Neutral Citation [2015] IEHC 381

THE HIGH COURT

[2015 No. 159 COS]

IN THE MATTER OF LADBROKES (IRELAND) LIMITED

AND

IN THE MATTER OF LADBROKES LEISURE (IRELAND) LIMITED

AND

DARA PROPERTIES LIMITED

(AS RELATED COMPANIES WITHIN THE MEANING OF SECTION 4 (5) OF THE COMPANIES (AMENDMENT) ACT 1999

AND

IN THE MATTER OF THE COMPANIES (AMENDMENT) ACT 1990 (AS AMENDED) THE "ACT"

JUDGMENT of Mr. Justice Cregan delivered on the 17th day of June, 2015

Introduction
1. The issue which arises in this application is whether an Examiner is obliged to provide sensitive commercial information to a *bona fide* potential investor who has been admitted to phase two of a bidding process, where that interested bidder maintains that it needs that commercial information to enable it to make a proper bid or investment proposal, to the Examiner, in respect of the company.

The company in Examinership
2. On 21st April, 2015, the High Court made an order appointing Ken Fennell as interim Examiner of Ladbrokes (Ireland) Ltd, Ladbrokes Leisure (Ireland) Ltd and Dara Properties Ltd. Mr. Fennell's appointment as Examiner was confirmed by order of the High Court dated the 1st May, 2015.

3. The petition states that the companies are members of the Ladbrokes group of companies, which is one of the world's leading online and betting companies and provides both in- store and interactive betting services and a variety of online betting games including roulette, online poker and online bingo. The company employs a total of 840 employees with an average of four to five employees per shop.

4. At para. 8 of the petition, it states that one of the companies has 191 leasehold stores held under 195 leases and that another company seeking Examinership has fifteen leasehold stores held under sixteen leases. In para. 41 of the petition it states that, at present, 196 betting shops are trading under the Ladbrokes name in Ireland. The petition also states at para. 42 *that "The companies operate principally through these betting shops. While an online gambling business is operated in the Irish market using the Ladbrokes brand, this business is operated through the main group website and its revenues and liabilities are processed through another company in the group. The companies do not share in the revenues for the online business nor are they required to fund its liabilities."* It is clear therefore that the betting shops are crucial to the Ladbrokes business model. Indeed, already in this Examinership numerous applications for repudiations of leases have been considered and granted by the court.

5. The petition also states that it is the view of the management of the companies that approximately 60 stores may have to close and that there are 34 stores which are no longer open (where costs continue to be paid by the companies) and that repudiation applications may need to be brought. The companies also believe that the balance of its stores are potentially viable but that the high cost of rents has had a significant effect on the ability of the companies to trade successfully in these stores. The petitioner believes that it will be necessary to negotiate improved lease terms and significant rent reductions with landlords (see paras. 75 to 78 of the petition).

6. The companies in this Examinership had a turnover in 2014 of approximately €415 million. The companies also employ approximately 840 employees and have approximately 200 shops or outlets. This Examinership is therefore, by any measure, an Examinership of some significance.

The Applicant
7. The Applicant, Boylesports, is an interested bidder for the companies. Founded in 1982, Boylesports has developed into a business with a turnover of €1 billion in 2014. It employs more than 1,700 employees across 208 shops. Its growth has been achieved organically and by acquisition. As Mr. Michael Bent the Chief Financial Officer of Boylesports stated in his first affidavit "Boylesports has a successful record of buying and integrating other businesses, including in recent years Celtic Bookmakers, (where 100 jobs were saved) and William Hills 15 Irish outlets (acquired with the saving of 65 jobs). Boylesports has grown each of the acquired businesses and continues to invest in each of the relevant locations". Indeed Boylesports say that an acquisition of the companies would be a significant transaction which could not responsibly be undertaken without some level of due diligence of the companies affairs.

Chronology of events
8. One of the complaints made by Boylesports is that "there has been a notable contrast between the pace of this Examinership generally and the deadlines imposed on bidders". The chronology of events in this regard is as follows:

- 21st April 2015 - Ken Fennell appointed as interim Examiner.

- 1st May 2015 - Examiner confirmed.

- 10th May 2015 - 19 days after his appointment, Examiner advertises seeking expressions of interest.

- 19th May 2015 - 28 days after his appointment, Examiner issues his process letter formally beginning the bidding process. This letter set a deadline of three days later for receipt of indicative offers.

- 22nd May 2015 - Deadline for receipt of indicative offers. Boylesports submit a substantial indicative offer.

- 27th May 2015 - Five days later, the Examiner responded to indicative offers. The Examiner admits three companies to phase two of the bidding process. These companies are Ladbrokes UK Ltd (the parent company of the companies in the Examinership), Boylesports and a third unnamed company. The Examiner imposed a deadline of Thursday 4th of June, 2015 – eight days later – for the submission of final offers.

- 28th May 2015 - One day into the eight day period the Examiner allows Boylesports access to the data room.

- 29th May 2015 - Boylesports, having reviewed the information in the data room, immediately became aware that none of the key information was available to it. It instructed its solicitors, Ronan Daly Jermyn, to write immediately to Matheson (solicitors for the Examiner) on 29th May, 2015.

- 30th May 2015 - Certain information about litigation involving the companies, together with the petition papers and the independent accountant's report was added to the data room.

- 1st June 2015 - Examiner's solicitors reply to Boylesports solicitors. No real concessions were offered to Boylesports. It was invited to continue its due diligence with a view to submitting a bid by the deadline of 4th June, 2015 and, if needs be, to renew its request for an extension when that deadline was reached.

- 2nd June 2015 - Boylesports issue and serve the current application, made returnable to 3rd June, 2015.

- 3rd June 2015 - Court directions re. exchange of affidavits and legal submissions.

- 12th & 16th June - Hearing of court application.

The investment process

9. Mr. Ken Fennell, the Examiner, stated in his affidavit that following his appointment as Examiner he received a number of expressions of interest with regard to potential investment in the companies. He also stated that the granting of court protection to the companies generated a significant amount of publicity and prompted an initial expression of interest from Boylesports. For completeness, the Examiner on 10th May, 2015 advertised in the Sunday Business Post for expressions of interest in investing in the companies. Mr. Fennell set out the steps he took to structure the investment process. On 19th May, 2015 he sent out the "process letter," the confidentiality letter/non disclosure agreement and the information memorandum to all parties who had expressed an interest in investing in the companies. These documents specified the procedure and timing for the progress of their proposals. A preliminary, non- binding, written offer was required to be submitted by 22nd May, 2015 (i.e. three days later).

10. Following the issue of the phase one letter, the Examiner received four offers - three of which were selected to enter phase two of the process. As part of phase two of the process, three parties were invited to submit a final offer no later than 5pm on Thursday 4th June, 2015.

11. Having received four preliminary non binding written offers by 22nd May, 2015 the Examiner then admitted three companies to phase two. These three companies were Ladbrokes UK Ltd – (the parent company of the companies in Examinership), Boylesports and a third unidentified company. The phase two letter was issued to all the parties selected to participate in phase two on 27th May, 2015. The phase two selected parties were required to perform due diligence and submit a binding offer by Thursday 4th June, 2015.

12. Mr. Fennell stated in his first affidavit that *"the above time frame was required to ensure that the Examinership was conducted as expediously as possible. Given the scale and complexities of the companies' undertakings, I believe that it is beneficial to all stake holders that the period of uncertainty surrounding the Examinership is as short as possible. From my experience of similar complex restructuring assignments, the longer the period of uncertainty the greater the chance of issues arising that may impact on the successful restructuring of the company. I believe that sound commercial judgment must be exercised in such assignments balancing the interests of all stake holders as fairly as possible. As I set out in further detail below, regulatory approval will be a relevant factor in any agreement with the Applicant and, in order to minimise execution risk, I took the view that it was in the interests of all parties that the process leading to a final offer be progressed as expeditiously as possible".*

13. As Mr. Bent, Chief Financial Officer for Boylesports points out in his first affidavit, Boylesports submitted a substantial indicative offer for the companies involving a substantial eight figure sum to fund a scheme of arrangement for the benefit of creditors and therefore to revitalise the operations of the company. Mr. Bent stated that "that investment would allow for the discharge in full of the preferential creditors, a substantial dividend for the unsecured third party trade creditors (including property lease creditors) and also a very substantial investment in the business". Mr. Bent also stated that:

> *"Furthermore the number of store closures may be reduced by Boylesports with the consequent benefit for local employment. Boylesports may be prepared to keep open outlets that the company now propose to shut down (I cannot be more definitive in this regard because as yet the Examiner has declined to identify the stores now listed for closure or to provide any meaningful information about trading at those stores (or at any of the other outlets)."*

14. It is clear therefore and this is accepted by all parties, including the Examiner, that Boylesports is a *bona fide* potential investor, that it has made a substantial indicative bid and that on that basis it has been admitted to phase two of the bidding process.

The information sought by Boylesports

15. In its letter of 22nd May, 2015 (i.e. its non- binding indicative offer letter to the Examiner) Boylesports submitted its non- binding indicative offer in connection with the proposed transaction. In the course of this letter it stated as follows:

> *6. Due diligence*
>
> *"We would expect to undertake customary commercial legal taxation and financial due diligence. Our outline due diligence requirements prior to signing final definitive legal agreements are outlined in appendix one attached but these will be further refined following access to the data room. We would ensure the necessary resources are applied to ensure the due diligence exercise is undertaken in an expedious manner".*

16. Appendix one set out the information sought under the following heading:

- Financials
- Property Information
- Staffing
- Suppliers
- Insurance
- Litigation
- Brand/trademark
- Tax
- HR

17. Under the financials the following information was sought:

- Profit and loss account by shop for the last three financial years
- Number of slips by shop for the last three financial years
- Copy of fixed asset register

Under Property Information the following information was sought:

- Copies of all leases
- Identity of stores currently closed and sixty stores earmarked for closure
- Staffing organisational chart
- Breakdown of head office roles

18. As Mr. Bent for Boylesports stated in his first affidavit:

> *"As a matter of principle, due diligence has a direct bearing on the financial result to be achieved in an investment process and so on the outcome for creditors. The more limited the information given to bidders and the less time given for the assessment of that information, the higher the risk for a bidder and so the greater the risk discount that a bidder must apply to its bid and in turn the worst the outcome for the creditors".*

19. Boylesports noted that when the Examiner replied on 27th May, 2015, to its indicative offer letter of 22nd May, 2015, he replied saying "I am pleased to inform you that based on the contents of the indicative offer letter, I have selected you as one of the phase two selected parties". Mr. Bent notes that the Examiner took no issue with the information requirements set out by Boylesports and allowed Boylesports into phase two without any qualification in that regard. The letter of 27th May, 2015 permitted Boylesports into phase two, and permitted them access to the electronic data room to facilitate due diligence. The deadline of 5pm on Thursday 4th June, 2015 was set for final offers.

20. Mr. Bent stated that once Boylesports gained access to the data room on the evening of Thursday 28th May, 2015, *"it quickly became apparent to Boylesports and its advisors that it contained nothing like the information requested on the basis of which request our indicative offer had been made. Without explanation we were presented with a data room that contained little of significance beyond publicly available information or that contained in the information memorandum circulated by the Examiner with his invitation for phase one indicative offers"*.

21. At para. 16 of his affidavit Mr. Bent states:

> *"Thus our indicative offer was explicitly based on stated requirements for information identified in appendix A to our offer letter of 22nd May 2015. The Examiner admitted Boylesports to phase two explicitly on the basis of the contents of our letter of 22nd May 2015 which included our request for information. Little of that information and none of the key information has been given to us".*

22. At paragraph 17, Mr. Bent states:

> *"However, if we are constrained by an unnecessarily tight time frame and at the same time denied key information, it is difficult to see how our admission to phase two can be anything more than a matter of form. The Examiner's present course appears set to exclude from the reckoning, Boylesports very substantial offer to the detriment of creditors".*

23. At para. 18 Mr. Bent states:

> *"The failure of the due diligence process excludes also the possibility of an increased offer from Boylesports which might be justified by a better understanding of the business".*

24. It is clear that Boylesports complained immediately to the Examiner by way of a letter from its solicitors (Ronan Daly Jermyn) to Matheson (solicitors for the Examiners) on Friday, 29th May, 2015.

25. Subsequently, the following day, Saturday 30th May, 2015, without explanation, certain information about litigation, together with the petition papers on the independent accountant's report, was added to the data room. The litigation information had been sought by Boylesports but Mr. Bent stated that it was "well down that list in terms of priority".

26. On Monday, 1st June, 2015, the Examiner's solicitors replied to Boylesports' solicitors. However in Boylesports' view that response offered no real concession. The Examiner invited Boylesports to continue with its due diligence, with a view to submitting a bid by the deadline of 4th June, 2015 and if necessary to renew its request for an extension when that deadline was reached. Mr. Bent comments:

> *"the invitation to continue with due diligence is hard to understand given the lack of information. The invitation to renew our request for an extension just as the deadline arrives is equally empty. The Examiner knows now that we do not have the information that we need to formulate a final offer so that his deadline is unworkable and his proposal leaves Boylesports in a position of unacceptable and unnecessary uncertainty at considerable cost".*

The Examiner's/Matheson's letter of 1st June, 2015 justified the refusal to provide the information on the basis that it was commercially sensitive.

27. Arising out of the refusal of the Examiner to provide the information sought, Boylesports reduced the amount of information which it was seeking to what it stated was an "absolute bare minimum" or, "an irreducible bare minimum", necessary to make a proper bid. Mr. Bent stated that if this information was not provided then all Boylesports could do would be to provide "a lame duck bid".

The "absolute minimum" information sought by Boylesports
28. Boylesports states that it needs the following information as an irreducible bare minimum with a view to making a proper bid:

(a) Trading data

(1) Turnover by Shop for each of the last three years

(2) The number of betting slips by shop by year for each of the three years

(It states that "this information will help us to assess trading at each location where no information as to profit by location is given and will help in our assessment of whether all of the proposed closures are in fact needed").

(b) Lease date (in each case by shop)

(1) Rent

(2) Key lease terms

(3) Square footage leased

(It states that "This information will again help us to assess performance of each location. Lease terms have a major impact on a locations financial performance").

(c) List of shops earmarked for closure in the Examinership process. (It states that this information is essential both to an understanding of what the future business will be and as a basis for our application for competition law approval).

(d) Detailed split of the companies head offices by line item. (It states that this information is needed to understand what synergies might be achieved by a merger of the head office function).

29. It is accepted by all parties that this information can be provided by the Examiner within a matter of hours. There is therefore no difficulty logistically in providing the information. The sole basis upon which the information is being withheld is that it is commercially sensitive.

30. The Examiner's position in response to these requests has evolved over time. Thus, the current position as of the date of the application, was as follows

1. Trading data - the Examiner still refuses to provide this information but has indicated that it will provide the information on a regional basis.

2. The lease data information – this information has now been given by the Examiner to Boylesports.

3. The list of shops earmarked for closure. The Examiner has agreed to give this information in principle but has stated that it would only give it as and when repudiation applications in respect of each lease have been issued by the Examiner.

4. Head office costs - some of this information has been given but Boylesports maintain that further information is required.

Boylesports submit that this information is the absolute bare minimum they require in order to make a proper bid and investment proposal to the Examiner. To support their claim they have exhibited a letter from Kieran Wallace of KPMG (Boylesports advisers in this matter). Mr. Wallace in his letter confirms that it is reasonable of Boylesports to seek this information, that the information sought provides the bare minimum foundation for a proper bid, that all the information sought should be readily available to the Examiner and that all of the information sought was well within the scope of what any experienced insolvency practitioner would anticipate in establishing an investment process.

31. In his second affidavit Mr. Bent states as follows:

> *"We could submit a final offer in the absence of the essential information. But that bid would be so discounted for risk and so conditional as to be a lame duck. The Examiner is apparently untroubled by that prospect. He seems confident that his process will result in a scheme presumably because he has available to him the Ladbrokes UK scheme with which the companies entered the process. The Examiner seems to be proceeding on the basis that any scheme of arrangement whatever its terms would represent a "success". I am advised however that such an approval is not*

consistent with the Examiner's duties under the relevant legislation. The Examiner's lack of interest in our participation in his process is underscored by his refusal to meet with us (indicating in his letter of 28th May, 2015, his belief that a meeting would not serve any useful purpose at this time)".

32. Mr. Bent also states:

"This has been in marked contrast to our experience of buying the bulk of the Celtic Bookmakers estate as a going concern in a competitive process out of a trading receivership where the receiver had a vital interest in protecting the going concern to maximise its price. There the essential information – including all of the now outstanding information and more besides – was promptly given to us allowing us to bid and quickly complete a deal".

33. Mr. Bent also states that Boylesports understand the time constraints of the Examinership process, that Boylesports understand that insolvent businesses are unstable ones and that the process must move quickly. He also stated that Boylesports understand that the need for speed reduces the scope for due diligence but, as he says, *"that in turn increases the focus on the essential information. What little is caught must be truly useful".*

34. He states in para. 14 – 18 of his second affidavit that

"The turnover and number of betting slips for a shop together make up the standard industry benchmark for evaluating performance. That information allows a buyer to work out for example the average stake in the shop. With that we get a sense of whether the shop is vulnerable to the departure of a few high staking customers or enjoys a more stable reliance on a large number of low staking ticket customers, also a trade that generally yields better margins."

"15. Performance is not homogeneous across an estate of shops. The only hard analysis of the business occurs at the level of the individual shop. A shop in one suburb or town may perform very differently to a sister shop in another. For this reason the regionalised data given by the Examiner does not meet the need. The only effective way – and the industry standard way – of valuing the estate of shops is to do so shop by shop".

16. As the Examiner and the companies expect, we do have a business model that allows us to assess trading performance. That is why we ask for very little information: we have not asked for profit by shop or for shops costs other than rent. Once we have the turnover and slip numbers for a shop and the rent we can analyse that data in the context of our business model and form our own commercial judgment on each shop and then on the aggregate so as to put our best possible final offer on the table in what is presented by the Examiner as an open competition for the companies".

17. Boylesports would not buy a shop without knowing this information. Nor I believe would any other industry participants. We have never done so. We got that data by shop when we bought Celtic Bookmakers, we got it when we bought the William Hill shops and indeed in every acquisition we have made. In this respect I have included a letter from an independent consultant in the industry, Mark Openshaw of Openshaw (Off Course) Ltd. in which he confirms in his experience that the key information in the context of the purchase of bookmakers, is turnover and slip information by shop. Mr. Openshaw has his own business as a consultant assisting and advising parties in the context of the purchase and disposal of bookmaking businesses.

18. The Examiner and the companies acknowledge the essential nature of this key trading data. They accept that it would be provided in an ordinary acquisition (at para. 32 of the Examiner's affidavit and para. 4 of the company's affidavit). Mr. McAteer who has delivered a report in support of the Examiner also agrees (at para. 15 of that report). They all say that ordinarily this information would be provided but only to a preferred bidder or to a bidder that had paid a break fee. But those factors do not take from the quality of the data as essential. Without it we cannot properly value the business and put forward a best possible investment offer. Yet in the Examiner's own process which envisages neither

a. A third phase involving a preferred bidder nor

b. A break fee

we are asked to lodge - in the Examiner's words - our final offer without that key data. The Examiner cannot I believe rely on his own choice of procedure to justify his refusal to produce the data".

35. Mr. Bent also states, (in response to the companies view, and the Examiner's view that this is commercially sensitive and would enable Boylesports to discover which are Ladbrokes' best Irish shops) at para. 21 of his second affidavit:

"Put simply the supposed risk is that we would discover which are Ladbrokes' best Irish shops. But we already have a good sense of that just as I am sure Paddy Power (and Ladbrokes also) have a good sense of the best shops in our estate. It is a highly competitive sector and its players watch each other closely. That knowledge might readily be verified by the simple process of surveying footfall at shops something that anyone on the public road might do with a simple mechanical counting device.

22. We have the information that we need to compete vigorously with Ladbrokes across Ireland and we do so daily. Over the past ten years Boylesports has acquired or opened 145 new shops. We always look for the best location and always have an eye on the competition when doing so…..we have the information that we need to compete against the companies. What we are looking for is something different: the information to value their business to put forward our best and final offer."

36. Mr. Mark Openshaw in his letter which has been exhibited to Mr. Bent's affidavit states as follows:

"9th June 2015

Dear Michael

I refer to the above matter.

I am writing this letter in my capacity as a betting consultant involved in buying and selling licensed betting shops.

As you will be aware I have significant experience in the licensed betting industry having worked in the industry for over 15 years as an independent consultant since leaving the Horserace Totalisator Board in 1998.

My work has primarily involved with assistance in the sale of betting shops e.g. chains such as John Wood Group in Bradford, Jack Taylor and many other outlets. I have consistently advertised in the betting office supplies magazine the main industry trade magazine for the past 15 years.

It was my experience and it has always been my experience in the context of acquisitions involving licensed betting operations whether these involved the sale of single premises, or multiple premises, that the following minimum information is at all times sought by and provided to all perspective investors of the said licensed betting operations:

a. Turnover by shop (for the preceding three years prior to its sale)

b. Number of betting slips by shop by year (for each of the said three years)

c. Also weekly slips turnover and profit plus FOBT performance is normally provided in the process

Yours sincerely,

Mark Openshaw"

37. I note in passing that Mr. Openshaw's letter is the only independent verification from an expert in the betting industry that this information is the "minimum information" which is sought by, and provided to, all prospective investors of betting operations. All the other letters either for the Examiner or for Boylesports or for the company have all been provided by experienced insolvency practitioners in Ireland. These persons are of course eminent insolvency practitioners and experienced in Examinerships. They are of course obviously not experts in the betting industry.

38. Mr. Bent also states in his second affidavit that *"a lame duck bid from Boylesports would leave the field open to Ladbrokes UK. It would pave the way for Ladbrokes UK's pre-packaged re-structuring to the prejudice of creditors giving the shareholders a windfall that I am advised the Examinership scheme was never intended to provide. And with that, the business and the employees would remain under a stewardship whose strategy and management over recent years has seen the companies' turnover walk out the door in contrast to the performance of Boylesports, Paddy Power and others. The companies projected turnover for 2015 is in the order of 60% of its 2008 turnover. Those who delivered that performance are now being preferred in a restricted and pre-packaged process in which insolvency is blamed on unviable property leases. But high rents do not cause plunging turnover".*

Ladbrokes UK Limited

39. Mr. Bent also complains about the role of Ladbrokes UK in the making of this decision. As Mr. Bent states in para. 24:

> *"Perhaps most significantly in the overall, and as Ms. Murphy makes clear at para. 4 of her affidavit, it is the companies – and not the Examiner – that have decided what information would be given to bidders. Ladbrokes Irish operation does not have its own senior management, a tier eliminated in 2012 when Ladbrokes stopped running its Irish operation as a separate business and brought it under the direct control of UK based executives reporting to the director for UK South and Ireland….. the directors of the companies deal with day to day operational matters but no major decisions made without reference to the English parent (though in saying that I make no criticism of the Irish directors). A decision to release the outstanding trading information would plainly be a significant one in the companies' views. It is inconceivable that this decision would be made without reference to the English parent. It seems plain then, that Ladbrokes UK – a competing bidder – is the one that has made the decision to withhold this essential information. That makes perfect sense from the standpoint of Ladbrokes UK and is consistent with its goal of a pre-packaged restructuring which sheds burdensome property leases while keeping the business under the same ownership and management. But it usurps the Examiner in his central role of running a proper investment process with a view to insuring the best scheme for the business and its employees and creditors."*

40. Mr Bent also states that "this Examinership has been in planning for some time". He states that "the petition in these proceedings was presented with the knowledge and support of Ladbrokes UK, as is apparent from the content of the petition and as would be expected". He notes that as far as the companies and Ladbrokes UK are concerned, the focus of the restructuring should be on the uneconomic rental obligations at many of the company's stores. He also notes that the petition stated that Ladbrokes UK has confirmed that it was prepared to make the necessary, reasonable investment to ensure the ongoing survival of the companies.

41. Mr. Bent then says at para. 26 of his first affidavit:

> *"It appears then the companies and Ladbrokes UK have embarked on the Examinership process with the clear objective of securing the company's future in the continued ownership of Ladbrokes UK on the basis of reduced property rental commitments. What they want then is a 'pre-packaged restructuring.' "*
>
> Mr Bent also comments that neither the very tight timeframe for the investment process nor the information deficit work to the prejudice of Ladbrokes UK. It has the information because it is the parent company of the companies in Examinership.

42. Mr Bent also states:-

> *"However, and for the reasons given at paras. 12 and 27 above as a matter of fundamental business common sense, the information deficit and unnecessarily tight timeframe must have a depressing effect on bids generally and so on the return for the creditors."*

43. Another issue about which Boylesports complain is that it will be necessary, should Boylesports acquire the companies to obtain the approval of the Competition and Consumer Protection Commission (The CCPC). This will take a number of days although Boylesports indicated that it is confident that the CCPC will be able to consider this matter and give approval or refuse approval within

approximately 9 to 10 days. Boylesports say that their competition advisors at LK Shields Solicitors have already been briefed and are ready to engage with the CCPC but they lack information sought as to the intended store closures which would "obviously be material to that engagement" because it goes to the question of overlap between "our operations and those of the companies". Mr Bent comments that it is "especially difficult to understand the Examiner's refusal to provide that information" in circumstances where those store closures will be the subject of hearings in open court in relation to repudiations of such leases.

44. Mr Bent states:

> *"To date however we have been stymied by a near complete lack of meaningful information while at the same time prejudiced by a very tight timeframe. Our team, assembled at considerable expense, has been kept from its proper work by the Examiner's conduct and engaged instead again at considerable expense in a frustrating struggle to secure fair play for all bidders in this process to the ultimate benefit of the companies and their creditors".*

45. Mr Bent also says:

> *"I say and believe that there is no statutory basis for the pre-packaged restructuring now being pursued by Ladbrokes UK and that it is inimical to an Examiner's duty to seek out the best available scheme for the benefit of the company in Examinership and its employees and creditors. The Examinership regime imposes a radical check on creditors property rights and was enacted by the Oireachtas to do so on the foundation of a recognised public interest in the saving of employment and enterprises that are essentially viable. In those circumstances I am advised and believe that there is a strong public interest in preventing the abuse of that statutory regime."*

The position of the Examiner

46. In his replying affidavit the Examiner has stated that the information made available in the data room "was carefully selected by me taking into consideration issues of commercial sensitivity". He also states that *"I say that logically as Examiner I would have to be the person required to take the commercial decision as to what information is to be made available to a potential investor as part of its due diligence. The first step in such a process would be to understand what the investor might require. The next step following receipt of this information would be to determine what information it was appropriate to provide".*

47. At paragraph 19 he states *"I made an informed commercial decision as to what information could be provided, taking into account the interests of the companies, potential investors and creditors of the companies and my duties as Examiner".*

48. At paragraph 20 he says *"I do not accept that the information which was made available in the data room on 28th May, 2015 was not adequate for the purpose of carrying out due diligence and making a final and binding bid, if the Applicant elected to do so, by Thursday 4th June, 2015. I am satisfied that the information which was provided was more than sufficient for this purpose and I do not accept Mr. Bent's characterisation at para. 18 of his affidavit of the due diligent process as a "failure".*

49. At paragraph 31 he states that *"I do not accept that the Applicant or any interested party requires details of turnover for each store for each of the previous three financial years in order to make a final and binding offer. The companies consolidated accounts in respect of the previous three financial years which are more detailed than those filed in the companies' registration office were provided to the interested parties. The breakdown of the turnover in respect of specific stores by location is commercially sensitive and, if made available to the interested parties, could be used by an interested party who is not ultimately successful in acquiring the companies from the Examinership process, to gain a competitive edge over the companies in a particular location"*.

50. He then states at para. 32:

> *"The companies directors have a significant and in my view well founded, concern that if the turnover and number of betting slips by reference to each store is provided to the interested parties, a party who is not ultimately successful in the Examinership process could take advantage of that information in the period following the Examinership. I have considered the companies' position in this regard and I believe that there is a significant risk that competitors could target individual shops which have a high turnover by specific targeted action in competing shops of their own in the same area. In addition I am informed by the companies that in merger and acquisition transactions in the gaming and betting industry outside of an Examinership process, such information would not be made available to potential investors unless one party was in an exclusive negotiating position where a legally binding contract was almost certain".*

51. He did however offer to provide the information in relation to turnover and the number of betting slips on a regional basis.

52. At paragraph 42 the Examiner states:

> *"Based on the information provided in the data room and based on my previous experiences in such transactions, I believe it is reasonable to assume that a potential investor has the necessary information to arrive at an informed decision as to whether to invest in the companies."*

53. And at para. 45 he states:

> *"As such it is my opinion that the information provided in the data room is consistent with what would typically be provided as part of a merger and acquisition/investment appraisal process for the purposes of assisting a potential investor in making a considered investment of whether to invest in the companies. I am satisfied that the approach that I have taken is fair and reasonable taking into consideration all the circumstances of the Examinership."*

54. At para. 46 he rejected the Applicant's assertion that the manner in which he is conducting the Examinership is materially prejudicing the companies' unsecured creditors.

55. He also rejects the Applicant's averment that his conduct as Examiner would lead to any abuse of the statutory regime.

56. At para. 49 he states

> *"As this Honourable Court would be aware, the investment process in an Examinership is different in many respects to the acquisition of a company or a business by third parties in an arms length acquisition."*

He also referred to a letter sent by his solicitors dated 2nd June, 2015, in which his solicitors clearly highlighted the potential ramifications for the companies' business by accepting the Applicant's request for certain commercially sensitive information and he continues:

> *"It is clear that neither the companies nor I as Examiner could expose the business to such a risk and I am fully satisfied that it makes good commercial sense for such an approach to be adopted. I am of the view that the potential survival of the companies as going concerns following the conclusion of the Examinership could be undermined by the provision of commercially sensitive information to its competitors. As Examiner I am required to make a commercial judgment in relation to how the investment process is conducted taking into consideration all the competing factors. As outlined above, the Applicant's position at para. 22 (d) of the affidavit to the effect that the insolvency of the companies justifies the disclosure of commercially sensitive information is not a view with which I agree. The concern in relation to the release of commercially sensitive information is driven by the imperative to protect the companies' assets and its business which the Examinership process is designed to preserve."* (Emphasis added).

57. At para. 50 the Examiner notes that although a confidentiality agreement is in place he does not accept the suggestion that such an agreement justifies the provision of the confidential information to the Applicant. He says the policing of such a prohibition in the non- disclosure agreement would be difficult if not impossible.

58. At para. 51 he says that, as an Examiner, he is required to exercise commercial judgment with regard to how the investment process is conducted and that he is obliged to take into consideration the interests of the employees and the creditors but that ensuring the interests of any potential investors are balanced is not part of the commercial judgment he is obliged to exercise.

59. At para. 53 he states that the business of the company could be irreparably damaged by the provision of commercially sensitive information to competitors and that he is obliged as Examiner to preserve the value of the assets of the company. At para. 54 he states

> *"I believe that any unsuccessful investor furnished with such information could use such information to their competitive advantage against individual stores where it is competing directly with such stores, which could seriously prejudice the companies' survival following the conclusion of the Examinership process."*

The affidavits filed on behalf of the companies

60. The companies are also opposed to the provision of this information. Their position is that the information is commercially sensitive to the companies and would, if obtained by Boylesports, confer a significant competitive advantage on Boylesports to the detriment of the companies. Ms Jackie Murphy, Company Director states as follows:

> *"I am advised that in providing information to prospective bidders as part of any investment process established by the Examiner, both I and my fellow director must strive to seek a balance between protecting the future viability of the company and satisfying the Examiner's need to adequately inform potential investors to enable consider them an offer to invest. To provide detailed and sensitive information in the Examinership process which would only be available in a sale to a party who has been selected as the "preferred bidder" and who would normally have agreed to pay a break fee if negotiations broke down, could facilitate other market competitors gaining a competitive advantage and sensitive commercial information through the Examinership. I am advised that such an outcome would not be consistent with, or in keeping with, the purposes of the Examinership legislation".*

61. I would note however that it is implicit in this averment that such detailed and sensitive information would in fact be available if the company were engaged in a sale of the company to another party, rather than the Examinership process. In other words, the company appears to accept that the information is of importance - indeed of vital importance - and would be provided in a merger, acquisition or sale process, but only to a party who has been selected as a preferred bidder, and only then if they had agreed to pay a break fee if negotiations broke down. However, there is no provision in the Examinership process for the selection of one party as a preferred bidder, or indeed for the payment of break fees.

62. Ms. Murphy also exhibits a letter from Luke Charlton of Ernst and Young who states:

> *"that the directors have a significant concern that if the turnover and betting slips by store information is provided to every party then any of the losing parties could take advantage of that information in the period following the Examinership. This would call into question the ability of the companies to meet the business plan on exit from Examinership."*

63. Ms Murphy also exhibits a letter from Mr. Jim Luby (an experienced insolvency practitioner with McStay Luby) who states that he is of the opinion that Boylesports and other bidders have been provided with adequate information to allow them to bid, in the context of an Examinership investment process, with the typical time constraints and urgency which that process requires. Mr. Luby says that he agrees with the approach of the companies in resisting disclosure of this information. He says "this information goes to the heart of the companies business. Such information would enable a competing business to calculate, on an approximate basis, the profitability of individual stores as competitors with industry experience will have details of the average costs involved in operating betting shops."

The response of Boylesports

64. Boylesports argues that the reasons being given by the Examiner for refusing to release the information do not withstand scrutiny. It submits as follows:-

> 1. Firstly, the question of confidentiality arises in every situation such as this and could be dealt with by means of a confidentiality agreement.
>
> 2. Secondly, the provision of commercially sensitive information in an Examinership such as this, is a necessary and inevitable part of the process. It submits that if a bidder cannot obtain such information then they are effectively working in the dark which undermines the competitive effectiveness of the process to the detriment of creditors.
>
> 3. Thirdly, that by refusing to provide such vital commercial information to a bidder, because it is a trade bid, the Examiner is effectively excluding trade buyers from the bidding process because a trade buyer's knowledge of the business and its ability to assess the risk makes it the most likely source of the most attractive bid.

4. Fourthly, although it accepts that the information is commercially sensitive, nevertheless, it says that this information is the bare irreducible minimum it requires in order to properly value the business and in order to make a proper financial bid in the investment process. It maintains that any responsible trade bidder would need at least the information which Boylesports has sought.

5. Fifthly, Boylesports say that although the Examiner is maintaining that he cannot release commercial sensitive information in order to protect the company from any subsequent risk to their operations, the companies are, by their own admission insolvent, and their only hope lies in a successful scheme with the associated investments. It submits that the Examiner's approach in refusing to provide this information ostensibly for the purpose of maintaining confidential information of the company, in effect serves only to undermine the process of securing the best available scheme and investment.

6. Sixthly, that the information is not particularly sensitive from a competitor's perspective but is essential in order to make a proper financial bid for the company.

7. Seventhly, that the net effect of Ladbrokes UK having this information, whilst Boylesports is refused this information, effectively means that the Examinership is not being conducted on a level playing field, that it is tilted against Boylesports, that it is tilted in favour of Ladbrokes UK, that it thereby reduces the possibility of Boylesports tabling a proper competitive bid, which in turn subverts the investment process, reduces the possibility of the creditors getting the best possible deal in respect of their debts, frustrates the objectives of the legislation and is a manifest unfairness in the process.

The issue of locus standi

65. The Examiner and the companies have raised the issue as to whether the Applicant has locus standi to make its current application under the Act.

66. Section 13 (7) of the 1990 Act, now s. 532 (9) of The Companies Act 2014, provides as follows:

> *"A company to which an Examiner has been appointed or an interested party may apply to the court for the determination of any question arising out of the performance or otherwise by the Examiner of his or her functions".*

67. Section 508 (1) defines an "interested party" as a "creditor… or member of the company".

68. The Examiner in his first affidavit stated that he believed that the Applicant had not demonstrated its *locus standi* to make the application.

69. However I am satisfied on the affidavit evidence before the court that the Applicant is indeed a creditor of the company. Mr. Bent states at para. 2 of his first affidavit "for the avoidance of any technical arguments as to standing, Boylesports has agreed to buy a debt owed by the petitioner and on completion of that transaction will be a creditor of the petitioner". It appears from the affidavit evidence that the companies owed a rental debt to a company called Sorciem Ltd (the landlord of certain premises). This company has assigned that debt to Boylesports and a copy of the assignment documentation was exhibited. A schedule of rent due and paid on the relevant premises from January, 2013 to date is also exhibited. It appears that from October, 2013 only €25,000 of the annual rent of €55,000 was paid. The landlord informed Mr. Bent that the purported reduction in rent was entirely unilateral and never agreed. Thus a deficit arose and that debt has been assigned by Sorciem Ltd to Boylesports. Whilst I note that this assignment (and the validity of the debt) has been challenged by the Examiner and the companies', the matter is put in further detail by the third affidavit of Mr. Bent. It is not necessary for me to set out the correspondence or exhibits in full. However, I would note that the most recent letter is a letter dated 11th June, 2015 from Donegans Solicitors who acted on behalf of Sorciem Ltd, who have stated that "Ladbrokes are over holding in respect of the premises due to arrears of rent" and that there is a "shortfall since October, 2013 of €11,900 per annum", or in the alternative, a shortfall since October, 2013 of €30,000 per annum.

70. Having considered all the affidavit evidence I would conclude that the Applicant is a creditor of the companies and therefore is an interested party within the meaning of the statute.

Does the court have a statutory jurisdiction to consider this issue?

71. The statutory jurisdiction which is invoked by the Applicant is s.532 (9) of the Companies Act 2014.

72. This section provides that

> *"A company to which an Examiner has been appointed or an interested party may apply to the court for the determination of any question arising out of the performance or otherwise by the Examiner of his or her functions." (Emphasis added).*

73. The Applicant submits that once it has established that it is "an interested party" and that it has *locus standi* as a creditor, it is then in a position to apply to the court "for the determination of any question arising out of the performance by the Examiner of his functions".

74. It is submitted both by the Examiner and by the companies that even if the Applicant is a creditor, (which they dispute) such an interested party may only apply to the court qua creditor or qua member for the determination of any question arising out of the performance by the Examiner of his functions.

75. However I am of the view that the language of the statutory section is so broad that it permits an interested party to apply to the court for the determination of any question which may arise out of the performance by the Examiner of his duties. The statutory section does not seek to relate the questions which the interested party may raise, to their status as a creditor or member. Moreover it does not seek to limit the range of questions which may be raised by an interested party. Whilst it does mean that a creditor may seek (as in the present case) to raise a question as to how the Examiner is treating a potential investor and whilst that question might not seem related to the status of a creditor in the Examinership, nevertheless I am of the view that the words in the statute "for the determination of any question" – must be given their full and proper meaning. Therefore, this allows a member or creditor to raise any question which arises out of the performance by the Examiner of his functions.

76. I am satisfied therefore that the court does have statutory jurisdiction to entertain this application.

Does the court have an inherent jurisdiction to consider such an application?
77. The next question which arose was whether the court might have an inherent jurisdiction to consider this application. Given that the Examiner is an officer of the court it seemed to have been accepted by all sides that the court has an inherent jurisdiction to review any obviously wrongful actions of the Examiner. Thus, if the Examiner were to engage in a fraud, or were to engage in any actions which might result in a secret profit for the Examiner, the court could intervene to exercise an inherent supervisory jurisdiction over such actions by an Examiner. However Mr. Gallagher SC for the companies submitted that if such an inherent jurisdiction exists at all, it exists where the court has identified a wrong doing but not where the court is considering a decision of an Examiner in the exercise of his commercial judgment. Mr. Gallagher SC also submitted that such an inherent jurisdiction could not be activated by an aggrieved bidder.

78. I also note that Kelly J. in the matter of *Eircom Ltd.* (Kelly J. ex tempore 17th May, 2012) stated as follows:

> *"However reliance is also placed on the inherent jurisdiction of the court. I would require a lot of persuasion indeed to be satisfied that the court should identify an inherent jurisdiction which is in excess of a specific statutory jurisdiction which regulates who may make applications of this sort. But I will assume for the purposes of this ruling that locus standi has been established."*

79. In the Eircom case the court considered an application under s.13 (7) of the Act which is the identical provision to the current provision of the Companies Act 2014 which is under consideration in this matter.

80. In the circumstances therefore, whilst I am of the view that a court does indeed have inherent jurisdiction to review acts of wrong - doing by an Examiner, it is clear that the actions complained of in this case could not in any way be described as acts of wrong - doing. The Examiner in this case is an experienced Examiner and insolvency practitioner and the acts which are complained of are actions which he has taken, in his view, in the best interests of conducting the Examinership.

81. In those circumstances I am not entirely convinced that the court does have an inherent jurisdiction which could be triggered by any concerned or aggrieved party to review acts of the Examiner, in the performance of his duties, in circumstances where the statute itself has prescribed that the only persons who may make applications of this sort are creditors and members of the company. However it may be that future cases might involve an entirely different set of facts and I do not believe therefore that it is necessary to decide this issue one way or another in the context of this application.

Is the decision complained of a decision of the Examiner?
82. The Applicant also submitted that the decision of the Examiner was not in fact a decision of the Examiner at all but was rather an act of the companies. However having considered the submissions of Mr. McCann SC for the Examiner and also Mr. Gallagher SC for the companies' I am satisfied that the decision to withhold confidential information is indeed a decision of the Examiner.

83. It may well be that the companies formed the view that this confidential information should not be disclosed for reasons of commercial sensitivity and that the Examiner adopted the companies' decision. However the Examiner has also sought the views of a number of other experienced insolvency practitioners who also have experience of Examinerships and they have agreed with his decisions. Moreover the Examiner has stated in a number of averments in his affidavit that it was his decision.

84. Having considered all the affidavit evidence and all the submissions, I am satisfied that the decision complained of is a decision of the Examiner himself. It may have been influenced by the companies' viewpoint but it is nevertheless the decision of the Examiner.

Was the decision of the Examiner an exercise of his commercial judgment?
85. Having considered the affidavit evidence, I am of the view that the decision of the Examiner was an exercise of his commercial judgment on this matter.

86. The issue of what information should be given to potential investors is a matter for the commercial judgment of the Examiner. If he gives too little information, he runs the risk of not getting a full or proper bid. If he gives too much information – or all the information sought by Boylesports- he might then get a full and proper bid from Boylesports but other bidders might reduce their bids to discount for the fact that the company is now increasingly vulnerable to competitors when it exits the Examinership. From Boylesports' point of view, they say they are frustrated; from the Companies' point of view, they say the release of this information will damage the companies.

87. The weighing up and calibration of these competing interests is a matter for the commercial judgment of the Examiner.

88. Moreover, Mr Fennell says that he has exercised his commercial judgment and Mr McAteer (another experienced insolvency practitioner) supports his position. Mr McAteer states that he believes sufficient information has been provided to permit a detailed bid (see para. 18 of his report). Likewise Mr Charlton and Mr Luby support the Examiner's position.

89. I would therefore conclude that the decision of the Examiner was an exercise by him of his commercial judgment.

What is the standard of review of an Examiner's decision?
90. The next question which arises is, what is the standard of review of an Examiner's decision.

91. The question of the standard of review of an Examinership was considered by Kelly J. in the *Eircom* decision.

92. However, before I deal with that, an analogous question as to what is the correct test by which the court would interfere with the actions of a liquidator was considered by the Court of Appeal in the UK in *Re. Edennote Ltd* 1996 2 BCLC 389 where LJ Nourse stated as follows at page 394:

> *"Mr. Rayner James accepts and asserts that those authorities propound the correct test, namely (fraud and bad faith apart) that the court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable man would have done it."*

93. The UK Court of Appeal accepted that that was the correct test to apply. The court also stated that it was unnecessary and perhaps confusing to introduce "into the court's control of the acts and decisions of liquidators the language of its control of administrative action".

94. In The Law of Administrators and Receivers of Companies by Lightman and Moss the learned authors state at page 361:

> *"When called upon to review the exercise by insolvency office holders of their powers, the court has said that in the absence of fraud it "will only interfere…if [they have] done something so utterly unreasonable and absurd that no reasonable man would have done it." [Re Edennote Ltd].*
>
> *The question is not whether the court would have acted in the same way or would have reached the same conclusion as the insolvency practitioner. Nor will the resulting transaction be set aside where it has established merely that a reasonable practitioner may have acted differently or reached a different conclusion as long as the course of action pursued by the administrator was one that a reasonable practitioner could reasonably have contemplated. The legal basis for interference is the office holder's perversity or irrationality. To this extent it can be said that in exercising his powers for their proper purposes, the administrator is under a duty to act rationally.*
>
> *As well as being under a general duty to act in the interests of creditors as a whole, the fiduciary character of the administrator's status as agent and office holder means that he must act impartially and even handedly as between different creditors and different classes of creditors. In this respect his position is analogous to a trustee who is required to hold the balance fairly between income and capital beneficiaries. Thus the administrator cannot unduly favour one creditor or one class of creditors over another and in the formulation of his proposals he cannot be seen to side with any particular constituency."*

95. This issue and this authority was considered by Kelly J. in the *Eircom* decision, a decision which is similar to the decision under review. In the *Eircom* decision, Whampoa Ltd and DW Investment Management Ltd LP sought directions from the court pursuant to s.13 (7) of the Companies Amendment Act 1990. The Court held that Hutchinson Whampoa had no *locus standi* but that DW Investment Management Ltd was arguably a creditor of the company. Kelly J, despite his misgivings, stated that he assumed for the purposes of his ruling that *locus standi* had been established because in his view it was important to give a determination on the merits of the application. In that case the application for the directions which were being sought were to:

> (a) Direct the engagement between the Examiner and Hutchinson and to give due consideration to Hutchinson's proposal to invest in the company.
>
> (b) To enjoin the Examiner to allow Hutchinson into phase two of the investment process.
>
> (c) A direction to the Examiner to permit Hutchinson to have access to documents referred to in the due diligence list.
>
> (d) To make directions allowing the Applicants access to the valuation report prepared for the Examiner by Jeffries International.
>
> (e) To make an order postponing creditors meetings which were due to take place the next day.

96. It is noteworthy that one of the directions sought in the *Eircom* case was a direction permitting Hutchinson to have access to documents referred to in the due diligence list.

97. In considering these issues on the merits Kelly J. stated as follows:

> *"Now if I return for a moment to the reliefs which are sought in the notice of motion. There is considerable difficulty, even if I was to find in favour of the Applicants, in making orders of the type sought. For example an order to provide for the engagement between parties seemed to carry with it very considerable difficulties having regard to the observations of Mr. Justice Murphy in the Bula decision to which I was referred. But even allowing for all of that and assume for a moment that I could make orders of this sort, ought I to do so. What is being said on behalf of the parties who are opposing this application is that to do so would interpose into the Companies Amendment Act of 1990 a procedure which cannot have been envisaged by the legislature and in respect of which there will be no justification for me embarking upon. It would mean, it is said, that the court would, in effect, be micromanaging the Examinership and that the statute does not set up either an appeal mechanism from decisions made by the Examiner, nor a form of judicial review of the Examiner's decisions, particularly if those decisions involve a commercial judgment being exercised by him. And I think it is important to bear in mind that the statute which entitles an Examiner to be appointed presupposes that the appointment of such a person will involve the court giving the appointment to somebody who has particular knowledge and expertise. And that is why there is an affidavit at the time of the appointment as to the fitness of the person to act as Examiner and why invariably Examiners are drawn from insolvency practitioners, who would have an accountancy qualification and would have considerable business experience involving insolvent entities.*
>
> *The court has neither the expertise, nor indeed the backup to make commercial decisions. The court is here in a supervisory role and to decide legal issues. And in the event of the Examiner either misbehaving or doing something which is wrong in law there may well be an ability for the court to intervene in such circumstances. But in areas of commercial judgment it seems to me that the court's scope for intervention is very limited. And I'm not sure at all that the Act envisaged anything like an application of this sort (a) because it doesn't envisage an appeal mechanism or a judicial review mechanism. And the wording of subsection 7 speaks about the determination of a question rather than the giving of precise and definite instructions to an Examiner as to how he is to go about his function.*
>
> *But even if the Applicants surmount all of those difficulties and the form of orders they seek is capable of one being granted and one which is capable of being enforced, by what standard is the conduct of the Examiner to be judged on an application such as this?*
>
> *There is no authority on point in respect of an Examinership in this jurisdiction but I am very much inclined to take the view that the observations of the courts in England which are encapsulated in a passage from Lightman and Moss on the Law of Administrators and Receivers of Companies is persuasive. It persuades me that the court should only intervene in respect of the behaviour of an Examiner in very limited circumstances. What the courts in England have said in respect of insolvency practitioners, who admittedly are not on all fours with an Examiner but where there are many similarities, and I believe that this is the appropriate test to apply here, that passage from Lightman reads as follows"* [Kelly J. then set out part of the passage referred to above and then continued].
>
> *"I believe that that is the appropriate standard to apply in looking at the decisions of the Examiner here which are*

sought to be impugned. So assuming that the Applicants don't have locus standi difficulties, assuming that they don't have difficulties as to the form of reliefs which they seek, assuming that the court is prepared to read section 13 (7) in the way which they suggest and to regard the definition of "determination of any question" as extending to this sort of relief then that is the standard that has to be applied.

I am quite satisfied having had the benefit of all this evidence that in this case the Applicants assuming that they have an entitlement to make this case, fall far short of demonstrating to the court that the Examiner here has done something which is "so utterly unreasonable and absurd that no reasonable man would have done it".

98. Subsequently in his judgment Kelly J. also stated:

"On the contrary I believe that there was an entirely rational and reasonable basis for the Examiner to come to the conclusion which he did. It involved him making, in part at least, a commercial decision. He is the person qualified to make that decision not the court. I do not accept that this is an application which is entirely about process. It also involves the consideration of the merits to some extent of the proposal which the Examiner has given favour to and the proposal which was made by Hutchinson. He made his decision in the context of the commercial realities of that and, in my view, is not now to be the subject of that discretion which he exercised being set aside by the court on this application.

Consequently, for these reasons, I refuse the reliefs which were sought in the notice of motion."

99. There are many elements of the learned judge's views which are of application to the present case. Kelly J. stated that he did not accept that the application in that case was one which was "entirely about process" but that it also involved consideration of the merits of the proposal. In the same way here, although the decision of the Examiner is to some extent about the investment process, (i.e. about what commercial information to provide to a potential investor) it is also about the substance of how the Examiner conducts the Examinership investment process.

100. The Applicant, by contrast, seeks to argue that in certain cases there is a different standard and to rely on *Re. Capitol Films Limited (in administration)* [2011] 2 BCLC 359. In this case Mr Snowden QC sitting as Deputy Judge of the High Court stated at p. 398 of his decision:

"I do not think that the line of cases exemplified by Re Edennote are an appropriate analogy on the question of costs in this case. I accept that the court will generally defer to the commercial judgment of the office-holders where what is in issue is a challenge to the office-holders' assessment of the merits of one particular bid for a company's assets over another, or whether, for example, it might be possible to obtain an increased bid for those assets given more time. However, as I have indicated above, applications under paragraph 71 raise additional and different issues. They require the court to determine whether it is appropriate to prevent the holder of a fixed charge from enforcing his security rights and to permit the administrator to undertake a sale which promotes the purposes of the administration more generally. Such an application requires the court to balance the competing rights and interests of the holders of fixed charges with the rights and interests of the other creditors: see Re ARV Aviation Ltd [1989] BCLC 664. On that type of issue, the court does not simply apply the Edennote approach and defer to the administrators' business judgment provided that it is rational: the court will decide for itself how to resolve the competing interests of creditors: see e.g. Re Buckingham International plc (No.2) [1998] BCC 943 at 960-961 (CA)."

What is the appropriate standard?

101. The Examiner says that his decision is a commercial judgment made in the best interests of the company. He says therefore on the authority of *Eircom, Edennote* and *Lightman and Moss* that the Court should only set aside his decision if *"it is so utterly unreasonable and absurd that no reasonable man would have done it."*

102. The Applicant, by contrast, submits that the appropriate test to use is that laid down in *Re. Capitol Films Limited* i.e. that in an application such as this, the Court must balance the competing rights and interests of the parties.

103. I have considered the cases and textbooks relied on by all of the parties. I note that in *Re. Capitol Films Limited* the question which the court was considering was how to balance the competing rights of the holders of fixed charges with the rights and interests of other creditors.

104. I also note that in *Re. Wogans (Drogheda) Limited* [1993] 1 I.R. 157 the High Court and the Supreme Court also considered whether a Deed constituted a fixed charge or a floating charge. This was an application by the Examiner brought by way of a motion for directions in the High Court seeking a declaration that the Respondent did not hold a fixed charge over the debts of the company. There was no discussion in that case about the standard to be applied. The only issue under consideration was whether the charge was a fixed or floating charge. It was therefore a question of law.

105. Having considered these principles and authorities, I am of the view that the standard to be adopted by the court in considering questions on such applications depends on whether the question raised is:

a) A question of law

b) A question of fact (e.g. the commercial judgment of the Examiner).

106. If it is a question of law then the court must determine that question of law by reference to the appropriate legal principles.

107. If it is a question of fact, and if there is a contest about how the Examiner has exercised his commercial judgment, then the court should apply the criteria in *Eircom* and *Edennote*.

108. It is clear, in my view, having considered all the affidavit evidence, and all of the submissions that the central question which the court is being asked to determine in this application is a question of fact. The plaintiffs are seeking certain information; the Examiner has decided not to provide such information. The Examiner says that in making this decision he has had to balance all of the various interests involved, including the interests of the companies, the creditors and the employees. He says that in making this decision he has exercised his commercial judgment having regard to all the facts of the matter.

109. In my view therefore the central issue which the court is being asked to decide is a question of fact i.e. whether the decision made by the Examiner is a proper exercise of his commercial judgment. Therefore the standard is the Eircom/Edennote standard.

Has the decision of the Examiner failed the requisite standard?
110. The Examiner has given reasons for his decisions. His reasons are that the information which is being sought is commercially sensitive. He also believes that if the information is released to companies engaged in the bidding process those companies could subsequently, if they are unsuccessful in the bidding process, (or if they withdraw from the bidding process), use that information to target specific betting shops of the companies and thereby to damage the business of the companies. That is a valid commercial judgment of the Examiner. There is no suggestion that it is not made bona fide. If there was such a suggestion, there is absolutely no evidence to suggest that it is not being made bona fide.

111. Moreover, the Examiner has to balance the competing interests involved in the various investment proposals. On the one hand there is the competing interest of the companies who do not wish to release this commercial information because it is commercially sensitive and because it could do damage to the companies when the companies exit the Examinership process. On the other hand, Boylesports say that they need this information to make a full and properly informed bid for the company. They say it would be a lame duck bid. Mr. Gallagher SC submits that if this information is supplied to Boylesports it might depress any price which the Ladbrokes UK parent company might be prepared to bid for the company, because even if such a bid is successful their competitor now has vital confidential information which it can use to target the most profitable stores or betting shops of the Irish business. This exchange neatly encapsulates the competing interests which have to be balanced in this situation.

112. The Examiner has said that he has considered all the issues and that he has exercised his commercial judgment in such a way as to refuse the information being sought because it is highly sensitive, commercial, confidential information which if given to a trade creditor such as Boylesports might damage the company if and when it exits Examinership.

113. In the circumstances, I am of the view that the decision of the Examiner to withhold the commercial information is not so "utterly unreasonable and absurd that no reasonable man would have done it".

114. I am satisfied that this decision was properly made by the Examiner within the scope of his commercial judgment and I am also satisfied that it is not utterly unreasonable and/or absurd. Therefore the relevant standard is met.

Conclusion
115. In the circumstances I am of the view that the application must be refused.