, satisfied that under each of the four contested headings the position is broadly the same. There is a credible basis for the Banking Syndicate's position, although it may turn out to be wrong. It may turn out to be wrong for any number of reasons. A court can, of course, analyse the competing opinions of experts given on affidavit for the purposes of assessing whether it is possible to reach conclusions on the basis of obvious flaws or gaps in the evidence tendered on one side or the other. Even taking evidence tendered at its height, same may disclose flaws or gaps which entitle the court to disregard it in part or to treat conclusions asserted as not necessarily following from the substance of the evidence. The difference, in this case, between a possible cash flow of €75,000,000.00 and a negative cash flow of €11,700,000.00 comes down to the four areas analysed earlier. The evidence of the Banking Syndicate on those issues did not seem to me to disclose obvious flaws or gaps of that type such as would allow the court to treat the conclusions reached from same as unsafe in the absence of cross examination. In those circumstances the only possible conclusion is that there is a credible basis for the Banking Syndicate's position. First, any estimate of the likely performance of property over the next ten or so years is fraught with difficulty for reasons which hardly need to be stated here. Even if all the experts agreed on the best estimate, it could be no more than an estimate which everyone would have to accept might turn out, with the benefit of hindsight, to be have been quite wrong. Any assessment or evaluation in the current climate in respect of property is fraught with difficulty and the range of possible outcomes are many and widely disparate. That does not mean, of course, that a court should not do its best to form a credible estimate of the likely performance of the McInerney assets under receivership based on the best expert evidence available. However, where, as here, that expert evidence significantly diverges (between the €75,000,000.00 cash flow asserted on behalf of the Banking Syndicate to the more pessimistic "scenario 2" put forward on behalf of McInerney which gives a negative cash flow of €11,700,000.00 during the same period) the court is, in the absence of cross examination, left in a position where it can do more than conclude that there is a credible basis for the Banking Syndicate's position, but that equally it might well be that there is some merit in

some or all of the criticisms of that position put forward by the examiner or McInerney. That leads to the question of the appropriate discount rate.

6. The Discount Rate

6.1 A discount rate is used for the purposes of converting an income stream over a period of time to a current principal sum or net present value. It is a way of giving a current value to that future income stream. In many ways it is not unlike the actuarial valuations of a future loss of income or continuing expense with which the courts are familiar.

6.2 In the commercial context, a future income stream has to be discounted, perhaps, for two different reasons. First, there is the fact that applies in virtually every case which is that money in the future is not as valuable as money now. If I get money now, I can invest it in (hopefully) a very secure investment if I am risk averse. I may alternatively pay off liabilities and thus save myself having to pay interest on those liabilities for a period of time. There is thus a cost in any event associated with money being received in the future rather than now for the person who receives the money in the future will have to forego the investment opportunity of that money or, incur interest charges in respect of borrowed money until the income stream comes in.

6.3 However, as I understand it, in the commercial world, a discount rate is also used to reflect the risk of the income stream actually materialising. Put another way, someone investing money in a risky venture is obviously more likely to require a better rate of return to compensate for that risk than someone investing in an extremely safe project. Of course in a case such as this there is an almost infinite range of possible outcomes. The income stream may be as the Banking Syndicate suggests. It could even be better. There might be a better than expected recovery in the property market or a larger than expected drop in construction costs although it is true to say, as was pointed out by counsel for McInerney, that it would be highly improbable that both of those eventualities could occur at the same time. Obviously the income stream could be worse for any or all of the reasons which were argued on behalf of McInerney and the examiner and as are analysed earlier in this judgment or, indeed, for other reasons connected with the market in property or the like. It also seems clear that there is a legitimate interaction between an appropriate discount rate and the extent to which the income flow figures to which it is applied might be regarded as optimistic. A conservative set of cash flow figures would obviously warrant a lower discount rate than an optimistic set. The problems under this heading with which I am faced are twofold. For the reasons which I have already sought to analyse, I am satisfied that the Banking Syndicate's cash flows represent a credible assessment but by no means necessarily a correct one. For like reasons, it is extremely difficult to form any judgment as to whether those figures could be regarded as being optimistic, pessimistic or average. When coupled with the significant differences of opinion by the relevant experts as to the appropriate discount rate to be applied, it is difficult again to do more than say that the approach of the Banking Syndicate is a credible one. It may turn out to be wrong. The project may be riskier than asserted and might warrant a larger discount rate. Then again it might not. It is impossible to resolve the conflicts of expert evidence without the benefit of cross examination.

7. Overall Conclusions

7.1 The above analysis leads me to the view that the Banking Syndicate has put forward a credible basis for suggesting that the receivership model which they propose has the potential to generate an income stream which approximates to a current principal sum of the order of €50,000,000.00. It may well be that the risk on that sum is more on the down side than the up side. In that context the up to date valuations put forward in respect of the McInerney property portfolio need to be noted. The examiner's valuation was dependent on assumptions. Three different valuations were put forward depending on the assumption made. The first was a valuation of €20,000,000.00 on the basis of an immediate sale of the entire property portfolio in one lot. The second was a valuation of €23,000,000.00 on the basis of a sale within six months in separate lots. The third was a figure of €30,000,000.00 on the basis of a sale in a number of lots with as much time as was needed to secure the best price. It should be noted that the figure of €30,000,000.00 was stated to be a figure discounted to pay proper regard to the fact that there would be a delay in the money coming in under that heading. It should also be noted that it was suggested, in later evidence submitted on behalf of the examiner, that the discount figure used may have been too low. For the Banking Syndicate, the DTZ Sherry Fitzgerald figure was somewhat higher than €30,000,000.00, but was not discounted so that it may well equate to the €30,000,000.00 figure just mentioned. If those figures are correct it may well be that anyone taking on the project of developing the lands would expect a return which would give a profit and, thus, an income stream which might give a present value, even allowing for risk, of something over €30,000,000.00. However, some regard does have to be had to the big picture with which I am confronted. The scheme which the examiner puts forward involves a significant investment by the potential investor who was already on the scene at the time of the contested application to appoint an examiner ("Oaktree"), and which is referred to frequently in the course of the judgment delivered at that time. It would seem that, in round terms, Oaktree are putting up a sufficient sum to pay the Banking Syndicate €25,000,000.00, to pay the other creditors, both unsecured and preferential, together with a sum of €5,000,000.00 working capital. One must assume that Oaktree believe that they have reasonable prospect of getting a return on that investment.

7.2 Likewise, the Banking Syndicate are willing to forego an immediate payment of €25,000,000.00 for the opportunity to gain what they hope will be more through the receivership model which they propose. It is likewise reasonable to infer that the Banking Syndicate feel that they will do better by that model than the €25,000,000.00 which they are now required to forego. In passing it should be noted that the Banking Syndicate accept that, like Oaktree under the post examinership model, the Banking Syndicate would also have to provide working capital of the order of €5,000,000.00. It follows that the equation facing both Oaktree and the Banking Syndicate is broadly similar. There are some differences on which I will briefly touch. However, in general terms both are to "put up" (actually in the form of capital and loan capital in the case of Oaktree and metaphorically in the sense of a payment foregone in the case of the Banking Syndicate) a sum of the order of €25,000,000.00 or a little more in the case of Oaktree (so as to meet the other creditors). Both will have to put up

approximately €5 million in working capital. Both hope to gain by the exercise.

7.3 The question that must be asked is as to whether it is likely that the gains which could reasonably be expected to be achieved by Oaktree would be materially different from the gains which might be expected to be achieved by the Banking Syndicate, for, unless that be so, it is hard to see how it would not be reasonable for the Banking Syndicate to feel that they would get a decent return on foregoing €25 million in circumstances where Oaktree must be taken to expect to get a decent return on the slightly greater expenditure which they will have to incur. There are, undoubtedly, some differences between the two models. The Banking Syndicate receivership model involves, essentially, a workout where the assets will be exploited and ultimately sold through the vehicle of NewCo, which will ultimately be wound down, presumably, when the receivership project comes to an end (the assumptions on which the cashflow model is based assumes that there will be some land remaining after 10 or 11 years which will then be sold off). However, it does have to be said that if NewCo were a successful model, established in the house building business, it might itself have a sale value to a new purchaser who might well wish to exploit any entitlement which it might have or be given to the McInerney lands and any reputation which it might have built up. On the other hand, there is no doubt that what is envisaged by the Oaktree investment is a McInerney post-examinership which will continue to trade indefinitely and which would, presumably, at some stage in the future, contemplate purchasing further lands for exploitation. Given the current market, with its significant overhang, and even allowing for the fact that McInerney's property portfolio may be better located than most, it would seem unrealistic to hope that there would be any significant new land purchases for development purposes any time soon. Just how big a difference there is in practice between the two models under this heading can only be a matter of conjecture. Much of the other bases on which it might be suggested that the income stream which could be derived by McInerney, post-examinership, would be better than that which would be achieved by the Banking Syndicate under their receivership model, derive from the disputes under the variety of headings which have already been analysed. There may be some merit in those points. It is, for the reasons already analysed, just impossible to tell.

7.4 There is, in truth, very little precedent, either in law or on the facts, for an issue of the type with which I am faced. The closest analogy (and it is by no means close) is the situation which has on occasion occurred (see, for example, *In Re Laragan Developments Ltd* [2009] IEHC 390), where it is suggested by creditors that there has been wrongdoing (such as, for example, reckless trading) which could be pursued by a liquidator to the benefit of the creditors as a whole, but where any such cause of action would not exist in the event that the company completed a successful examinership. Such issues do need to be seriously addressed when they arise. If there is a realistic prospect that creditors might benefit from a liquidation, then that is a factor to be given significant weight in the court's consideration. An assessment of the likelihood of the creditors so benefiting will, of course, depend on an assessment of the chances of the company, through its liquidator, succeeding in recovering monies from third parties, including the commercial reality of being able to recover such monies. A company which might theoretically have a strong chance of obtaining a judgment for €10 million against a former director may not leave its creditors

better off by pursuing that course of action, if the director is himself insolvent. A court will never be able to form a definite view on what the chances of the creditors are in such circumstances. It would be wholly improper to take anything other than a general view on the prospects of the company succeeding in any such action, not least because there would remain a real chance that such a case would come before the courts which should not be prejudiced. In addition, the information which may be available to assess the likelihood of recovery may be far from complete. However, the court should do the best it can on the materials available to see whether there is a realistic prospect that the creditors would do better under liquidation and by the pursuit of claims against third parties than it might under the scheme of arrangement proposed. On the facts of *Laragan Developments*, I was not persuaded that there was any such realistic prospect.

7.5 However, on the facts of this case, I am satisfied that the Banking Syndicate has a realistic prospect of doing better under the proposed receivership model than under the scheme of arrangement. Even with the benefit of cross-examination, it would never, of course, be possible to decide for certain that the Banking Syndicate would do better. It might, however, have been possible to form a more accurate view as to the probabilities. Given my conclusion that the Banking Syndicate has a realistic prospect of doing better under the receivership model, it seems to me that there are no countervailing factors which would lead me away from the obvious conclusion to derive from that fact which is to the effect that the scheme, as proposed, is unfairly prejudicial to the Banking Syndicate.

7.6 It is, of course, the case that in many examinerships there is a significant difference between the projected overall outcome on liquidation, on the one hand, and under a possible scheme of arrangement, on the other hand. There is, thus, a financial "gain" to be had by avoiding both the expense of liquidation and "losses", such as increased failure to collect debts or lower values on plant to be sold. Such "gain" can be used to make all creditors positions better. In such a context it is possible to envisage cases where both secured and unsecured creditors will be better off under a scheme of arrangement than on liquidation even where the liabilities of the secured creditors are written down. It is not necessarily a zero sum game. Also in some cases the likely result on either scenario may be capable of fairly accurate calculation. This case would never have been such a case but the absence of any real basis for choosing between the conflicting expert testimony make any such calculation all the more difficult. Also the "gain" in this case is more problematic as it stems from possible profits from the exploitation of the McInerney portfolio. However, I have concluded that there is a reasonable basis for the assertion that the scheme is unfairly skewed against the Banking Syndicate.

7.7 Before departing from this issue, I should also note the significant disparity between what is now offered to the Banking Syndicate and what seemed to be under consideration at the time when I was persuaded to appoint an examiner. The evidence before the court on that occasion was that there were negotiations between Oaktree and the Banking Syndicate which had culminated in an offer in excess of €50 million with additional contingency sums bringing the offer up to €60 million in certain eventualities. It must, of course, be noted that what was on offer at that time was a scheme whereby the Banking Syndicate would

remain as lenders to McInerney. The sum of €50-€60 million was not, therefore, an immediate payment proposed to the Banking Syndicate, but rather, a sum to which the indebtedness of McInerney to the Banking Syndicate would be written down. However, given that the whole basis of what was then proposed was that McInerney had a realistic prospect of survival on that basis, it follows that it was being maintained that there was a real prospect that the Banking Syndicate would, over time, be repaid that sum of €50-€60 million, together with any interest that might accrue on it prior to payment. There is a very significant difference indeed between that sum and what is now proposed which while, perhaps, partly explicable by the fact that what is now proposed is an immediate payment rather than a continuing interest bearing debt, nonetheless remains significantly at variance with the sums then being considered, even making all due allowances for that differentiation. That disparity is not, in itself, a decisive factor in the judgment which I have to reach, which is as to whether the scheme proposed is unfairly prejudicial to the Banking Syndicate. However, it does have to be noted that as things evolved, and as the scheme moved from one where the Banking Syndicate was to remain in as continuing bankers to one where the Banking Syndicate was to be bought out, a significantly more pessimistic view of the prospects of McInerney seems to have emerged. While it is fair to say that the outlook for the property market is even less favourable now than it was in the Autumn, I am not sure that that deterioration can fully explain the difference to which I have referred.

7.8 In coming to that view, I have not ignored the fact, put forward on behalf of McInerney, that a more pessimistic view of the likely sales prices to be obtained for houses constructed by a company such as McInerney can have a disproportionate affect on the value of property held for such development purposes. This can, of course, be the case. The value of potential development land can be viewed as being referable to the potential profits which can be made by its exploitation. If, say, a company was anticipated to make a 20% gross margin, then a 10% reduction in the likely sales price (in the absence of any corresponding reduction in the costs of construction) would halve the profit. Thus, a 10% reduction in anticipated sales prices in the absence of any anticipated corresponding reduction in construction costs would be likely to have a much greater than 10% reduction on the underlying value of the development land itself. However, in the absence of a detailed analysis of the extent to which there might have been a reduction in the anticipated likely sales prices of houses to be constructed on McInerney lands, any change in likely construction costs, and any other material factors, it is impossible to form any detailed view on the extent to which an anticipated reduction in the likely price to be obtained for houses built on the McInerney property portfolio could have affected the value of that portfolio as and between the Autumn, when the examiner was appointed, and now.

7.9 Be that as it may, for the reasons which I have already set out, I am satisfied that the scheme, as proposed, is unfairly prejudicial to the Banking Syndicate and must, therefore, be refused confirmation. Given that the scheme is not being approved, and having regard to the fact that the issue as and between the Revenue and the examiner is one of principle, from the Revenue's point of view, it seems to me that it would be inappropriate to determine that issue in a case where it would be moot.

7.10 In summary, therefore, I will refuse to confirm the scheme of arrangement.