THE HIGH COURT

[2018 327 Cos.]

IN THE MATTER OF M.D.Y. CONSTRUCTION LIMITED

- and -

IN THE MATTER OF THE COMPANIES ACT, 2014

- and -

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 541

JUDGMENT of Mr Justice Quinn delivered on the 28th day of November, 2018

1. This was an application of the Examiner Mr Neil Hughes to confirm Proposals for a scheme of arrangement pursuant to s. 541 of the Companies Act, 2014. Confirmation was opposed by a number of unsecured creditors. The grounds of objection fall under two headings;

> (1) That the Proposals do not comply with the requirements of s. 541 (4)(b) in that they are unfairly prejudicial to their interests.
>
> (2) That the evidence as to the financial and trading status of the Company after examinership, including cash-flow projections presented by the Examiner with input from the proposed investor, is such that if the Proposals are confirmed the Company will be insufficiently capitalised and does not have a reasonable prospect of survival as a going concern.

2. Although s. 541 does not stipulate a requirement to demonstrate at this stage of the process that the Company has a reasonable prospect of survival, it is well-established that this test is relevant to confirmation of proposals (see *Tivway Limited & Others* [2010] IESC 11).

3. On 15th of November, 2018, I gave my decision and made an order confirming the Proposals. As a number of substantive issues had been raised by the objectors I indicated that I would deliver this judgment. To understand the objections it is necessary to summarise the history of this examinership including certain events which occurred before the presentation of the petition.

Background

4. The business of the Company is the provision of building contractor services. The Company has traded for over thirty years and the Examiner says in his report pursuant to s. 534 that it has a history of successful trading on large scale building projects. In the months prior to examinership the Company had ongoing contracts with each of Kildare County Council (32 units of social housing), Wicklow County Council (42 units of social housing), Cooperative Housing Ireland (72 units), Fold Housing Association (43 sheltered housing units and communal facilities) and other projects. At the date of presentation of the petition, the Company employed 49 persons directly. A number of these have since left and the Examiner says that confirmation of the Proposals will facilitate the continued employment of 24 staff members.

5. The Company traded profitably and increased its turnover consistently in the years 2013-2017. For the period of six months to the end of June 2018, it recorded a sharply reduced gross profit and an operating loss. Particular difficulties which threatened the future viability of the Company included a dispute with an employer Helsingor Limited, reduced gross profit margin and losses deriving from the acquisition of development sites. The latter left the Company indebted to its secured lender Everyday Finance DAC (which had purchased the Company's loan from AIB) in the sum of €4.48 million, which it was unable to service. Negotiations to agree a restructuring of that debt had failed.

6. On 31st August, 2018 the sole shareholder of the Company, MDY Holdings Limited agreed to sell its shares to Ortelo Holdings Ltd ("Ortelo"). This transaction occurred in the context of certain restructuring and investment negotiations with Ortelo and its shareholder. One of the beneficial owners of Ortelo is a Mr Chris Wholey. Mr Wholey is also a director and the majority shareholder in KC Civil Engineering Ltd (KCC). KCC is the largest unsecured creditor and objects to the confirmation of the Proposals.

7. On 5th September, 2018 four of the Company's six directors resigned leaving the managing director, Mr Thomas Dunne and Mr Mel O'Reilly as the only remaining directors. It is said that at some time after 31st August, 2018, Ortelo proposed to appoint new directors, but the composition of the board of directors was not in controversy at the time of this hearing.

8. On 19th September, 2018 the directors resolved to petition the court for the appointment of an examiner.

9. On 20th September, 2018 the petition was presented and Mr Hughes was appointed interim examiner by Mr Justice O'Connor. The petition was made returnable before this court on 22nd October, 2018 when the appointment of Mr Hughes was confirmed.

Interim Examiner

10. At the hearing of the petition, the Interim Examiner delivered a report to the court on the work undertaken by him since his appointment. He reported that in addition to the usual process of familiarising himself with the Company's affairs, attendance at the Company's premises, communication with creditors, employees and key contractors and clients he engaged with potential investors and formulated proposals for a scheme of arrangement.

11. On 17th October, 2018 the Interim Examiner, the Company and KM Lynskey Construction Services Ltd ("the Investor") entered into a binding agreement for investment in the Company, to support the implementation of proposals for a scheme of arrangement ("the Proposals"). On the same day, the Interim Examiner issued notices convening meetings of members and creditors pursuant to s. 534 (2) of the Act for the purpose of considering and voting on the Proposals. Unusually – and this was the subject of criticism by the objectors – the meetings were convened for the day immediately following the first return date for the hearing of the petition.

12. At the hearing of the petition a number of creditors, including the secured creditor Everyday Finance DAC, Revenue, unsecured creditors, contingent creditors and clients of the company appeared.

13. Counsel then representing Ortelo, applied for an adjournment of the petition to afford time to file an affidavit in support of an

application to remove the examiner and/or appoint a different examiner. Ortelo was the only party to apply for an adjournment. It expressed certain concerns as to the manner in which the Interim Examiner had conducted the investment process to date. Everyday Finance also expressed concerns about the process, including in particular the timing of convening statutory meetings for the day immediately following the return date of the petition.

14. Submissions were made on behalf of the petitioner and on behalf of a number of other parties, including certain clients of the Company, to the effect that time was of the essence as far as concerned the progression of the examinership. Counsel on behalf of Kildare County Council and Wicklow County Council, whose contracts are said to be critical to the survival of the Company, and who had previously given notices of termination of contracts, informed the court that they were reserving their position as to whether they would withdraw those termination notices. They said that continuing uncertainty would negatively inform their decisions as to the future.

15. The Court refused the application for an adjournment. Apart from the reservations expressed by Ortelo – which was not a creditor but a disappointed bidder in the investment process – and others concerning the process and its timing, no party opposed the making of an order confirming the appointment of an Examiner. Having considered the petition, the grounding affidavit, the report of the Independent Expert and other proofs advanced the Court confirmed the appointment of the Examiner.

16. In making the order on 22nd October, 2018 I made it clear that by confirming the appointment of the Examiner the court was making no assessment of the substance of the Examiner's Proposals for a scheme of arrangement and that this order did not preclude any party from making any other application it may wish to make under the provisions of the Act. No other such application was made.

17. Although it is unusual, if not unprecedented, for an interim examiner to activate Section 534(2) prior to the hearing of the petition, no party suggested that he did not have the power to do so. Order 74A Rule 6(2) provides that an

> "interim examiner… shall have the same powers and duties in relation to the company until the date of the adjourned hearing as if he were an examiner appointed other than on an interim basis".

Whether it was intended that this Rule extended to the power to activate Section 534(2) is questionable.

18. The pace at which the Interim Examiner moved was the source of disquiet expressed at the hearing of the petition and at the s. 541 hearing. As Kelly J. observed Re Eircom Ltd, unreported, High Court, ex tempore, 17 May 2012, the appointment of an interim examiner should be the exception rather than the rule. A fortiori, cases in which an interim examiner would, before the hearing of the petition, conclude an investment agreement, finalise proposals for a scheme of agreement and convene meetings pursuant to s. 534(2) – albeit for a date after the hearing of the petition – should be the exception and not the norm. There is no doubt that it is good practice for an examiner to move promptly after his appointment, including formulating proposals for a scheme of arrangement, and not to habitually avail of the extensions and outside time limits prescribed by the Act. However, if he finalises proposals and convenes statutory meetings, he is doing so before all the creditors and interested parties, other than the petitioner, have had the opportunity to voice their support or opposition to the petition itself or to be heard as to the identity of the examiner. Creditors and interested parties always have the option to make applications in relation to the conduct of the examinership, whether under Section 532 or otherwise, and ultimately to be heard in relation to the proposals of the examiner under s 541. However, they should also have the opportunity to be heard at the petition before an examiner would activate Section 534(2). None of this is to find that the Interim Examiner acted improperly, but this case should not be taken as an endorsement of such a course of action as a general practice, and there should be compelling reasons for so proceeding.

19. In this case, the period between the appointment of the interim examiner and the first return date fixed for the hearing of the petition was 32 days. This was partly due to the long vacation but it is longer than would be normal or desirable. Secondly, it was said that key clients of the Company had indicated time was of the essence in terms of finalising a plan for the company's survival, and that the Company was at risk of losing those contracts at any point, hence the urgency of finalising the investment and scheme of arrangement. However, urgency is a common feature of examinership, and therefore would not in every case be a factor of itself justifying such a course of action. If the need for such is identified at the outset there is no reason why an application would not be made for an early date for the hearing of the petition.

20. In cases where the hearing of a petition is adjourned, an application for extension of the time for delivering the report required by s.534 may become inevitable and this is not unusual. That however, is preferable to convening statutory meetings before the petition has been heard, unless there are compelling reasons.

The Proposals

21. On 23rd October, 2018 the Examiner held the statutory meetings to consider and vote on the Proposals and on 24th October, 2018 (being day 34 of the protection period) he delivered his Report to the court pursuant to s. 534. The hearing pursuant to s. 541 was set down for 31st October, 2018, and after adjournments to enable the parties to exchange affidavits the confirmation hearing took place on the 8th, 9th and 12th November, 2018.

22. The Proposals have been modified more than once from those first circulated to creditors on 17th October and presented to the statutory meetings. Before the court for confirmation was a version modified on 9th November, 2018 which was handed into court on that day.

23. The Proposals provide for the making of an investment by KM Lynskey Construction Services Ltd ("the Investor") in an amount of €1,452,466 by way of loan. In the original proposals, the amount of the investment was €1.7 million.

24. The Examiner exhibited the Investment Agreement and Escrow Agreement pursuant to which the investment monies had been lodged in an account with his solicitor pending confirmation of the Proposals.

25. The investment is expressed to be conditional on certain matters including confirmation that certain contracts between the Company and named clients, being Kildare County Council, Wicklow County Council and Cooperative Housing Ireland are continuing. The Court was informed that these confirmations are forthcoming and therefore the only condition outstanding as regards the Investor is the confirmation by the court of the Proposals.

26. The Proposals provide that the shares in the Company be cancelled and new shares be issued to the Investor, thereby extinguishing any rights of the existing member. Any rights purportedly acquired by Ortelo as an alleged shareholder also cease on the effective date of the Proposals.

27. Everyday Finance DAC was owed a total sum of €4.6 million. It holds a fixed charge over the Company's premises at Naas, County Kildare and a floating charge over the remaining assets and undertaking of the Company. The Proposals provide for the payment of a total sum of €1,260,000 as follows:

(1) €560,000 within 21 days of the Effective Date

(2) €350,000 by 1st July, 2019

(3) €350,000 by 31st December, 2019.

28. On payment of the initial sum of €560,000, the floating charge will be released. On payment of the final balance, the fixed charge over the premises at Naas will be released.

29. The initial proposals provided for the payment of a sum of €1 million to Everyday. Everyday voted against those Proposals but they have withdrawn their objections.

30. The leasing creditors are to receive the entire amount of their debt by equal instalments commencing 1st February, 2019.

31. The pension scheme creditor, super preferential creditors and preferential creditors are to be paid 100% of their debt.

32. The unsecured creditors are to receive a dividend of 3%.

33. Contingent Creditors and "Contingent Litigation Claims Creditors" are to receive a dividend of 0.5%.

34. "Connected Creditors" and "Contingent Personal Guarantee Creditors" are to receive a zero dividend.

35. The modified Proposals contain particular provision for the treatment of a new class of creditors namely "Contract Claimants" being Kildare County Council and Wicklow County Council which include preservation of certain rights of set off in their favour, a provision which the objectors say is unfairly prejudicial to them.

36. The Examiner has exhibited a statement of assets and liabilities contrasting the outcome for creditors on a going concern basis and on a liquidation basis. This Appendix estimates that on a winding up there would be funds available to pay preferential creditors in full and a small distribution under the floating charge, but no dividend for unsecured creditors. On a going concern, there would be a significant distribution for the holder of the floating charge. Under the Proposals, the payment to the charge holder is limited facilitating the dividend of 3% to unsecured creditors.

Section 534 Report

37. At the statutory meetings the Proposals were accepted by all classes except the following which voted against the Proposals: -

(1) The secured creditor. Everyday has in the meantime withdrawn its objection based on a modification which increased from €1 million to €1.26 million the amount of its payment.

(2) Contingent litigation claims creditors. These creditors are now not opposing the confirmation of the proposals.

(3) Unsecured creditors.

38. It is important to note the extent of the opposition in the creditors meeting (and at this hearing) from unsecured creditors. The Report recites that the company has 347 unsecured creditors owed a total amount of €11,540,245. The Examiner reports that valid votes in favour of the Proposals were 38 creditors having a value of €1,217,000 and that valid votes against the Proposals were 17 creditors having a value of €3,205,866.

39. There was no debate at the confirmation hearing as to whether the Examiner was correct in disallowing any of the votes of creditors. On any view, it is clear that although a majority in number of those who voted at the meetings supported the Proposals, the overwhelming weight of the value of those who voted was against the Proposals. In circumstances where unsecured creditors would obtain no dividend on a winding up, this voting result is unusual and is a factor to be taken into account.

40. Among those who voted against the Proposals were KCC and Sean Smyth Construction, both of whom were represented at this hearing.

41. Counsel for Sean Smyth informed the court that he had instructions to oppose the confirmation also on behalf of eighteen creditors owed in aggregate some €1,819,124.

42. KCC was admitted by the Company to be owed €997,255. It claims that the true balance owing to it is €1,997,225. Whilst there was a dispute at the hearing about this difference the quantum of the liability to KCC is not a matter for determination on this application. The Proposals contain the standard provisions in a scheme for the determination of unagreed claims by an Expert. However, it is clear that KCC and Sean Smyth Construction are the two largest creditors being owed at least €997,000 and €889,000 respectively. A close third to these is Kingspan, owed €866,000 although it did not vote on the Proposals or participate in the meetings or this hearing.

43. The report recites the investment process undertaken by the Examiner following his appointment. He engaged with eight parties, seven being external, who had expressed interest in investing in the Company. Interested parties who signed a non-disclosure agreement were provided with an information memorandum. The Examiner received proposals from two external parties with a third party indicating additional interest. He reports that certain clarifications were sought and that ultimately, he identified a preferred investor, KM Lynskey. He reports that after doing so he received an updated proposal from an unsuccessful party. The manner of the investment process is criticised by KCC and Sean Smyth and I shall refer to that later.

44. The Examiner reports that in his opinion the conditions for survival of the Company as a going concern identified in the Report of the Independent Expert have been met with the exception of the confirmation of the Proposals by the court. In particular, he reports the following: -

(1) That implementation of the Proposals will ensure the continued employment of 24 persons in addition to

subcontractors.

(2) That although the dividend at 3% is low and therefore "disappointing", the return for unsecured creditors is better than on a winding up of the company.

(3) Clients on critical projects have indicated that if the Proposals are confirmed they will withdraw the notice of termination previously served by them. The Examiner believes that this coupled with the support of the Investor will enable the Company to trade at a cash surplus and meet future liabilities as they fall due.

(4) The Examiner expressed the opinion that the Company has a reasonable prospect of survival as a going concern and he refers to the cash flow projections and a "post examinership" balance sheet which he says shows the Company having adequate working capital.

45. The Examiner recommends confirmation of the Proposals in the modified form now before the court. He states that if the Proposals are not confirmed he will not recommend the continuance of the protection of the court. This point is important having regard to the submission as to alternatives made by the objectors.

The Helsingor Claim
46. The Company has been in dispute with a client on a particular project, namely Helsingor, as to the balance if any due and owing on a contract completed by the Company in February 2018. The Company claims that it is owed a balance of €6,205,342. The client disputes this claim and has counterclaimed for €3,820,714. The matter has been referred to a conciliation which is due to be heard in February 2019.

47. During the hearing, different views were expressed as to what would be the likely result of the conciliation. The Examiner and the Company estimate the recovery at €2.5 million, but acknowledge that the recovery could be as low as €1 million. The objectors observe that this is an unknown number and that the claim is being fully defended by the client and recovery could be nil.

48. Despite querying whether this claim is likely to generate a substantial return, the objectors claim that for the scheme of arrangement to be fair and equitable, it ought to contain a provision ring-fencing the proceeds of the Helsingor claim to provide for a potential second dividend to unsecured creditors. They have also suggested that a variation of such a provision would involve a potential additional payment to the secured creditor and a balance thereafter to the unsecured creditors.

Objections
49. Counsel for KCC, Mr Doherty, submits that the terms of the Proposals fail the test for Section 541 for three reasons.

(1) They do not represent the best possible outcome for the creditors having regard to the existence of alternatives and the fact that there is still, in his submission, sufficient time within the framework of the Act, to have alternative proposals formulated and confirmed which deliver a better outcome for creditors. The objection is linked to the concern expressed about the investment process, in that KCC submits that it was willing to make the investment required to support such a better outcome.

(2) That the Company does not have a reasonable prospect of survival as a going concern having regard to the amount of the investment committed, the post-examinership cash position, the projected low gross profit margin and inadequacy of working capital.

(3) That in their treatment of certain creditors and classes of creditors the Proposals are inherently unfairly prejudicial to the interests of his clients and other unsecured creditors.

KCC Proposals

50. Prior to the examinership, the principal of KCC, Mr Wholey was actively involved in discussions with the Company for an investment and the acquisition of the shares on 31st August, 2018 by Ortelo was part of that process. It was said that the failure to conclude those investment discussions resulted from a breakdown in negotiations with the secured lender. After the appointment of the interim examiner, KCC submitted an investment proposal to him. ("the KCC Proposal"). This proposal was not accepted but its contents have been put before the court by KCC in this hearing. Properly, none of the parties submit that it is the function of the court at this hearing to decide between that proposal and the Examiner's Proposals. However, during the hearing, there was extensive reference to the KCC Proposal and much comparing and contrasting between it and the Examiner's Proposals. At the heart of the objectors' submissions is the proposition that existence of an alternative renders the Examiner's Proposals not fair and equitable. Therefore, there is no escaping the fact that this information is put before the court with a view to inviting the Court to find that the Proposals recommended by the Examiner do not present the most favourable outcome for creditors. This inevitably would draw the Court towards a comparative assessment of the respective commercial merits of the alternatives.

51. KCC says the following in relation to its proposals:

(1) That it provides a better working capital base from which the Company would emerge from examinership based on a higher gross profit margin and a committed working capital facility from KCC as an investor.

(2) That the investor would introduce a valuable pipeline of projects which will generate stronger income into the future than the proposals of the Examiner and that it is an investor of more substance.

(3) That for unsecured creditors the initial dividend would still be 3% but that the proceeds of the Helsingor claim could be ring-fenced to provide a potential second dividend to creditors.

52. KCC complain that they were denied the opportunity to advance an improved investment proposal by the non-transparent manner in which they allege the Examiner conducted his process. The Examiner says that KCC's proof of funding came late and was insufficient and that the source of the potential second dividend for unsecured creditors, namely the Helsingor claim, was subject to the floating charge of Everyday Finance and therefore not freely available to the Company or for a second dividend to creditors. He says that there was a lack of clarity as to the identity of the parties behind the KCC investment and that he assessed the completion risk as high, having regard inter alia to the history of unsuccessful pre-examinership investment discussions with this party.

53. The Examiner says that he objectively assessed the investment proposals submitted and exercised his own professional judgment

as to the selection of investor and form of scheme of arrangement to be recommended to the creditors and the court.

54. KCC is the largest unsecured creditor of the Company and having regard to the level of the debt admitted to be due to KCC the court must attach weight to its submissions. However, the court cannot disregard the fact that KCC, whilst objecting in its capacity as a creditor, was one of the unsuccessful bidders for the investment.

55. The decision as to which investment proposal should be accepted to underpin the Proposals for a scheme of arrangement is a commercial judgment for the Examiner. The principles which govern the court's approach to scrutiny of such decisions are well established and reaffirmed in the judgment of Kelly J. in *Re Eircom Ltd* and by Cregan J. in *Ladbrokes (Irl) Ltd & Ors & Companies (Amendment) Act 1990* [2015] IEHC 381. In *Re Eircom Ltd* Kelly J. adopted extensively the passage from the L*aw of Administrators and Receivers of Companies* by Lightman and Moss as follows:

> *"When called upon to review the exercise by insolvency office-holders of their powers, the Court has said that in the absence of fraud it will only interfere if they have done something so utterly unreasonable and absurd that no reasonable man would have done it. The question is not whether the Court would have acted in the same way or would have reached the same conclusion as the insolvency practitioner. Nor will the resulting transaction be set aside where it is established merely that a reasonable practitioner may have acted differently or reached a different conclusion as long as the course of action pursued by the administrator was one that a reasonable practitioner could reasonably have contemplated. The legal basis for interference is the office-holder's perversity or irrationality. To this extent it can be said that in exercising its power for their proper purposes the administrator is under a duty to act rationally."*

Kelly J then said: -

> *"The court has neither the expertise, nor indeed the backup to make commercial decisions. The court is here in a supervisory role and to decide legal issues. And in the event of the examiner either misbehaving or doing something which is wrong in law there may well be an ability for the court to intervene in such circumstances. But in areas of commercial judgement it seems to me that the court's scope for intervention is very limited."*

56. Mr Doherty says that he is not inviting the court to "second guess" the Examiner's commercial judgment but submits that the Proposals are unfairly prejudicial to his clients and others, "*having regard to the existence of an alternative*". In reality, this is an exercise in testing the Examiner's commercial judgment as to the selection of the investor. Although the objectors call into question the timing and manner of the investment process, they do not go so far as to evidence conduct in respect of which the principles in *Re Eircom Ltd* and In *Re Ladbrokes (Ireland) Ltd* would justify the Court intervening, let alone refusing to confirm the Proposals.

The Kirby Report

57. KCC have referred to a report by Mr Myles Kirby, an experienced insolvency practitioner, in which he has undertaken a critique of the Proposals. Mr Kirby says that the Proposals do not address the difficulties of the Company which were identified in the report of the Independent Expert. Perhaps the most important point he makes, and which was the subject of extensive debate at the hearing, is that the projections exhibited by the Examiner show a low gross profit margin which has not been addressed in the Proposals and that no or inadequate evidence or working capital has been provided. Mr Kirby says that by contrast the entire investment is applied towards fees and payments of dividends, leaving no funds for working capital. Therefore, he says that this presents a serious risk to the Company's prospect of survival as a going concern.

58. Mr Kirby says that the amount being invested is insufficient even to meet the examinership costs and the dividends under the scheme, let alone the working capital requirements of the Company. He says that the projections illustrate an unsustainably low growth project margin. He has not analysed the assumptions and numbers underpinning them but has a concern that the Company is insufficiently capitalised to withstand variants from these projections.

59. Mr Kirby says that because projections are estimates of future performance it is critical that they are adequately stress tested and there must be a cushion for possible variation. Mr Kirby says that on a very straightforward stress testing exercise that the Company will be in a precarious financial position if there is "*even a tiny adverse variance from the projections".*

60. Mr Kirby then focusses on the alternative proposals submitted by KCC. He says that a document prepared by Mr Walsh, previously the Independent Expert whose report supported the petition, shows that the comparison of the Examiner's proposal and the KCC proposal would show a better outcome for creditors on the KCC proposal, most notably the potential for a "second dividend" arising from the Helsingor claim.

61. Mr Doherty has put the proposition that in cases where there is a conflict within the affidavit evidence, in this case, he says between the evidence of the Examiner and that of Mr Kirby, and in the absence of cross-examination of those deponents, it is not open to the court to conclusively determine which of these accounts to favour. He submits that in those circumstances the Court cannot find that the Examiner has discharged the onus of proof that the Proposals are fair and equitable. In support of this proposition he cites the judgments in *Re McInerney Homes Limited* [2011] IEHC 4 of Clarke J. in the High Court (applying the principle decided by the Supreme Court on this particular issue in *Boliden Tara Mines v Cosgrove* [2012] IEHC) and of O'Donnell J. in the Supreme Court, [2011] IESC 31.

62. It is well established by the judgment of the Supreme Court in *Re McInerney Homes Ltd* and other cases that the onus is on the Examiner to show that the Proposals are fair and equitable and not unfairly prejudicial to an interested party which objects. In the *Re McInerney* case, the court was presented with the evidence of the Company and the Examiner and conflicting evidence of a syndicate of banks objecting to the proposals. Extensive affidavit and expert evidence had been submitted by the objecting syndicate as to the manner in which a receivership would be conducted and its likely outcome for the syndicate, based on detailed projections, cash flows and valuations. As Mr Doherty cites, the court held that in the absence of cross examination and in the face of such a body of evidence the court was

> *"unable to conclude that on the written record the evidence of the receiver is so implausible that it must be discounted...The court could not conclude that the companies had demonstrated that the receiver's calculations were wrong and therefore the companies had failed to satisfy the court that the proposals were not unfairly prejudicial to the secured creditors."*

63. The report of Mr Kirby is a professional opinion and critique of the Examiner's proposals. It refers to and summarises the alternative proposals submitted by KCC, being the party which engaged Mr Kirby. The KCC proposal is not proffered as a set of proposals which themselves could now be presented as statutory proposals by the Examiner without extensive further refinement,

commercial negotiation and critically an examination of whether if confirmed it would enable the Company to retain the important contracts which certain employers confirmed they will continue if the Examiner's Proposals are confirmed. Whilst helpful in testing the fairness of the Examiner's Proposals, such a critique and comparison is just that, and not evidence of a likely outturn comparable in form or substance to the evidence proffered by the objecting syndicate in the *Re McInerney* case.

64. Mr Doherty also submits that the effect of the judgment in *Re McInerney Homes Ltd* is that the approach adopted by Clarke J. *Re Tony Gray Ltd*, (26th November, 2009) is no longer to be favoured by the court. In that case, a scheme of arrangement was proposed by the Examiner whereby, unusually, the entire means of remedying the insolvency was by writing off debt and without the introduction of new capital. The court was invited to focus on the projections for the company's trade post-examinership and whether the company had a reasonable prospect of survival into the future and maintaining employment. The examiner put before the court projections which were said to be realistic but which it was said left the company in "*straightened circumstances and likely to experience financial difficulty for some time*". As Clarke J. put it, "*the figures are tight but they nonetheless show a picture of survival*."

65. In the instant case, there is a debate as to whether the projections showing a low gross profit margin and a post-examinership balance sheet leave adequate working capital for the survival of the company. The evidence of the Examiner is that the Investor selected has the resources and ability to fund cash flow requirements of the Company at least in the medium term. Whilst somewhat unsatisfactory as to the manner and late timing of its presentation, the examiner delivered an affidavit verifying that in addition to the €1,400,000 already lodged in escrow a further sum of €500,000 had been lodged by the Investor as an illustration of its willingness to honour the commitments already made by it to the Examiner to support the Company in its working capital requirements. The precise terms on which this additional €500,000 were lodged have not been detailed. However, the Examiner cites this lodgement in standing over his opinion that this Investor has demonstrated the necessary commitment to the Company.

66. In every case, the court will require the examiner to evidence the ability of the Company to survive not only in the short term immediately after exiting the examinership so that this court is not merely sanctioning a short-term formula which avoids immediate liquidation or receivership. However, as Clarke J. said in Re Tony Gray,

> *"these matters are not capable of exact assessment. It is neither necessary or appropriate to reach a definite view of the precise level of trading which the company will be able to achieve … looking at the evidence as a whole, I could not conclude that there is any necessary reason for believing that the cash flows on which the Examiner has based his views are overly optimistic. It may turn out that that is so, but it is not clearly so."*

67. I am not persuaded that the approach to such matters adopted by Clarke J. in *Re Tony Gray* is no longer appropriate. When the evidence is assessed against the test of a *"reasonable prospect of survival of a going concern*", applied by the Supreme Court in *Re Gallium Limited* [2009] IESC 9 and numerous other cases and which does not demand certainty, I am satisfied that the evidence is sufficient to show that the Examiner has discharged the onus of proof.

Other Objections

68. I turn to the objections made to the proposals in their terms. Before doing so, it should be noted that most of the time at the hearing focussed on the fairness of the Proposals having regard to the possibility of an alternative scheme providing a better outcome for creditors. The submissions concerning the treatment of different classes of creditors within the Proposals were therefore limited.

69. KCC submit that it is unfair that the Company, under its new ownership following examinership, should have the benefit of a 'windfall' derived from the proceeds of the Helsingor claim. It is argued that a fair and equitable treatment for all creditors would be for the potential proceeds of this claim to be ring-fenced for a potential second dividend and if necessary in part for a second payment to the secured creditor.

70. Counsel on behalf of Everyday Finance made it clear that the floating charge confers on it a priority over the proceeds of this claim and that it would oppose any scheme or modification containing the 'ring-fencing' provision. The illustrative statement of estimated outcome contrasting going concern and liquidation also show that the deficit as regards the floating charge is such that proceeds of the claim would flow to Everyday Finance before providing any dividend to unsecured creditors. There is also likely to be a connection between the outcome of this claim and the final amounts which the Investor may need to advance to the Company by way of working capital. In so far as the Investor is assuming risk, the existence of this claim will have informed its due diligence. This issue is closely connected to the question of the treatment of the secured creditor discussed below and for reasons as described there I do not find the Proposals to be unfairly prejudicial to any parties by reason of the omission of a 'ring-fencing' clause.

71. It is argued that the payment of a dividend of 0.5% to contingent creditors as distinct from a dividend of 3% for unsecured including agreed unsecured creditors is arbitrary. It is ironic that this ground of objection is advanced by unsecured creditors who will receive 3% under the scheme. The Examiner states that the distinction is based on the fact that the majority of unsecured creditors are sub-contractors, suppliers and others who make up the essential supply chain of the company, whereas the claimants who are treated as contingent are those who have threatened claims for damages or other contract claims.

72. At first reading, this objection has its attractions, and the Examiner himself acknowledges that a dividend of 3% is disappointing albeit better than creditors would obtain on a winding up of the Company. Therefore, it is questionable whether the payment of such a dividend would be sufficient to persuade all those in the supply chain to continue to support the Company. It is also relevant that the potential quantum of contingent claims is unknown, and not even estimated. However, the distinction made in the Proposals recognises the different legal character of the claims made and is not uncommon in such schemes.

73. The objectors submit that the preservation of certain rights of set off in favour of the so-called "Contract Creditors" namely Kildare County Council and Wicklow County Council is unfair when not made available to other creditors. It is clear from the evidence and submissions of those parties that the continuance of the contracts with Kildare County Council and Wicklow County Council is central to the survival of the Company as a going concern. The court has been informed that the receipts from these contracts, including retention monies already due, form part of the cash-flow projections for at least the next twelve months. This court is satisfied that the establishment of this class and their treatment in relation to the provision concerning potential set-offs, having regard to the special position of the members of that class, constitutes fair treatment and does not render the proposals unfairly prejudicial to other creditors.

74. The objectors say that the secured creditor is receiving under these Proposals more than it might receive on a winding up. If that were correct it would be an unusual feature of the Proposals. Everyday submits that under the Proposals it is required to relinquish any potential further direct interest in the proceeds of the Helsingor claim. It submits that if it were to appoint a receiver it would be in full control of the prosecution of that claim and therefore, if anything, the failure to dedicate the proceeds of that claim to it is

potentially unfair to it. Another unknown when assessing the treatment of Everyday is the value of the premises in Naas, Co. Kildare, although estimates have been quoted, over which Everyday hold a fixed charge.

75. The court has been spared a potentially contentious hearing regarding the fairness of the Proposals to the secured creditor. In so far as there is uncertainty as to whether it could secure a more favourable outcome by a receivership or on a winding up, this could only be resolved by another hearing involving, among many other issues, evidence and debate as to the value of the Naas property and speculation as to the result of the Helsingor claim. In the face of such uncertainty, the Examiner's Proposals represent his approach to balancing competing interests and it seems to the Court that the payment to Everyday of an amount certain is not unfairly prejudicial to the unsecured creditors.

Sean Smyth Construction

76. Counsel for Sean Smyth Construction Co. made a number of submissions largely in support of those made by counsel on behalf of KCC. He made the additional submission that the true objective of this examinership was to protect the directors of the Company from being pursued by creditors for fraudulent and/or reckless trading claims. He submitted that this was not the purpose of the Act and were it not for the examinership his client would pursue such claims against the directors.

77. The Company has been under protection since 20 September 2015 and this was the first time any party made such an observation. No evidence was proffered in support, either in the affidavit of Mr Smyth or otherwise.

78. There may be cases in which an objector could persuade a court, either at the hearing of the petition, or at a hearing to confirm proposals or by an application during the process, that the examinership is inappropriate for such reasons and if a court was satisfied that such issues required further investigation it would make appropriate orders, and potentially exercise its discretion to refuse confirmation of proposals. The Act contains a number of provisions which apply where there is evidence of irregularities, including at Section 533 the requirement to hold a hearing to consider such evidence and if appropriate, to make certain orders. Although s. 518 provides that the court may decline to hear a petition if it appears that there has been material non-disclosure or an absence of good faith, it is well-established that the requirement of disclosure and good faith is a continuing obligation and accordingly it would be a relevant consideration to a s.541 hearing. In the absence of evidence, this is not such a case.

Conclusion

79. Whilst the objectors represent a material portion of the total value of the unsecured debt, there are in total over 340 unsecured creditors, including the objectors, who will if the Proposals are confirmed receive a dividend, however small, which would not otherwise be available to them on a liquidation.

80. The Examiner says that if the Proposals are not confirmed he will recommend cessation of court protection. This would likely have the consequence of a winding up of the Company or a receivership or both. The objectors have urged the court to refuse to confirm the Proposals and to extend the court protection for a period of time to enable proposals offering a better outcome to be formulated by the Examiner. Whilst the Examiner did not go so far as to say he would resign if the Court refuses to confirm the Proposals, the objectors say that if necessary the matter should be adjourned to enable them to nominate an alternative Examiner. This can only mean an examiner who would formulate proposals based on the KCC Proposals or something better in their view. The hearing of this application concluded on Day 53 and therefore they say that there is sufficient time within the statutory framework to enable this to be done.

81. The Court has heard submissions as to urgency from both the Examiner and from the critical clients of the Company. The Court has also been informed that as far as the clients are concerned, their confirmation of agreement to withdraw notices of termination is conditioned on confirmation by the Court of the Proposals. There has been no indication that if confirmation is refused and, unusually, court protection extended for the purpose urged by the objectors, the Company will still have viable contracts live with these critical clients by the time a new examiner would have been appointed, negotiated with a different investor, formulated new proposals, convened and held new statutory meetings and the court would have held a second s. 541 hearing. On the contrary, the evidence is that the continuance of the viable undertaking would be at high risk, a risk which the court cannot ignore. Nor can it be assumed that a different formulation of proposals would not meet objection from different interested parties or would be found by this court after another contested hearing to meet the tests for confirmation under s. 541.

82. Having regard to these considerations and the findings recited earlier in this judgment I have concluded:

> (1) That the concerns expressed by the objectors as to the conduct of the investment process by the Examiner, advanced principally by a creditor which is also a disappointed bidder, do not evidence a failure by the Examiner to perform the duty conferred to him by the Act and in particular do not amount to a deviation from the proper exercise of his commercial judgment in the selection of an investor.
>
> (2) That the circumstances do not justify extending court protection for the purpose of appointing a different examiner to formulate new proposals, whether based on the KCC Proposal or otherwise.
>
> (3) That on the state of the evidence before the Court the Examiner has demonstrated that the Company has a reasonable prospect of survival as a going concern if the Proposals are confirmed.
>
> (4) That the Examiner has discharged the onus of proving that the Proposals are fair and equitable to the classes of creditors which did not accept the Proposals and are not unfairly prejudicial to the interests of the objectors.

83. I have therefore made the order confirming the Proposals in the form presented to the Court on 9th of November, 2018.