Neutral Citation Number: [2009] IEHC 390

THE HIGH COURT

2009 149 COS

IN THE MATTER OF LARAGAN DEVELOPMENTS LIMITED IN EXAMINATION (UNDER THE COMPANIES (AMENDENT) ACT 1990)

AND IN THE MATTER OF THE COMPANIES ACT 1990 AS AMENDED

JUDGMENT of Mr. Justice Clarke delivered the 31st July, 2009

1. Introduction

1.1 The company named in the title to these proceedings ("Laragan") successfully petitioned for the protection of this Court under the provisions of the Companies (Amendment) Act, 1990 (as amended) ("the Act") in March of this year. On foot of an initial application, Paul McCann ("the Examiner") was appointed as an interim Examiner on the 27th March, 2009. Later on the 22nd April, 2009, the appointment of the Examiner as such was confirmed by this Court.

1.2 In accordance with s. 18 of the Act, the Examiner prepared proposals for a Scheme of Arrangement which, having been the subject of the various meetings of members and creditors required by the provisions of the Act, was presented to the Court. The Examiner's report in that regard, which had annexed to it a copy of the relevant proposals, was dated the 26th June, 2009.

1.3 Thereafter, having presented his report, under s. 24 of the Act, to the court, I fixed Tuesday the 7th July for the conduct of a hearing in relation to whether the Scheme of Arrangement should be approved with or without modifications. I should, at this stage, draw attention to the fact that counsel on behalf of the Examiner, quite properly and most helpfully, drew my attention, at the time when the report was initially presented, to the fact that there had been a significant amount of opposition to the scheme voiced by creditors, at at least some of the creditor meetings conducted to consider the scheme. Amongst the points which I was told had been raised were concerns based on the relatively short period of time which the creditors had had, in their view, available to them to consider the scheme. With that in mind, counsel suggested that a reasonably lengthy period might be provided prior to the commencement of the confirmation hearing. It was for that reason that what is, perhaps, an unusually long period elapsed between the presentation by the Examiner of the s. 18 report containing the proposed Scheme of Arrangement to the court and the commencement of the substantive hearing under s. 24 in respect of confirmation of that scheme.

1.4 In addition, I gave directions at the time when the s. 18 report was presented to me, that the Examiner should inform all relevant creditors that any creditor wishing to make objection to the confirmation of the scheme should submit such objection in writing to the solicitors for the Examiner not later than Thursday, the 2nd July, 2009. My intention in giving that direction was to attempt to ensure that there would be some structure to the confirmation hearing. I was anxious that there would, to the greatest extent possible, be advance notice of the sort of issues which were likely to be raised.

1.5 On foot of that direction the Examiner gave the required notice and received a significant volume of correspondence from various creditors. A copy of all relevant correspondence was made available to me in the course of the hearing, together with certain of the records of the company which appeared to the Examiner to be relevant to the respective issues raised by the creditors concerned.

1.6 Be that as it may, when the confirmation hearing (under s. 24 of the Act) commenced on the 7th July, 2009, a significant number of creditors appeared for the purposes of objecting to the confirmation of the scheme, making other complaints about the form of the scheme, and, in some cases, for the purposes of seeking additional information. Some of those who appeared were represented by solicitors (and in some cases counsel). Others appeared themselves. A wide variety of issues were canvassed. It will be necessary to refer to the more important of the points raised in due course.

1.7 The hearing of the confirmation application continued for four days. At the close of the hearing, I indicated that I would reflect on the matter and proposed to rule on it in a summary way on the following Tuesday, that is the 14th July. However, by that day I had not reached firm conclusions on the issues raised and postponed the delivery of my ruling until the 16th July, to afford me a greater opportunity to consider some of the issues raised.

1.8 On the 16th July, I gave a brief ruling during which I set out the principal reasons why I was persuaded that it was inappropriate to approve and confirm the Scheme of Arrangement. I indicated on that occasion that I would, subsequently, deliver a full reasoned judgment setting out the basis for having reached the conclusions concerned. This judgment is directed to setting out those reasons.

1.9 In that context it is appropriate to turn firstly to a brief description of Laragan.

2. Laragan

2.1 Laragan is a wholly owned subsidiary of Laragan (Holdings) Ltd which in turn is owned by a Mr. Alan Hanly ("Mr. Hanly"), as to 74.33%, and by a Mr. Joseph Albert Hanly, as to the balance. Thus Mr. Hanly controls both Laragan (Holdings) Ltd and Laragan. Mr. Hanly also controls as significant number of other companies which in general terms seem to have been engaged in construction, hotel, and other similar ventures.

2.2 It would appear that, during the course of its history, Laragan was never engaged in what might loosely be called independent business. Rather Laragan was employed as a construction company for the purposes of carrying out building works in relation to a variety of developments being conducted either by Mr. Hanly personally, or by other companies under Mr. Hanly's control. At the time when Laragan went into examinership it was involved in three main projects. Firstly, Laragan was involved in a development of houses and apartments at Carrickmines Green in County Dublin ("Carrickmines"). Secondly, Laragan was involved in a housing development at Milner's Square, Santry, Dublin ("Milner's Square") and thirdly, Laragan was involved in a hotel and golf resort at Kilronan Castle in Roscommon ("Kilronan Castle").

2.3 Separate bankers had provided funding in respect of each of the three developments concerned. So far as Carrickmines was concerned, the relevant property was owned by Mr. Hanly personally. Bankers to that project were Allied Irish Bank ("AIB"). AIB had

funded the project by lending money on the security of the site concerned to Mr. Hanly personally (Mr. Hanly being, of course, the owner of the site). Mr. Hanly then funded Laragan for the purposes of Laragan constructing the development on the site for Mr. Hanly. It will be necessary to explore that relationship in more detail in due course.

2.4 A similar arrangement was in place in respect of Milner's Square, although in that case the relevant bankers were Bank of Scotland (Ireland) Limited ("BOSI").

2.5 The position in respect of Kilronan Castle was different. It would appear that Kilronan Castle was owned by a number of persons who are described in the s. 18 report as "tax investors". The bankers to that project were Anglo Irish Bank ("Anglo"). Unlike AIB and BOSI (who, as has been pointed out, had lent monies to Mr. Hanly as the owner of the sites in respect of which they were providing funding), Anglo had lent money directly to Laragan.

2.6 There is no doubt but that Laragan had become hopelessly insolvent. Indeed it is important to note at this stage that, in the days immediately prior to the application to me to appoint an interim examiner, Laragan was the subject of a winding up petition to this Court which came on for hearing before Laffoy J.. In circumstances which it will be necessary to explore in a little more detail, it would appear that affidavit evidence was filed in respect of that winding up petition, by a senior official of Laragan, which suggested that Laragan was solvent. It would also appear that at the relevant time, Laragan was already considering making an application to be placed under the protection of the court and that the relevant documentation in relation to such an application was under preparation. It is, of course, a pre-requisite to the appointment of an Examiner and the placing of a company under the protection of the court, that the company concerned is insolvent. The fact that Laragan procured, on the one hand, that an affidavit be sworn which suggested that it was solvent for the purposes of defending a winding up petition, while, at the same time, preparing documentation for an examinership application, which could only have arisen in the event that it was insolvent, was wholly unacceptable and was the subject of severe and well founded criticism by Laffoy J.. However, counsel for the directors of Laragan (who were the petitioners in the examinership) quite properly brought the criticism of Laffoy J. to my attention when applying for the appointment of an interim Examiner. I took the view that, on the information then available, it would be wrong to exclude the possibility that Laragan might be saved for the benefit of its employees and, perhaps, its creditors so that the undoubted misconduct of Laragan so rightly criticised by Laffoy J., did not seem to me to be a reason for cutting Laragan off from the opportunity to see whether an appropriate Scheme of Arrangement could be put in place.

2.7 Against that brief background it is next appropriate to turn to the general areas of concern that were expressed by or on behalf of the various categories of creditor. However, before so doing I should note that all of the formal requirements necessary to consider the approval of the Scheme of Arrangement were met. I should also note that the concerns of same creditors, including a number of public authorities, were satisfactorily met during the course of the hearing so that those concerns did not have to form part of my consideration.

3. The Creditors Concerns

3.1 A wide variety of issues, both of general application and specific to individual creditors, were canvassed both in the correspondence submitted to the Examiner's solicitor in accordance with the direction to which I have referred, and in the course of the oral submissions made by and on behalf of at least some of those creditors. It should be noted in passing that some of the creditors who had written to the Examiner's solicitor did not attend at the oral hearing at all. I, nonetheless, had regard to the contents of any such correspondence. Likewise, some creditors who had written to the Examiner's solicitor did appear but indicated that they were content to allow their case to rest on the contents of their respective letters. Some creditors did, however, address the Court. Likewise I did not place any formal barrier in the way of any creditor who wished to address the Court, even if such creditor had not complied with the direction concerning setting out objections in writing in advance.

3.2 Against that background it was possible to discern certain general types of objection that were raised by one or more creditor. I propose to turn to the more important of those concerns.

Unfairness Generally

3.3 A striking feature of the Scheme of Arrangement proposed was the relatively low level of dividend being proposed for most of the categories of creditors. It will be necessary to refer specifically to some of those categories in due course. In that context some creditors complained that the scheme as a whole was unduly favourable to the financial institutions involved. However, the truth is that such financial institutions were secured creditors in relation to the assets of Laragan (in the case of Anglo) and, insofar as it might be relevant, in respect of the sites on which Laragan was conducting building works, in the case of AIB and BOSI. Whatever may be the merits of the priority which goes with the status of secured creditor under the law, the fact remains that the holders of mortgages and debentures, such as the financial institutions that were involved in this case, have a priority as a matter of law and there are, therefore, significant limits as to the extent to which those creditors can be deprived of their position at the head of the queue. While understanding the concerns expressed in that regard by a number of creditors, it did not seem to me that the general question of the position of the financial institutions at the head of the queue was a matter which could legitimately be taken into account in assessing the fairness or otherwise of the scheme proposed.

The Deposit Creditors

3.4 A second element of alleged unfairness related to the position of what were described in the Scheme of Arrangement as the deposit creditors. Those persons were purchasers who had entered into contracts for the purchase of units in the residential developments to which I have referred at Carrickmines and Milner's Square. The scheme proposed paying such creditors 1% of their deposit (such a deposit was typically either €15,000 or €20,000) and releasing those creditors from their contractual obligations. The creditors concerned suggested that the scheme was wholly unfair to them. This is an issue to which it will be necessary to return in due course.

Separate Enforcement

3.5 A number of creditors expressed concern that they were likely to be deprived of the opportunity of seeking to enforce any entitlement which they might have to proceed against Mr. Hanly personally or against Laragan's parent company, Laragan (Holdings) Ltd. The question of proceeding against Mr. Hanly personally was, it was said, possible either because of assurances given by Mr. Hanly to various creditors or because of suggestions that Laragan might have been guilty of fraudulent or reckless trading such that it would, on a liquidation, be open to a liquidator to seek to recover any shortfall from Mr. Hanly personally.

3.6 The possibility of recovering from Laragan (Holdings) Ltd stems, it was said, from the fact that that company had given guarantees over Laragan's liabilities under the provisions of s. 17 of the Companies (Amendment) Act 1986, which section has the effect of enabling companies which have the benefit of such a guarantee from a parent to avoid the full level of disclosure to the Companies Registration Office, which would otherwise be the case. It will be necessary to turn to these issues in due course as well.

Lack of Disclosure and Litigation Misconduct
3.7 Next certain concerns emerged in the course of the hearing in relation to the information which was placed before the Court on the occasion of the application for the appointment of an interim examiner being, in particular, information contained in the report of the independent accountant, which is required to be submitted as part of the evidence to support a petition to this Court to appoint an examiner. The report concerned in this case was a report of OCC Chartered Accountants and was dated the 27th March, 2009. It appeared that there were certainly material inaccuracies in that report. On that basis, the question of the appropriate response of the court to such inaccuracies coupled with the difficulties to which I have already referred concerning the inconsistent positions adopted on behalf of the company in relation to the winding up petition on the one hand, and the application for the appointment of an interim examiner, on the other hand, needed to be considered. In addition it emerged in the course of the hearing that Laragan had, in flagrant breach of its obligations under the Act, commenced proceedings while under examinership. Such alleged misconduct formed a separate head of objection.

The Relationship between Mr. Hanly and Laragan
3.8 Finally, it was necessary to identify a series of factual matters which emerged in the course of the hearing which were suggestive of the fact that the dealings between Mr. Hanly and Laragan were far from arms length. It will be necessary to refer to those facts and the consequences which flow from them in due course.

4. The General Approval
4.1 Having identified the principal concerns which were raised at the hearing before me, I should next set out the general approach which I indicated, prior to the close of the hearing, that I would follow. As I pointed out when giving brief reasons for my ruling on the 16th July, 2009, I did, in fact, follow that course of action.

4.2 As will be seen from the types of issues and concerns that were raised, some of same were concerned with a suggestion that there was a lack of fairness as and between one category of creditor and another. Others were more general in nature and were directed towards a suggestion that the scheme should not be approved at all and that the company should be put into liquidation. It is, in that context, also worthy of some note that, in response to concerns expressed either at creditor meetings, in the correspondence received by the Examiner's solicitor in accordance with my direction to which I have referred, and in the course of points made during the hearing, the Examiner sought to deal with at least some of those concerns by means of adjustments to the scheme. Some adjustments were, therefore, proposed by the Examiner, and I will, where relevant, to refer to such adjustments under the heading of the general area of complaint to which the adjustment concerned was an intended response. I will deal more fully with the work of the Examiner before concluding this judgment. However, it is appropriate to note at this stage that, in my view, the response of the Examiner to the concerns expressed was commendable. Where there were explanations as to why issues could not be addressed, same were given in a clear fashion. Where it was possible to address relevant concerns, the Examiner sought to do so.

4.3 In any event it seemed to me that the appropriate course of action to adopt, when faced with both specific and general objections directed to, respectively, individual aspects of the scheme and the general suitability of the scheme as a whole, was to address the specific complaints first and, where appropriate, to consider whether any legitimate concern could be ameliorated by appropriate adjustments in the scheme. In that way it would be possible to identify the fairest and most practical scheme which could be put in place. It would then be appropriate to assess whether such scheme (with whatever relevant improvements could be brought about) would warrant approval.

4.4 In that context I should, therefore, first set out the reasons why it would, in my view, have been appropriate, if any scheme were to have been approved, to have made one further adjustment in the scheme beyond those which had been introduced on behalf of the Examiner in the course of the hearing. In order to address that question it is necessary to return to the position of the deposit creditors.

5. The Deposit Creditors
5.1 As previously indicated the position in relation to the deposit creditors under the scheme was that the contracts of those creditors for the purchase of units were to be treated as liabilities of Laragan in favour of those creditors (in the amount of the relevant deposit), with the relevant purchase contracts terminated. However, those creditors were only to receive a dividend of 1% so that the deposit creditors would, in practice, receive only €150 or €200.

5.2 It should, however, be noted that, in the course of the hearing, it was indicated on behalf of the Examiner that it had been possible to put in place an additional feature of the arrangements with such deposit creditors. It was said that any deposit creditor would have the right to choose, at his or her election, to purchase a unit in the relevant development at its now current price (that price to be objectively verified by a firm of estate agents). Should the creditor make that election, the creditor concerned will be given full credit for the deposit previously paid as part of the purchase price concerned. Thus, any deposit creditors who still wanted to buy a unit in the relevant development would be able to do so at today's price rather than the significantly higher price that had previously been agreed. The creditor concerned would be given full value for their deposit as part of paying today's price. It seemed to me that that was a significant improvement in the scheme. It does, in addition, lead to a consideration of the justification put forward for the nominal 1% dividend. On the basis of the additional arrangement just referred to a payment to a deposit creditor of such a dividend would, of course, only arise where the creditor concerned elected not to purchase under the arrangements to which I have referred.

5.3 It was clear that the prices which had been agreed to be paid by the various depositers concerned were prices fixed at or near the top of the housing market. The prices concerned were way above the current value of any of the relevant properties. As the courts are all too well aware, many persons who bought residential property "off the plans" at the top of the market are now faced with grave difficulty. Frequently those parties are unable to fund a closing of the relevant sale because financial institutions are not prepared to lend money based on a value which is no longer realistic. In some such cases purchasers have already had their deposits forfeited, and in a few cases developers are pursuing claims which suggest that the purchaser concerned is liable in damages beyond the scale of the already forfeited deposit. It is impossible to have anything but sympathy for people who find themselves in such difficult circumstances. However, in the absence of statutory intervention, the law seems to be clear. Parties enter into a contract to buy at a given price. If the purchaser is unable or unwilling to pay that price at the end of the day, then that purchaser is liable for breach of contract for the difference between what the price of the property is now (and for which it can be sold to someone else) and the price that they had agreed to pay. Unless there is some separate reason why the party concerned may be entitled to treat the contract as unenforceable, the purchaser concerned will be in a very difficult financial position.

5.4 In those circumstances it was suggested that the deposit creditors were getting a significant benefit as a result of being released from their contractual obligations. In principle it is possible to see how that could be so. Someone who, say, contracted to buy a property at €350,000, where the property concerned is now only worth €250,000, is facing a breach of contract claim for €100,000. Being released from such a contract would, everything else being equal, be of significant benefit to the relevant purchaser who would

not now be going to be kept to what has turned out to be an unfortunate bargain. If the situation in respect of Laragan's contracts were as simple as that, there might well have been considerable merit in the argument put forward to justify the proposed 1% dividend. In such a simple case the true benefit or "dividend" to the deposit creditors would have been that they would have been released from their contracts which release could, in many cases, have been worth very much more in saving to them than the value of the deposit.

5.5 However, it did not seem to me, on the information which was made available in the course of the hearing, that this case was as simple as the theoretical set of facts which I have just sought to analyse. In at least a significant number of cases the deposit creditors, through their solicitors, had raised significant concerns, long in advance of the examinership, over what was undoubtedly very real delay being experienced in bringing the relevant residential units forward to completion. In many cases purchasers suggested that the relevant contract was at an end. In some cases, litigation had already been commenced. It seemed to me that there was a very real possibility (and on the basis of the limited hearing which I was able to conduct and on the basis of the very limited information which could, within the parameters of such a hearing, be made available to me) that there was a case to be made that many, if not most, of the deposit creditors would have been able to maintain that their contract with Laragan was already at an end, prior to examinership, by virtue of a failure on the part of Laragan to comply with its side of the bargain concerning the timely construction of the units concerned. In the case of any such creditor then no value would properly attach to that creditor being released from the relevant contract, for that creditor would already have been entitled to escape from his or her contractual liabilities because of Laragan's own default. In such circumstances, there would not seem to me to have been any justifiable basis for treating such a creditor in any different way from any other equivalent trade creditor. Such a deposit creditor would, it could be argued, be entitled to treat the contract as at an end and sue for the deposit back.

5.6 In those circumstances I came to the view that, in order that the scheme should be fair to the deposit creditors, it would, in the event that I was persuaded that the scheme should be adopted, be necessary that the scheme be adjusted so as to bring the relevant deposit creditors up to the same level of dividend as the ordinary agreed unsecured creditors. This alteration would have had the effect of reducing the likely dividend available to those ordinary unsecured creditors by some margin. The precise amount which was likely to be paid to unsecured creditors was not finalised in the scheme proposed as the total fund that would be available to those unsecured creditors would depend on certain other factors, such as the extent to which disputed creditors' claims might be allowed or disallowed in the expert adjudication process specified in the scheme for the determination of such disputed claims. However, in general terms, it seemed likely that the entitlement of general unsecured creditors would be reduced by less than 1%, while the deposit creditors would be increased by at least four and possibly a larger percentage. Without such an adjustment it would have seemed to me that it would have been necessary to reject the scheme of the basis that it was disproportionately unfair to the deposit creditors. The overall views which I reached in respect of the possible approval of the scheme as a whole were directed, therefore, to a scheme which might be amended or adjusted in the fashion which I have just indicated.

5.7 Against that background it is necessary next to turn to those allegations which might reasonably be grouped under the heading of alleged misconduct.

6. Harm of Disclosure and Litigation Misconduct

6.1 I have already set out two of the matters that could properly come under this heading in some detail. The first concerns the manner in which it would seem that this Court (in the shape of Laffoy J.) was misled by an officer of the company in the course of the winding up application. The second concerns the fact that the company, in clear breach of its obligations under the Act, commenced proceedings while under the protection of the Court without making any application to the Court in advance. I mention both of these instances together because the explanation given in both cases is somewhat similar. It was said to Laffoy J. that the officer of the company concerned was not, as it were, "in the loop" and honestly, but mistakenly, swore to what turned out to be an entirely inaccurate picture as to the company's financial health. Likewise, the solicitor who issued the relevant proceedings in the course of the examinership appeared before me and apologised for his actions. His explanation was that he had received instructions from, it would appear, the same individual who had sworn the affidavit in the winding up proceedings, to issue the proceedings concerned. The solicitor indicated that he believed that the Examiner was aware of the proceedings. The solicitor could offer no explanation as to how he had come to issue proceedings without the permission of the court. It is a clear and unambiguous provision of the Act that such proceedings can only be issued with the permission of the court. Other than pleading ignorance of those statutory provisions, the solicitor concerned could offer no explanation. There does indeed seem to have been an unfortunate history amongst Laragan and its advisors of the left hand not knowing what the right hand was doing. Without reaching any concluded view on the matter (it would be impossible to reach any such view within the parameters of the sort of hearing with which I was concerned), the circumstances were certainly open to a real suspicion that the left hand did not want the right hand to know what was happening, and sought to take advantage of using different officers and different legal advisors for different parts of its interaction with the courts. However, in the end, it did not seem to me that those issues should lead to a refusal to approve a scheme which otherwise ought to be approved.

6.2 The next matter that needs to be commented on is the undoubted failure of the independent accountant to get a number of matters right. In one respect the total of inter-company liabilities, with other Hanly companies, so far as Laragan was concerned, was understated by an amount in excess of €12,000,000. It would seem that the explanation for this is that the independent accountant based his report on management accounts of what was loosely described as the Hanly Group. It would seem that some other companies within Mr. Hanly's control, which companies were owed money by Laragan, had taken the prudent course of action, for the purposes of their own management accounts, of treating some of Laragan's liabilities as being unlikely to be paid. There is nothing wrong in that. However, the money was still owing by Laragan and the fact that the companies to whom Laragan owed money decided that they were unlikely to be paid could not have meant, to any reasonable accountant, that Laragan did not still owe the relevant money and that the money concerned should not still have been included in Laragan's liabilities.

6.3 There is no doubt but, therefore, that the independent accountant's report was seriously inaccurate in that regard. A second question concerning work in progress also appeared to me to have been inaccurately stated in the independent accountant's report, but as this issue is perhaps more central to matters which I will have to address later in the course of this judgment, I do no more than record that fact at this stage.

6.4 I had occasion in In *Re Traffic Group Limited* [2008] 3 I.R. 253, to consider the net effect of two previous judgments of Costello J. in this Court in *Re Wogan's (Drogheda) Limited* (Unreported, High Court, Costello J., 7th May, 1992) *and Re Selukwe Limited* (Unreported, High Court, Costello J., 20th December, 1991). Having analysed those two decisions I noted, at para. 5.8 of *Traffic Group*, that there may be cases where the wrongful actions of those involved in promoting an examinership are so serious that the court is left with no option but, on that ground alone, to decline to confirm a scheme which would otherwise be in order, as Costello J. did in *Re Wogan's (Drogheda) Limited*. However, I also went on to note that it was important that the court considered whether there was any other way in which its disapproval of the litigation misconduct concerned could be marked and, in particular, I noted that a court has to have regard to the extent to which an enterprise or jobs might be saved as a balance against the need to discourage the court being misled.

6.5 At the end of the day, I came to the view that, while the elements of the independent accountant's report that were inaccurate were significant and should not have occurred, same were not sufficient to warrant refusing to approve a scheme which would otherwise be properly approved.

6.6 The final element to be considered under this general heading concerns the possibility, canvassed by a number of creditors both represented and unrepresented, that a liquidator, who would have the opportunity to conduct a rigorous review of the company's relevant activities, might well discover wrongdoing which would justify seeking to make the principals of the company personally liable. In that context it should be noted that the Examiner had, in my view, clearly given significant consideration to the question of whether there were any matters which he ought properly bring to the Court's attention (as is his statutory duty) as amounting to any such wrongdoing. The Examiner was clear in his view that no such matters had come to his attention. It does, of course, have to be noted that the Examiner must operate, for good reason, within a very short timescale. While the Examiner is duty bound to examine the company, to follow up any information which might come to his attention concerning possible wrongdoing, and to report on same to the court, an Examiner nonetheless does not have the opportunity to conduct the same type of investigation that a liquidator would.

6.7 The view of the Examiner should be recorded. He was of the view that, on the basis of the information available to him, a case might be made out (principally with the benefit of hindsight) that the directors should have faced up to the insolvency of Laragan perhaps some three months earlier. However, the Examiner was not of the view, on the basis of the information available to him, that there was likely to be a case which could be made out for the directors being treated as being personally liable for any liabilities of the company.

6.8 In all of those circumstances, and with some considerable misgiving, I came to the view that the questions concerning failure of disclosure and misconduct, real as they were in some cases, were insufficient to warrant failing to approve a scheme which would otherwise properly be approved.

6.9 I next turn to the possibility of creditors being deprived of an opportunity, by the approval of the scheme, to pursue Mr. Hanly personally or other companies within the Hanly Group.

7. Possible Personal Liability

7.1 I have already dealt with the possibility of the principals of Laragan being personally liable for the liabilities of Laragan as a result of any misconduct that might be discovered. It is always possible that a liquidator may uncover matters which an Examiner, by reason of the short timeframe within which the Examiner has to operate, did not. However, nothing which came up at the hearing before me suggested that the possibility in this case was any more than just that, a possibility.

7.2 However, there were two other aspects of the potential personal liability of Mr. Hanly or other companies within the Hanly Group that were canvassed and which I considered as part of the argument as to whether the scheme should be approved. The first such possibility arose from the contention made by a number of parties that, in certain circumstances, Mr. Hanly had guaranteed liabilities of Laragan in their favour. The difficulty which emerged was that by virtue of the provisions of s. 25A(1)(c) of the Act, a person who wishes to rely on a guarantee in relation to the liabilities of a company which is the subject of an approved Scheme of Arrangement must, in advance of the convening of any meetings to consider that Scheme of Arrangement, afford the guarantor concerned the opportunity to exercise any vote which the creditor concerned might have at any relevant meeting.

7.3 In those circumstances it seems arguable that where a Scheme of Arrangement is approved, a person's entitlement to act on a guarantee may be lost in the event that they do not serve the appropriate notice on the relevant guarantor. It would seem that many of the persons who claimed to be in a position to have entitlement against Mr. Hanly personally had not served any such notice. The extent to which any such claims against Mr. Hanly personally might be regarded as independent claims capable of surviving a Scheme of Arrangement is, of course, a matter on which I could make no determination at this stage. It certainly seems to me to be the case that there is at least a risk that some persons who might have claimed to have a factual basis for pursuing Mr. Hanly personally might have lost any such entitlement, had the scheme been approved, by virtue of the failure of such persons to comply with the provisions of s. 25A(1)(c).

7.4 However, it did not seem to me that this was an appropriate factor to take into account. If any claims against Mr. Hanly for personal liability are stand alone claims, then same are not affected. If such claims are properly characterised as guarantees and if it be the case that an entitlement to pursue Mr. Hanly personally might be impaired by the approval of a scheme, then that impairment stems from the failure of the creditor concerned to operate the machinery of s. 25A(1)(c). In those circumstances it would not seem to me to be appropriate to have regard to the effect which that section might have on claims against Mr. Hanly personally in considering whether it was appropriate to approve or not approve the scheme.

7.5 The second question under this heading arose in relation to the fact that Laragan had the benefit, for the purposes of its accounts, of a guarantee from its parent company Laragan (Holdings) Ltd. The purpose of that guarantee was to comply with the provisions of s. 17 of the Companies (Amendment) Act 1986, which provides that companies enjoying such a guarantee from a parent are released from some of the detailed disclosure obligations imposed by the Companies Acts when making their annual returns. The possibility of enforcing any such guarantee from Laragan (Holdings) Ltd was the subject of some debate at the hearing. It is not yet established whether such a guarantee from a parent company can be enforced directly by the creditors of the subsidiary company, or whether same can only be enforced by the company itself (presumably through a liquidator on liquidation). Be that as it may, the Examiner brought to my attention the fact that, on all the evidence available to him, it seemed highly improbably that Laragan (Holdings) Ltd would be able to make any meaningful payment on foot of the guarantees it called for, for the financial picture in respect of Laragan (Holdings) Ltd was itself most unhealthy. In those circumstances it seemed to me that the question of whether, and to what extent, an enforcement of the relevant guarantee could arise, whether it might be to the benefit of the creditors, and whether it could in practice benefit the creditors even after a Scheme of Arrangement had been approved, were all entirely theoretical given that the guarantee was, as things ultimately turned out, no longer of any commercial value.

7.6 In those circumstances it did not seem to me that this factor was one which, on the facts of this case, ought to weigh at all in the balance.

7.7 I now turn to the matter which caused me the greatest concern and which was ultimately the reason why I came to the view that it was not appropriate to confirm the Scheme of Arrangement proposed. The issues under this heading relate to the relationship between Mr. Hanly and Laragan.

8. The Relationship between Mr. Hanly and Laragan

8.1 It became increasingly clear in the course of the hearing before me that the relationship between Mr. Hanly and Laragan was

extremely far from a proper arms length relationship. A number of examples (by no means exhaustive) will illustrate this point.

8.2 In the context of considering how Laragan dealt with work in progress in its accounts it was necessary to conduct an analysis of the precise contractual basis on which Laragan provided building services to Mr. Hanly. The position was far from clear.

8.3 It would seem that a standard RIAI building contract was entered into between Mr. Hanly and Laragan, certainly so far as Milner's Square is concerned. The relevant articles of agreement were produced in Court. As is standard in such cases the agreement provided for architects certificates and a payment of the sums (as certified by the architect) as the building process went along with the retention of a percentage of the sums so certified against the possibility of defects and the like.

8.4 From other documents produced it is clear that, when a purchaser entered into an agreement to buy one of the residential units concerned, that purchaser, as a matter of contract, entered into two separate arrangements. Firstly, there was an agreement with Mr. Hanly personally for the purchase of the site on which the building was to be built with a separate building contract between that purchaser and Laragan. The overall purchase price was divided between the two.

8.5 It would seem that the interlocking arrangements between the parties was such, therefore, that, insofar as any residential unit which had not been sold was concerned, Laragan was conducting building works in respect of that unit directly for Mr. Hanly. To the extent that a unit was sold, the building contract in respect of that unit was taken over by the purchaser concerned who then agreed to pay a particular sum specified in the relevant contract to Laragan.

8.6 A first striking feature is that there seemed to be no contract (or at least no contract produced to me) to govern the change in the legal relationship between Laragan and Mr. Hanly that was to occur when such a unit was sold. A simple example will explain. A unit might be half constructed. Mr. Hanly might, had he complied with his own building contract with Laragan, have paid money for that construction on foot of architect's certificates referable to the first half of the construction of the unit concerned. On the other hand the purchaser would agree to pay the full cost of construction. What is to happen to the money already paid by Mr. Hanly? No contract was produced to explain how that was intended to work.

8.7 Of even greater importance was the fact that I was told that the system concerning payment by architect's certificates (which formed a central part of the written agreement between Mr. Hanly and Laragan) was not, in practice, complied with. What in fact appears to have happened is that whatever money Laragan needed to carry out the construction concerned was lent by Mr. Hanly to Laragan. So far as Laragan was concerned, the monies spent were treated as work in progress in the form of a partly built building with a corresponding debt to Mr. Hanly. It would appear that the intention was that, when the contract was completed, Mr. Hanly would pay the full contract price to Laragan, but would, in effect, set off that price against the money already lent to Laragan. However, it was equally clear that the relevant contracts were well over budget so that Mr. Hanly had lent more to Laragan than Laragan was likely to recover on foot of the fixed priced contract. Precisely how that was to work in the end was by no means clear.

8.8 These are more than theoretical distinctions. If the building contract entered into between Mr. Hanly and Laragan had been complied with, then some of the money which Mr. Hanly had advanced would actually have been monies properly paid by Mr. Hanly to Laragan and thus be Laragan's monies rather than monies lent to it which were still owed back to Mr. Hanly.

8.9 One further major matter was left most unclear. Under the regime for the sale of the units concerned it is clear that the relevant purchase price was to be divided as and between a site fine to Mr. Hanly personally and a building contract price in favour of Laragan. No contractual documents were produced to suggest that there was any binding arrangement between Mr. Hanly and Laragan as to how that division would be made, particularly in circumstances of a changing market. If the unit prices went up by €20,000 who was to get the benefit? Was it to be Laragan or Mr. Hanly or both, and if so, in what proportions? Indeed with that in mind I invited counsel for the Examiner to obtain an undertaking from both Laragan and Mr. Hanly that in the event that the scheme was approved, any shortfall in the price which might be obtained for the various units under construction would be borne by a reduction in the site fine rather than in Laragan's construction contract price. Such an undertaking was forthcoming. However, the very fact that it was necessary to obtain such an undertaking emphasises the complete lack of any worked out arrangement between Mr. Hanly and Laragan.

8.10 In all those circumstances it seemed to me that Laragan was little more than a vehicle of convenience for Mr. Hanly and other companies within the Hanly Group. Laragan's relationship with Mr. Hanly and those other companies lacked even the semblance of an arms length arrangement which one might expect if one were to properly treat Laragan as an undertaking in itself. I was mindful of the fact that it is not unusual within a large group of companies for certain functions within such a group to be carried out by a single company within the group concerned. In those circumstances the relevant company does not provide services to any outside parties but rather confines itself to providing the appropriate services for the group as a whole. In some cases, for example, administration is provided by a special purpose company which then bills other members of the group for the services rendered. There is nothing, of course, wrong with that in principle.

8.11 However, it seems to me that where a group of companies organises itself in such a way, significant questions need to be asked as to whether such a company can properly be the subject of an examinership on a standalone basis, divorced from other companies within the group. What the court is required to be satisfied of is that there is a real prospect of the undertaking or part of the undertaking concerned surviving. Is there any meaningful way in which it is proper to describe a company, which only works for other companies within the same group and does so on something that falls far short of an arms length basis, as being an undertaking in the sense in which that term is used in the Act? In my view it is not. The true undertaking within Mr. Hanly's control was the totality of the group of companies and, indeed, himself as the owner of some of the lands concerned. Laragan was a vehicle of convenience solely for the purposes of carrying out fixed price construction contracts on anything but an arms length basis. It was not, in my view, the sort of enterprise which can properly be described as an undertaking for the purposes of the Act. As I pointed out in *Traffic Group* the underlying social benefit of a successful examinership is the preservation of a real enterprise and real jobs for the benefit of the community. It is not saving shareholders from the consequences of having invested in a failed enterprise.

8.12 In addition it is necessary, therefore, to consider what would have been saved by approving the scheme. It would appear that the only jobs which might be saved would be those jobs which would be required to finish out the developments under construction. However, if there is any commercial reality to those developments being finished at this stage, then it is clear that they will be finished out in any event so that the jobs associated with the finishing out of those companies will be saved in any event. No additional jobs will be saved by approving the Scheme of Arrangement. Likewise there will, in no meaningful sense, be an enterprise which will be kept going for the benefit of the community. It is, of course, possible that putting Laragan into liquidation might result in a squabble between the various lenders concerned over who is entitled to what, with Laragan's bankers competing with the respective bankers who have charges over the sites concerned for control of the partly built units. It is possible that such a squabble might delay any agreement on a means of completing out the developments. However, if Laragan were to have any real prospect of

continuing, even in the short term, it could only be because there was some commercial sense in finishing out those developments. If that is truly the case, then it seems unlikely that the lending institutions concerned will not be able to come to some practical *modus vivendi* to allow the units to be finished in any event and to confine any disputes which they might have as to a share in the proceeds that would be generated by completing and selling the developments concerned. I was not, therefore, satisfied that there was, in truth, any real independent undertaking or enterprise there to be saved and preserved, or any real likelihood of a net improvement in the number of jobs available being achieved by approving the Scheme of Arrangement. It was for those reasons that I was not persuaded that it was appropriate to approve the Scheme of Arrangement.

9. The Examiner

9.1 I should not finish this judgment without reiterating some comments which I made in the course of my brief oral ruling on the 16th July concerning the Examiner. Some creditors expressed criticism in the course of the hearing before me of the way in which the Examiner had carried out his functions. I was not at all persuaded that there was any justification for those criticisms. The Examiner has to operate within a tight timeframe. If there is to be a scheme proposed to the court then that must be done within 100 days of the commencement of the process. Allowing for the need to hold meetings and the like, it was essential that any scheme be finalised at least ten to fourteen days prior to that 100 day deadline. The Examiner was working to a tight timeframe and, in my view, there was no basis for the suggestion that there were other lines of inquiry, whether in relation to improved deals which would give greater benefit to creditors or which might expose wrongdoing which in turn might lead to the possibility of being able to pursue the directors, which could have been followed in any meaningful way in that timeframe. As I have already pointed out it seemed to me that the Examiner was pro-active as to suggestions in relation to improvements to the scheme made both at the creditors meetings and at the hearing before me.

9.2 I have no doubt that the scheme which the Examiner ultimately brought forward was the best scheme that could be put together in all the circumstances (save for the adjustment indicated earlier in respect of the deposit creditors). The fact, therefore, that I was ultimately persuaded not to approve the scheme should not be viewed as, in any way, a criticism of the Examiner. It was the Examiner's job to put together the best scheme he could and bring it to the court. He did that job well. It was not the Examiner's fault that the underlying materials with which he was dealing (that is a company, in the shape of Laragan, which was a vehicle of convenience of Mr. Hanly and had little or no arms length independent existence as an undertaking) were not ideal material for an examinership or a scheme at the end of such a process.

10. Conclusions

10.1 For those reasons I determined, on the 16th July, to make an order refusing the approval of the Scheme of Arrangement and also to make an order putting Laragan into liquidation. As counsel for Laragan wished an opportunity to take instructions as to whether Laragan wished to appeal, I refrained from making any final orders on the 16th July but postponed such action until the 17th July to give Laragan an opportunity to consider the brief reasons which I had given orally on the 16th July and to take advice. On the 17th July, it was stated on behalf of Laragan that it was not intended to appeal. I therefore made, on the 17th July, the orders which I had intimated I would make.