Neutral Citation Number: [2010] IEHC 57

THE HIGH COURT

2009 677 COS

IN THE MATTER OF EYLEWOOD LIMITED (UNDER THE PROTECTION OF THE COURT)

AND IN THE MATTER OF WOODMAN INNS LIMITED (UNDER THE PROTECTION OF THE COURT)

AND IN THE MATTER OF THE COMPANIES (AMENDMENT) ACT 1990

AND IN THE MATTER OF THE COMPANIES (AMENDMENT) (NO. 2) ACT 1999

AND IN THE MATTER OF AN APPLICATION PURSUANT TO ORDER 75A OF THE RULES OF THE SUPERIOR COURTS 1986

AND IN THE MATTER OF A PETITION BY TWEEDY GROUP OF BARS LIMITED

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 5th day of March, 2010

1. Eylewood Limited ("Eylewood") trades as "Muldoon's Late Bar and Oxygen Niteclub" from a licensed premises in the city of Waterford. Woodman Inns Limited ("Woodman") trades as "Woodman Bar and Ruby's Niteclub" from a licensed premises in the city of Waterford. Eylewood and Woodman are each wholly owned subsidiaries of Tweedy Group of Bars Limited ("the Petitioner"). The Petitioner is the sole member of each of Eylewood and Woodman.

2. Mr. Robert Tweedy ("Mr. Tweedy") and his sister, Ms. Anne Tweedy, are directors of each of the Petitioner, Eylewood and Woodman. Mr. Tweedy Senior, their father, is also a director of Woodman. Mr. Tweedy and Ms. Tweedy each hold 50% of the issued share capital of the Petitioner.

3. On 28th October, 2009, the Petitioner presented a petition, pursuant to the Companies (Amendment) Act 1990 ("The Act"), seeking the appointment of Mr. Kevin Hughes as Examiner of each of Eylewood and Woodman. The Petitioner had, at that time, two other wholly owned subsidiaries; Cherryfox Taverns Limited, which also operated a licensed premises in Waterford, and Ulysses Taverns Limited, which had operated a licensed premises but ceased to trade in 2006. No application was made in relation to those companies.

4. On 5th November, 2009, Mr. Hughes ("the Examiner") was appointed as Examiner of each of Eylewood and Woodman, pursuant to s. 2 of the Act.

5. On 4th February, 2010, the Examiner filed in Court two reports, pursuant to s. 18 of the Act, with proposals for schemes of arrangement for each of Eylewood and Woodman. In his reports, he recommended that the Court confirm the proposals for the schemes of arrangement appended to each report.

6. The confirmation hearing was initially fixed by order of the Court (Clarke J.) for 11th February, 2010, but was unable to proceed on that day. It commenced before me on 19th February, 2010, and, unusually, lasted three days. Barrowville Estates Limited, the proposed investor, supported confirmation of the proposals, as did the Revenue Commissioners. The Petitioner, Mr. Tweedy, Ms. Tweedy and Bank of Scotland (Ireland) Limited ("BOSI") opposed confirmation. Two other creditors, the Governor and Company of the Bank of Ireland ("Bank of Ireland") and Diageo Ltd., were represented and stated to be neutral. Bank of Ireland is a secured creditor of each company with debts in excess of €6.6 million due by each company. To consider the issues ultimately arising on the confirmation hearing, it is necessary to describe briefly what took place in the examinership between 5th November, 2009, and 4th February, 2010, insofar as it is relevant to the position of the parties at the confirmation hearing and during the course of the confirmation hearing.

7. The examinership appears to have proceeded in a normal way until 12th January, 2010. During that period, there appears to have been reasonable co-operation between the Examiner and each of Eylewood, Woodman, the Petitioner and their directors. Mr. Tweedy holds a contract of employment with the Petitioner. He is described as the managing director of Woodman and is stated to be in receipt of salary from Woodman; whilst also described as managing director of Eylewood, he does not now claim to be an employee of or in receipt of salary from that company. Ms. Tweedy appears to have a non-executive role as a director of each of the three relevant companies. Mr. and Ms. Tweedy are also guarantors of certain debts of Eylewood and Woodman. The Petitioner was a notice party to all applications to the Court in the Examinership, pursuant to the order of 5th November. The Examiner applied for and obtained extensions of time in which to deliver a report on 8th December, 2009, and 18th December, 2009, the latter expiring on 13th January, 2010. On 11th January, 2010, the Examiner notified the Petitioner of his intention to apply, on 13th January, 2010, for a further extension until 5th February, 2010, and Mr. Tweedy swore on affidavit in support of that application.

8. During all this period, an investor was being sought and the Examiner had repeatedly indicated to the Court that he was hopeful of procuring an appropriate investor and being able to prepare proposals for schemes of arrangement within the period of protection. The Examiner had imposed a deadline of 4.00 p.m. on Tuesday 12th January, 2010, for the making of investment proposals from those who had indicated an interest. In his third report to the Court of 13th January, 2010, he indicated that by the time of that deadline, he had received investment proposals from two interested parties and a letter from a third. Mr. Tweedy, in the affidavit sworn by him on 13th January, 2010, in support of what he then believed to be the proposed application for an extension of time, confirmed that he had been copied with correspondence in relation to three investment proposals but considered there might be a fourth.

9. In the course of the examinership, the Examiner was in receipt of weekly cash income and expenditure reports from each of Eylewood and Woodman, detailing all inflows and outflows for each company. On 7th January, 2010, he received an income and expenditure account for Woodman Inns Ltd., which showed cash on hand in the company of €146,822, as at 3rd January, 2010. He states that he decided to independently review the information received as the examination was reaching a critical stage and he arranged for a member of his office to attend at the premises of Woodman at 11.00 a.m. on 12th January, 2010. At 1.13 p.m. on 12th January, 2010, the Examiner was furnished with a new income and expenditure account. This included payments which had not been disclosed in the earlier weekly report aggregating €125,000. The Examiner learnt that these payments were made in cash from Christmas takings which were maintained in a safe in Woodman's office. Woodman was not in a position to provide invoices for the cash payments to the Examiner's representative present on 12th February. The payees were identified as:

- Mr. Tweedy: €35,000

- Ashfront Ltd.: €25,000 (a company controlled by Mr. Tweedy and the accounts controller of Woodman which provides administration services to the Tweedy Group)

- Michael Walsh (former accountant of the Group): €35,000

- Kenny Stephenson Chapman (solicitors to the Petitioner and Woodman and Eylewood): €20,000

- BDO Simpson Xavier (financial advisers to the Group): €10,000.

10. The Examiner immediately prepared a report for the Court outlining the above facts. In that report, he made clear that he did not have any particular difficulty with the payments to the solicitors and financial advisers as they appeared to be in relation to work being done as part of the process of the examinership; although he contended that they should have been properly invoiced to Woodman and flagged to the Examiner prior to payment. However, he did express serious concern with the first three payments totalling €95,000. These payments were not envisaged in the projections in the independent accountant's report for the period of examinership. Payments totalling €1,200 *per* week were provided for and being paid to Mr. Tweedy in the course of the examinership.

11. The Examiner, in his report to the Court of 13th January, 2010, indicated that he had lost trust in the management of Eylewood and Woodman, as had Bank of Ireland, which he had informed, and the agreement of which, as secured creditor, to any proposals for schemes of arrangement was essential. Bank of Ireland holds first fixed charges over the property of Eylewood and Woodman and floating charges over each company. The Examiner expressed the view to the Court in the written report that a receivership (on the appointment of the Bank of Ireland) appeared to be the only option available, notwithstanding the progress made with potential investors.

12. However, prior to the matter being mentioned in Court on 13th January, 2010, informal notice was given to Mr. Tweedy of the change in the proposed application. Whilst he makes complaint of that notice (it was extremely short), he was represented by counsel at the Examiner's application, who made on his behalf an immediate acknowledgement of the difficulties presented for the examinership process by the payments made. Mr. Tweedy undertook to immediately lodge a sum of €75,000 with his solicitors and to reimburse the aggregate of the disputed sums of €95,000, in the event that the Court determined that the sums ought not to have been paid in the course of the examinership. He also undertook not to make any further payments, other than in accordance with the projections already furnished in the independent accountant's reports. On those undertakings, and having regard to the extremely short notice of the application to Mr. Tweedy, the protection period was extended to Monday 18th January, 2010, and Mr. Tweedy was given an opportunity to file a supplemental affidavit explaining the payments made. On 18th January, 2010, the Court, by agreement of the parties, directed the solicitor for Mr. Tweedy to release the sum of €75,000 to Woodman, and made an order, pursuant to s. 7(7) of the Act, that the Examiner have power to ascertain and agree the claims against Woodman and Eylewood of Robert Tweedy, Michael Walsh and Ashfront Limited in relation to the payments made. The Examiner indicated that he believed he could still formulate proposals for schemes of arrangement and the time was extended for the delivery of the Examiner's report to 3rd February, 2010, (being the 99th day from presentation of the petition). The Court also directed that any proposals for a scheme of arrangement must be circulated by 27th January, 2010.

13. The Examiner subsequently agreed a payment to Ashfront Limited of approximately €19,000 and a payment either of net salary due or of approximately €20,000 to Mr. Tweedy. The precise agreement in relation to the latter remains in dispute. Nothing now turns on this.

14. On 19th January, 2010, the Examiner states he concluded that there was only one investment offer upon which he could formulate proposals for a scheme of arrangement. The proposed investor was Barrowville Estates Limited ("Barrowville"). He informed Mr. Tweedy of this. Mr. Tweedy appears to have been opposed to the proposed investment from Barrowville from that time forward. He believed that there were alternative investment proposals which had not been properly considered by the Examiner, and which, in his view, were preferable. In the following days, there appears to have been some vacillating in his attitude and promises to cooperate with due diligence being conducted by Barrowville.

15. On 28th January, 2010, each of Mr. Tweedy and Ms. Tweedy wrote to the Examiner, withdrawing their support for the examinership process. The primary objection was to the Examiner's decision to treat Barrowville as the preferred bidder. In particular, objection was made to the fact that the investment proposal was a sum of €5 million for shares in both Woodman and Eylewood, without consideration being given to the requirements of each company separately, and its creditors. Further, it was alleged that two other offers which had been made had not been fully explored by the Examiner. These were stated to be one from L.G. Holdings Limited and a second from the Kinglet Group, making a cash offer of €5.5 million, again, for shares in both Woodman and Eylewood.

16. On Friday 29th January, 2010, the Examiner made an application to the Court on notice to the Petitioner (albeit not in accordance with time required by the order of 5th November, 2009) and obtained the following orders, pursuant to s. 9(1) of the Act:

> (i) That all powers and functions vested in or exercisable by the directors of Eylewood Limited which relate directly or indirectly to the negotiation and finalisation and entering into of an investment agreement with Barrowville Estates Limited ("the Investor") shall be performable and exercisable only by the Examiner.
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> (ii) That all powers and functions vested in or exercisable by the directors of Woodman Inns Limited which relate directly or indirectly to the negotiation and finalisation and entering into of an investment agreement with Barrowville Estates Limited ("the Investor") shall be performable and exercisable only by the Examiner.

17. The Examiner, in his affidavit grounding the application for the above orders, expressed the view that the proposed investment agreement with Barrowville was almost finalised; that it was the only basis on which he could formulate proposals for schemes of arrangement; and that the order sought, transferring to him the powers of the directors to finalise the terms of the investment agreements and cause Woodman and Eylewood to enter into those agreements, was necessary and expedient to safeguard the interests of Eylewood and Woodman, their employees and creditors. Through

counsel at the hearing, he expressed the view that the proposed investment agreement would enable him to finalise proposals for schemes of arrangement which would give each of Eylewood and Woodman a reasonable prospect of survival as a going concern.

18. Counsel for the Petitioner opposed the application, primarily on the basis that the Petitioner was implacably opposed to the proposed investment agreement with Barrowville, and that in such circumstances, it was not possible for the Examiner to conclude a binding investment agreement in advance of the relevant meetings of creditors and members. He also, with leave of the Court, handed in a letter obtained by the Petitioner's solicitor from Matheson Ormsby Prentice on behalf of Kinglet in relation to its proposed investment. Counsel for the Petitioner contended that the Examiner should continue to consider other investments and, in particular, one from Kinglet.

19. In the affidavits sworn on the subsequent applications, there is some dispute as to precisely what I said in the course of that hearing. I do not now recall exactly. Insofar as it may be relevant, I recall reading the letter from Matheson Ormsby Prentice and taking the view that it did not confirm the immediate availability of funds to support an unconditional investment proposal from Kinglet. I also recall querying with counsel for the Examiner as to whether the Examiner had been advised that he could enter into a binding investment agreement with Barrowville (unconditional, save in respect of High Court approval) in the absence of agreement from the Petitioner as the sole member in each of Eylewood and Woodman. I was informed that he believed that this could be done. In those circumstances, I formed the view, as it was then approximately day 94 of the Examinership and the Examiner believed he could enter into an investment agreement which would form the basis for schemes of arrangement which would give each of Eylewood and Woodman a reasonable prospect of survival as a going concern, that it was in the interests of those companies, their employees and creditors to transfer the relevant directors' powers to enable such investment agreements be finalised and entered into on behalf of Eylewood and Woodman. However, having regard to the objections from the Petitioner, and the inability due to time constraints to permit Mr. Tweedy swear and file a replying affidavit, the order made by the Court included an express provision that the remuneration, costs and expenses of the Examiner from that date forward, inclusive of the application made on 29th January , 2010, be separately justified and considered in any application under s. 29 of the Act.

20. On 29th January, 2010, the Examiner entered into an investment agreement ("the Investment Agreement") on behalf of each of Woodman and Eylewood with Barrowville and their solicitors, Eversheds O'Donnell Sweeney, who act as "Escrow Agent" for the purposes of the Agreement. On the same day, or the next day, the Examiner gave notice of proposed meetings to the creditors and to the Petitioner as member of each of Eylewood and Woodman.

21. On 3rd February, 2010, the creditors' and members' meetings were held in respect of each of Eylewood and Woodman. On the same day, the Examiner prepared his report, pursuant to s. 18 of the Act, in relation to each of Woodman and Eylewood, with the respective proposals for a scheme of arrangement, and in each case recommended confirmation of the proposals to the Court.

22. On 3rd February, 2010, the Petitioner caused a motion to be issued returnable for 2.00 p.m. on that day, seeking orders removing the Examiner from each of Eylewood and Woodman, pursuant to ss. 13(1) and 13(7) of the Act and certain other reliefs.

23. On 4th February, 2010, the Examiner filed in Court his report dated 3rd February, 2010, and by order of the Court (Clarke J.) the confirmation hearing was fixed for 11th February, 2009. The Court also adjourned the motion seeking removal of the Examiner to the same date. The hearings were ultimately adjourned to Friday 19th February, 2010. In the intervening period, several affidavits were sworn in the application to remove the Examiner, which, with exhibits, run to three lever-arch files. In addition, affidavits were sworn for the purposes of the confirmation hearing by the Examiner and other interested parties.

24. At the commencement of the hearing on 19th February, 2010, I ruled that the confirmation hearing should proceed first, but, as certain of the factual matters upon which the Petitioner and Mr. and Ms. Tweedy sought to rely to object to confirmation were contained in the affidavits sworn in the application to remove the Examiner, that I would permit those affidavits to be treated as part of the evidence for the purposes of the confirmation hearing.

25. The reason for which I so directed the confirmation hearing to proceed was that as the Examiner had filed in Court his reports with the proposals for schemes of arrangement recommending their confirmation on 4th February, 2010, the Court appeared under an obligation, having regard to the terms of s. 24 of the Act, to hold confirmation hearings, regardless of whether or not the Court might now determine that the Examiner should be removed. No objection was taken to this ruling and the confirmation hearings proceeded.

Confirmation hearings

26. The confirmation hearings were unusually complex and protracted. A number of factors contributed to this. The first, for which I make no criticism of any party, is the fact that there are two quite separate and distinct examinerships in the one set of proceedings. This follows from the fact that the Petitioner sought in the one set of proceedings two quite separate and distinct orders, pursuant to s. 2 of the Act, appointing Mr. Hughes as Examiner of each of Eylewood and Woodman. This was not a case where an application was made for the appointment of an Examiner pursuant to s. 2, and also a number of applications for his appointment to related companies, pursuant to s. 4 of the Act. No objection was taken at the hearing of the petition to the joinder of the two quite separate examinerships in the one set of proceedings. It may have resulted in some savings in costs. However, it may also have contributed to some confusion. I draw attention to this, as it appears that the Act and Rules of Court made thereunder may not properly envisage two or more distinct applications, pursuant to s. 2, for the appointment of an Examiner, and resulting examinerships to be the subject of a single proceeding. I reserve for a future date the decision as to whether it should be permitted.

27. There were other matters in relation to which there were significant changes made in the course of the confirmation hearings to the terms of the schemes which the Court was being asked to confirm. Additional evidence was also adduced. The constantly shifting positions prolonged the hearing for which the Examiner, Barrowville, the Petitioner and Mr. Tweedy must share responsibility. The principal such matters relevant to the issues I have to decide are as follows.

28. First, an Examiner is obliged, pursuant to s. 19(h) of the Act, to include in his s. 18 report "his recommendations". The recommendations made by the Examiner in his Eylewood report were:

> "I am satisfied that the implementation of the Proposals for a Scheme of Arrangement will enable the Company and the whole of its undertaking to survive as a going concern, and that such survival is in the best interests of the Creditors as a whole, and that such survival will be facilitated by the confirmation of the Proposals.
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> The Proposals contained in **Appendix I** have been accepted by at least one class of Creditors in accordance with the requirements of s. 24 of the Act.
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> I therefore recommend that the court exercises its discretion to confirm the Proposals in accordance with the provisions of s. 24 of the Act, and that the Scheme of Arrangement shall come into effect on such date as this honourable court shall fix."

The Examiner, in the above, clearly expressed his opinion to the Court that the proposals for the scheme of arrangement will enable the survival of the company and the whole of its undertaking as a going concern. Notwithstanding the absence of any express reference to the survival of the company as a going concern in s. 24, it is commoncase that this is a minimum requirement for proposals for a scheme of arrangement, having regard to the terms of s. 2 of the Act for the appointment of an examiner, and the overall purpose of the Act. The Examiner regrettably failed to put any facts before the Court in his report, to either support or justify the opinion expressed. The Court would obviously wish to have regard to such an opinion expressed by an examiner in forming its own view on the issue, as it must. However, as stated by the Chief Justice in *Vantive Holdings* [2009] I.E.S.C. 68, in relation to an opinion in an independent accountant's report:

> ". . . the weight to be attached to the accountant's opinion will depend on the degree and extent to which he supports that opinion with his or her own objective reasoning and the appraisal of material or factors relied upon for reaching his or her conclusions."

29. The Examiner failed to put before the Court any appraisal of the facts or factors relied upon or reasons for the opinion expressed and recommendation made. Whilst the proposals indicate the amount of the investment and the fact that it would be "used to discharge the Examiner's costs and remuneration, together with payment of dividends as required under the proposals", the amount of such costs were not identified nor was there any computation of the dividends payable. Further, the independent accountant had identified in his report a number of conditions in relation to Eylewood's survival as a going concern and there was no consideration of the proposals in relation to same, nor any view expressed as to how the then proposed investment and scheme would provide Eylewood, at the date of the proposals, with a reasonable prospect of surviving as a going concern. The Examiner's report did include, as required by s. 19(e), a statement of the assets and liabilities of Eylewood as at 29th January, 2010. However, that statement does not appear to include costs of the examinership to that date and is pre-confirmation and thus gives no indication of the financial position of the company if the proposals were confirmed.

30. The Examiner delivered a supplementary affidavit sworn on 22nd February, 2010, which included a post-examination statement of affairs on the basis of the proposals being confirmed for Eylewood and Woodman and, exceptionally, was given leave to file it in Court on second hearing day. The affidavit and exhibits contain the type of information required by the Court to consider the opinion expressed by the Examiner in his recommendations in accordance with the decision of the Supreme Court in *Vantive Holdings* [2009] I.E.S.C. 68. Normally, such affidavit should be filed with the s. 18 report, or the information contained in the s. 18 report itself. In view of the time constraints in examinerships, if this cannot be done with the s. 18 report, an examiner should file a supplemental affidavit as soon as possible thereafter setting out the relevant information but in advance of the confirmation hearing.

31. Secondly, the proposals in relation to Woodman, in respect of which confirmation was recommended in the report of the Examiner, included at clause 5.2 the following:

> "Mr. Robert Noel Tweedy appears to be the Managing Director and Secretary of the Company. The other directors of the Company are Ms. Anne Tweedy and Mr. Robert Tweedy who are non-executive directors. It is a requirement of the Investor that all of the existing directors (and the Company Secretary) resign as officers of the Company and their positions be made redundant on the Effective Date, subject to the approval of the Proposals. It is my opinion that a change in the senior management of the Company is necessary for its effective future operations. Subject to the approval of the within proposals, Mr. Niall McLoughlin will become a director and Secretary of the Company and Mr. Sean McLoughlin will become a director of the Company."

The Eylewood proposals contained a similar clause, save that Mr. Tweedy Senior was not referred to as a non-executive director.

32. The proposals in relation to each company also included proposals to amend the Memorandum and Articles of Association of each company as set out in Appendix F. Included in the amendments was the addition of a new Article 18, and at 18.2 to provide:

> "The offices of all directors appointed before the Effective Date shall be vacated on the Effective Date on which Niall McLoughlin shall be appointed as director and Secretary of the Company and Sean McLoughlin shall be appointed as director of the Company."

33. The Examiner was recommending that the Court confirm proposals which he contended could and would have the effect of removing Mr. Tweedy (who, he stated, appeared to be the managing director) and Ms. Tweedy and Mr. Tweedy Senior as directors of Woodman; and a similar proposal in relation to Eylewood. No formal notice of this intention was given to any of the Tweedys in their capacities as directors. At the commencement of the hearing, they were not formally represented before the Court. There is some artificiality in the lack of notice and representation, certainly insofar as Mr. Tweedy and Ms Tweedy is concerned. The Petitioner was appearing and represented by counsel and solicitor. They were acting on the instructions of Mr. Tweedy and Ms. Tweedy as directors of the Petitioner. It also became apparent that counsel for the Petitioner proposed to make submissions on behalf of Mr. Tweedy and Ms. Tweedy as guarantors of the

debts of each of Eylewood and Woodman, as contingent creditors of each company. Having regard to the issues raised, I requested counsel and solicitor for the Petitioner to take instructions as to whether they could also represent all three directors of Woodman and permit the hearing proceed. They subsequently confirmed such instructions.

34. I also enquired of counsel for the Examiner as to the legal basis for the inclusion of proposals in the schemes of arrangement which include the effective removal of directors. I did so as the issue had never previously arisen before me and I was not aware or any relevant judgment. The Act is not clear, in that it includes references to changes in management and direction in s. 22(1)(f) and (g) in relation to the contents of the proposals for schemes of arrangement. However, it does not provide for notice of proposals to directors and, makes no provision in s. 24(4) for any consideration by the Court of the fairness of the proposals for directors nor gives them a right to appear and be heard at a confirmation hearing. Further, s. 24 does not provide that a scheme of arrangement, when confirmed by the Court, is binding on directors or other office holders, as it does in relation to members and creditors.

35. I was then informed by counsel for the Examiner that Barrowville was withdrawing its requirement that the existing directors vacate their offices on confirmation of the proposals, but was maintaining an intention to subsequently remove the directors, including Mr. Tweedy as managing director of Woodman (if he established he held that position) or Eylewood. It was indicated that the proposals and amendments to the Memorandum and Articles would be modified to remove this requirement. Counsel for Mr. Tweedy, in response, indicated Mr. Tweedy was an employee of Woodman, not of Eylewood. He subsequently produced a document from the auditors confirming that PAYE and PRSI were paid by Woodman in respect of Mr. Tweedy's salary in 2009, and indicated that he had instructions to say, if removed in the future, Mr. Tweedy would institute unfair dismissal or wrongful dismissal proceedings against Woodman. Nevertheless, the removal of the directors as part of the schemes was removed as an issue, and it remains to be decided whether this is permitted under the Act.

36. Thirdly, Bank of Scotland (Ireland) Limited ("BOSI") was included as "the contingent secured bank creditor" in the Woodman scheme. It holds a guarantee from Woodman in respect of liabilities of Ulysses Taverns Limited to it. The guarantee was secured by a fixed charge over the property of Woodman, ranking after the Bank of Ireland. The proposals recommended to the Court included a nil dividend to BOSI. BOSI submitted a proxy in favour of the chairman at its meeting, with specific instructions to vote against the proposal. On 9th February, 2010, Ms. Jean Desmond of BOSI swore an affidavit exhibiting the guarantee and a demand made in writing on 6th November, 2009, on Woodman (after the presentation of the petition), seeking immediate repayment of the sum of €4,762,581.35, then alleged to be due and owing by Ulysses Taverns Limited to BOSI. It had previously written by letter dated 2nd February, 2010, to the Examiner, requesting that it be treated as a secured creditor by reason of the demand made and also contending that the proposed scheme was unfair and discriminatory by reason, in particular, of the dividend proposed for Bank of Ireland as secured creditor.

37. After the commencement of the hearing, I was informed by counsel for the Examiner that, with the consent of Barrowville, the Examiner was proposing a modification to the scheme of arrangement in relation to Woodman to provide for a 2% dividend for BOSI. A further potential acceptable modification was indicated by Barrowville on the third day of the hearing, after counsel for BOSI had made his submission and objections on the basis of unfair prejudice to BOSI, *inter alia*, by reference to the position of unsecured creditors who are to receive a 5% dividend. Barrowville, through its counsel, indicated to the Court that if the Court took the view that the proposals in relation to Woodman were not fair and equitable to BOSI, or that they were unfairly prejudicial to BOSI, that the investor would not consider it a material modification to the Woodman scheme for the purposes of clause 2.1(a) of the Investment Agreement if the Court were to modify the Woodman scheme so as to provide for BOSI a dividend of 5%, *i.e*. equal to the unsecured creditors.

38. Fourthly, on the first day of the hearing, counsel for Barrowville informed the Court that he was instructed to state that Barrowville was also committed to making available an additional €500,000 by way of working capital for the benefit of Eylewood and Woodman. He indicated that this would also be lodged with Barrowville's solicitors and it was confirmed on the second day of the hearing that this had been done. That sum was taken into account by the Examiner in his supplemental affidavit sworn on 22nd February, 2010, and in the post-confirmation *pro forma* statement of affairs exhibited to the affidavit and the Court was asked to take it into account.

39. Fifthly, counsel for the Petitioner and Mr. and Ms. Tweedy, in making his submissions in relation to the unfairness of the proposals in relation to Mr. and Ms. Tweedy's position as guarantors, referred, *inter alia*, to a guarantee given by Mr. Tweedy to Navoro Limited (the landlord of part of the Woodman premises) of the obligations of Woodman, as lessee, under an indenture of lease dated 8th July, 1998. On the third day of the hearing, the Court was asked to accept in evidence a release of the guarantee then executed by Navaro Limited of Mr. Tweedy, as guarantor, conditional upon confirmation of the Woodman scheme of arrangement.

40. Sixthly, on the third day of the hearing, the Petitioner and Mr. and Ms. Tweedy also sought to put into evidence, and were permitted to do so, asset purchase agreements entered into between Woodman and Eylewood, respectively, and Mr. William Bolster, the person associated with the Kinglet bid. It was stated that the purpose of this was to demonstrate to the Court that, if the Court did not confirm the schemes, there was a potential alternative, subject to approval of the Bank of Ireland, to either a receivership or liquidation of each of the companies.

41. There is one further preliminary matter to which reference must be made before considering the issues arising on the application for confirmation. Since the decision of Costello J. in 1992, in *Wogans (Drogheda) Limited* (Unreported, High Court, 7th May, 1992, at pp. 14-15), it is clear in that the Court will not confirm proposals for a scheme of arrangement which is to be funded by an investment, unless there exists a binding agreement with the investor to make the investment, conditional only upon approval by the Court of the scheme of arrangement. The reasons why such approach is necessary, having regard to the consequences for creditors of confirmation of a scheme of arrangement, were more recently set out in a judgment delivered by me in the matter of *Cisti Gugan Barra Teoranta* [2008] I.E.H.C. 251; [2009] 1 I.L.R.M. 182. It is normal for examiners to ensure the availability of the funds, in addition to the contractual obligation, by requiring, as was done in this instance, an investor lodge the monies with his solicitor to be held in escrow, pending confirmation by the Court of the proposals for the scheme of arrangement.

42. However, the Investment Agreement relied upon by the Examiner in relation to the proposals for both schemes is not only conditional on Court approval. Clause 2 of the Investment Agreement provides:

"**2. Conditions**

2.1 Completion of the matters provided for in Clause 3.1 is subject to and conditional upon the following conditions being satisfied (or in the case of the condition provided for in Clause 2.1(b) waived in writing by the Investor and the Examiner) on or before midnight on the Confirmation Date, or such other date as may be agreed in writing between the Investor and the Examiner:

(a) the Proposals, including for the avoidance of doubt with respect to each Scheme of Arrangement, being approved by the High Court without material modification, and

(b) no material claim, material demand, material suit, material action or material proceeding of any nature being pending or threatened against a Company by any third party save to the extent that such claim, demand, suit, action or proceeding is disclosed in the Proposals and PROVIDED THAT the condition expressed in this Clause 2.1(b) shall not apply unless the aggregate liability and/or loss (including, without limitation, any costs or expenses) arising from or in connection with all such claims, demands, suits, actions or proceedings would be greater than EUR50,000.

2.2 The Parties shall use their respective reasonable endeavours to ensure that the conditions set out in Clause 2.1 are satisfied by the Confirmation Date.

2.3 If the conditions set out in Clause 2.1 have not been satisfied (or in the case of Clause 2.1(b) waived) by the Confirmation Date then this Agreement shall automatically terminate without any further action of the Parties and all rights and obligations of the Parties hereunder shall cease to have effect immediately. Provided however, termination of this Agreement shall not affect the accrued Agreement as at termination and the terms of this Agreement will nevertheless continue to bind the Parties and the Escrow Agent to such extent necessary to give effect to such accrued rights and/or obligations."

43. As appears, the proposed investment in each of Eylewood and Woodman is not only conditional upon the confirmation of the schemes of arrangement in both Eylewood and Woodman, but, in addition, conditional in accordance with clause 2.1(b) on no material claim being made in accordance with the terms of that clause. No waiver in writing has been entered into of this condition. Barrowville, through counsel, indicated that it was continuing to rely on that condition only in relation to three potential liabilities for the companies arising from the objections to confirmation. Subject to the ruling of the Court on those issues in favour of the position taken by the Examiner and Barrowville, it was prepared to waive the conditionality in clause 2.1(b). However, it was made clear that an adverse ruling on either of the first two issues must result in the Court refusing to confirm the proposal for each scheme. It is clear on such an adverse ruling the agreement to invest would not become unconditional. The three issues are:

- Whether or not the Act permits a scheme to include a compulsory transfer of the shares held by the sole member as included in each of the proposals for Eylewood and Woodman.

- Whether or not s. 25A(1)(d) limits the indemnity and/or subrogation rights of the existing guarantors of debts of the companies upon payment pursuant to the guarantees after the confirmation of the schemes to the payments set out therein.

- Whether or not the modified proposal to pay BOSI a 2% dividend is fair and equitable and not unfairly prejudicial to its interest. This would not appear now to be material in the light of the final position taken by Barrowville as set out above

44. It appears necessary to repeat what I indicated in *Cisti Gugan Barra Teoranta*, that the Court will not normally entertain an application for confirmation of a scheme which is based upon an investment conditional on any matter other than the confirmation by the High Court of the scheme without material modification. In a situation of a group of companies, an investment may reasonably be conditional upon approval of the scheme in relation to each relevant company. However, on the facts herein I decided that I would consider the two legal issues identified on the undertaking given by Barrowville through counsel that if each were resolved in its favour it would waive the conditionality in clause 2.1(b).

45. In summary, by the end of the confirmation hearing, the Court became required to consider the application of the Examiner to confirm the schemes of arrangement in relation to each of Eylewood and Woodman, as modified in the modified proposals presented to the Court on 23rd February, 2010, including the revised amended Memorandum and Articles of Association in relation to each company handed in on that day. Further, it is intended by the parties that the Court do so on the basis of the following additional factual matters which occurred since the commencement of the hearing:

(i) The facts set out in the affidavit of the Examiner sworn on 22nd February, 2010, and exhibits thereto;

(ii) an additional €500,000 to be made available by Barrowville as working capital in Eylewood or partly in Eylewood and partly in Woodman;

(iii) the waiver by Barrowville of the condition in clause 2.1(b) of the Investment Agreement, subject to the resolution in favour of the position of it and the Examiner on the issues relating to compulsory transfer of the shares and the nature of the continuing rights of the guarantors against the companies after confirmation of the proposals;

(iv) the agreement by Barrowville that a further modification of the scheme in Woodman to provide a dividend of 5% to BOSI is not a material modification for the purposes of clause 2.1(a) of the Investment Agreement;

(v) the conditional release by Navoro Limited of Mr. Tweedy as guarantor of Woodman under the lease of 8th July,

1998;

(vi) the conditional asset sale agreements between each of Eylewood and Woodman and Mr. William Bolster;

(vii) written confirmation from the current auditors of Woodman that, based on the audited accounts for the year ended 31st December, 2008, Woodman owed Mr. Tweedy €149,000.09, on that date, and that, based on his representations to them, a balance of €94,519.00 remained due to him as of 27th October, 2009, in respect of such loan;

(viii) written confirmation from the auditors of Woodman that Mr. Tweedy's sole employment in the year ended 31st December, 2009, was with Woodman and that all taxes and levies arising on the salary paid to Mr. Tweedy in 2009 were included in the PAYE/PRSI returns for Woodman for the year ended 31st December, 2009.

Legal issues

46. The objections advanced on behalf of the Petitioner and Mr. Tweedy and Ms. Tweedy to confirmation of the proposals are multiple. They include the two discrete legal issues on the proper construction of the Act, which continue to affect the conditionality of the investment. It appears desirable to consider these in advance of the more factually based issues.

Compulsory transfer of shares

47. Each of the schemes provide for the compulsory transfer by the Petitioner of all shares held by it in Eylewood or Woodman to a nominee of Barrowville, in accordance with the Articles of Association of the company, as proposed to be amended. The Petitioner is not agreeable to the transfer of its shares in either Eylewood or Woodman. The issue of principle is whether a scheme of arrangement may include an enforceable obligation on the sole member of a company to transfer all its shares to a third party. The Examiner, supported by Barrowville, submits that the Act does so provide, and relies, in particular, upon section 22(6)(e). The Petitioner contends that the Act does not expressly so provide, and relies upon the fact that its property right in its shares is a constitutionally protected right and the principles relating to the construction of statutes which interfere with constitutionally protected rights.

48. It is not in dispute that the shares now held by the Petitioner in Eylewood and Woodman are property rights. Nor is it in dispute that as a legal person it may rely on the constitutional protection of property rights as determined by Keane J. in *Iarnród Éireann v. Ireland* [1996] 3 I.R. 321. The Examiner submits, however, that the shares are now valueless, in the sense of having no monetary value. Having regard to the current insolvency of each company, it is probably correct to say that the shares have a nil market value. However, having regard to the nature of the property right inherent in holding shares in a company, it does not appear to me that shares which are worthless, in the sense of having no monetary value, do not continue to constitute a property right.

49. In *O'Neill v. Ryan* [1993] I.L.R.M. 557, Blayney J., in delivering a judgment in relation to the rule in *Foss v. Harbottle* (1843) 2 Hare. 461, cited with approval passages from the judgment of the Court of Appeal in England in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)* [1982] Ch. 204, which included the following statements:

> "The plaintiff's shares are merely a right of participation in the company on the terms of the article of association . . .".
>
> "When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortune of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting. The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed on them by the articles of association."

The above referred to right of participation is a property right which continues to subsist even where, by reason of the insolvency of a company, the market or monetry value of the shares in it may be worthless. The Petitioner continues to have such a property right by reason of its shareholdings in Eylewood and Woodman.

50. This property right of the Petitioner in its shares is primarily protected by Article 40.3.2 of the Constitution which provides:

> "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

The general right of the State to regulate property rights is, of course, governed by Article 43. However, it is now well established that the protection of an individual to the exercise by him of his own property rights is protected by Article 40.3.2, see, *inter alia*, *Blake v. Attorney General* [1982] I.R. 117 at p. 135. The constitutionally protected property right of the Petitioner is to protection by the State "as best it may from unjust attack" of its right of participation in the companies as sole member of each.

51. Even assuming that the construction of ss. 22 and 24 of the Act, contended for by the Examiner may be considered as interfering with the right of the Petitioner to the property in its shares, it appears that the proper approach of the Court in construing an Act which potentially infringes on constitutional rights, is correctly summarised by the author of *Statutory Interpretation in Ireland*, David Dodd, Tottel Publishing, 2008, at para. 11.51, where he states:

> "It is frequently stated that enactments that interfere with constitutional rights are to be strictly construed. This strict interpretation rule means that where there is a genuine doubt or ambiguity as to the interpretation, a permitted meaning that is less restrictive of the constitutional right should be presumed to be the intended one. The

more radically an enactment erodes a constitutional right, the more it is to be expected to be expressed with absolute clarity. Courts may not readily permit a provision to abrogate constitutional rights by implication and may reject interpretations that limit such rights where there is no clear and express wording supporting the interpretation. A strict interpretation does not omit the possibility of necessary implication, but those implications must be clearly intended if they are restrictive of constitutional rights."

In support of the last sentence, Mr. Dodd refers to the decision of Hamilton P. (as he then was) in *Byrne v. Grey* [1988] I.R. 31, at p. 38, where he stated:

> "These powers encroach on the liberty of the citizen and the inviolability of his dwelling as guaranteed by the Constitution and the courts should construe a statute which authorises such encroachment so that it encroaches on such rights no more than the statute allows, expressly or by necessary implication."

In that decision, Hamilton P. was considering powers conferred on members of the Garda Síochána by a search warrant issued in accordance with s. 26(1) of the Misuse of Drugs Act 1977.

52. Counsel for the Petitioner did not disagree with the greater part of the principles stated by Mr. Dodd, but did submit that an interference with constitutionally protected rights by statute must be express and unambiguous and did so in reliance upon an earlier decision of Finlay P. (as he then was) in *The Claim of Viscount Securities Limited* (1978) 112 I.L.T.R. 17. That was a consultative case stated by a Property Arbitrator. The issue was whether or not the Arbitrator was precluded from awarding compensation to the claimants for the reduction in value of their lands following a refusal of planning permission by reason of s. 56(1)(a) of the Planning and Development Act 1963. At p. 20, Finlay P. stated:

> "Two major questions of principle would appear to me to affect the issues arising before me. The first is that the provisions in general contained in the Act of 1963 entitling a Planning Authority to refuse permission and the Minister on appeal to confirm such refusal or issue in effect a new refusal for the development of land is an invasion or restriction of the full property rights of an owner of land. If, therefore, the Legislature intended that such invasion, restriction or reduction of property rights should be enacted without providing compensation in the event of a reduction in value for damage suffered it is a necessary principle of the construction of statutes in accordance with the Constitution that they should have expressly and unambiguously so provided."

Whilst the above quotations may be seen as indicating a difference of approach between Hamilton P. and Finlay P. in those two cases, I think, having regard to the fact that what was being considered by Finlay P. was "an invasion or restriction of the full property rights of an owner of land" without providing compensation for damage suffered by a reduction in value, that the apparently stricter approach is consistent with Mr. Dodd's statement that, "the more radically an enactment erodes a constitutional right, the more it is to be expected to be expressed with absolute clarity".

53. Applying the above principles to the construction of the Act and, in particular, ss. 22 and 24, as to whether it permits a scheme of arrangement to include the compulsory transfer by a member of all its shares in the company, I have concluded that it does so, for the following reasons.

54. Section 18 of the Act obliges an examiner to formulate proposals for a scheme of arrangement. A scheme of arrangement is nowhere defined in the Act, nor does it expressly exhaustively set out what may or may not be included in a scheme of arrangement. However, s. 22 sets out certain matters which must be specified or provided for in proposals for a scheme of arrangement. These include, at s. 22(1)(c) "any class of members and creditors whose interests or claims will be impaired by the proposals."

Section 22(6) then provides:

> "For the purposes of this section and sections 24 and 25, the interest of a member of a company in a company is impaired if—
>
> (a) the nominal value of his shareholding in the company is reduced,
>
> (b) where he is entitled to a fixed dividend in respect of his shareholding in the company, the amount of that dividend is reduced,
>
> (c) he is deprived of all or any part of the rights accruing to him by virtue of his shareholding in the company
>
> (d) his percentage interest in the total issued share capital of the company is reduced, or
>
> (e) he is deprived of his shareholding in the company."

55. There is an analogous provision in relation to creditors in s. 22(5) which provides:

> "For the purposes of this section and sections 24 and 25, a creditor's claim against a company is impaired if he receives less in payment of his claim than the full amount due in respect of the claim at the date of presentation of the petition for the appointment of the examiner."

56. The scheme of the Act, as set out in ss. 23 and 24, is that meetings are held of the relevant classes of members and creditors and then, following presentation of the examiner's report, a confirmation hearing is held by the Court at which it may, as it thinks proper, and subject to the provisions of ss. 24 and 25, confirm, confirm subject to modifications, or refuse to confirm the proposals. Where the Court does confirm proposals (with or without modification), s. 24(5) provides that the "proposals shall be binding on all the members or classes of members, as the case may be, affected by the proposal and also on the company". Section 24(6) makes the proposals binding on creditors when confirmed. Section 24(7) provides for the automatic taking effect of amendments to the Memorandum and Articles of Association of the company specified in the proposals after confirmation by the Court "notwithstanding any other provisions of the

Companies Acts". Section 24(8) gives the Court, where it confirms proposals, jurisdiction to "make such orders for the implementation of its decision as it deems fit".

57. The Court's jurisdiction to confirm proposals is restricted by s. 24(4), which provides:

> "The court shall not confirm any proposals—
>
> (a) unless at least one class of creditors whose interests or claims would be impaired by implementation of the proposals have accepted the proposals, or
>
> (b) if the sole or primary purpose of the proposals is the avoidance of payment of tax due, or
>
> (c) unless the court is satisfied that—
>
> (i) the proposals are fair and equitable in relation to any class of members or creditors that has not accepted the proposals and whose interests or claims would be impaired by implementation, and
>
> (ii) the proposals are not unfairly prejudicial to the interests of any interested party."

58. The Act, in ss. 22 and 24 in particular, clearly envisages that a scheme of arrangement will include impairment both of creditors' claims and the interest of a member in the company. It goes further and identifies, *inter alia*, what may constitute impairment of the interest of a member in the company. This includes "he is deprived of his shareholding in the company". I accept the submissions of counsel for the Examiner and Barrowville that the Act, by including deprivation of a shareholding in s. 22(6)(e) as a form of impairment, must be construed as providing that deprivation of a member's shareholding may form part of proposals for a scheme of arrangement. There would be no purpose in including s. 22(6)(e) unless such impairment could form part of proposals for a scheme of arrangement. An obvious way in which a member may be deprived of its shareholding is to provide for the compulsory transfer of the shares to a third party on the coming into effect of the scheme of arrangement.

59. This construction is also consistent with other provisions of the Act. Section 24(4)(c) is directed, *inter alia,* in accordance with Article 40.3.2 of the Constitution to preventing any unjust attack on the property rights of a member whose interest will be impaired by deprivation of its shares in the company. Where, as on the facts of this examinership, the member is in a class which has not accepted the proposals, then the Court may not confirm the proposals unless it is satisfied that the proposals are fair and equitable to the member. The court must also be satisfied the proposals are not unfairly prejudicial to the interests of that member. These issues will be determined on all the relevant facts and ensure the member's constitutional protection of its property right in the shares. Proposals which are held by a Court to be fair and equitable, or not unfairly prejudicial to the interests of the member, could not, in my view, be an "unjust attack" on the property rights of the member.

60. Sections 24(5), (7) and (8) are also, in my view, confirmatory of the construction which I have placed on the Act, and indicate what the Oireachtas intended as permissible to include in a scheme of arrangement, pursuant to section 22. Each of those subsections are clearly directed to making binding, on the member concerned, an obligation to transfer its shares, permitting amendments to the Articles of Association without the cooperation of the member, and enabling the Court to make orders which would implement the obligation to transfer shares if the member failed to execute the relevant transfers.

61. The inclusion of an obligation on the member or members to transfer shares, without their agreement, is also supported by the amendment to s. 24(4)(a) by the Companies (Amendment) (No. 2) Act 1999. As originally enacted in 1990, s. 24(4)(a) provided that there had to be acceptance by one class of members whose interests would be impaired before the Court could confirm the proposals; however, this was deleted in 1999. Finally, it is consistent with the overall purpose of the Act, and absence of any intention therein to help shareholders whose investment has proved unsuccessful, as consistently explained in the case law on the Act: see, for example, Clarke J. in *Re Traffic Group* [2008] 3 I.R. 253 at p. 260.

62. In reaching this conclusion, I have considered again the judgment delivered by me in *McEnaney Construction Limited* [2008] 3 I.R. 744, and relied upon by counsel for the Petitioner. In that case, which also concerned a single member company, the original proposals in the scheme of arrangement included that the 100 issued ordinary shares then held by the sole member would be cancelled. I indicated that I could not confirm the scheme with the proposal to cancel the 100 issued shares in the capital of the company, and the proposals were subsequently modified. The reason for this, as explained in the judgment delivered, was that the effect of the cancellation of issued paid up shares in the capital of a company limited by shares is to reduce the capital of the company. Section 72(1) of the Companies Act 1963 (as amended), precludes a company from reducing its share capital in any way, except insofar as expressly permitted by the Companies Act 1963. If the Court had made an order, pursuant to s. 24(8), as originally sought, that the issued shares in the capital of the company be cancelled, it would have been directing the company to do something which it was unlawful for it to do by reason of s.72(1) of the Companies Act 1963 (as amended). The compulsory transfer of shares is not analogous. There is no provision of the Companies Act, or any other provision of law, which precludes a member of a company, such as the Petitioner, from complying with an obligation imposed on him, either by s. 24(5) of the Act, or by an order of the Court pursuant to s. 24(8), directing it to transfer all of its shares in Eylewood or Woodman to Barrowville or its nominee.

63. Accordingly, I have concluded that it is permissible for an examiner to include in proposals for a scheme of arrangement a provision that a member transfer all of its shares in the subject company; to propose amendments to the Articles of Association to enable effect be given to such provision; and to request the Court to make appropriate orders under s. 24(8), if it confirms the scheme. However, the issue as to whether or not the Court will confirm a scheme which includes such a proposal to which the member is objecting, will depend upon its assessment of the facts and a consideration of same in accordance with s. 24(4)(c) of the Act. The Court will have to be satisfied that the proposal is fair and equitable to the member and/or is not unfairly prejudicial to the interests of the member.

Continuing rights of guarantors

64. The second issue on the construction of the Act, is whether or not s. 25A(1)(d) of the Act limits the indemnity and/or subrogation rights of the existing guarantors of debts of the companies upon payment pursuant to the guarantees after confirmation of the proposals by the court. This issue arises as Mr. Tweedy and Ms. Tweedy have guaranteed debts of each of Eylewood and Woodman to third parties. They contend that they are contingent creditors of each company and, as the schemes make no provision to write down the contingent liabilities to them, that they retain their full rights of indemnity and subrogation to the creditors' rights against each of Eylewood and Woodman, in the event that demand is made on them, and payment is made by them, pursuant to the guarantees. The Examiner and Barrowville submit that the continuing rights of the guarantors against the companies after confirmation of the schemes is limited to the payments specified in section 25A (1)(d) of the Act.

65. The relevant guarantees are set out and exhibited in an affidavit of Mark Walsh, solicitor, sworn on 10th February, 2010, and do not appear to be in dispute. The guarantees in respect of debts of Eylewood are:

> (i) A guarantee of Mr. Tweedy to the Bank of Ireland dated 16th June, 2005, in respect of all sums due with a limit of €5,450,000.
>
> (ii) A guarantee of Ms. Tweedy to the Bank of Ireland of 16th June, 2005, for all sums with a limit of €5,450,000.
>
> (iii) A guarantee of Mr. Tweedy of 7th October, 2005, to M.J. Gleeson & Company Limited of all sums due.

And, in respect of Woodman:

> (i) A guarantee of Mr. Tweedy to the Bank of Ireland dated 16th June, 2005, for all sums, with a limit of €2,775,000.
>
> (ii) A guarantee of Ms. Tweedy of 16th June, 2005, to the Bank of Ireland of all sums, with a limit of €2,775,000.
>
> (iii) A guarantee of Mr. Tweedy of 7th October, 2005, to M.J. Gleeson & Co., Ltd., of all sums due.
>
> (iv) A guarantee of 27th April, 2005, of Mr. Tweedy to Diageo (Ireland) Ltd., of all sums due.

All the above creditors served notices pursuant to s.24A(1)(c) and are presumed to intend to pursue the personal guarantees of Mr and Ms. Tweedy.

66. Neither scheme includes, as a class of contingent creditors, persons who have entered into guarantees of the debts of the company. There is, in each scheme, a class named "Contingent Litigation Claims Creditors". These are defined as:

> "The creditors to whom the Company may become indebted in respect of any and all liabilities, costs and expenses in respect of claims of any description made or at any time in the future made, howsoever arising from or in connection with any contract engagement, circumstance, event, incident, occurrence, act or omission on or before the Fixed Date, but excluding the Litigation Claims Creditors".

No party made any submission that guarantors of debts of the companies were included in this definition. Rather, it was commoncase that the proposals did not refer to the position of Mr. Tweedy and Ms. Tweedy, as guarantors of debts of either company. Further, the statement of assets and liabilities of each company, as at the date of the proposals, does not refer to any contingent liability of either company to the guarantors. This statement may be required by s. 22(2) of the Act, which provides:

> "A statement of the assets and liabilities (including contingent and prospective liabilities) of the company as at the date of the proposal shall be attached to each copy of the proposals to be submitted to meetings of members and creditors under section 23."

67. The submission of the Examiner, supported by Barrowville, is that the effect of s. 25A of the Act is to exclude any future liability of Eylewood or Woodman to the guarantors in connection with future payments pursuant to existing guarantees, save to the extent expressly provided for in section 25A(1)(d).

68. The submission made on behalf of Mr. Tweedy and Ms. Tweedy, as guarantors, is primarily that as guarantors, in accordance with the general law relating to sureties, they are entitled to be fully indemnified by Eylewood and Woodman for all monies paid to a creditor, pursuant to the guarantees in respect of the companies' debts. Further, that they also have a right, again, when payment is made, pursuant to the guarantee, to be subrogated to the creditors' rights as against Eylewood or Woodman, as the case may be. They also submit that they are at present contingent creditors of each company, in that each company has a contingent liability to indemnify them when and if they make payments to creditors, pursuant to the guarantees. Since that contingent liability is not written down or extinguished in the schemes of arrangement, it survives and is not extinguished by ss. 24 or 25A(1)(d) of the Act.

69. In support of the submission, the guarantors rely upon statements of principle in relation to the rights of a surety in *Chitty on Contracts*, Vol. II: Specific Contracts, (30th ed.), Sweet & Maxwell 2008, which, at para. 44.116, states:

> "A surety is in principle entitled to be indemnified fully for monies paid to a creditor in respect of a principal debtor's liability."

And, further, at para. 44.128:

> "A surety who pays the creditor is subrogated to the creditor's rights as against the debtor. This means, *inter alia*, that he is entitled to the benefit of all securities belonging to the debtor and charged with the liability which the

surety has been called on to meet. As in the case with the right to an indemnity and/contribution, this right does not arise until actual payment by the surety, but the surety's potential right is recognised even before payment."

70. The above appears to be a correct statement of the law in Ireland. It should be added that the above principles flow, not from any contract between the principal debtor and the surety, but rather, from the equitable principles derived from an aim "to ensure that the person primarily liable should bear the whole burden in relief of others" (see Moss and Marks, *Rowlatt on Principal and Surety*, 5th ed. 1999, Sweet & Maxwell, at p. 143). It is also important to note, in the context of the submissions made herein, that the surety's primary right upon payment is a right to an indemnity from the principal debtor and the surety's right to be subrogated to the creditors' rights against the debtor (including to securities held) derives from the right to an indemnity. Halsbury (5th ed), vol.49, at par 1139 under a heading 'Origin and Enforcement of Right' states:

> The guarantor's right to the creditor's securities on payment of the guaranteed debt is derived from the obligation imposed on the principal debtor of indemnifying the surety, which makes it inequitable for a creditor ,by electing not to avail himself of the securities for the guaranteed debt, to throw the whole liability on the guarantor.

71. A further general principle from the law of sureties, which is relevant to a consideration of s. 25A, is that certain actions or inaction by a creditor may discharge the surety from its obligations to the creditor. This will depend, in part, upon the terms of the contract of guarantee and/or indemnity between the creditor and the surety. In the absence of special agreement, where a creditor releases the principal debtor or fails to take steps to protect security held, a surety will be discharged. (See Moss and Marks, *Rowlatt on Principal and Surety,* 5th ed. 1999, Sweet & Maxwell, chapters 8 and 9). No submission on any potential release was made on the facts of these applications. The Court has assumed that all guarantees will remain enforceable.

72. Section 25A of the Act was inserted by s. 25 of the Companies (Amendment) Act (No.2) 1999. Prior to that, the Act of 1990 contained two substantive provisions relevant to the position of guarantors, which still apply. Section 5 of the Act precludes proceedings against a guarantor or steps towards execution against a guarantor's property during the period of examinership. Further, s. 24(6) of the Act provides that:

> "(6) Where the court confirms proposals (with or without modification), the proposals shall, notwithstanding any other enactment, be binding on all the creditors or the class or classes of creditors, as the case may be, affected by the proposals in respect of any claim or claims against the company and any person other than the company who, under any statute, enactment, rule of law or otherwise, is liable for all or any part of the debts of the company." [Emphasis added].

Neither of those provisions have been amended. The last phrase in the above sub-section makes the proposals binding on guarantors of debts of the company as a person liable by contract for all or any part of the debts of the company. Nevertheless, there was no express interference by the Act, as originally enacted, with the right of a creditor to enforce a guarantee in respect of debts which might have been the subject matter of a scheme of arrangement against a guarantor. However, it would appear that the general principles relating to sureties may have created uncertainty about the enforceability of guarantees when the debt guaranteed was written-down in a scheme of arrangement.

73. The position of guarantors under the Act prior to amendment was considered by Costello J. in 1992, in *Wogans (Drogheda) Limited*. One of the reasons he refused confirmation of the proposals in that case was a failure of the scheme to deal with the position of the guarantors and the contingent liability of the company to them. At p. 16 he stated:

> "Secondly, the effect of the scheme on personal guarantees is relevant for another reason. If the personal guarantees are not discharged by confirmation of the scheme by the Court, than a contingent liability exists against the company - if payment is made on foot of the guarantee the guarantor has subrogation rights against the company. Unless the scheme of arrangement limits those subrogation rights the company may face a claim by the guarantor which would jeopardise the whole of the scheme of arrangement. So the court cannot conclude that the scheme which it is considering will facilitate the company's survival.
>
> It is not necessary for me to express any concluded view on the effect of the scheme of arrangement on the two guarantees in this case. It suffices if I say that there are arguments of considerable force to support the view that the guarantees are not discharged by the present scheme and that the directors may well be personally liable on foot of the guarantees. This means that this scheme of arrangement is defective."

It appears from the above, that Costello J. considered that at the time of the proposals for the scheme, there was a contingent liability of the company to the guarantors. As such, he clearly considered them to be contingent creditors. I would also observe that insofar as he refers to "subrogation rights", I do not consider that he was in any way excluding a right to an indemnity. It appears to me that he was simply referring, in short form, as is often done, to the rights of a guarantor to be indemnified as subrogation rights.

74. Costello J. had previously considered the position of guarantors in proposals for a scheme of arrangement in the matter of *Selukwe Limited* (Unreported, High Court, 20th December, 1991). In that case, the Examiner had included in the proposals for the scheme an obligation on the bank which held a guarantee from two directors to release the personal guarantees. The bank objected to the scheme, *inter alia*, on this basis. Costello J. upheld that objection, but indicated that rather than refuse confirmation of the proposals, he was prepared to modify them, and stated at p. 2:

> "I think I need not refuse the proposals because I think I can modify them and I propose to do so. I propose to delete sub-paragraph A of paragraph 3 of the proposals on page 6 and I will provide for a new paragraph which will read: 'Nothing herein will affect the liability of the directors on foot of the personal guarantees to Allied Irish Bank'. The paragraph should further provide that the directors will not be entitled to be subrogated to any rights of the Bank against the Company unless they pay more than 90 per cent of the debts to the Bank, in which event their

subrogation rights will be limited to the sums paid in excess of 90 per cent of the debt. The reason for this is to make clear that they are not entitled to claim against the Company for all sums they may pay on foot of their guarantees. The situation should be that the Company's liability to the Bank in relation to this transaction should be limited to 10 per cent as provided in the scheme. If such a provision was not contained in the proposals it might well upset the whole balance of the proposals and defeat their object."

75. Counsel for the Examiner in Barrowville submit, *inter alia,* that s. 25A(1(d) is intended to provide the limitation of subrogation rights in a manner similar to that done by Costello J. in the modification of the scheme. The reference to 90% by Costello J. is because the bank was receiving 10% under the scheme. It is not clear from the judgment whether the modification made by Costello J. was one in relation to which the parties had made submissions. Nevertheless, it is, of course, appropriate to take this judgment into account in construing s. 25A(1)(d) of the Act.

76. Section 25A of the Act, as inserted by s. 25 of the Act of 1999 provides:

"(1) The following provisions shall have effect in relation to the liability of any person ('the third person') whether under a guarantee or otherwise, in respect of a debt ('the debt') of a company to which an examiner has been appointed:

(a) subject to paragraph (b) and save where the contrary is provided in an agreement entered into by the third person and the person to whom he is liable in respect of the debt ('the creditor'), the liability shall, notwithstanding section 24(6), not be affected by the fact that the debt is the subject of a compromise or scheme of arrangement that has taken effect under section 24(9);

(b) neither paragraph (a) nor any of the subsequent provisions of this subsection shall apply if the third person is a company to which an examiner has been appointed;

(c) if the creditor proposes to enforce by legal proceedings or otherwise the obligation of the third person in respect of the liability, then—

(i) he shall—

(I) if 14 days' or more notice is given of such meeting, at least 14 days before the day on which the meeting concerned under section 23 to consider the proposals is held, or

(II) if less than 14 days' notice is given of such meeting, not more than 48 hours after he has received notice of such meeting,

serve a notice on the third person containing an offer in writing by the creditor to transfer to the third person (which the creditor is hereby empowered to do) any rights, so far as they relate to the debt, he may have under section 23 to vote in respect of proposals for a compromise or scheme of arrangement in relation to the company;

(ii) if the said offer is accepted by the third person, that offer shall, if the third person furnishes to the examiner at the meeting concerned a copy of the offer and informs the examiner of his having accepted it, operate, without the necessity for any assignment or the execution of any other instrument, to entitle the third person to exercise the said rights, but neither the said transfer nor any vote cast by the third person on foot of the transfer shall operate to prejudice the right of the creditor to object to the proposals under section 25;

(iii) if the creditor fails to make the said offer in accordance with subparagraph (ii), then, subject to subparagraph (iv), the creditor may not enforce by legal proceedings or otherwise the obligation of the third person in respect of the liability;

(iv) subparagraph (iii) shall not apply if a compromise or scheme of arrangement in relation to the company is not entered into or does not take effect under section 24(9) and the creditor has obtained the leave of the court to enforce the obligation of the third person in respect of the liability;

(d) if the third person makes a payment to the creditor in respect of the liability after the period of protection has expired, then any amount that would, but for that payment, be payable to the creditor in respect of the debt under a compromise or scheme of arrangement that has taken effect under section 24(9) in relation to the company shall become and be payable to the third person upon and subject to the same terms and conditions as the compromise or scheme of arrangement provided that it was to be payable to the creditor.

(2) Nothing in subsection (1) shall affect the operation of—

(a) section 5(2) (f), or

(b) any rule of law where by any act done by the creditor referred to in that subsection results in the third person referred to therein being released from his obligation in respect of the liability concerned."

77. Whilst the issue which I have to determine is the proper construction of s. 25A(1)(d), it must primarily be construed from the words used by the Oireachtas in the sub-section itself, but also placing them in a context of the entire of s. 25A, and the remaining provisions of the Act. It therefore appears necessary to consider what the Oireachtas was seeking to achieve by the insertion of s. 25A from the words used.

78. The entire section appears intended, first, to protect the right of a creditor to enforce a guarantee of debts of a company which is the subject of a write-down in a scheme of arrangement, secondly, to limit the right of guarantors to enforce a guarantee and, thirdly, to make express provision in certain circumstances for payment by a company to the guarantor rather than to the creditor in accordance with the scheme. Section 25A(1)(a), of itself, provides that the writing-down of a debt owed by a company to a creditor in a scheme of arrangement does not automatically discharge the liability of the guarantor unless there is a contrary provision in the guarantee. However, it must be read in conjunction with section 25A(2)(b) which appears to preserve the right of a guarantor to contend in accordance with the law of sureties that by reason of an act done by a creditor, presumably, in connection with the scheme of arrangement that

liability under the guarantee is discharged. It may therefore be the case that where the creditor agrees to take certain steps, for example, releasing security as part of a scheme of arrangement, a guarantor may still be entitled to rely on the general law to argue that its liability is discharged. The ability to do so will depend on the terms of the guarantee and the relevant facts.

79. The section then contains notice provisions which limit the right of a creditor to enforce a guarantee unless complied with. Unless a creditor serves the notice provided for in s. 25A(1)(c) of the Act, he cannot thereafter enforce, by legal proceedings or otherwise, the guarantee. This applies even where a scheme is not confirmed unless leave of the Court is obtained. The creditors with the benefit of the guarantees from Mr Tweedy and Ms Tweedy all served notices on them in accordance with s. 25A(1)(c) of the Act .

80. Construing s. 25A(1)(d) in accordance with the plain meaning of the words used by the Oireachtas, it appears intended to provide for certain consequences where a guarantor makes a payment to the creditor, pursuant to a guarantee of the debts of a company after the period of protection has expired. That date, in accordance with s. 26 of the Act, is either the date of coming into effect of the scheme of arrangement, or such earlier date as the Court may direct. Where a scheme is confirmed, it would normally be the date upon which the scheme comes into effect. The consequence upon the guarantor making such a payment which is expressly provided is that any payment which would, except for the payment made under the guarantee, be payable to the creditor under the scheme of arrangement which has come into effect, shall "become and be payable to the [guarantor] upon and subject to the same terms and conditions as . . . the scheme of arrangement, provided that it was to be payable to the creditor". Again, in accordance with its express wording, it only appears applicable where the payment made by the guarantor is made prior to the payment to the creditor by the company in accordance with the scheme of arrangement. Many schemes of arrangement provide, for example, that payments to certain creditors will take place at thirty or sixty days after the date the scheme comes into effect or, exceptionally, after a longer period.

81. Counsel for the Examiner and Barrowville accept that the above is the effect of the express wording of s. 25A(1)(d), but submit that by necessary implication, it must be construed in the context of the Act, as limiting to the amount specified therein, the right of the guarantor, either to an indemnity from the company, or to be subrogated to the rights of the creditor against the company as principal debtor.

82. It is not in dispute that right of the guarantor to be indemnified by the company is a property right and is entitled to the constitutional protection already referred to. Accordingly, the principles of construction set out above equally apply to this section. The submission made on behalf of the Examiner and Barrowville as to why, by necessary implication, it limits the guarantor's right to an indemnity, is threefold. First, they submit that in accordance with general principles, the section must be construed so as to give it a purpose and effect. They submit that unless it is to be given the limiting effect for which they contend, that it has no purpose or effect as the guarantors, by reason of the general law of sureties, would have a right, in the circumstances set out in the sub-section, to be subrogated to the creditors' rights under the scheme of arrangement. Whilst I accept the general principle of construing a section so that it has purpose and effect, it does not appear to me that it may be without effect because of the provisions of sections 24(5) and (6). Those sub-sections make confirmed proposals binding on the company, creditors and any person who is liable for all or part of the debts of the company. Accordingly, in accordance with the express wording of those sub-sections, once the scheme comes into effect, the company is obliged to make the payments provided for in the scheme to the creditor, and not to any other person. Accordingly, it appears to me that s. 25A(1)(d) may be directed to making clear that in the circumstances set out therein, payment may be made, not to the creditor in accordance with the scheme, as obliged by sections 24(5) and (6), but, rather, to the guarantor.

83. Secondly, they submit that s. 25A(1)(d) should be construed, having regard to the decision of Costello J. in *Re Selukwe* as intended to provide for the type of limitation on subrogation rights of the guarantors, as provided by Costello J. in that case, by modification of the proposals for the scheme of arrangement. Where the Oireachtas enacts legislation following a decision of the Courts which has identified a *lacuna* or difficulty in existing legislation, then it may be appropriate to take that prior judgment into account. It does not appear to me that Costello J. did identify any such *lacuna* or difficulty in the Act. He did identify a *lacuna* in the Examiner's proposals. In any event, the type of modification which he made in *Selukwe* to the scheme of arrangement makes, as will appear from the above extract, express provision for express limitation of the "subrogation rights" of the guarantors. The Oireachtas has made no reference to limitation of subrogation rights or indemnity rights in section 25A(1)(d).

84. Thirdly, counsel for the Examiner and Barrowville submit that if I were to conclude, that s. 25A(1)(d) did not limit or extinguish the right of the guarantors to an indemnity from Eylewood and Woodman if payment is made in the future, pursuant to the guarantees, that it would set at nought the intention and purpose of the Act, in relation to schemes of arrangement facilitating the survival of the companies as going concerns. I do not accept that submission for the following reason.

85. I respectfully agree with Costello J. that the liability of a principal debtor to a guarantor of its debts where demand has not yet been made on the guarantor and payment has not been made, pursuant to the guarantee, is a contingent liability. Further, that a guarantor, in such circumstances, is a contingent creditor of the principal debtor and its contingent right to be indemnified by the principal debtor or to be subrogated to the rights of the creditor against the principal debtor, may be (and should be) dealt with as part of a scheme of arrangement.

86. The term "contingent creditor" is not defined in the Companies Acts. In *Re. William Hockley Ltd.* [1962] 1 W.L.R. 555 Pennycuick J. (as he then was) said at p. 558:

> "The expression 'contingent creditor' is not defined in the Companies Act, 1948, but it must, I think, denote a person towards whom under an existing obligation, the company may or will become subject to a present liability upon the happening of a future event or at some future date …".

In *County Bookshops Ltd. v. Grove* [2002] E.W.H.C. 1160 (Ch.); [2003] 1 B.C.L.C. 479, Neuberger J. (as he then was) referred to the above passage from the judgment of Pennycuick J. and said at para. 49, that the term "contingent creditor" was "not a term of art" and that "its precise meaning will depend on its context". It seems to me that in the context of proposals for schemes of arrangement under the Act, the term "contingent creditor" includes a guarantor with a contingent right of indemnity against a company in respect of which the guarantor has guaranteed its debts to a

creditor. For the very reasons advanced by counsel for the Examiner and Barrowville, if it did not, it would set at nought the purpose of the Act.

87. I recognise that there is some confusion on the wording of the Act, having regard to the apparent distinctions in s. 3 between a creditor and a contingent or prospective creditor, nevertheless, it appears that references to creditors in sections 19, 22, 23 and 24 of the Act, are intended to include contingent and prospective creditors. This appears to be confirmed by the references, both in s. 19(e) and s. 22(2) to statements of "the assets and liabilities (including contingent and prospective liabilities) of the company" [emphasis added] required to be attached to the proposals for a scheme of arrangement. It is, in my experience, common for Examiners to include contingent creditors. The Examiner initially, in the Woodman proposals, included BOSI as a contingent creditor, albeit, of course, contingent in a slightly different sense, as Woodman was the guarantor and the contingency was demand being made. It is therefore permissible for an examiner to include, as contingent creditors, persons who have given guarantees of the debts of the company in examinership, and then to write-down the contingent liability of the company to the guarantor arising out of the guarantor's right of indemnity against the company. If this were done, then there is, for the company, the type of certainty which is clearly envisaged by confirmation of a scheme of arrangement. As I have already mentioned above, s. 24(6) makes a scheme of arrangement binding on a guarantor once the scheme is confirmed by the Court.

88. No modification was sought of either scheme of arrangement by the Examiner to include Mr. Tweedy and Ms. Tweedy as contingent guarantee creditors. If the only debts guaranteed were the unsecured debts to certain trade creditors, then I might have considered modifying the proposals to include the guarantors as contingent creditors and writing down the contingent liability of the company to them to nil (save in respect of payments in excess of 95% of the debt) , as was done by Costello J. in *Re Selukwe Limited*. It appears to me that there could be no prejudice to the guarantors and it would not be unfair or inequitable to do so. In each of Eylewood and Woodman, unsecured trade creditors would, as a matter of probability, receive no payment, either in a receivership or in a winding-up. If the guarantors were called upon to pay in those circumstances, they would have to pay the full debt due to the trade creditors and there would be no assets in the companies against which they might exercise any right of indemnity. In the proposals for the schemes of arrangement, the unsecured trade creditors are receiving 5%. This is reducing the liability of the guarantors to those creditors under the guarantees, and hence, they would still be in a better position by 5% following an examinership, compared with their position in a receivership or winding-up, even if their contingent rights to be indemnified by the company were reduced to nil.

89. However, the facts relating to the guarantees given to the Bank of Ireland are significantly more complex. Bank of Ireland also holds first fixed and floating charges over the property of both Eylewood and Woodman to which the guarantors may have some contingent entitlement. It is not at all clear that it could be considered not unfairly prejudicial to the interests of the guarantors or fair and equitable to them on the facts herein to reduce to the amount provided in s. 25A(1)(d) their contingent right to an indemnity from the companies in respect of monies paid under the guarantees to the Bank of Ireland. This is particularly so on the facts of Eylewood where it appears, from the statement of affairs as at 29th January, 2010, appended by the Examiner to his report, that the Bank of Ireland holds as part of its security a fixed charge over premises valued on a going concern basis in November 2009, at €2,700,000, and, in accordance with the proposals for the scheme, is only to receive a sum of between €2,221,473 and €2,321,473 in full and final settlement of the debt due by Eylewood. Further, as confirmed by the solicitor to the Bank of Ireland at the confirmation hearing and provided for in the scheme the bank has agreed to release all security held by it from Eylewood in consideration of such payment which appears significantly less than the valuation relied upon by the Examiner of the property. These facts were heavily relied upon by counsel for the guarantors in the alternative submission (if I were to construe s. 25A as contended for by the Examiner and Barrowville) as to the unfairness of the proposals to Mr Tweedy and Ms Tweedy as guarantors to the Bank of Ireland. The guarantees were stated to be given in connection with the purchase of the premises by Eylewood. It was submitted that if by reason of s. 25A(1)(d) the guarantors had no right of indemnity from Eylewood, and if payment were made, pursuant to the guarantees, that the effect of the proposals for them would be that Eylewood, upon payment of a sum of between €2,221,473 and €2,321,473, would retain its premises valued at approximately €2.3 million free of the charge to the Bank of Ireland or by subrogation to the guarantors and the guarantors would have a liability to the bank of €5.75 million less payments made by Eylewood and by reason of the transfer of the Petitioner's shares without any continuing interest in Eylewood.

Conclusion

90. I have concluded for the reasons set out that s. 25A(1)(d) of the Act cannot be construed as limiting the indemnity and/or subrogation rights of the existing guarantors of debts of the companies upon payment pursuant to the guarantees after the confirmation of the schemes to the payments set out therein. As already set out in this judgment, counsel for Barrowville has made clear that insofar as Barrowville was prepared to waive the conditionality attaching to its investment in accordance with clause 2.1(b) of the Investment Agreement, it was only doing so if the guarantors' right to an indemnity from Eylewood and Woodman was limited to the payments provided for in s. 25A(1)(d) of the Act.

91. Having regard to the conclusion I have reached, that the right to an indemnity is not so limited, there is no longer before the Court, in relation to either company, a proposal for a scheme of arrangement based upon a binding commitment to invest. There are thus no monies available to fund the schemes of arrangement and the Court must refuse to confirm the proposals for the schemes of arrangement in both Eylewood and Woodman. In such circumstances it is un-necessary for me to consider the other objections to confirmation.

92. I think it appropriate to add that it is with regret that I have reached this conclusion. Notwithstanding the criticisms made of the Examiner in relation to some aspects of the manner in which the proposals for the schemes of arrangement were put before the Court and reported upon, I do not underestimate the difficulties which this examinership presented. I do not wish the decision which I have taken to be seen as in any way condoning the attitude taken by Mr. Tweedy and Ms. Tweedy, as directors of Eylewood and Woodman, in refusing to cooperate with the Examiner. As directors of Eylewood and Woodman, they owed obligations to each of those companies and, as they are insolvent companies, to their creditors and, in the context of an examinership, to employees. The Act clearly imposes obligations on directors to cooperate with and assist an Examiner . For example s. 8(1) provides that "It shall be the duty of all officers . . . of the company . . . to give [the Examiner] all assistance in connection with his functions which they are reasonable able to give". Regretfully, they appear to have lost sight of those responsibilities in the course of their disputes with the Examiner. They also appear to have failed to appreciate the absolute time limits imposed on the examinership process by the legislation in relation to their dispute with the Examiner concerning alternative investment proposals. They did, of

course, have other interests in the subject matter of the examinership. They were perfectly entitled to object, as guarantors, and as I have held contingent creditors and as such "interested parties" for the purposes of s.24 to the failure to address their positions as contingent creditors in the schemes of arrangement. They were also, perhaps, entitled, although misguided, in seeking to protect the interests of the Petitioner in companies where its shareholdings were so obviously of no monetary value.

93. I will hear the parties as to what, if any, additional orders I should now make to an order pursuant to s. 24(3) of the Act refusing to confirm each of the schemes of arrangements and an order pursuant to s. 26 of the Act that each company cease to be under the protection of the Court.