Neutral Citation Number: [2010] IEHC 340

THE HIGH COURT

2010 475 COS

IN THE MATTER OF MCINERNEY HOMES LIMITED

AND

IN THE MATTER OF MCINERNEY HOLDINGS PUBLIC LIMITED COMPANY

MCINERNEY CONSTRUCTION (HOLDINGS) LIMITED

MCINERNEY CONTRACTING LIMITED

MCINERNEY CONTRACTING DUBLIN LIMITED

(EACH A RELATED COMPANY)

AND

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

JUDGMENT of Mr. Justice Clarke delivered the 24th September, 2010

1. Introduction

1.1 Each of the applicant companies ("McInerney") is a company within the McInerney Group of Companies ("McInerney Group"). There are further companies within that group which are not the subject of this application. McInerney, in one form or another, has been a house builder in Ireland for upwards of 100 years. In common with many companies in the construction and development sector, McInerney has suffered a significant financial reversal in recent years due to the collapse of the property market. McInerney is currently insolvent.

1.2 In those circumstances, an application was brought by McInerney in which the appointment of an examiner was sought. A petition was presented on the 26th August, 2010, and the usual application for directions was, as required, made on the same day. In addition, an interim examiner, Mr. William O'Riordan ("Mr O'Riordan") was appointed by the court (Clark J.) on the same occasion when the directions motion was heard.

1.3 The relevant directions were complied with and the substantive hearing of the application to appoint an examiner initially came before Finlay Geoghegan J. on the 7th September last. Because there was opposition to the appointment of an examiner from three banks (that is Anglo Irish Bank Corporation Ltd, Bank of Ireland plc and KBC Bank plc) (collectively "the Banking Syndicate"), it was necessary for the application for the appointment of an examiner to be put back for a short number of days until the 11th September when it came on for hearing before me. Certain other creditors either supported the application through correspondence or adopted a neutral position. The creditors supporting the application were, in the main, small unsecured trade creditors. The formal proofs which are required to be established for the appointment of an examiner were all in place, together with satisfactory evidence of compliance with the directions previously given by Clark J. In substance, therefore, the issue which I had to try concerned the objection taken by the Banking Syndicate to the appointment of the examiner.

1.4 Having regard to the urgency of the matter, I indicated to the parties that I would give a brief ruling on the following Monday, that is the 13th September. On that occasion I ruled that Mr. O'Riordan should be appointed as examiner, but that I would give reasons for coming to that view in a judgment to be delivered today. This judgment is directed towards setting out the reasons for coming to that conclusion.

1.5 In addition, I did give a specific direction to the examiner on the 13th September to report to me on certain matters which were of importance to the examinership. I set out some brief background to that direction in a verbal ruling on the 13th September. I also propose dealing more fully with the reasons for giving such a ruling in the course of this judgment.

1.6 In the context of the fact that the real issue was as and between McInerney on the one hand and the Banking Syndicate on the other hand it is first appropriate to turn to the objections raised by the Banking Syndicate.

2. The Objections

2.1 While focusing on the objections raised by the Banking Syndicate it is, of course, important to recollect that the onus of proof rests on the petitioner to establish any matters necessary for the purposes of the appointment of an examiner. See *Re Vantive Holding* Ltd [2010] 2 ILRM 156. However, it was accepted by all concerned that the formal requirements for the appointment of an examiner had been met. In substance, therefore, the only real issue was as to whether the questions raised by the Banking Syndicate were such as ought preclude the appointment of an examiner. Two sets of issues were raised on behalf of the Banking Syndicate. First, it was said that, looking at the McInerney Group as a whole, no reasonable prospects of survival of the undertaking or any part it had, it was said, been established. In order to consider that issue it was necessary to turn first to the case put forward on behalf of McInerney as to such potential survival. I will set out my views on that question in early course.

2.2 In addition, the Banking Syndicate suggested that, even if I were to be satisfied that there was some reasonable prospect of survival of all or part of the McInerney Group taken as a whole, it was said that I could not be satisfied, at least in respect of some of the companies named in the title to these proceedings, that the prospects for survival of all or a part of the undertaking of each such company had been established. I will set out my views on that issue later in the course of this judgment.

2.3 There was, therefore, an attack on the adequacy of McInerney's case, both at the overall level of the prospects of survival in respect of the group as a whole and at a narrower level in respect of individual companies within the group. There were not, in reality, any significant discretionary issues raised which were suggested as being sufficient to warrant the court not appointing an examiner if, contrary to the Banking Syndicate's primary submission, I was satisfied that there was a reasonable prospect of survival both in respect of McInerney as a whole and each of the individual applicant companies.

2.4 In those circumstances, it seems that the appropriate starting point for setting out my reasoning should be an analysis of the

financial position of McInerney together with its difficulties and a consideration of the prospects of the survival of the whole or any part of its undertaking. I turn, therefore, to McInerney's problems.

3. McInerney's Problems

3.1 The McInerney Group as a whole has a somewhat complex corporate structure. However, for practical purposes it would appear to operate in four divisions viz:-

1. An Irish house building and contracting division;

2. A UK house building division;

3. Commercial operations being office, retail and industrial developments in both Ireland and the UK. These operations are conducted by Hillview Developments Limited ("Hillview") and its subsidiaries, which companies are, it would appear, currently engaged in negotiations with their lenders on a proposed restructuring of borrowings. The borrowings of Hillview do not involve recourse to the rest of the group. An examiner was not sought in respect of Hillview or its subsidiaries; and

4. Resort management in Spain. It would appear that a voluntary administrator has been appointed to the company dealing with this division through the Spanish Courts.

3.2 While there was some minor dispute between the parties as to the precise level of indebtedness of McInerney to the Banking Syndicate, it was common case that the sum involved was somewhat over €110,000,000. Ultimately, the problems of McInerney stem from the fact that its balance sheet was significantly influenced by property holdings, the value of which had to be significantly reassessed in the light of the crash of the property market. On the basis of the materials before the court it would appear that the directors of McInerney generally took the view that it was necessary to write down the value of those property assets by something in excess of 50%. It is said that the exercise which led to that decision involved a detailed consideration of each of the relevant property assets, having regard to the type of prices which could now be secured for houses of the type which McInerney typically produces, coupled with up to date development cost assessment. There was nothing in the materials to suggest that such an exercise was carried out other than in a proper way. There was evidence to support the fact that McInerney did not engage in the purchase of sites in fringe locations. While it is true that the value of development land in such fringe locations has fallen by figures much in excess of 50% over the last number of years (as the experience of the Commercial Court bears out), it did not seem to me that a reduction in the value of McInerney's land holdings of a figure in excess of 50% was unrealistic in all the circumstances. It is, of course, extremely difficult to value development land at the moment because there is, in truth, very little market for such land. However, I was satisfied that the write down in the value of the lands included by McInerney in its books was as realistic as one can be in the difficult circumstances in which all now find themselves. While the possibility that it might be necessary to put in place further write downs can never be ruled out, it seemed to me that the current accounts provide a potentially realistic basis for looking at the prospects of McInerney into the future.

3.3 However, the write down to which I have referred (which was well in excess of €150,000,000) placed McInerney in a position where its liabilities significantly exceeded its assets.

3.4 In that context, McInerney instructed Goldman Sachs with a view to attempting to find a way out of its difficulties. Goldman Sachs identified a potential investor, being Oaktree Capital Management L.P. ("Oaktree") a US company. Ultimately a proposal by Oaktree to invest €40,000,000, being as to €30,000,000 into the UK division and €10,000,000 into the Irish division, was put in place. Discussions progressed involving Oaktree and the Banking Syndicate concerning on the one hand a potential investment by Oaktree and, on the other hand, a restructuring of the loans which the Banking Syndicate had made to McInerney.

3.5 It was clear that McInerney's banking arrangements and the proposed investment were two parts of a jigsaw which needed to interlock if a suitable arrangement for the rescue of McInerney was to be put in place. Obviously, from the perspective of Oaktree, its investment would be into a restructured McInerney, which would have some form of restructured banking arrangements. In order for the investment to make sense from Oaktree's perspective, it would be necessary that Oaktree viewed a potentially reorganised McInerney as being a viable proposition in the light of any restructured banking facilities that might be put in place. Likewise, from the perspective of the Banking Syndicate, there would be little point in engaging in a restructuring of McInerney's liabilities so as to allow McInerney to continue in business unless there was a sufficient and appropriately structured investment such as would lead the Banking Syndicate to take the view that it had a better opportunity to recover more of its outstanding debt by permitting such a restructuring to take place, rather than by pulling the plug and, presumably, putting in a receiver. The Banking Syndicate appointed IBI as advisers for the purposes of reviewing the investment proposal on the 22nd July, 2010. However, difficulties began to emerge in the early part of August.

3.6 It would appear that, on the 5th August, 2010, McInerney representatives were invited to attend a meeting at Bank of Ireland and were informed that, arising from certain procedures and requirements which participating institutions are obliged to follow in order to comply with the National Asset Management Agency Act 2009, the Banking Syndicate would not advance €500,000 of stand by working capital to McInerney and, in addition, had cancelled the overdraft facility of McInerney and implemented what was described as a 100% cash sweep. A cash sweep means that any available cash is taken by the bank on foot of its security and applied in reduction of McInerney's loans. It should in passing be noted that two of the three members of the Banking Syndicate are so called NAMA banks. While not strictly speaking a legitimate party to the examinership, NAMA was represented at the hearing and indicated that it was adopting a neutral position. It appears to be accepted that, insofar as that portion of the Banking Syndicate's liabilities which are due to Bank of Ireland and Anglo are concerned, those liabilities will, in a relatively short period of time, be taken over by NAMA.

3.7 In any event, after the 5th August, McInerney's position became difficult. While it was clear for some considerable period of time prior to that date that McInerney was in a position where its liabilities exceeded its assets by a considerable margin, McInerney was, up to that time, with the support of the Banking Syndicate, able to continue to trade. However, in the light of the measures which were informed to McInerney on the 5th August, that situation changed radically for McInerney was no longer in a position to pay any of its liabilities. It, thus, became insolvent and this application followed.

3.8 It is against that general background that it is necessary to address the question of whether McInerney has established, at group level, a reasonable prospect of survival of the whole or any part of its undertaking. I turn to that issue.

4. Prospect of Survival

4.1 While it is true to say that each case in which the question of a reasonable prospect of survival arises in the context of an application to appoint an examiner turns on its own facts, there are certain general features which tend to crop up in most cases. By

definition, as a result of s. 2(1) of the Companies Amendment Act 1990 ("the 1990 Act"), a company entering examinership has to be insolvent. The first port of call has, therefore, to be to identify why the company is in financial trouble in the first place. There will normally be two consequences of whatever has led to the company's troubles. First, whatever losses are attributable to that cause remain a blot on the company's balance sheet and will need to be addressed in some form or other if the company is to survive. Second, unless the cause is largely a one off event or series of connected events with no continuing affect other than the losses attributable to them (such as, for example, a failed diversification or take over), then it will be necessary for the company to adopt measures to ensure that those causes are addressed and that its day to day trading into the future can realistically be projected as being likely to operate on a profitable basis.

4.2 Both of those questions arise in the context of McInerney. Its problems have left a huge gap in its balance sheet. Any prospect of survival requires a solution to that problem whether in the form of a reduction in its liabilities (principally to its bankers) or a significant injection of capital in the form of an investment or, more realistically, having regard to the scale of the problem, both of the above. In essence, therefore, a solution must be found to the very large hole in McInerney's balance sheet by a reduction in its debt to its banks and an investment if it is to have any realistic prospect of survival.

4.3 In addition, the problem of whether McInerney will be in a position to be able to trade profitably into the future needs to be addressed. It is not, therefore, just a case that McInerney has suffered a one off loss and has now returned to profitable trading on a day to day basis. Rather, it is clear that McInerney continues to suffer from a very significant reduction in the number of units which it can sell. There has, therefore, to be a realistic basis for believing that that problem can be solved in order that McInerney can have a realistic prospect of survival.

4.4 It, therefore, seemed to me that there were two issues that needed to be addressed under this heading. The first was as to whether there was a realistic prospect of being able to solve the companies' capital problem by a reduction in its bank debt and an investment. For the reasons which I have already addressed in the context of the negotiations which took place between the existing Banking Syndicate and Oaktree, those two elements of the equation are necessarily closely interlinked. Second, in addition, it is necessary that there be a realistic basis for believing that the business of McInerney, should it emerge from examinership, would be able, on a day to day basis, to trade profitably into the future. I propose setting out my reasons for concluding that McInerney had established a realistic prospect of survival under both of those headings in the sequence which I have set them out.

4.5 So far as McInerney's capital shortfall is concerned, the situation is complicated by the position adopted by the Banking Syndicate. The stated position of that Banking Syndicate, through counsel, at the hearing before me, was that the syndicate had taken the view that it no longer wished to be a lender to McInerney. It was not, however, absolutely clear to me as to the basis on which that indication was given. As a matter of fact, on the evidence, it would appear that negotiations continued between IBI on behalf of the Banking Syndicate and McInerney and Oaktree, after the Banking Syndicate indicated in early August that it was calling in its loans insofar as it could and, indeed, after an interim examiner was appointed. While there was some dispute between the parties as to whether those negotiations were without prejudice, it seemed to me that, for the purposes of the application with which I was concerned, it was sufficient that I have regard to the fact of those negotiations rather than the detailed position adopted by the parties in same. The final position adopted on affidavit on behalf of the Banking Syndicate seemed to me to suggest that it was the view of the Banking Syndicate that the gap between the parties still remained very large, notwithstanding what seemed to be an improved offer by Oaktree made less than a week before the hearing before me. That offer appears to have been improved in the sense that Oaktree indicated a willingness to accept a lower reduction in McInerney's debt to the Banking Syndicate than had previously been its stated position.

4.6 Leaving aside, for the moment, the precise terms of any possible arrangement, it seems that, at a general level, what was being discussed was the possibility that Oaktree would make an investment of the order of €40,000,000 into the McInerney Group as a whole divided, as I have pointed out, as and between the UK division and the Irish division. On the other side, in the event of an agreement, the Banking Syndicate would accept that its total liabilities would be reduced by writing off some portion of those liabilities. Provided the amount and terms of an Oaktree investment coupled with the amount and terms of continuing banking facilities could be agreed by both parties, then there would be no reason, in principle, why a satisfactory arrangement might not be made. It was to that end that negotiations were being conducted.

4.7 However, it is clear that, in order for any such arrangement to be satisfactory to the Banking Syndicate, the syndicate would have to be persuaded that the amount that it was likely to recover through such a restructuring would be at least as much as the amount that it might recover through a receivership.

4.8 There can be little doubt but that the stated position of the Banking Syndicate was that the offer on the table from Oaktree (even allowing for the improved offer to which I have referred) would not provide the Banking Syndicate with a set of arrangements where the syndicate would view its prospects as being better under a re-organised and restructured McInerney rather than under a receivership. It seemed to me that I had to take the Banking Syndicate at its word on that point. What was not quite so clear was whether there might be any terms which could be negotiated as a result of which the Banking Syndicate's view of that equation might change. The Banking Syndicate is currently owed a sum in excess of €110m. As part of an exercise, the results of which were placed before the court on behalf of the Banking Syndicate, a review of the likely recovery of the Banking Syndicate under a receivership was engaged in. It will be necessary in due course to refer to the business plan and projections which have been developed by McInerney. It should at this stage be noted that the Banking Syndicate has suggested that that business plan and its assumptions may be unduly optimistic. However, for the purposes of this exercise the Banking Syndicate accepted the assumptions which underlay that plan and came to a calculation which suggested that its recovery under a receivership might be, over a ten year period, something of the order of €90m. However, it was, quite properly, acknowledged that it was necessary to discount that sum by virtue of the fact that much of the relevant monies would not come in until well into the ten year period. Converted to a current day sum, the amount would appear to be somewhere of the order of €60m depending on the cost of funds figure utilised. The reason for utilising a cost of funds figure in the calculation is, of course, that until such time as the Banking Syndicate recovers any particular sum of money, it will need to fund the money outstanding. Depending on the cost which the Banking Syndicate would have to pay for those funds, then the present value of receiving such funds after a period of time needs to be discounted by that cost of funds. For example, if the Banking Syndicate receives €1m today then that has a value of €1m to it. On the other hand, if it receives €1m in seven years time then it will have had funded that €1m for all of the intervening period and will have suffered the loss of having had to pay whatever the cost of funds would be for that period. It is obvious that the €1m in seven years time is less valuable than €1m today and the calculation as to its current or present value requires to be carried out by reference to the cost of funds.

4.9 The consequence of that exercise is that it seems highly improbable that the Banking Syndicate will recover anything like the full value of its loans. Even on the basis of McInerney's assumptions, which the Banking Syndicate itself seems to regard as unduly optimistic, the syndicate does not, it would appear, believe that it is likely to recover very much more than half of its entitlements. In those circumstances, it does not seem to me to be unrealistic to assume that there is some level of reduced debt at which it would

appear likely to the Banking Syndicate to make sense to do a deal. The Banking Syndicate is not going to recover the full sum or anything like it in any event. Exactly how much below that full sum gives rise to a figure where it makes sense to do a deal is, of course, a complex matter and one which, at this stage, can only be a question of conjecture. In addition, it is also appropriate to take into account the point made by counsel on behalf of the Banking Syndicate which is to the effect that there is a significant difference between a bank being actually given cash today (even at a reduced sum) in full discharge of a loan and the same bank being asked to continue to provide facilities to the relevant borrower having taken a reduction in the amount owing. If, for example, McInerney were in a position, through other borrowing or investment or both, to offer the Banking Syndicate a cash sum of (say) €60m today, to take out the syndicate's entire liabilities, that would be one thing. It would be a different thing to ask the Banking Syndicate to reduce its liabilities to €60m today and to nonetheless, in addition, to require the syndicate to depend on the ongoing success of McInerney for the repayment of that reduced sum of €60m. It would undoubtedly be reasonable for the Banking Syndicate, in any such consideration, to factor in the significant difference between the certainty of full payment under the first of those two propositions and the undoubted risk which would attend the second. That is not to say that there may not be a figure at which it would make commercial sense for the bank to adopt under the second possibility. Rather, it provides a cogent argument why that figure would need to be higher under the second possibility to reflect the Banking Syndicate's continuing exposure to the risk of McInerney not being able to repay its debts.

4.10 Against that general background, I invited counsel for McInerney to indicate how it was perceived that McInerney had a realistic prospect of being able to solve its capital problems. While not put in this way, it seemed to me that, at the end of the day, three possibilities were explored. It seems to me, on the basis of my current understanding of the matter, that those three bases amount to the only ways in which the capital problems of McInerney might be solved. If there is an alternative it is something which has yet to be explored.

4.11 The three ways seem to be the following:-

> (a) That the existing Banking Syndicate enter into an agreement with McInerney (or Mr. O'Riordan is his capacity as examiner) and that at the same time Oaktree (or an alternative investor) enter into an interlocking agreement such that both the Banking Syndicate and Oaktree/an alternative investor are happy with the overall set of arrangements.
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> (b) That a scheme of arrangement is put in place which requires the Banking Syndicate to take a reduction in its entitlements in circumstances where McInerney has put in place alternative banking arrangements sufficient to take out its liabilities to the Banking Syndicate at that reduced level. Obviously those arrangements would need to be such that there was an investment by Oaktree/an alternative investor of a sufficient amount and on sufficient terms so as to satisfy a putative alternative bank to make such a facility available.
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> (c) That a scheme of arrangement is put in place (if that be legally possible) which would have the effect of altering both by a reduction in the amount due and, perhaps, in respect of other terms, the banking arrangements between McInerney and the Banking Syndicate such that those revised banking arrangements were, in effect, imposed on the Banking Syndicate in the absence of its agreement. In those circumstances it would be necessary also for there to be an investment from Oaktree/an alternative investor sufficient to make the scheme of arrangement stack up.

4.12 There are, of course, problems with each of those eventualities. So far as the first is concerned there is the question as to whether there is any realistic likelihood of such an agreement being entered into. However one interprets the stated position of the Banking Syndicate, it is certainly to the effect that the existing offer on the table from Oaktree is a long way short of being sufficient to persuade it to enter into an agreement such as would allow an examiner, if appointed, to come forward with a scheme of arrangement which had the agreement of the Banking Syndicate and Oaktree/an alternative investor. It should be noted that the examiner drew to my attention the fact that there had been some expressions of interest from potential investors other than Oaktree. It does also have to be acknowledged that Goldman Sachs has, of course, been seeking investors for many months and that the timeframe for the completion of a deal (presumably after due diligence) by an alternative investor is tight. However, the possibility of either Oaktree or such an alternative investor making an improved offer does not seem to me to be unrealistic. In all those circumstances, for the reasons which I have already sought to analyse, it does not seem to me that one could rule out the possibility that there is a set of arrangements which could be negotiated and which would meet the end of being satisfactory to both the Banking Syndicate and Oaktree or an alternative investor.

4.13 So far as the second possibility is concerned, counsel on behalf of the Banking Syndicate indicated that, while the court was not being invited at this stage to make a final ruling on the matter, it was the position of the Banking Syndicate that an arrangement of the type contemplated was not permissible as part of a scheme of arrangement which could be approved under the 1990 Act. There is, therefore, a question over whether such an arrangement is legally possible. In addition, of course, even if such an arrangement is legally possible in principle, it would follow that any reduction in the liabilities of McInerney to its banks which was imposed as part of such a scheme of arrangement, would need to be such as could not be described as "unfairly prejudicial" for should it be unfairly prejudicial the scheme could not be approved. To the extent, therefore, that there may be a legal entitlement to include within a scheme of arrangement a provision which reduces the liabilities of the relevant company to its secured creditors, it follows that, in assessing whether any such provision might be permitted, it would be necessary to assess the position of the same secured creditor in the alternative scenario of a receivership or a winding up. The argument put forward on behalf of McInerney is that unsecured creditors are frequently required to take a very small percentage of their liabilities in a scheme of arrangement reflecting the fact that, in many cases, the same unsecured creditors would receive nothing on a liquidation. On the basis of McInerney's argument it is said that there is no reason why a secured creditor cannot be placed in the same position at the level of principle, provided that due regard is had to the fact that the alternative scenario for the secured creditor is likely to be a lot better than that for the unsecured creditors. In those circumstances it is said that, at the level of principle, if it could be demonstrated that a secured creditor was only likely to recover (say) 50% of its debt under a receivership or a liquidation, there was no reason why a requirement to reduce the entitlement of that secured creditor to (say) 55% as part of a scheme of arrangement was impermissible. Whether that is a correct view of the law is a matter that awaits determination. However, even if it be a correct view of the law, there is clearly a difficulty which would need to be surmounted on the facts of this case.

4.14 There was not, at least at the time of the hearing before me and my ruling, any identified alternative bank or banks, who had indicated a willingness to enter into negotiations to provide funding on an on-going basis to McInerney in a sufficient sum to allow the examiner to work on a scheme of arrangement which would provide for the taking out of the liabilities of the existing Banking Syndicate at a reduced sum. I did not come to the view that the absence of such an alternative banking arrangement was a matter which should weigh very heavily in the circumstances of this case. Whatever may be the merits or otherwise of the negotiations which have been conducted over the last number of months between the Banking Syndicate and McInerney and Oaktree, it seems absolutely clear that negotiations were continuing, at least in some fashion. In those circumstances, it is, perhaps, not surprising that McInerney has not, as yet, explored the possibility of an alternative bank or banks being taken on as its lenders. However the fact

remains that, in order for a scheme of the second type identified above to put in place, a bank or syndicate of banks would need to be indentified in early course, such that concluded banking arrangements could be agreed and put in place by the time any such scheme might come into place. That is, of course, a time which cannot occur more than 100 days after the commencement of this examinership process and thus the clock is ticking fairly fast in that regard.

4.15 In summary, therefore, the principal difficulties which seem to arise under this heading are the identification of a willing bank or banks who would be prepared and be in a position to make banking facilities available within the relatively short timeframe with which we are concerned and who would also be in a position to agree a sufficient level of banking facility such as would, when combined with any investment that might be forthcoming from Oaktree and/or another investor, allow McInerney to pay off its existing Banking Syndicate and have sufficient capital left to allow it to do business. It would also be necessary that any amount specified for paying off the Banking Syndicate would either be acceptable to the Banking Syndicate or alternatively be sufficient to meet a reduced liability specified in a scheme of arrangement in circumstances where such a course of action is determined to be legally possible and where the amount was determined by the court not to be unfairly prejudicial to the Banking Syndicate. It is clear that each element of that equation has it own difficulties.

4.16 It seemed to me that the third possibility carries with it even greater difficulties. Without reaching any conclusion on the legal issues put forward on behalf of the Banking Syndicate, it seemed to me that counsel on their behalf had pointed to very considerable legal difficulties with a scheme of that type. The first difficulty concerns the question of whether a scheme of arrangement can legitimately provide for the rewriting of on-going contractual arrangements between parties. That a party who is owed money can, at the level of principle, be required as part of a scheme of arrangement to take less money, can hardly be doubted. That a contract can, in certain circumstances, be repudiated, cannot be doubled. It is certainly arguable that a scheme of arrangement may be able to provide for some delay in the payment of monies which are recorded as to be paid to creditors under the scheme. Precisely how far it might be legitimate to go in delaying such a payment is a matter which is yet to be subject of any significant determination. However requiring a bank to continue as an active lender to a company against the wishes of that bank is a matter which seems to me to have very significant practical and legal difficulties. It might be one thing to impose a partly deferred repayment to a bank such that the bank was required to accept payment over time of an existing liability. Even such an arrangement would be a matter that would require careful legal consideration as to whether it was permitted under the examinership legislation. However even such an arrangement would not be sufficient for McInerney who will, of course, require on-going finance to enable it to continue to do business. It is difficult to envisage circumstances in which a scheme of arrangement could oblige a creditor to provide further credit against his will. In addition there is the problem identified by counsel for the Banking Syndicate as to how, in practice, it would be possible for McInerney to continue to sell houses and retain some of the proceeds of sale as on-going working capital in circumstances where, it would appear (as the matter was not fully explored, I do not so decide) that the Banking Syndicate has full security which it can, under the existing terms of its arrangements with McInerney, only be required to release on payment of the full proceeds of sale. It is also possible to envisage other difficulties which might arise.

4.17 There are, therefore, very real difficulties with each of the possible means of dealing with McInerney's capital shortfall. However it did not seem to me that those difficulties were such as would preclude me from taking the view that there was nonetheless a reasonable prospect of those difficulties being overcome. For reasons which should be apparent from the comments which I have made, I am particularly sceptical about whether the problems inherent in the third possibility are capable of solution. However, it did not seem to me to be unreasonable to conclude that a solution might be found to the problems which arise in respect of Items 1 and 2. In those circumstances I came to the view that there was a reasonable prospect of McInerney overcoming its capital problems in one or other of those two ways and that an overall view should, therefore, be taken that, at present, there was a reasonable prospect of solving those capital problems.

4.18 That leads to a consideration McInerney's business plan which is, as I have already analyzed, the other important part of the equation. There can be little doubt that attempting to put forward a realistic business plan for a company in the construction and development sector in the current climate is an extraordinary difficult task. Such a course of action will inevitably involve some degree of speculation which is incapable of overly rigorous analysis. However, it seemed to me that there were a number of factors that should weigh heavily in my consideration. The first is the potential investment from Oaktree. It is true that the only companies which are the subject of this examinership application are those involved principally in the Irish Division. It is true, therefore, that the potential investment of Oaktree in these companies seems to be currently limited at €10m and that €2.5m of that sum is regarded as being likely to be expended during the course of the examinership. Indeed one minor issue which arose in the course of the affidavits exchanged between the parties concerned a contention on behalf of the Banking Syndicate (which appears to be accepted by Oaktree and McInerney) that the sum of €2.5m mentioned is insufficient. However it would now appear that Oaktree are happy to make up any additional sum required under that heading. While dealing with that point it was argued on behalf of the Banking Syndicate that the somewhat belated indication on behalf of Oaktree that it was willing to meet any shortfall under the heading to which I have just referred was an example of a last ditch attempt to save the examinership. I have to confess that it did not appear to me that that was the appropriate inference to draw. Rather it seems to me to be appropriate to infer that Oaktree was a significant investor anxious to do business and that that was an argument in favour of the proposition that there was a realistic chance that some appropriate deal under one or other of the first two headings to which I have earlier referred might be made.

4.19 However the fact remains that there is what seems to be a substantial realistic and skilled investor out there willing to put its money where its mouth is. Whether Oaktree agree exactly with the assumptions which underline McInerney's business plan or not, is neither here not there. The fact is that Oaktree would be most unlikely to be willing to put up very significant sums of money unless it was Oaktree's view that it could make a profit. In that context it is important to distinguish the attitude adopted by an existing banker to a company on the one hand and a potential investor on the other hand. For the reasons which I sought to analyse *Re Vantive Holdings Ltd (No. 2)* [2009] IEHC 409, it does not necessarily follow from the fact that a bank may support examinership that that bank truly believes that the company has a reasonable prospect of survival. Rather the bank may simply take the view that a restructuring in examinership might lead it to having to suffer a reduced hit when the company ultimately succumbs. However, the same equation does not seem to me to apply in respect of an investor. While there can be circumstances in which an investor may take over a company with a view, not to its long term survival but rather in order that its more profitable parts be broken up and sold, it nonetheless logically follows that an investor can only make a profit if some elements of the company concerned are found to be capable of surviving on an on-going basis, unless, of course, there are sufficient saleable assets within the company which could be realised so as to leave the company with a surplus at the end of the day. It does seem to me to be reasonable to infer, therefore, that, if a company such as Oaktree is willing to put a substantial investment into a company such as McInerney, Oaktree views the component parts of McInerney as being likely to be viable into the future. Even if viewed only on an asset basis such a conclusion would necessarily involve Oaktree considering those assets as having a real possibility of improved value in the future. If that be so then it provides comfort for the view that McInerney's assumptions are broadly correct.

4.20 Secondly, having reviewed the material placed before the court, I was satisfied that the McInerney business plan represents a realistic approach. It may, of course, not be achieved. Projecting sales of houses into the future is notoriously difficult at the present

time. However, McInerney is far from a single project company. It has very significant experience in the building of a particular category of housing. Its focus appears to be towards a type of housing where there is a more realistic prospect of recovery in the shorter rather than longer term. It has within it very considerable experience in relation to estimating the market and positioning itself in the best segments of that market. It seems to me that there is value in the existing expertise within McInerney which would be lost by it being broken up in circumstances where it component parts were separately sold by a receiver. It is, in truth, a company where there is a realistic basis for believing that the whole exceeds the sum of the parts. I came to the view that its business plan was realistic even though no one can predict with any great degree of confidence what the Irish house construction business is going to look like over the next three to five years.

4.21 Having regard particularly to the comfort which, in my view, could properly be obtained from the fact that a significant investor was willing put up monies based on its view as to McInerney's future and that the fact that the materials seemed to me to support McInerney's own plans as being realistic, I came to the view that, provided that the capital problem to which I have earlier referred, could be solved, McInerney had a reasonable prospect of survival in respect of significant parts of its undertaking. Given that, for the reasons which I have already set out, I was satisfied that there was a reasonable prospect of solving that capital problem, it seemed to me that I should take the overall view that McInerney had established, at least at group level, a reasonable prospect of survival such as to meet the statutory test. There remained the problem of the case made by the Banking Syndicate in respect of the individual companies who are applicants in this case. However, before turning to that issue I should briefly set out the direction which I gave to the examiner and my reasons for so doing.

5. The Direction given to the Examiner

5.1 As is clear from the analysis in which I have engaged concerning the difficulties which might be encountered by McInerney in solving its capital shortfall, I was of the view that there remained real problems with each of the potential solutions. I, therefore, came to the view that it would be appropriate to direct the examiner to report back to me no later than Friday the 1st October, for the purposes of giving me an independent view from the examiner as to whether there remained any realistic prospect of solving that capital shortfall under any of the three headings which I have identified or, indeed, any other basis which might commend itself to the examiner.

5.2 It should be noted that the examiner had indicated, in a brief report to me which I had the opportunity to consider at the hearing, that it was his view, based on the limited opportunity which he had had to consider McInerney, that the relevant companies had a realistic prospect of survival. Given the difficulties which I have identified in each of the three possible means of meeting the companies' capital shortfall, it seemed to me that it would be appropriate to get an early independent indication from the examiner as to whether there was a realistic basis for considering that the problems attendant on each of the possible means of solving that capital problem could be solved.

5.3 On the basis of having directed the examiner to produce such a report, I indicated that same should, at least initially, be supplied to McInerney and the Banking Syndicate so that a further hearing, at which consideration could be given to the findings of that report, can be conducted on Monday the 4th October. I now turn to the question of the individual companies within the group.

6. The Individual Companies

6.1 It is correct to say, as was pointed out by counsel for the Banking Syndicate, that the 1990 Act (s. 4(2)), in its amended form, requires, as a condition to appointing an examiner in respect of any related company, that, amongst other things, there be a reasonable prospect of the survival of the whole or any part of the undertaking of such a related company. It follows that it is necessary for me to consider whether there is a reasonable prospect of survival not only at group level, but also at the level of each individual company.

6.2 However, the materials before the court seemed to me to make clear that each of the relevant companies continued to trade, subject to having working capital available to allow that course of action to be conducted. I have already indicated that I was persuaded that the McInerney business plan was realistic. It did not seem to me that that business plan involved any of the related companies which are the subject of this examinership disappearing from the scene although the scale of relevant operations might be reduced. Provided, therefore, that the group as a whole had a reasonable prospect of survival, I was also persuaded that each of the companies which are the subject of this application, likewise, had a reasonable prospect of survival.

7. Conclusions

7.1 For the reasons which I have set out I was, therefore, satisfied that each of the companies who are the subject of this examinership application had established to my satisfaction that they had a reasonable prospect of survival.

7.2 There were no other factors which could properly have led me to exercise my discretion against appointing an examiner in those circumstances.

7.3 However, having regard to the real problems identified which relate to the ability of McInerney to solve its capital problems, it seemed to me to be appropriate to give the directions to which I have referred to the examiner to enable a further early consideration to be given to the question of whether there is, in truth, a realistic prospect of solving those problems.