Neutral Citation Number [2011] IEHC 28

THE HIGH COURT

2010 522 COS

IN THE MATTER OF MICHAEL MCLOUGHLIN (PHARMACY) LIMITED AND

IN THE MATTER OF SUNDRIVE PHARMACY LIMITED (A RELATED COMPANY)

AND

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

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2009

JUDGMENT of Mr. Justice Clarke delivered the 28th January, 2011

1. Introduction

1.1 An examiner was appointed under the Companies (Amendment) Act 1990 ("the 1990 Act"), to the two companies named in the title to these proceedings. The examiner subsequently reported to the court in accordance with the 1990 Act and proposed the confirmation of schemes of arrangement designed to rescue both companies. While there was no overall opposition to the confirmation of the schemes of arrangement, two separate objections were taken to aspects of what was proposed. I will refer to the nature of those objections in due course. One of the objections concerned a proposed clause in the respective schemes of arrangement which provided for a certain degree of immunity from suit in favour of the examiner. The second objection concerned the way in which certain potential liabilities of the companies to the Revenue Commissioners ("the Revenue") was proposed to be dealt with in the schemes of arrangement.

1.2 Having heard argument from all interested parties at the confirmation hearing, I indicated to the parties that that I would rule on the matter on Friday the 21st last. On that occasion I indicated to the parties that I agreed with the objection made in respect of the proposed exclusion of liability on the part of the examiner, and agreed in part with the objection raised by the Revenue. I invited the representatives of the parties to agree (if possible) amendments to the respective schemes of arrangement to reflect my ruling. In addition, having heard those representatives on the question, I also came to the view that the amendments which would be necessary to give effect to that ruling were not such as would require or warrant the schemes being put again to meetings of the members and creditors of the companies. On that basis I indicated that, provided appropriate amendments were finalised, I would confirm the scheme in its amended form.

1.3 Happily, it proved possible for the advisers of the relevant interested parties to agree on appropriate amendments to the respective schemes of arrangement and I subsequently confirmed the schemes in that amended form. I had, however, indicated to the parties on the 21st January last that I would give detailed reasons for the conclusions which I had reached. This judgment is directed to those reasons.

1.4 The first port of call should, therefore, be to set out the basis of the two objections to which I have already referred.

2. The Objections

2.1 As noted earlier there were, technically, two separate schemes of arrangement in respect of the two companies named in the title to these proceedings. No material difference, relevant to the objections to which I am about to refer, arose as and between the two schemes.

2.2 In relation to the scheme in respect of Michael McLoughlin (Pharmacy) Limited, Clause 18.2 provided as follows:-

> "The Examiner shall have no personal liability in relation to these Proposals or his actions as Examiner or the conduct of the Examinership, (save in the case wilful default, gross negligence, or fraud on the part of the Examiner or his staff). Without prejudice to that exclusion of personal liability, if the Examiner has, in the performance of his functions under the Act, assumed, or if in future during the Protection Period he were to assume, personal liability on any contracts as provided for in Section 13(6) of the Act, the Examiner shall have a right to an indemnity out of the assets of the Company in respect of such personal liability. The Examiner's right to be paid on foot of any such indemnity or indemnities in respect of any obligation entered into by him in the performance of his functions shall rank in priority to the payment of any part of the debt due to the Creditors, and shall continue, notwithstanding the ending of the Protection Period."

An identical provision appeared in the proposed scheme in relation to Sundrive Pharmacy Limited.

2.3 Bank of Scotland was a significant creditor of both companies. The solicitor for Bank of Scotland objected to the inclusion of a clause in those terms in both of the proposed schemes of arrangement on what was said to be a principled basis. It should be emphasised that the solicitor for Bank of Scotland did not suggest that there was any basis for believing that the examiner in this case had done anything other than a competent and professional job. Rather, it was said that an exclusion clause of the type proposed to be included in these cases had begun to "creep in" to schemes of arrangement proposed for confirmation to the court. It was said that Bank of Scotland opposed the inclusions of such clauses as a matter of principle, and not on any basis connected with the facts of this case.

2.4 It should also be noted that, after the conclusion of the confirmation hearing, I invited the representatives of the relevant parties to return to court to also address me on the question of whether the 1990 Act contemplated the inclusion of such clauses in a scheme of arrangement and, thus, whether the court had, in truth, jurisdiction to confirm a scheme of arrangement including such a clause. The solicitor for Bank of Scotland argued that the court did not have such jurisdiction and that the 1990 Act did not contemplate the inclusion of such clauses in a scheme of arrangement.

2.5 In respect of both that issue and the merits of the inclusion of such a clause in the event that there was a jurisdiction in that regard, counsel for the examiner and counsel for the companies argued that there was such a jurisdiction and that it was appropriate to exercise it on the facts of this case at least. The issue which arose under this heading, to which I will shortly turn, is as to

whether there is a jurisdiction to include such a clause and, if so, whether it was appropriate to exercise that jurisdiction in this case.

2.6 The second objection was made on behalf of the Revenue. It will be necessary to set out the basis on which the Revenue claim that the companies owe it a significant sum of money in somewhat more detail in due course. However, there would appear to be a significant likelihood that part of the liability due to the Revenue may be a liability arising under the provisions of s. 438 of the Taxes Consolidation Act 1997 ("s. 438"), arising from directors loans. In an affidavit filed on behalf of the Revenue, it is said that the best estimate which can be made of the relevant liability at this time is €556,623 in the case of Michael McLoughlin (Pharmacy) Limited and €467,410 in the case of Sundrive Pharmacy Limited. It will be seen that the liability is, therefore, said to be somewhat in excess of €1,000,000 to which may well be added interest.

2.7 It should also be noted that there were other liabilities of the companies to the Revenue which were dealt with in a manner satisfactory to the Revenue such that no issue arose on the confirmation hearing in relation to those liabilities.

2.8 The way in which the respective schemes of arrangement proposed to deal with that potential liability to the Revenue was to provide for a series of interlocking measures. First, there is a commitment on the part of the companies (which will now be under new management for both companies are to be taken over by a major supplier and creditor as a result of the schemes of arrangement) to pursue what will by then be the former directors of the company for what are said to be liabilities of those directors to the companies. To the extent that monies may be recovered under such a process, a so called "residual debt fund" was proposed to be created from any realisation of amounts due to the company from its directors and/or persons connected with the directors less any costs associated with such a recovery. Thus, the residual debt fund will be comprised of the net proceeds of litigation designed to recover from the directors and their associates sums due to the companies. The schemes of arrangement estimate that the amounts so due are very substantial indeed, although there are, obviously, questions as to the extent to which any such sums may actually be recovered. The respective schemes of arrangement provide that the residual debt fund should be shared among various categories of creditors in circumstances where the Revenue would be entitled to receive a payment in respect of the amounts which might be due by the companies under s. 438, but only by sharing proportionately in that fund along with all other relevant creditors.

2.9 It should be noted in passing that, at the hearing, the solicitor on behalf of Bank of Scotland intimated that Bank of Scotland were happy to be deleted from the list of creditors who might share in the residual debt fund, thus enhancing the share which all other creditors would get in the event that monies are actually recovered and placed into that fund.

2.10 In essence, the case made on behalf of the Revenue was one based on what was said to be unfair prejudice being suffered by the Revenue by reference to the treatment of its potential entitlements as a creditor under s. 438. It was said that, while all other creditors, including unsecured creditors, were to receive a guaranteed amount under the respective schemes of arrangement (10% in the case of unsecured creditors), the Revenue were not to be guaranteed any payment in respect of the potential liabilities under s. 438. In addition it was said that, even to the extent that the Revenue might hope to receive some payment from the residual debt fund, the Revenue would still receive a lower total payment in respect of its entitlements under s. 438 than other creditors, for such other creditors would receive their share of the residual debt fund in addition to or as a top up to their basic entitlements under the scheme, whereas the Revenue would only receive an equivalent and proportionate share of the residual debt fund.

2.11 Counsel for the examiner argued that, in all the circumstances of the case, the proposal was not unfairly prejudicial to the Revenue. I propose addressing the detail of the arguments put forward by the examiner while setting out my reasons for coming to the conclusion that, at least in part, the Revenue were correct in their objection.

2.12 As already noted, I have already ruled that the exclusion clause in respect of the examiner should not be included in the scheme. I will turn first to setting out my reasons for coming to that conclusion. I propose then turning to my reasons for concluding that the schemes required to be amended to meet, at least in part, the objection of the Revenue.

3. The Exclusion Clause

3.1 It is first necessary to comment on the jurisdiction of the court. It must be recalled that what is at issue here is the content of an appropriate scheme of arrangement which might be confirmed by the court under the provisions of the 1990 Act. The starting point has, therefore, to be a consideration of the provisions of the 1990 Act itself.

3.2 First, it should be noted that the initial reference to a scheme of arrangement is to be found in s. 18, which provides that the examiner shall, where the various pre-conditions set out in that section are met, formulate proposals for "a compromise or scheme of arrangement". Section 22 deals with the contents of such proposals. Subsection (1)(a) simply requires that the proposals specify each class of member and creditor. Subsections (1)(b)-(d) provide for the specification of classes of members and creditors whose interests or claims will or will not be impaired and requires equal treatment within each class. Subsection (1)(e) simply provides for implementation while subs. (1)(f) and (1)(g) provide for the possibility of alterations to management or direction and/or the memorandum and articles of association. None of the above measures seems to contemplate an arrangement providing for immunity for an examiner. There is a catch all final provision to be found in s. 22(1)(h) which allows for the inclusion of such other matters as the examiner deems appropriate. That provision must, of course, be interpreted by reference to the detailed provisions of the other subsections and the purposes of the 1990 Act as a whole.

3.3 In addition, s. 24(5) and (6) provide that, where the court confirms proposals, same shall be binding on both members, creditors, and the company. There is no reference to the examiner in those provisions.

3.4 It seems to me to be clear, therefore, that a scheme of arrangement as contemplated by the 1990 Act is a scheme involving the company, its members and its creditors, whereby a set of arrangements is put in place designed to allow for the survival of the company. The express terms of the 1990 Act do not, therefore, in my view, appear to contemplate a scheme of arrangement involving measures between persons who might have a claim against an examiner arising out of the performance by the examiner of his or her duties and that examiner.

3.5 In those circumstances the question which arises is as to whether there is an implied authority for the inclusion of such a clause or, indeed, whether such clause comes within the scope of the "other matters" referred to in s. 22(1)(h) so as to permit that the scheme should contain measures designed to provide some degree of immunity to an examiner.

3.6 In that context, it is also appropriate to comment on some of the arguments put forward in favour of the inclusion of such a clause. First it was pointed out, correctly so far as it goes, that an examiner, in carrying out the statutory functions required by the 1990 Act, has to balance a whole range of interests. In that context, the examiner's primary duty is to the court and to comply with the statutory obligation to examine the company and, if appropriate, formulate and bring forward proposals for a scheme of arrangement. In those circumstances it is clear that the examiner may have to balance a whole range of interests in seeking to

formulate such a scheme or in carrying out any other functions which the 1990 Act confers or the court requires. However, it seems to me that those considerations do not provide a basis for suggesting that an examiner should be immune from being sued for negligence. Rather, those considerations may very well be important matters to be taken into account in determining the precise duty of care which an examiner may owe. It might very well provide an answer to many cases of negligence which might be sought to be raised against an examiner for the examiner to point to the fact that the examiner's overriding duty was to the court and to the performance of the duties which the 1990 Act imposes rather than to any one individual or body. Whether that argument would provide a complete answer might very well depend on the circumstances of the individual case. The nature of the examiner's role is, therefore, in my view something which goes to the extent of the examiner's duty of care but does not provide a basis for seeking to have the duty of care completely excluded by means of an immunity clause such as was proposed in this case.

3.7 In addition it should be noted that s. 7(6) provides that an examiner may apply to the court to determine any question arising in the course of his office or the exercise of any relevant powers. Thus, the examiner has the added protection, in cases of difficulty, of having access to the court to determine any questions of dispute. Provided that an examiner bona fide applies to court for directions under that section and properly puts before the court any relevant materials, then it is very hard indeed to see how the examiner could have any liability for implementing the court's directions. Doubtless any party likely to be affected by a decision of the court under s. 7(6) would be put on notice of the examiner's application, would have a right to be heard, and could not, thereafter, complain about directions given by the court by the backdoor method of seeking to sue the examiner.

3.8 In addition, it should be noted that a jurisdiction to include an indemnity clause in a scheme of arrangement would create a significant anomaly as and between the position of examiners in cases where the examinership came to a successful conclusion with the confirmation by the court of the scheme of arrangement concerned, on the one hand, and examiners in the case of failed examinerships on the other hand. In one case the court would, it is said, have a jurisdiction to allow, by the inclusion of a suitable clause in the scheme of arrangement concerned, the examiner to become immune from certain categories of liability whereas in the other case the examiner would be exposed to whatever types of claims might legitimately be brought. It would be difficult to see any logical basis for that distinction. Unless, therefore, the wording of the legislation clearly required such a distinction to be drawn, an interpretation which created such an anomaly is one which the court should be slow to adopt.

3.9 Finally, I should deal with an aspect of the argument which touched more on the facts of this individual case rather than on matters of general principle. For reasons which it is unnecessary to go into at this stage, the examiner in this case had, from the beginning, full direction over the companies. That measure was necessary to retain the confidence of important creditors whose continuing support was essential for the survival of the company. It is true, therefore, that, in this case, the role of the examiner was significantly wider than would have been the case in an ordinary examinership. However, that fact did not seem to me to provide a sufficient argument for the inclusion of an indemnity in favour of the examiner in a scheme of arrangement.

3.10 None of those arguments provide, in my view, a basis for suggesting that the 1990 Act contains an implied power to include an immunity clause in a scheme of arrangement. I was not satisfied, for the reasons already analysed, that there is an express jurisdiction to include such a clause, for it does not seem to me to be the type of measure which the 1990 Act contemplates being included in a scheme of arrangement in the first place.

3.11 Even if there were a jurisdiction, the fact that additional powers are given to the examiner would not seem to me to provide a justification for an indemnity such as is here proposed. I could see no reason in principle why an examiner who is given additional powers, for good reason, by the court, should not have the same potential liability in respect of the exercise of those powers as many other officers of the court such as liquidators, administrators and the like. As pointed out an examiner, like such other officers, has the important safeguard of being able to seek directions from the court in any case of difficulty.

3.12 All in all it seemed to me that if it had been the intention of the Oireachtas that examiners could be immune from suit in negligence arising out of the exercise of their functions, the Oireachtas would have said so in the 1990 Act. There is no doubt that the 1990 Act does not expressly so provide. On a proper construction of the 1990 Act it did not seem to me that the court was conferred with a discretion to include such an immunity by the backdoor of an appropriate clause being included in a scheme of arrangement. The fact that the scheme proposed in this case proposed to preserve liability for fraud, gross negligence and the like did not, in those circumstances, seem to me to be of any relevance.

3.13 For all those reasons I was satisfied that the court does not have a jurisdiction to approve such a clause. I was further satisfied that, even if the court had a jurisdiction to include such a clause, there was no legitimate basis for the inclusion of such a clause on the facts of this case. If any jurisdiction existed, it would seem to me that it could only be exercised in a wholly exceptional case for to do otherwise would be to introduce, by the backdoor, an immunity measure into the 1990 Act. It is next necessary to turn to the Revenue issue.

4. The Revenue Issue

4.1 As pointed out earlier, the Revenue claim which is at the heart of the dispute under this heading, arises under s. 438. That section provides for the treatment of certain loans made by a close company to individuals who are participators in the relevant company. Such loans are to be treated as a payment of a grossed up amount, having regard to a notional deduction of appropriate taxes, such as would leave the same net sum as being paid to the relevant individual. The affect of all this is that, in appropriate circumstances, the company concerned can be liable to return significant sums of tax to the Revenue where such loans are made. It would appear that, in the course of examining the affairs of the companies, the examiner came across loans which appeared to the examiner to give rise to a potential liability under s. 438 on the part of the companies and brought the relevant facts to the attention of the Revenue. It is in those circumstances that a significant potential liability on the part of the companies to the Revenue under s. 438 arises.

4.2 As was also pointed out earlier, the way in which that potential liability is sought to be met is by means of the residual debt fund. It is clear that persons who were directors of the companies owe significant sums to the companies. There is a commitment on the part of the companies, under their new management, to pursue those liabilities. There is, however, doubt about how much net funds will actually be recovered by that process. To the extent that such funds are recovered, same will be included in the residual debt fund. When the precise amount of any liability of the companies to the Revenue under s. 438 is ascertained then, under the schemes as proposed, the Revenue would be entitled to share on a proportionate basis in the residual debt fund.

4.3 The Revenue complains that the treatment of its entitlements under s. 438 are unfair when compared to the treatment of other creditors under the schemes of arrangement. A number of arguments are put forward on the part of the examiner against that proposition.

4.4 The Revenue complains that the schemes of arrangement give it no guaranteed payment of any sums due under s. 438, because

any payment is dependant on recovery from the directors so as to create the residual debt fund. It is said that that, in itself, is a discrimination because no other comparable set of creditors is so treated. The examiner draws attention to the fact that there are certain other categories of creditor who do no receive a guaranteed payment. However, as pointed out by counsel for the Revenue, those categories involve persons connected in one way or another with the company. There can always be a justification for distinguishing as and between creditors who are connected with a company and what one might loosely call independent creditors. The fact that no guaranteed payment is given to connected creditors does not seem to me to provide a justification for making no guaranteed payment to the Revenue.

4.5 Second, attention is drawn on behalf of the examiner to the undoubted fact that the Revenue have been entitled to ensure a better rate of payment in respect of certain of their debts (by the exercise of a right of set off) than applied in the case of ordinary creditors who did not have that right. There is no doubt that the Revenue did exercise such a right of set off and have, therefore, been able to deal with other liabilities of the companies to the Revenue (that is liabilities other than the liability which may well arise under s. 438) in a satisfactory way. While some weight might be attached to that fact in an overall consideration of the fairness of the scheme to the Revenue, it does not seem to me that it is a factor of any significant weight, for the Revenue's right of set off exists and would appear to be a factor that could have been used by the Revenue to its advantage in any likely insolvency scenario which might emerge in respect of the companies. It is not an added entitlement which in any way derives from the examinership process.

4.6 A third point made by the examiner concerns the difference which arises on the facts between the Revenue claim in this case and certain other claims which are not yet definitively ascertained. The schemes of arrangement proposed provided for a not untypical method of determination of contested or un-admitted creditor claims. It is necessary to pause to say something about the justification for such clauses which are now typically to be found in virtually every scheme of arrangement proposed for confirmation to the court.

4.7 In the formulation of schemes of arrangement examiners are required to put together a series of interlocking measures which provide the company with a real prospect of survival. Such schemes will inevitably involve further investment, whether by existing shareholders, new investors, or a combination of both. It is highly unlikely that any such investment would be forthcoming while there remains significant doubt about the companies financial position into the future, brought about by ongoing questions relating to the existing liabilities of the company concerned. Small disputed debts may not be a problem. However, it is most unlikely that investors could ever be secured to put up the funding necessary to implement a scheme of arrangement if there were serious doubts (brought about by contested claims) as to the future viability of the company. With that in mind, schemes of arrangement normally provide for some means of early definitive determination of disputed claims. Depending on the scale of such disputed claims, the mechanism for the payment of those claims may either fall on the company post examinership (where the amounts are not very large) or may be dealt with by retaining a fund under the scheme provided for the in the examinership to meet such claims. Obviously any such claims are likely, in any event, to be paid only at a percentage for there is no reason why a disputed creditor should end up getting more than an undisputed creditor.

4.8 Measures such as those which I have just described are, in my view, ordinarily justified by the need to bring certainty to the process. It is true that creditors who have a summary and quick dispute resolution mechanism imposed on them do lose out on their right to have their claim determined in the ordinary (and, perhaps, it might be said, leisurely) route through the courts. However, in virtually all cases the relevant class of creditors would probably get nothing in any event in a liquidation or receivership so that the right to pursue a claim against an insolvent company may be of little real value. In those circumstances getting (say) 10% of whatever an expert may determine their entitlement to be, may be better than any other scenario and may be fair in comparison with the fact that an agreed creditor of the same type (for example, unsecured) will get the same percentage.

4.9 The schemes in this case have such a mechanism. The problem is that it would appear to be unlikely that a final determination of the amount which may be due to the Revenue under s. 438 could be made within the same type of timescale as would be required in order to bring certainty to the affairs of these companies and as applies to the other disputed debts or liabilities. As pointed out earlier, there is a real prospect that the claims under s. 438 may exceed €1,000,000 together with interest. Even at 10% those claims would be well over €100,000. If the companies had to provide for a contingency of 10% in the event that the Revenue were able to establish claims of that order under s. 438, then that contingency would be a real barrier to the continued survival of the companies. If that contingency had to be retained from the sums earmarked for early payment to creditors then the benefit of the schemes to ordinary creditors would be very heavily diluted by the size of the Revenue contingency.

4.10 Under this heading it seemed to me that the examiner had a valid point. There may be practical considerations which make it necessary that different categories of creditor be dealt with in different ways. One of those practical considerations may be the need to bring certainty at an early stage so that the remaining provisions of the scheme of arrangement can be implemented in early course, while at the same time not placing large contingencies against the company post examinership. If money has to be retained to meet possible disputed claims or claims where the amount of same have not yet been ascertained, then that can only be done in one of a number of ways. If funds available in the context of the scheme of arrangement (presumably from an investor) are to be retained to meet any such claim, then it follows that the amounts available to be paid in early course to all other categories of creditors have to be reduced and, where the unascertained claim is large, reduced by a significant amount. If, on the other hand, there is to be an immediate payout to the existing creditors, then the company will have to bear the risk of a significant contingency in the future. The former course of action would not be fair to the existing creditors and the latter would place a significant barrier to the survival of the company. Such analysis justifies, in my view, the need to take special measures to deal with large disputed claims from whatever source. That analysis does not justify the claims being ignored or dealt with in an unfair way. It does, in my view, justify different measures being adopted in respect of large disputed or unascertained claims than might apply in other circumstances.

4.11 I was, therefore, satisfied that the examiner was justified in including the potential Revenue claim under s. 438 in a different category from other claims for it is both large and as yet unascertained. However, it seemed to me that the way in which the Revenue claim under this heading was dealt with was unfair. A simple example will illustrate this point.

4.12 If one were to envisage an agreed unsecured creditor in the sum of €100,000 and the ultimate successful Revenue claim under s. 438 being in the same sum of €100,000, it is necessary to analyse what would ultimately happen to those two claims under the schemes as proposed. The unsecured creditor would get an immediate payment of 10% or €10,000. The unsecured creditor would remain a creditor for the balance of €90,000 and would be entitled to seek to recover some of that remaining sum on a proportionate basis out of the residual debt fund. The Revenue would not be entitled to anything now but would be entitled to seek to recover its full debt of €100,000 from the residual debt fund. On the assumption that the residual debt fund itself provided for a further dividend of 10%, then the unsecured creditor would get a further €9,000 (being 10% of €90,000) while the Revenue would get €10,000 (being 10% of €100,000) from the residual debt fund. In the circumstances the unsecured creditor would collect a total of €19,000 while the Revenue would collect a total of only €10,000. It seemed to me that there was no justification for that distinction.

4.13 It is, of course, true to say, as was argued on behalf of both the examiner and the companies, that the Revenue would get nothing in a liquidation if no money was collected from the directors for it is clear on the figures that, in those circumstances, there would be no funds available to meet the requirements of unsecured creditors. But that point applies equally to all other unsecured creditors as well. Those creditors would get nothing on a liquidation unless something significant was recovered from the directors. What then is the justification for making a distinction between those unsecured creditors and the Revenue. In my view there is a justification, based purely on the practical considerations which I have earlier analysed, in bringing the initial phase of the schemes of arrangement to an early close so that the ordinary unsecured creditors can get their payments and the company can face into its post examinership future without a large contingent debt hanging over its head. The fact that it is not practically possible to ascertain the Revenue entitlement under s. 438 within a timeframe to allow its claim to be dealt with in the same way, is an unfortunate fact but it remains a fact which must be faced. That analysis justifies the Revenue having to await the availability of funds into the residual debt fund before the Revenue receives any payment and, as an unfortunate but necessary knock on consequence, requires the Revenue to take its chances that enough money will come into the residual debt fund to enable it to be paid.

4.14 However, that fact did not seem to me to justify the Revenue continuing to be prejudiced even if and when sufficient funds comes into the residual debt fund to the extent that the Revenue would ultimately receive a lower total payment than another unsecured creditor. In those circumstances it seemed to me that the appropriate course of action was to require that the Revenue would have first call on the residual debt fund to obtain a payment up to and equivalent to the percentage being paid to ordinary unsecured creditors. To the extent that the residual debt fund was sufficiently liquid to give the Revenue that payment, then any balance can continue to be paid on a proportionate basis between all of the creditors as originally envisaged (with the exception of Bank of Scotland who have generously agreed to waive any entitlement under this heading). Therefore, provided sufficient funds come into the residual debt fund, the Revenue will end up getting the same as any other unsecured creditor. The only way in which the Revenue can be prejudiced vis-à-vis an ordinary unsecured creditor is if either no funds come into the residual debt fund or insufficient funds come in to allow the Revenue to receive what turns out to be 10% of whatever claim is ultimately determined under s. 438. That is undoubtedly a risk and one which is to the detriment of the Revenue, but for the reasons which I have already sought to analyse, it seems to me to be a distinction which is a necessary consequence of the fact that the Revenue debt is currently a long way away from being finalised.

4.15 In those circumstances I indicted to the parties that I would only be prepared to approve the schemes of arrangement in the event that appropriate amendments were introduced to give the Revenue priority out of the residual debt fund up to the point where the Revenue had achieved an equality of payment on a percentage basis with other unsecured creditors.

5. Conclusions

5.1 In summary, therefore, I was satisfied that it was not within the competence of the court to include within an approved or confirmed scheme of arrangement a clause which purported to give immunity to an examiner. I was further of the view that, even if such a jurisdiction existed, it would not be appropriate to exercise same save in wholly exceptional circumstances which did not appear to me to exist on the facts of this case.

5.2 In addition, I came to the view that postponing the potential Revenue entitlements under s. 438 to the receipt of monies from the directors into the residual debt fund was reasonable but that placing the Revenue at a disadvantage vis-à-vis other unsecured creditors even if sufficient funds were received into that fund was unfairly prejudicial.

5.3 I, therefore, directed that revised schemes of arrangement should be brought forward which deleted the proposed indemnity clauses in the respective schemes and which made appropriate amendments to allow the Revenue to receiver a priority payment out of the residual debt fund up to the 10% which was earmarked in any event for all other unsecured creditors.

5.4 Happily, the parties were able to agree on the appropriate text of the necessary amendments and schemes incorporating those amendments were ultimately confirmed.