Neutral Citation Number: [2011] IEHC 25

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 21st January, 2011

1. Introduction

1.1 I am now faced with a novel and difficult question in these examinership proceedings. For the reasons set out in a judgment delivered by me on the 10th of this month I decided that it was not appropriate to confirm the scheme of arrangement proposed by the examiner. Parties and terms are used in this judgment in the same way in which they were in the judgment to which I have referred ("the Principal Judgment").

1.2 As is clear from the Principal Judgment, I came to the conclusion that the scheme of arrangement as proposed was unfairly prejudicial to the Banking Syndicate who had opposed the confirmation of that scheme. My basis for coming to that view was that the Banking Syndicate had made out a credible case for the proposition that a form of long term receivership, which the Banking Syndicate proposed, would have a realistic prospect of securing an income stream over 10 or 11 years in the sum of approximately €75,000,000. I was satisfied that a credible basis had also been made out for the proposition that that income stream had a present value of the order of €50,000,000 or, perhaps, a little less. That assessment, when compared with the €25,000,000 on offer under the scheme of arrangement, led me to come to the view that the Banking Syndicate would be unfairly prejudiced by a confirmation of the scheme as proposed.

1.3 McInerney now invites me to revisit that judgment in circumstances which it will be necessary to explore in some detail later in the course of this judgment. However, at the core of the case which McInerney now makes is an assertion that it is highly probable that the interest of two members of the Banking Syndicate, that is Bank of Ireland ("B of I") and Anglo Irish Bank ("Anglo Irish"), in the loans which the Banking Syndicate has advanced to McInerney and associated companies, will be transferred to the National Asset Management Agency ("NAMA"). On that basis it is said that it is now clear (or at least is highly likely) that the long term receivership model put forward by the Banking Syndicate will not, in fact, be put in place. In those circumstances it is argued that the court should revisit the Principal Judgment. It is also of some importance to note that it is said on behalf of McInerney that the materials and evidence on which it bases its contention only became known to it in the days immediately after the Principal Judgment was delivered such that it was, it is said, unable to make the argument which it now seeks to put forward during the hearing which led to the Principal Judgment.

1.4 It is first appropriate to set out briefly the procedural history since the Principal Judgment was delivered.

2. Procedural History

2.1 The Principal Judgment was delivered on the 10th January. Counsel on all sides sought a not unreasonable opportunity to read the written judgment, to consider its contents, and to give advice and take instructions on any matters which might arise.

2.2 While it was clear that the principal order which the court would make was an order refusing to confirm the scheme of arrangement there were, of course, other matters that might need to be dealt with, not least the possibility that McInerney might seek to appeal and might, in that context, seek some continuation of the protection of the court to enable it to pursue such an appeal. Against that background I indicated that I would not make any formal order on the day in question, would adjourn the matter until the following Friday (i.e. the 14th January), would make a formal order refusing to confirm the scheme of arrangement on that day and would hear counsel as to any further orders or measures which it might be argued ought be put in place.

2.3 However, when the matter came back before the court on the 14th, counsel for McInerney intimated that it was the intention of McInerney to seek to invite me to revisit the determination made as set out in the Principal Judgment. A grounding affidavit to that end had been sworn and was before the court. Having heard counsel for both McInerney, the examiner (who maintained a neutral position) and the Banking Syndicate, I decided that the best course of action would be to give the Banking Syndicate an opportunity to put in any replying affidavit which it would wish and to put the matter in for hearing early on the following Monday. By that time the Banking Syndicate had filed a replying affidavit which in turn had been replied to on behalf of McInerney. The hearing then proceeded.

2.4 In addition to questions which might be said to go to the merits of the application, there was also some discussion at the hearing as to the nature of the jurisdiction of the court to revisit a judgment in circumstances such as were said to exist on McInerney's case. I did not understand counsel for the Banking Syndicate to disagree that there was such a jurisdiction at the level of principle, although there may have been some "difference of emphasis" between counsel as to the precise parameters within which such a

jurisdiction should properly be exercised. In those circumstances it is appropriate that I turn first to the question of the court's jurisdiction.

3. The Court's Jurisdiction

3.1 It is important to commence a review of the court's jurisdiction by noting that the timing of an application which is designed to seek to go behind a ruling of the court is a matter of some considerable importance. Where proceedings have come to their natural conclusion, whether in a court of first instance or, in the event of an appeal, as a result of a determination of the court which has the final appellate role in the circumstances of the case, then it can, at least in litigation involving the rights and obligations of parties, be said that the ruling of the courts is a final ruling which can only be displaced in very limited circumstances, such as where it can be demonstrated that the judgment of the court had been procured by fraud or the like. In such cases the fact that a party may come across new evidence or wish to advance a new argument or, indeed, both, is not, in itself, a basis for reopening the case unless it is appropriate to infer from the relevant new evidence that there was fraud or other unconscionable conduct on the part of its opponent. In those circumstances the necessity to bring finality to proceedings outweighs any possible injustice that might be caused in an individual case. It is important to note that, if it were possible to reopen proceedings on a significantly less stringent test, then the finality of every case would be called into question with a significant collective injustice to all parties to all litigation. It is that consideration that outweighs any possible injustice on the facts of an individual case.

3.2 However, the situation is not quite the same when the proceedings are still alive in the sense that a valid appeal remains before an appellate court and has not yet been finally determined. In those circumstances the courts have recognised a jurisdiction to admit additional or new evidence subject to stringent conditions which have been the subject of definitive judicial ruling. See, for example, the cases of *Lynagh v Mackin* [1970] I.R. 180 and *Murphy v. Minister for Defence* [1991] 2 I.R. 161. The appellate court also has a discretion, to be exercised sparingly, to allow new arguments to be raised.

3.3 In that context it must be remembered that, at the stage when an application to admit such new evidence or make new argument is made, the proceedings are not over in the full sense of the word. There is an appeal pending before an appellate court of competent jurisdiction and there remains the real possibility that that appellate court may take a different view on any material issue than the view taken by the court of first instance. While giving a generous jurisdiction to the courts to allow new evidence or argument at such a stage would be a recipe for litigation chaos, it nonetheless remains the case that, provided the relevant stringent tests are met, the balance of justice is found to favour allowing the additional evidence or argument to be heard principally, it would appear, because the weight to be attached to the finality of proceedings is somewhat less when there is still a live appeal extant in relation to those proceedings than would be the case if the appeal had been finally determined.

3.4 Therefore, so far as new evidence, materials or arguments are concerned it does not seem that the emergence of same offers any basis for reopening a case which had finally concluded (unless, as I have indicated, the new materials can justify an inference of litigation fraud or serious misconduct), but can, in certain circumstances, justify the admission of new evidence or permitting new argument, with whatever consequences may flow from that, where the relevant new evidence becomes available at the appellate stage.

3.5 However, here I am concerned with an application made even earlier in the process. The proceedings have not come to a final end. Neither are they the subject of an appeal because the final order of this Court has not yet been made up. The application is made after the judge has delivered a reasoned ruling but before the formal court order has been made. One of the issues which it will be necessary to address is as to whether the circumstances which would justify the court in revisiting its own judgment prior to the making up of a final order (on the basis of the availability of new evidence or argument) are any wider in those circumstances when compared with an application to an Appeal Court to admit new evidence or argument.

3.6 In any event, the jurisdiction to revisit a judge's determination before final orders have been made was the subject of a recent comprehensive review by the Court of Appeal for England and Wales in *Paulin v. Paulin & Anor* [2010] 1 W.L.R. 1057. I propose quoting a lengthy passage from the judgment of Wilson L.J. in that case because it seems to me to set out a detailed and comprehensive account of the history of the jurisprudence in this area in England and Wales and seems to me also to be persuasive as to the position in this jurisdiction. Wilson L.J., at para. 30, said the following:-

> "Study of the many authorities cited to us on this first issue leads me to attempt to summarise the law in relation to it as follows:
>
> > (a) A judge's reversal of his decision is to be distinguished from his amplification of the reasons which he has given for it. Where the reasons for his decision are allegedly inadequate, a party should generally invite him to consider whether to amplify them before complaining about their inadequacy in this court and he has an untrammelled jurisdiction to amplify them at any time prior to the sealing of his order: *Re T (Contact: Alienation: Permission to Appeal)* [2002] EWCA Civ 1736, [2003] 1 FLR 531, per Arden LJ at [41], being a case in which the inadequate reasons were my own.
> >
> > (b) A judge has jurisdiction to reverse his decision at any time until his order is perfected but not afterwards: *In Re Suffield and Watts* (1888) 20 QBD 693. Nowadays an order is perfected by being sealed pursuant to CPR 40.2(2)(b).
> >
> > (c) Until 1972 the courts made no attempt to narrow the circumstances in which it would be proper for a judge to exercise his jurisdiction to reverse his decision prior to the sealing of the order. Thus *In re Harrison's Share under a Settlement* [1955] Ch 260 this court rejected, at 275, the submission that the jurisdiction should be exercised only in cases of manifest error or omission. "Few judgments are reserved," it said interestingly at 276, "and it would be unfortunate if once the words of a judgment were pronounced there were no locus poenitentiae". Indeed it now seems that a written reserved judgment may be less open to a judge's reversal than an *ex tempore* judgment: *Stewart v. Engel* [2000] 1 WLR 2268, per Sir Christopher Slade at 2276A; and that, if a written judgment has been disseminated only as a draft, it may be more open to reversal by the judge than if it has been handed down and thus finally delivered: *Robinson v. Fernsby* [2004] WTLR 257, paras. 98 and 113, per May LJ and Mance LJ respectively.
> >
> > (d) In 1972, however, came the decision of this court in *In re Barrell Enterprises* [1973] 1 WLR 19. The jurisdiction to reverse is now often described as "the *Barrell* jurisdiction": see for example *Stewart v. Engel*, cited above, per Sir Christopher Slade at 2274A. The decision of this court in *Barrell* is generally regarded as having narrowed the circumstances in which it is proper for a court to reverse its decision prior to the sealing of the order; and nothing turns on the fact that Miss Barrell's application was made to this court for reversal of its own decision to dismiss her appeal, which, for an unexplained reason, had for six months not been enshrined in a sealed order. This court said,

at 23H – 24B:

> "When oral judgments have been given, either in a court of first instance or on appeal, the successful party ought save in most exceptional circumstances to be able to assume that the judgment is a valid and effective one. The cases to which we were referred in which judgments in civil courts have been varied after delivery (apart from the correction of slips) were all cases in which some most unusual element was present."

It seems to me that the court's reference to "oral judgments" was in contradistinction not to written, reserved judgments but to written, sealed orders.

> (e) The limitation apparently placed by this court in *Barrell* upon the proper exercise of the jurisdiction to reverse, namely by its adoption of the formula that the circumstances should be exceptional, was not universally welcomed. For example in *Pittalis v. Sherefettin* [1986] 1 QB 868 this court seemed to pay little more than lip-service to it: see the judgments of Fox LJ at 879 F-G and of Dillon LJ at 882 C-F. Indeed, in there observing that it was in itself exceptional for a judge to be satisfied that the order which he had previously pronounced was wrong, Dillon LJ in effect emasculated the limitation into insignificance. But even after the bulk of the Civil Procedure Rules had come into effect in April 1999, the formula adopted in *Barrell* was unequivocally reaffirmed both by the majority decision of this court in *Stewart v. Engel*, cited above, per Sir Christopher Slade at 2275H – 2276D and per Roch LJ at 2292E, and, *obiter* yet significantly, by the five-judge constitution of this court in *Taylor v. Lawrence* [2002] EWCA Civ 90, [2003] QB 528, in which, at [13], in quoting from *Barrell*, the court chose to italicise the words "save in most exceptional circumstances".
>
> (f) So the formula in *Barrell* governs. But how far does it help? In *Compagnie Noga D'Importation et D'Exportation SA v. Abacha* [2001] 3 All ER 513 Rix LJ, still sitting as a judge of the Commercial Court, observed, at [42 – 43], that it was not a statutory definition and should not be turned into a straitjacket at the expense of the interests of justice and that a formula of "strong reasons" was an acceptable alternative to that of "exceptional circumstances". In *Robinson v. Fernsby*, cited above, May LJ observed, at [94], that the formula of "exceptional circumstances" was "a relatively uninformative label" and, at [96], that he preferred the alternative which Rix LJ had suggested.
>
> (g) It is therefore instructive to notice examples of the application to particular facts of the jurisdiction to reverse a decision prior to the sealing of the order. An early example is *Miller's Case* (1876) 3 Ch. D 166: the court's attention had not been drawn to one of a company's articles of association, which compelled a conclusion opposite to that which had been reached. Another example is *Millensted v. Grosvenor House (Park Lane) Ltd* [1937] 1 KB 717: for the negligence of the hotel in upsetting a jug of hot water over her, the judge awarded damages of £50 to the claimant but on the following day, without further argument on that point, he informed the parties that his award had been excessive and would be only £35. A third example is *In re Harrison's Share under a Settlement,* cited above: ten days after the judge had approved proposed variations of trusts the House of Lords held in other proceedings that a judge had no jurisdiction to do so in such circumstances. A fourth example is *Dietz v. Lennig Chemicals Ltd* [1969] 1 AC 170: shortly after the date of a master's approval of a settlement of the claims of a purported widow and child it was learnt that three weeks prior to that date the widow had remarried."

3.7 It should in passing be noted that the judgment went on to consider certain issues arising from the adoption in England and Wales of the English Civil Procedure Rules. However, that analysis did not lead the Court of Appeal to take any different view and, of course, there is no equivalent of the changes introduced by the Civil Procedure Rules in this jurisdiction. I am, therefore, satisfied that the above quoted passage represents the law in this jurisdiction. I also agree that the formulation suggested by Rix L.J. in *Cie Noga D'Importation et D'Explortation SA* (as approved by May L.J. in *Robinson v. Fernsby*) is a more appropriate description of the relevant test. In those circumstances, it seems to me that, in order for the court to exercise its jurisdiction to revisit a question after the delivery of either an oral or written judgment, it is necessary that there be "strong reasons" for so doing.

3.8 It is also worthy of some note that the examples of the application of the jurisdiction cited in *Paulin* include circumstances where a material matter was not drawn to the judge's attention (see *Millers case*) and cases, such as *Millensted v. Grosvenor House*, where the judge simply changed his mind following from the delivery of a ruling but before the formal court order had been made up. It is clear that what is said to be the basis for revisiting my judgment in this case comes into the former category. It is said that there are further materials or evidence now available which ought lead either to a different decision or, at a minimum, a reopening of the case.

3.9 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.

3.10 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.

3.11 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.

3.12 Different considerations might well apply where the nature of the application to the court to revisit is based on what is said to be a simple error on the part of the judge concerned in the judgment. At its simplest a judge might, for example, deliver a reasoned written judgment which included a clear computational error relevant to the assessment of damages. Likewise, there may well have been materials before the court whose significance were not drawn to the judge's attention in the course of the hearing but which might clearly affect the proper outcome in the light of the approach of the judge to the case as disclosed in a reasoned judgment. However, where the basis for seeking that the court revisit its judgment is to be found in the proposed presentation of additional evidence or materials, then it seems to me that it would be inappropriate for the court to go down that road without applying, at least in general terms, a test similar to that which an appellate court would apply in deciding whether to admit new evidence at an appeal. In those circumstances it seems to me that the new materials must be such that same would probably have an important influence on the result of the case, even if not decisive, and be credible. In addition, such new evidence will not ordinarily be permitted to be relied on if the relevant evidence could, with reasonable diligence, have been put before the court at the trial.

3.13 Against that background it is necessary to turn to the case made on behalf of McInerney to the effect that I should revisit the Principal Judgment.

4. McInerney's Case

4.1 The factual basis which underlies McInerney's case can be simply put. Affidavit evidence was tendered on behalf of McInerney of two communications received by McInerney from B of I Group Legal Services in the days immediately following the Principal Judgment. To put those communications in context, it is necessary to give a brief outline of the process whereby assets may come to be acquired by NAMA. First, it should be recalled that both B of I and Anglo Irish are banks who are participating in the NAMA scheme. It also seems clear that the loans of those banks to McInerney (being property loans) qualify for NAMA purposes. The loans of those two banks (but not the loan of the third member of the syndicate, KBC Bank ("KBC")) are, therefore, loans which are susceptible to being acquired by NAMA.

4.2 In general terms the procedure which seems to be adopted by NAMA is that, in respect of loans which are potentially capable of being acquired, NAMA engages with the bank concerned in a form of due diligence to ascertain material facts about the loan for the purposes of enabling NAMA to make a final decision as to whether to acquire the loan in question and, if it should decide so to acquire, to place a value on the loan having regard to such matters as the value of any security and the like. In that context it would appear that there was an ongoing communication between B of I and McInerney as part of that due diligence process, in the course of which B of I sought up to date information about the status of the underlying assets on which certain McInerney loans were secured, presumably for the purposes of B of I complying with its obligations to NAMA to give NAMA relevant information as part of the due diligence process which I have described. It will be necessary to return briefly to that process somewhat later in this judgment.

4.3 In any event, one of the communications to which I have referred was an email of the 12th January from a Frances Murtagh, a solicitor in B of I Group Legal Services, to a Mr. Graham Farrell on behalf of McInerney, which was a reminder in respect of queries of the type to which I have referred which queries had been set out in a previous email of the 24th November list. The other communication is an email from a Patricia McSparran, again of B of I Group Legal Services, to a Daphne Madden on behalf of McInerney. That email was also a reminder in respect of queries which had been raised in respect of a different property in an email dated the 30th November last. However, of greater relevance to the issue which I now have to decide is the fact that that email starts with the following statement:-

> "As you are probably aware there has been a delay in furnishing the McInerney loans to NAMA. However, we understand now that the transfer will be taking place very shortly."

On the basis of those emails it is suggested that it is now clear that there is, to put it at a minimum, a very high degree of likelihood that those aspects of the McInerney loans which are due to B of I and Anglo Irish will be transferred to NAMA and, it is suggested, in that context, that the long term receivership model which formed the basis of the Banking Syndicate's case and the court's judgment, is no longer likely to proceed. On that basis it is suggested that the Principal Judgment should be revisited.

4.4 In a replying affidavit on behalf of the Banking Syndicate, a number of facts are averred to. First, attention is drawn to the ongoing due diligence passing between B of I and McInerney which appears to rest with an email of the 9th December from the bank to McInerney seeking various updates. It is true to state that part of the earlier email exchanges in that due diligence process (being an email of the 30th November, 2010), spoke of the "loan being transferred to NAMA in the next few days". That did not, of course, happen. However, it appears from Mr. Murray's affidavit that on the 1st December, 2010, NAMA confirmed by email to B of I that "a board decision on the acquisition of the McInerney's loans (is) deferred until the current High Court case runs its course". Likewise, Mr. Murray exhibited a letter written by solicitors in the context of these proceedings in which it was stated to be the view of the Banking Syndicate that "the loans will not transfer to NAMA prior to the end of the examinership". In a further replying affidavit on behalf of McInerney, Mr. Enda Cunningham indicated that McInerney had been unaware, until after the Principal Judgment, of the fact that NAMA had deferred an acquisition decision until after the proceedings had run their course. It is also asserted by Mr. Cunningham that, during the hearing which led to the Principal Judgment, it was the view of McInerney that a transfer of the McInerney loans to NAMA was not likely to occur. This belief is stated to have derived from the absence of any suggestion in the evidence, filed by the Banking Syndicate in the context of the confirmation hearing, to the potential transfer of the McInerney loans to NAMA. In argument it was also suggested that the fact that the due diligence correspondence by email, to which I have already referred, ended on the 9th December was also consistent with that view for, it is said, the Banking Syndicate's evidence for the hearing which led to the Principal Judgment was filed after that date.

4.5 As is clear form the analysis of the case law to which I have already referred, there are two principle questions which the court must consider in an application such as this. The first is as to whether what is said to be new evidence is likely to have a significant effect on the court's consideration (even though not necessarily decisive). The second is as to whether the new evidence (and, by inference, any argument which might be based upon it) could reasonably have been expected to have been made available or raised at the initial hearing. It is necessary to address both of those questions in the context of the facts which I have just outlined. I turn first to the question of the materiality and substance of the issue raised.

5. Materiality and Substance

5.1 It is correct to say, as was argued by counsel on behalf of McInerney, that the hearing which led to the Principal Judgment proceeded on the basis that it was highly probable that the Banking Syndicate would, in fact, proceed along the lines of the 10 to 11 year receivership which formed the basis of much of its expert evidence. It is also true that the conclusion as to the scheme of arrangement being unfairly prejudicial against the Banking Syndicate was based on an analysis of that model and the conclusion which I reached, which was to the effect that there was a realistic basis, on the evidence, for the Banking Syndicate's contention that its position would be significantly better under that receivership model than under the proposed scheme of arrangement. If, therefore, there was, in truth, very little likelihood of that model actually being pursued, then it seems to me that that fact would have been potentially a highly material factor in the court's consideration.

5.2 It is important to emphasise that I was not, in the Principle Judgment, dealing with certainties. I was dealing with a possible course of future events. The Banking Syndicate did not give an undertaking to follow the receivership model. There was not certainty that the model would, therefore, be followed. However, the underlying assumption behind the Principal Judgment was that there was a significant degree of likelihood that the model would, in fact, be followed. In dealing with the future course of events in any court proceedings a court can do no more than look at the possibilities and assess the likelihood of them occurring. Such decisions are not conducted on the balance of probabilities, for that test is relevant to deciding whether facts actually occurred rather than estimating the likely course of future events. In the case of the likely course of future events, the court must form any assessment which it is obliged to make by looking at the likelihood of various events occurring and, where relevant, considering all possibilities, weighted if appropriate for the chances of them actually happening and, thus, reaching an overall fair and just assessment of the likely course of such events.

5.3 It should be emphasised that the question of the loans concerned "going into NAMA" was not in itself a material matter certainly so far as KBC was concerned. Even in relation to B of I and Anglo Irish, the only consequence of a relevant loan "going into NAMA" is that NAMA becomes the lender rather than the bank from whom the loan is acquired. NAMA may have some additional statutory powers in respect of the relevant loans, which powers were analysed in the judgment of the divisional court in *Dellway v. NAMA & Ors* [2010] IEHC 364. However, in general terms the contractual position between NAMA and a borrower whose loans have been acquired by NAMA is the same as the contractual position that that borrower previously had with the bank from whom the loan in question is acquired. Whether or not the McInerney loans were likely to go into NAMA was not, therefore, in itself a highly material factor. If the receivership model was likely to proceed anyway the prejudice to KBC at least would be unchanged.

5.4 However, the consequence that the loans (or at least those aspects of them which were held by B of I and Anglo Irish) going into NAMA would have had on the likelihood of the long term receivership model actually being proceeded with would have been a significant issue. If it was reasonable to infer that there was a low degree of likelihood of that model actually being applied, then that fact, of itself, would clearly have been material to an assessment of unfair prejudice.

5.5 There would be, of course, two consequences of the loan going into NAMA. First, two of the creditors in McInerney (being B of I and Anglo Irish) would receive whatever amount was ultimately fixed as a result of the NAMA process for the loan's in question. Those banks would not enjoy any additional benefits which might derive from the long term receivership model if it were to be deployed. However, it does not seem to me that that fact, of itself, was likely to be highly material, for it would have ignored the position of KBC. Even if the loans go into NAMA, then the loans will remain loans to McInerney on the same terms as currently exist save that the lender will be NAMA and KBC, with NAMA holding the percentage of the syndicated loans cumulatively now held by B of I and Anglo Irish. There was some brief discussion at the hearing as to what the legal position in those circumstances would be. I appreciate that in the short time available counsel did the best they could and the tentative indication was that KBC might well have a veto over any method of enforcement which NAMA might wish to deploy. Given the circumstances in which that debate occurred, it would not seem to me to be safe to reach even a tentative conclusion as to what the legal position might be.

5.6 In all those circumstances it seems to me that, on the basis of the evidence currently available, there is a real possibility that a conclusion that the McInerney loans of B of I and Anglo Irish were highly likely to go into NAMA would be a fact of significant materiality in a consideration of whether the scheme is unfairly prejudicial to the Banking Syndicate. Given that the evidence which the court currently has is, for understandable reasons, highly limited, it seems to me that any safe conclusion on the consequences of the loans in question going into NAMA would require additional evidence.

5.7 The second leg of the question under this heading is, of course, whether there is any real evidence that the loans are likely to go into NAMA. It seems to me that the emails produced by McInerney, and in particular the email from Ms. McSparran, do provide such evidence. It was indicated by counsel for the Banking Syndicate, speaking from his instructions, that there were no informal contacts between the Banking Syndicate and NAMA. It also appears that NAMA's formal position is that it has not yet made up its mind. I have no reason to doubt but that that is a correct statement of the position. However, in dealing with the likely course of future events, for the reasons which I have already set out, the court is not merely concerned with formal positions but rather in making a realistic assessment of the likely course of events. It is not, in those circumstances, possible, in my view, for parties to hide behind the formal positions adopted.

5.8 In addition, I should emphasise that there may well be other evidence which might lead to a different view. However, on the basis of the evidence currently available, it seems to me that the only reasonable inference to draw is that the Banking Syndicate, at least, considers there to be a very significant probability that the loans will go into NAMA for without that being the case (or without some other explanation), it is difficult to see how Ms. McSparran's email could have been written. Indeed, given the stated position of NAMA to the divisional court in Dellway that its default position was that it would acquire all qualifying loans, it is easy to see how the Banking Syndicate would have that view. There was, doubtless, very sound reason why NAMA would not wish to become involved in the examinership process, for it became clear in the course of that process that any scheme of arrangement likely to be proposed was one which would involve taking out the loans of the Banking Syndicate. Were that to happen, then there would be no loans left for NAMA to take over. There was very significant logic, therefore, in NAMA deferring any decision until the examinership process was over. However, that does not take away from the possibility (and on the basis of the current evidence, and I emphasise current, it seems to me to be much more than a possibility) that the Banking Syndicate operated on the assumption that it was highly likely that, in the event that the examinership did not result in a confirmed scheme of arrangement, the B of I and Anglo Irish aspects of the loans in question would go into NAMA.

5.9 In all those circumstances, it seems to me that the first leg of the test is met. There is material now before the court which is credible and has the potential to be of real significance to the potential outcome of the proceedings. It is next necessary to consider why that material was not before the court in the hearing which led to the Principal Judgment and the extent to which McInerney must bear responsibility for that state of affairs.

6. Could the Material have been made Available?

6.1 The starting point for a consideration of this point has to be the fact that the possibility of a NAMA involvement was known from

the earliest stages. I have already identified the fact that the Banking Syndicate was engaged in significant due diligence with McInerney which was NAMA related. Indeed, at the hearing which led to the appointment of the examiner in the first place, there was significant reference to the possibility that loans might go into NAMA. The prospect that the McInerney loans might, therefore, at least so far as B of I and Anglo Irish be concerned, "go into NAMA" was always known and considered by all parties.

6.2 It is certainly correct, therefore, to say, as the Banking Syndicate urged, that there was nothing to stop McInerney raising the possibility that the loans might well be taken over by NAMA at the hearing. The real question which, therefore, arises is as to whether there were circumstances which adequately explain why McInerney did not raise that question. Two matters were urged by McInerney in that context. The first is the fact that the due diligence correspondence to which I have referred appears to have ended on the 9th December. I am not sure that that fact of itself is of any real significance. That date was only eleven days before the commencement of the hearing and the intervening period included two weekends, such that there were only six working days between that communication and the commencement of the hearing. I do not, therefore, place any significance on that fact.

6.3 Of somewhat greater substance is the fact that McInerney urges that it was, as it were, led astray by the complete absence of any reference in the materials put before the court by the Banking Syndicate of even the possibility that the B of I and Anglo Irish aspect of the Banking Syndicate's loans would be taken over by NAMA, and what the consequences of any such takeover would be for the likely course of events into the future.

6.4 There are arguments on both sides under this point. It is true, as the Banking Syndicate urges, that McInerney could, nonetheless, have raised the question. If McInerney had asked what the position in relation to NAMA was, then doubtless the Banking Syndicate would have to have indicated what the up to date position was and the court could have taken into account in its judgment an assessment of the likelihood of the loans going into NAMA, the consequences for the potential long term receivership if that were to happen, and any other material factors, and reached a conclusion on that basis. It is clear, therefore, that McInerney must bear at least some of the responsibility for the state of affairs which has arisen. I accept the evidence put forward by Mr. Cunningham that McInerney assumed that NAMA was no longer on the table. However, it was no more than that. An assumption. It would have been open to McInerney to seek confirmation that its assumption was correct either from the Banking Syndicate or by raising the issue in court. It did not do so. It must bear responsibility for not having done so.

6.5 However, it seems to me that the Banking Syndicate must also bear some of the responsibility for that state of affairs. On the basis of the evidence currently before the court, and I emphasise that it may be that a different view ought properly be taken if more evidence becomes available, it seems to me that it is appropriate to infer that there was a view in the Banking Syndicate that there was a significant degree of likelihood that the loans would be taken over by NAMA in the event that the scheme of arrangement was not approved. If that should turn out to be the case, then it seems to me that the Banking Syndicate must bear its fair share of the blame for the fact that that issue was not raised for, in those circumstances, a failure to even advert to that possibility was, to put it at its minimum, objectively apt to mislead. I should say that for my own part I had assumed that the absence of any such reference to NAMA meant that that eventuality was not any longer considered to be a significant possibility.

7. Conclusions

7.1 I am, therefore, faced with a situation where there seems to be a realistic possibility that there are matters which could, in a very real sense, be material to the court's consideration which were not before the court and not, therefore, taken into consideration in the Principal Judgment and which are not, indeed, fully before the court even now. I am satisfied that both McInerney and the Banking Syndicate bear some responsibility for that state of affairs. Where then does the balance of justice lie? In that context I note that, when considering an abuse of process argument put forward in that case, Hardiman J., speaking for the Supreme Court in *AA v. the Medical Council*, made clear that in such cases the court has a somewhat wider discretion than in cases involving strict *res judicata.* There is, in my view, at least a basis for McInerney not bringing forward the NAMA argument even though, for the reasons which I have sought to analyse, I am of the view that McInerney must itself bear a broadly equal share of the blame for the argument not being made. However, in those circumstances it seems to me that the balance of justice does require that this matter be reopened.

7.2 For the reasons which I have already analysed, I am not satisfied that there is sufficient evidence before the court on this issue to allow me to reach any concluded determination at this stage. I will, therefore, discuss with counsel a regime to allow either side to put forward such additional evidence as it may wish, at least initially on affidavit. The issue (and in my view it is the only issue), that can properly be addressed in the reopened hearing is as to the likelihood of the long term receivership model actually being put into place having regard to whatever likelihood there may, in turn, be that the B of I and Anglo Irish aspect of the Banking Syndicate loans are acquired by NAMA. I should re-emphasise what has already been stated on a number of occasions in the course of this judgment. It seems to me that that assessment must be conducted as a matter of substance rather than form. I will not, in that context, consider it sufficient that parties simply repeat that no decision has been taken. I am concerned to make a realistic assessment on the likelihood of various events occurring rather than assessing the current formal legal position.