Neutral Citation Number: [2011] IEHC 63

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

EX-TEMPORE JUDGMENT of Mr. Justice Clarke delivered on the 21st February, 2011

1. The purpose of this ruling is to deal with an issue which arose earlier this afternoon in circumstances where, having delivered the latest judgment in this examinership process, the matter was put back to today to determine what orders should be made. This process has been the subject of a sufficient number of judgments already that it is unnecessary to set out the facts again, save to note a brief chronology of recent events.

2. On the 10th of January of this year, I delivered judgment after what I have come to describe as the confirmation hearing. In the course of that judgment (*In Re McInerney Homes and the Companies Acts* [2011] IEHC 4), I set out the reasons why I had come to the view that the Banking Syndicate were unfairly prejudiced by the scheme of arrangement put forward on behalf of the examiner. On that basis I indicated my intention to refuse to confirm that scheme. The matter was put back until the 14th of January to enable the parties to consider the judgment and deal with any questions that might arise as to the orders to be made, including, if appropriate, questions concerning the possibility of an appeal.

3. On the 14th of January, counsel on behalf of McInerney indicated that McInerney wished to apply to revisit the confirmation judgment. I indicated on that day that I would allow McInerney to put forward argument in favour of adopting such a course of action. Affidavit evidence was filed and a further hearing conducted, as a result of which I delivered a judgment (*In Re McInerney Homes and the Companies Acts* (Unreported, High Court, Clarke J., 21st January, 2011)) setting out the reasons why, at the level of principle, I was prepared to allow the matter to be revisited.

4. The parties then filed significant additional evidence, a further hearing occurred and judgment was delivered last Thursday (*In Re McInerney Homes and the Companies Acts* (Unreported, High Court, Clarke J., 17th February, 2011)). This later judgment differed somewhat from the original confirmation judgment in the sense that I indicated that I had come to the view that, in respect of those two members of the Banking Syndicate - that's to say Bank of Ireland and Anglo Irish - who are participating institutions under the NAMA Act, I was no longer satisfied that those banks would suffer unfair prejudice. However, I indicated that it remained the case that I was satisfied that the non-participating institution member of the Banking Syndicate, that is KBC Bank, was unfairly prejudiced. Thus, the overall result remained the same, being that the scheme of arrangement proposed on behalf of the examiner was not to be confirmed.

5. The matter was put in again to today for the purposes of considering what orders needed to be made and any other matters arising. It would appear that since last Thursday, a new offer has been made by the potential investor vis Oaktree, or an Oaktree vehicle, to the examiner, under which offer Oaktree proposes to pay a significant additional sum to KBC Bank.

6. I should make clear at the outset that, in my view, it was entirely proper for the examiner to bring that offer before the court. It is difficult to see how the examiner could have done anything else when a significant new offer was put on the table as it were. Therefore, I want to be clear that nothing which I say can in any way be interpreted as being critical of the actions taken by the examiner. It would appear that the terms of the new offer provide that extra money (in excess of €6m) is to be given as a cash sum to KBC so as to bring up the amount that would in total be paid to KBC to a sum which would give KBC the same total payment as KBC would obtain if €50m were to be made available to the Banking Syndicate as a whole. That €50m sum, it will be recalled, was the approximate present value placed by the Banking Syndicate on the long term receivership model which has been the subject of extensive debate and analysis in the course of this process. On that basis, it is said that the court might wish to consider that KBC could no longer be prejudiced because it is now proposed that KBC will get, under the revised scheme of arrangement, a sum equivalent to, in total, the appropriate percentage of the €50m sum which was estimated to be its likely recovery under the alternative of the long term receivership model.

7. Against that background, it is necessary to consider whether it is permissible, and if so in what circumstances, to yet again revisit the question of confirmation on the facts of this case.

8. First I should note that the issue now raised is not exactly the same as that with which I dealt on the 21st of January although there are, in my view, significant analogies. On that occasion, I was faced with issues arising from the fact that it was suggested on behalf of McInerney and, indeed, supported to an extent by the examiner, that there were new facts (vis the likely involvement of NAMA) which had become known since the confirmation judgment, which facts had the potential to have a significant effect on

whether that judgment was correct. The issue with which I am now faced is not so much a question arising out of a suggestion that there is new evidence on the basis of which it might be argued that the earlier judgment was wrong. Rather it is suggested that a new circumstance has come into being (vis the improved offer from Oaktree) which, it is said, the court ought now consider and ought take into account in deciding whether to confirm the scheme.

9. In that regard, I think it is appropriate to return to some of the comments which I made in the judgment of the 21st of January on the issue of principle as to the court's proper approach in circumstances such as this.

10. At paragraph 3.9 and the succeeding paragraphs of that judgment, I said the following:-

> "Before going on to the specific facts to this case, there are a number of other issues relating to jurisdiction which I should touch on. First it is important to note, as was pointed out by the Supreme Court in *In Re Vantive Holdings Ltd* [2009] IESC 69, that an application for the appointment of an examiner is not strictly speaking the type of case involving the rights and obligations of individual parties to which the *res judicata* rule applies. Thus, at the level of principle, a decision to refuse to appoint an examiner does not, of itself, necessarily preclude a subsequent petition. However, it is equally clear that, at least by analogy with the rule in *Henderson v. Henderson* (1843) 3 Hare 100, it would require strong reasons for the court to permit a second petition to be brought, certainly in circumstances where the revised basis for any second petition could have been put forward as a basis for the appointment of an examiner on the first petition.
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> The position is not, of course, exactly the same in relation to a decision by this Court to confirm or not confirm a scheme of arrangement. A hearing to confirm a scheme of arrangement takes place at the end of the examinership process. If a final order refusing to confirm such a scheme had been made, then there could be no question of a new application to approve the same scheme of arrangement arising for that examinership would have ended. At the same time it seems to me that the rationale behind the Supreme Court's decision in *Vantive* has significant application to the issue which I have to consider. In his judgment in this Court in *Vantive* [2009] IEHC 408, Cooke J. had taken the view that the statutory intent under the 1990 Act which favoured the preservation of jobs and enterprises carried greater weight than the need to bring finality to proceedings in the circumstances of the case. The Supreme Court took a different view. It certainly seems clear that a significant factor which influenced the Supreme Court in coming to that view was the fact that, in *Vantive*, much of the additional materials sought to be relied on in the second petition could have been included in the evidence put forward in the first petition in circumstances where the Supreme Court was not persuaded that any acceptable explanation for those materials not having been put before the court in the course of the first petition had been advanced.
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> It seems to me that a similar logic applies in a case, such as this, where it is sought to ask the court to revisit a reasoned judgment already delivered, between the time of delivery of that judgment and the formalisation of the court's order. It would, again, be a recipe for procedural chaos if a party were entitled, at such a stage, to seek to introduce new evidence or arguments simply because the relevant matters have not been advanced during the hearing. If it is an abuse of process in an examinership, by analogy with *Henderson v. Henderson*, not to put forward one's entire case on a petition and then seek to litigate a point not made on a second petition, then that principle applies whether consideration is being given to allowing the new point to be advanced after the process has finally finished to the extent that a final order has been made and perfected or, if possibly with only slightly less force, where the process has, in substance, finished by the parties completing their evidence and argument and the court reaching a reasoned conclusion."

11. It seems to me that those principles and comments are equally applicable on this application. In that regard, it is appropriate to note what was said by the Supreme Court in *Vantive*. In the judgment of the Chief Justice in *Vantive*, the following was commented on, the Chief Justice noted that:-

> "The appointment of an examiner on foot of a petition has laudable objectives which in general terms is designed to facilitate the survival of a company as a going concern notwithstanding its insolvency if it demonstrates that it has a reasonable prospect of survival. Once the petition is lodged the company is entitled to the protection of the Court which may be to the serious detriment of its creditors and that protection continues while the matter is pending before the Court. It comes to an end once the application is refused (subject to any stay which keeps alive the petition pending an appeal) or, if successful continue for up to 70 to 100 days. The protection of the Court could be artificially obtained if it were possible for a petitioner, after its first petition had failed, to proceed (even though such a step was not envisaged at the time of the first petition) with one or more successive petitions on the basis of additional evidence, notwithstanding it had been available and deliberately withheld, at the first petition, and thus extend further the protection of the Court from its creditors pending at least a hearing which resulted in its refusal. Again, to permit a party to make the same application on foot of withheld evidence by way of petition, without excusing exceptional circumstances, would undermine the principle of finality which the Courts have always considered essential to the integrity of the administration of justice. As Hamilton C.J., observed in *In Re Greendale Developments Limited (In Liquidation) (No. 3)* [2002] I.R. 514 "… the finality of proceedings both at the level of trial and possibly more particularly at the level of ultimate appeal is of fundamental importance to the certainty of the administration of law, and should not lightly be breached."

12. In a like vein, Denham J. at para. 42 of her judgment in the same case, said the following:-

> "The interests of justice require that there be finality of litigation. If a petitioner were entitled to make a second or further petition on the general 'overriding consideration' of legislative policy, as referred to previously, it would commence an era where multiple petitions would become the norm. A petitioner could then regard the primary petition as a stalking ground for advice on proofs from the Court. Clearly this was not envisaged by the legislation, nor is it consistent with fundamental principles of law."

13. It is clear, therefore, from the judgments of the Supreme Court in *Vantive* that finality is a matter of fundamental importance. It is not just simply a matter of procedure. It is, as was pointed out by Denham J., a fundamental principle of law. I would have no hesitation in agreeing with counsel for McInerney that, if there were a simple procedural problem which had given rise to difficulty in this case, then such a matter might very well be overridden by the considerations of legislative policy which underline the 1990 Act. However, what is at issue here is not a simple procedural problem, it is a question of whether there is a breach of a fundamental principle affecting the finality of the court's process.

14. It is first necessary to consider the status of Oaktree. By analogy with the situation that arises on a petition to appoint an examiner, it seems to me that a party who is engaged in a confirmation process, such as that with which I am concerned, is subject

to an obligation, analogous to that identified by the Supreme Court in *Vantive*, to put forward its best case at the confirmation hearing or accept the consequences. In that context, I should note that it also seems to me that an entity such as Oakview (or an Oakview nominee) who is potentially a beneficiary from the approval of a scheme and is clearly an entity that is integrally involved with the scheme is, in that sense, a party, even though it may not be formally a party for the purposes of the proceedings. There are a number of reasons for this. First, if the scheme is approved, Oaktree gets to own McInerney, and will become the only shareholder in McInerney. Therefore, to the extent that the approval of the scheme can result in a substantial enterprise becoming owned by Oaktree, it seems to me that it is an interested party in the general sense of that term, even though, as I have indicated Oaktree may not, strictly speaking, be a party entitled to be heard.

15. Second, it is clear that, without an investor such as Oaktree, there would be no scheme of arrangement, so to attempt to disentangle the scheme from Oaktree's investment, certainly in the circumstances of this case, is futile. It, therefore, seems to me that, in a case such as this, it is important to consider the actions of potential investors in the same way as it is important to consider the interests and actions of creditors, the company and any other relevant parties. It is also, in that context, important to recall another passage from the judgment of the Chief Justice in *Vantive* where he made clear that there were a large range of parties who had, as it were, a legitimate interest in the outcome of an examinership process. Those interested are not confined, indeed, to the parties who are formally represented, but also the wider community, including contractors and the like who might hope to do business with the company if it continues. However, it seems to me that where, in reality, as a matter of commercial substance, the real issue that has been contentious in this examinership from the beginning is one where the contesting parties are in truth Oaktree and the Banking Syndicate, it would be naive to consider Oaktree as anything other than a centrally interested party. That is not to minimise the role of the examiner. I have no doubt but that the examiner did his utmost to negotiate the best deal which he could. This is an issue to which I will return. In substance, however, this case was always about whether Oaktree would put up enough money to either satisfy the Banking Syndicate or persuade the Court that it should impose whatever was offered on the Banking Syndicate. While there were some other questions, such as the amounts to be made available to unsecured creditors and the like, at the level of significant financial substance, that was the true issue. On that basis Oaktree is a significantly interested party in this process.

16. I now need to turn briefly to the position that pertains at a confirmation hearing and the undoubted entitlement of the Court to confirm a scheme with modifications. Leaving aside the precise wording of the section for the moment, although it is a question to which I will return, it seems to me that, at the level of principle, for all the reasons of finality which the Supreme Court emphasised in *Vantive*, it is important that any party put forward the entire case which it wishes to make or have made on its behalf at a confirmation hearing. If, therefore, there is already before the court an issue concerning an aspect of a proposed scheme which might - perhaps depending on the court's view - require modification, then it is incumbent on any party who might have anything to offer on that question to at least indicate a preparedness, in the event that the court had concerns, to deal with those concerns. Otherwise, the process would be a recipe for what Denham J. identified in *Vantive* as being a stalking ground for an advice on proofs from the court. There is nothing wrong with a party indicating, for example, that it does not consider that a scheme is unfairly prejudicial, but also indicating that, if the court were persuaded otherwise, the relevant party might be prepared to take specified action to remedy the problem.

17. It needs to be noted that that is something that could have been intimated by Oaktree in this case if it had wanted to. It is, in my view, important to emphasise that the question of the possible separate prejudice to KBC was an issue which was clearly fairly and squarely on the table at the recent hearing. It is important to record that Mr Fanning, counsel for the Banking Syndicate, having made his case on behalf of the Banking Syndicate generally, made further points which were stated to be issues raised solely for the benefit of KBC. The issues that were raised under that heading were substantially the issues which persuaded me to remain of the view that the scheme was unfairly prejudicial to KBC. Therefore, no one could have been under any illusions about the fact that there was a possibility that a conclusion might be reached at the end of the process to the effect that Anglo Irish and Bank of Ireland were not prejudiced but KBC were, for that was a fall-back argument made expressly on behalf of KBC, and, therefore, all parties must have been aware that it was possible that that argument might succeed.

18. It is, of course, the case that argument was addressed by McInerney and by the examiner, contrary to that proposition, and their position was that, in the circumstances, KBC was not unfairly prejudiced. Those parties were, of course, entitled to argue that point, but that does not get away from the fact that it was an issue. It was an issue in the case. If anyone had anything they wanted to offer on that issue, such as the possibility that Oaktree might be prepared to deal with KBC's concerns in the event that I was persuaded that that was all that stood between the scheme and its approval, then the hearing was the time to make those points.

19. It is not, of course, an abuse of process for any party not to put forward its best offer. Oaktree was under no obligation to make any offer in this process. Having made an offer, Oaktree was not under any obligation to make its best offer. Oaktree was, in my view, however, under an obligation to put up its best offer if it wanted that to be the final say on the matter. It is not, in my view, open to a party to put up an offer, see how it flies, find out whether the court thinks it is good enough, and then, when the court has said that it is not good enough, come up with a further offer. The court is not part of a negotiating process. The court's job is to determine legal rights and obligations. The court's job in this case was to determine whether the scheme as proposed was unfairly prejudicial to, amongst others, KBC. If Oaktree had anything to offer about how that problem for KBC might be met, there was nothing to prevent Oaktree from putting that offer forward in advance of the hearing even on a contingent basis. Perhaps it might have been acceptable even after the hearing and before judgment. The situation might have been very different if someone had come in last week, before I had given judgment, and said "On reflection, we have thought about the KBC position and we might be prepared to accommodate KBC in the event that you are persuaded that KBC are still prejudiced". But that was not done. The abuse is not in failing to put forward your best offer; the abuse is in attempting to increase what was said to be your best offer at a time after the case has been decided. It should be recalled that, from the beginning, the examiner made clear that the previous offer was, in his view and having had extensive discussions with Oaktree, the best offer that could or was likely to be obtained.

20. In that regard, it seems to me there is, again, a close analogy with *Vantive*. It was accepted in both this Court and in the Supreme Court in *Vantive* that Mr Carroll was not motivated by any *male fides* in not putting forward the relevant appropriate evidence on the first Petition. The presentation of the second Petition was, nonetheless, found to be an abuse. It was an abuse because, having run the case on one basis, he was then seeking to run it on another basis. It seems to me that having regard to the fact that this is in substance an issue between Oaktree and the Banking Syndicate, that Oaktree sought to have the issue run on one basis, and that, having lost on that basis, Oaktree now wants to run it again on a different basis; that course of action is an abuse of process. Of course, none of the parties who are actually represented were guilty of an abuse. However, the fundamental principle of finality, it seems to me, is every bit as much breached when a party that as intimately involved in the process as Oaktree is in this process, is guilty of abuse. In addition, the wording of the section contemplates a confirmation hearing not a series of hearings where parties fine tune their positions in the light of the court's rulings.

21. For those reasons, I am satisfied that Oaktree was guilty of abuse. I am satisfied that it would be fundamentally inconsistent with

basic principles of law to allow the matter to be now reopened. If this was a matter that could not have been anticipated; if, for example, the court of its own motion came up with a problem that was not raised in the hearing, then the situation might be different. But this was an issue which was clearly open to being addressed, it was not addressed, and it is now too late to address it. In those circumstances, I am not prepared to have regard to the new offer which is on the table. It is too late. If it was to be put on the table, it needed to be put on the table before judgment. In those circumstances, it seems to me that it is appropriate simply to make whatever orders, having heard counsel, I consider appropriate in the light of the judgment delivered last Thursday.