Neutral Citation: [2014] IEHC 458

THE HIGH COURT

[2014 No. 378 COS]

IN THE MATTER OF O'FLYNN CONSTRUCTION CO.AND IN THE MATTER OF O'FLYNN CONSTRUCTION (BTC), O'FLYNN CONSTRUCTION, ROCHESTOWN AND EASTGATE DEVELOPMENTS (CORK) AS RELATED COMPANIES WITHIN THE MEANING OF SECTION 4 (5) OF THE COMPANIES (AMENDMENT) ACT 1990(AS AMENDED) AND IN THE MATTER OF THE COMPANIES (AMENDMENT) ACT 1990 (AS AMENDED)

AND

THE HIGH COURT

[2014 No. 6669 P]

BETWEEN

MICHAEL O'FLYNN AND JOHN O'FLYNN

PLAINTIFFS

AND

CARBON FINANCE LIMITED, PAUL MCCANN, PATRICK DILLON, MARK BYERS AND MARCUS WIDE

DEFENDANTS

JUDGMENT of Ms. Justice Irvine delivered on the 13th day of August, 2014.

1. There are two applications before this Court. The first is an application brought by O'Flynn Construction Co and the three related companies named in the title hereto, ("the Companies") to dismiss the petition presented by Carbon Finance Limited ("Carbon") on 29th July, 2014 and to discharge the order of McGovern J. made under s. 3A of the Companies (Amendment) Act 1990 ("the 1990 Act"), whereby he afforded interim protection to the companies named in the title hereto and appointed Mr. Michael McAteer, Interim Examiner of the said companies.

2. The basis for this application can be stated in simple terms:-

> (i) that there was a material non-disclosure by Carbon of all relevant facts in the presentation of the petition and in seeking the relief sought;
>
> (ii) that the circumstances necessary to obtain interim protection under the provisions of s. 3A of the 1990 Act did not and do not exist; and
>
> (iii) that the petition was presented for an improper purpose and/or otherwise than in good faith. In this regard it is asserted that the presentation of the petition was part of a commercial strategy on the part of the petitioner to take over control of all of those companies in respect of which Michael O'Flynn and John O'Flynn enjoy control ("the O'Flynn Group") and to displace present management for its own benefit.

3. The application to set aside the petition and the order made pursuant to s. 3A of the 1990 Act, was grounded on three affidavits the first of which was sworn by Brendan Lenihan, Chartered Accountant and group finance director of the O'Flynn Group. The others were sworn by Declan McDonald, a partner in Price Waterhouse Coopers and Michael O'Flynn, a director of each of the companies in the O'Flynn Group. Replying Affidavits were sworn on behalf of Carbon by Mr. Declan Taite, insolvency practitioner of Duff and Phelps (Ireland), and Lorna Brown, a director of Carbon.

4. The second application, wherein interlocutory relief is claimed, is brought in plenary proceedings (record no 2014/6669P) instituted by the principal shareholders of the O'Flynn Group, namely Michael O'Flynn and John O'Flynn. The Defendants to those proceedings are Carbon, Paul McCann, Patrick Dillon, Mark Byers and Marcus Wide. The second and third named defendants are sued in their capacity as joint receivers appointed by Carbon over certain assets of the plaintiffs. The fourth and fifth named defendants, along with the third named defendant, are sued in their capacity as joint receivers appointed by Carbon over certain shares the property of the plaintiffs.

5. The plaintiff's claim as against Carbon in the plenary summons proceedings relates, *inter alia*, to three demand letters ("the demand letters") dated 29th July, 2014. In those letters Carbon sought immediate repayment by the plaintiffs of sums allegedly due on foot of certain personal Facility Agreements. The sums so demanded were €11,555,481, €1,672,935 and € 3,535,935. The plaintiffs maintain that the demand letters are invalid for a number of reasons including Carbon's failure to afford them any notice or reasons for their actions, or any reasonable time to meet the said demands. They also claim that the demands themselves were unfair, unreasonable and made for an improper purpose.

6. The plaintiffs also seek declarations to the effect that all steps allegedly taken by Carbon on foot of the demand letters are invalid. These include the appointment of the second, third, fourth and fifth named defendants as receivers. More importantly, the plaintiffs maintain that Carbon acted unlawfully in issuing a demand letter directed to the O'Flynn Group, dated 29th July, 2014, claiming immediate payment of a sum of approximately €1.4 billion. In that letter, Carbon maintained that the appointment of the receivers to the plaintiffs' shareholding in Colebridge Limited ("Colebridge"), the parent company of the O'Flynn Group, constituted an event of default under a Facility Agreement dated 28th February, 2013, ("the Facilities Agreement") entitling it to demand repayment of all monies then due thereunder.

7. In addition to the last mentioned claims, the plaintiffs also seek the Court's determination in relation to the true construction of a

number of provisions contained in the Facilities Agreement which was made between O'Flynn Construction Holdings and Others and National Asset Loan Management Limited ("NALM"), to which terms Carbon is contractually bound as the assignee of the rights and obligations of NALM under that agreement.

8. In the application for interlocutory relief the plaintiffs seek orders restraining the defendants from taking any steps on foot of the demand letters such as to call in and/or enforce their securities and/or to call in and/or enforce the corporate loans of the companies within the O'Flynn Group. It also asks the Court to revoke the appointment of the second, third fourth and fifth named defendant as receivers over the assets of the plaintiffs or the assets of any of the entities within the O'Flynn Group. Finally they seek an order restraining the persons nominated by the defendants from purporting to act as directors of Colebridge International Limited or any other entity within the O'Flynn Group.

9. The grounding affidavit in respect of that application was sworn by Mr. Michael O'Flynn and was supported by an affidavit of Mr. Tom Daly. On the defendant's behalf, a further affidavit was sworn by Ms. Lorna Brown which was also directed towards the examinership application.

Background to the relationship between the parties

10. The O'Flynn Group, as appears from the affidavit of Michael O'Flynn, comprises over eighty entities and has for many years been engaged in the business of property development and construction in numerous countries including Ireland, United Kingdom, Germany and Spain. For the purpose of conducting its business it had access to credit facilities in several Irish banks. When the property market collapsed, the corporate loans of the O'Flynn Group were acquired by and transferred to NALM, the wholly owned subsidiary of National Asset Management Agency ("NAMA"). This occurred in January 2010. In or about the same time, certain personal loans of Michael and John O'Flynn were transferred to NAMA. Thereafter the O'Flynn Group engaged in negotiations with NALM and NAMA for the purpose of seeking to restructure these corporate and personal loans. It was, according to Mr. O'Flynn, the objective of the Group to continue in business and to exit NAMA with the benefit of some form of financing arrangement by way of a sale of their loans to a third party lender or capital provider.

11. The restructuring process was completed on 28th February, 2013 and culminated, insofar as the corporate loans were concerned, in a series of agreements between the individual companies within the O'Flynn Group and NALM. These included eight amended and restated facility agreements dated 28th February, 2013. As part of the process of restructuring their personal loans, the plaintiffs, *inter alia*, entered into four supplemental personal facility agreements with NALM.

12. It is common case that each company in the O'Flynn Group provided cross guarantees in respect of all other companies in the group and provided security to NALM over all assets not charged to other lenders. The plaintiffs also provided NALM with security over their shares in Colebridge.

13. On 16th May, 2014, NALM assigned its interests in the aforementioned corporate and personal loans to Carbon, a member of the Blackstone Group of Companies ("Blackstone") in a loan sale. Under the terms of the Assignment Agreement, Carbon became bound by obligations equivalent to those formerly owed to the borrowers by NALM under the various Credit Documents scheduled thereto.

14. Up until 29th July, 2014, the corporate loans of the O'Flynn Group and the personal loans of Michael O'Flynn and John O'Flynn appear to have been fully serviced and no actionable event of default under any facility agreement had occurred. Carbon does, however, maintain that the O'Flynn Group did default in respect of one payment due to NALM under the corporate facility but accepts that NALM agreed to allow the companies defer that payment provided they met their obligations in respect of all other payments thereafter, which they appear to have done.

15. While it appears that there were certain without prejudice dealings between the O'Flynn's and Carbon in relation to their personal loans it is agreed that Carbon, prior to 29th July, had given no intimation of its intention to call in the said loans. There were, however, as appears from certain without prejudice correspondence, some negotiations in late July 2014, whereby certain proposals were made with a view to Carbon selling the personal facilities back to the plaintiffs. However, no such sale was ultimately concluded.

16. It is without doubt that there were significant differences of opinion between Carbon and the management of the O'Flynn Group as to the proper construction of key provisions in the Facilities Agreements ("the Construction Issue") and this dispute became the subject matter of extensive correspondence between the parties. Likewise, it is without doubt, that from the time Carbon took over the corporate loan facilities, it started looking for additional information and documentation in relation to the group finances and in this regard, a significant body of correspondence, running to well over one hundred pages was exhibited to demonstrate the exchanges between the parties and their agents in relation to these two issues to which I will later return.

17. On 29th July, 2014, without any prior warning, Carbon issued the demand letters in respect of the plaintiffs' personal loans. The sums claimed were €11,555,481; €3,535,935; and €1,672,935 and the letters demanded that the repayment be made "forthwith". The letters were delivered to the home of Mr. Michael O'Flynn shortly after 10.30am and these were contained in an envelope marked "strictly private and confidential – to be opened by addressee only". Copies of these letters were also forwarded to Mr. O'Flynn by email and came to his attention at approximately 11.15am when he finished a meeting which had been ongoing at the time they arrived.

18. At around 1.00pm on the same date the second and third named defendants were appointed as joint receivers over certain assets of the plaintiffs. At the same time the third, fourth and fifth named defendants were also appointed receivers over the plaintiffs' shares in Colebridge. At 1.05pm those receivers passed a resolution removing all of the existing directors of Colebridge and appointing two other directors in their place.

19. Mr. Michael O'Flynn complains that he had no prior intimation from Carbon that it would seek repayment of the personal facilities and that had he been given such notice and/or a reasonable period in which to satisfy the demand, he would have been able to do so. He maintains that the events that happened later on 29th July, have made satisfaction of the demand more difficult.

20. The appointment of the various receivers at 1.05pm was then treated by Carbon as an event of default under the group's commercial facilities agreement. Accordingly, within what is alleged to have been a short period following the making of these appointments, demand letters dated 29th July, 2014, were served by Carbon on key holding companies within the O'Flynn Group, declaring that all sums then outstanding to the tune of approximately €1.4 billion fell due for immediate payment.

The Petition

21. On the same day, 29th July, 2014, and without any prior notice to the Group's management, Carbon presented a petition under the provisions of s. 3(1)(c) of the 1990 Act. Then, at approximately 4.00pm it applied to the High Court seeking the protection of the

Court in respect of the four companies named in the title hereto in the absence of an Independent Accountant's Report (IAR). In the petition it is stated that Carbon took the decision to petition the Court without an IAR as the same could not be prepared due to:-

> (a) the lack of full cooperation by the Group's directors and the Principal Shareholders; and
>
> (b) the lack of access to both the Companies' books and records combined with the absence of publicly available information relating to the said Companies.

22. By order of McGovern J., O'Flynn Construction Co. and the three related companies named in the title hereto were placed under the protection of the Court until 7th August, 2014, to allow for the submission of an IAR. In addition the Court made an order under s. 3A(4) of the 1990 Act, that the directors of the companies co-operate in the preparation of the IAR. Mr. Michael McAteer was appointed as interim Examiner and 27th August, 2014, fixed for the hearing of the petition. The affidavit verifying the petition was sworn by Ms. Brown.

The Hearing
23. Because of the urgency attaching to the present proceedings and to the delivery of this judgment I do not intend to rehearse the evidence placed before the Court in the lengthy affidavits delivered by the parties. I will do no more than try in a skeletal way to summarise the position adopted by the parties to the respective applications after which I will deliver my decision. Prior to doing that, I think its important, in the context of the application to set aside the Order of McGovern J. of 29th July, 2014, to briefly refer to the process with which the Court was concerned when that order was made in order to clearly identify the stage at which the present motions are advanced by the companies.

Overview of the examinership process
24. The process of examinership is commenced by the filing of a petition for the appointment of an examiner in the Central Office. In order for a company to come under the protection of the Court at the time of filing, as provided by s. 3(3A) of the Act, the petition must be accompanied by an IAR discussing the company's prospects of survival. Where the petition and IAR are filed together in the Central Office then the protection of the Court is activated automatically; there is no need for a Court order.

25. The 1990 Act also makes provision for the filing of a petition without an IAR. In such circumstances the company does not receive automatic Court protection. Instead, the petitioner must apply, on an *ex parte* application for directions, for a Court order granting protection pursuant to s. 3A of the Act. Section 3A provides for the exercise of an exceptional jurisdiction at the *ex parte* stage and, as such, requires that the petitioner satisfy the Court that the unavailability of an IAR is due to the existence of exceptional circumstances outside its control and which it could not reasonably have anticipated. If an order pursuant to s. 3A is granted by the Court, it may only be for a maximum of ten days. If no IAR is filed within this time then the protection of the Court will lapse (section 3A(7)).

26. After the filing of the petition and IAR, or the petition alone, O. 75A of the Rules of the Superior Courts provides that the petitioner should then apply to Court *ex parte* for directions. These directions will normally address matters such as the appointment of an interim examiner, an application for interim protection if no IAR has been filed, the advertisement of the appointment of the interim examiner and fixing a date for the full *inter partes* hearing of the petition for the appointment of an examiner. At the *inter partes* hearing of the petition, the Court decides whether to appoint an examiner to the company. This decision involves a consideration of the statutory requirements for such an appointment pursuant to s. 2 of the 1990 Act and, if those requirements are met, consideration of whether, in all the circumstances of the case, the Court's discretion should be exercised in favour of appointing an examiner.

27. In the present case, a petition was filed in the Central Office by Carbon on 29th July, 2014, which was not accompanied by an IAR. At the *ex parte* hearing for directions before McGovern J. on that date, an application was made, *inter alia*, for the appointment of an interim examiner pursuant to s. 3(7) and an order for interim protection in the absence of an IAR pursuant to s. 3A of the Act. The Court also set 27th August, 2014, as the date for the hearing of the petition.

Application to set aside Order made under S.3A of the Act.
28. The first relief sought by the Companies on this notice of motion is an order discharging the Order made *ex parte* by McGovern J. on 29th July, 2014, whereby he granted interim protection to the Companies in the absence of an IAR.

Section 3A of the 1990 Act
29. Section 3A(1) of the 1990 Act provides:-

> "(1) If a petition presented under section 2 shows, and the Court is satisfied—
>
> (a) that, by reason of exceptional circumstances outside the control of the petitioner, the report of the independent accountant is not available in time to accompany the petition, and
>
> (b) that the petitioner could not reasonably have anticipated the circumstances referred to in paragraph (a),
>
> and, accordingly, the Court is unable to consider making of an order under that section, the Court may make an order under this section placing the company concerned under the protection of the Court for such period as the Court thinks appropriate in order to allow for the submission of the independent accountant's report."

30. This provision sets out two requirements for the exercise of the Court's power to grant interim protection. Firstly, there must be exceptional circumstances outside of the petitioner's control which have rendered it impossible for it to present an IAR along with the petition. Secondly, it must be established that those "exceptional circumstances", as defined by s.3A (1) (a), could not have been reasonably anticipated by the petitioner.

Submissions
31. Mr. Cush S.C., on behalf of the Companies, maintained that the circumstances outlined to the Court by the petitioner were not such as to entitle it to the relief which was granted. There were no exceptional circumstances such as to justify the unavailability of an IAR. He also asserted that when making its application for the order seeking interim protection, the petitioner had failed to set out all relevant facts material to the Courts consideration and that this was in breech of the obligations of a party applying for *ex parte* relief and also in breach of its obligations under s. 4A of the Act. Relying on the decision of Hogan J. in *Re the Belohn* [2013] IEHC 157, [2013] 2 ILRM 407, Mr. Cush submitted that, there were two matters to which the Court should have regard when reconsidering

the *ex parte* orders on an *inter partes* basis: firstly, whether the order should be set aside by reason of lack of candour on the part of the petitioner and secondly, whether the order should be set aside based on an evaluation of the evidence that was before the Court which demonstrated that the facts did not justify the granting of the relief claimed under section 3A.

32. Addressing the petitioner's first contention which was that its inability to provide an IAR in time was due to a lack of full cooperation from management, Mr. Cush drew the Court's attention to the correspondence between the parties running to in excess of one hundred pages covering the very brief period between Carbon's acquisition of the personal and corporate facilities on 16th May 2014 and 29th July 2014, the date upon which the petition was presented. He characterised the correspondence as demonstrating intense, active and prompt engagement on the part of the companies in relation to a serious dispute as to the proper interpretation of the Facilities Agreement.

33. In relation to the allegation that a lack of full cooperation on the part of management was the reason for the non-availability of an IAR, Mr. Cush complained that the Court was not advised that the petitioner had never sought to obtain from management any of the information that it believed it needed for such purpose.

34. As to the petitioner's reliance on the assertion that the 2013 audited accounts were outside its control due to a lack of fulsome cooperation from the Group's management, Mr. Cush maintained that the Court ought to have been advised that the Companies had promised to deliver those accounts by the end of August 2014, and that they disputed the right of Carbon to have them in advance of that date.

35. Mr. Cush also relied on the correspondence to demonstrate that Carbon had not, as had been asserted in the petition, been denied access to books or records relevant to the preparation of an IAR. Where documents had not been delivered, this was because they were not due for delivery or where the Companies were disputing Carbon's entitlement to same. The Companies' lack of default in this regard would have been clear had the correspondence been brought to the Court's attention or it would at least have been aware that there was another side to Carbon's allegation.

36. Mr. Cush submitted that the matters addressed in the correspondence were clearly material to the Courts determination as to whether exceptional circumstances existed stemming from a lack of full cooperation and/or lack of documentation which had led to the unavailability of an IAR such as would justify the Court granting the interim protection sought in the absence of an IAR.

37. Mr. Cush also challenged, by reference to the evidence, the truth of the factual assertion made by the petitioner, in support of its alleged inability to prepare an IAR, that it had access to very little substantive information. This asserted that this was not true and relied on the correspondence and the evidence in the affidavit of Mr.Declan McDonald to demonstrate that this was so. He asserted that the petitioner in the preparation of the petition and in the matters put before the Court for the purposes of its s. 3A application had not complied with its obligations arising from the fact that it was making an *ex parte* application and neither had it complied with its obligations of utmost good faith as required by s. 4A of the Act

38. As Mr. Cush relied on the decision of the Court in *Re the Belohn* [2013] IEHC 157, it is convenient at this point to briefly refer to the facts of that case which concerned an application made to Hogan J. for interim protection in the absence of an IAR. The petitioner maintained that an IAR could not be prepared due primarily, to unwillingness on the part of a recently appointed receiver to hand over documents. However, in an email sent to the financial director of the company shortly before the application was made to the Court, the receiver indicated that he would not stand in the way of handing over documents. Hogan J. was satisfied that the error was *bona fide* and that no one was personally to blame for the non-disclosure as the circumstances leading up to the application were characterised by extreme urgency. However, he found that as the undisclosed email was objectively material to the matter under the consideration of the Court on an *ex parte* application, that in view of its non-disclosure, it would be unjust to allow the order made pursuant to s. 3A to stand.

39. Applying the reasoning in that case to the facts in the present application, Mr. Cush submitted that the matters discussed in the correspondence went to the assertion that non-cooperation and lack of access to documentation were the reasons for the absence of an IAR and the exercise of the Court's exceptional jurisdiction. He submitted that, in line with *Re the Belohn*, the correspondence demonstrated that the Companies believed that they were being fully cooperative with Carbon and that they were providing Carbon with all documents to which it was entitled. In these circumstances, this correspondence was relevant to the circumstances being relied upon by the petitioner to contend that it was not in a position to prepare an IAR and should accordingly have been put before the Court. His submission was that the failure of the petitioner to do so should result in the order made pursuant to s. 3A being set aside.

40. In response, Mr. McCullough S.C., for the petitioner, rejected the submission that there was any obligation on the petitioner to bring this correspondence to the Court's attention as it could not be said that it would have made a difference to the Court's decision to grant the interim protection sought pursuant to section 3A. The central thrust of his submission on the non-disclosure argument was that the duty on a petitioner is to present information which is relevant to the issues the Court has to decide and this is what the petitioner had done. In answer to the complaints made by the Companies as to the absence of materials on the contractual interpretation and financial information disputes, Mr. McCullough submitted that the statements of Carbon in the petition were qualified as Carbon's "view", and that these materials did not go to the inability of Carbon to produce an IAR. As such, exhibiting the correspondence would not have changed the decision of the Court. He also submitted that it was fanciful for the companies to suggest that Carbon might have approached management for the purposes of seeking whatever information it needed to prepare an IAR in circumstances where trust and confidence had broken down between the parties. It was, therefore, in Mr. McCullough's submission, unnecessary for the petitioner to advise the Court that it had not sought any requisite information from management.

41. Mr. McCullough also claimed that, as was evident from the affidavit of Declan Taite, chartered accountant, the petitioner as a matter of fact did not have all of the documents that it needed to prepare an IAR. There had, he submitted, been no breech by the petitioner of its obligations under s.4A and no material non-disclosure relevant to the s. 3A decision that the Court was being asked to make.

42. Mr. McCullough distinguished the circumstances of this case from those in *Belohn* on the basis that the undisclosed email in that case addressed precisely the issue before Hogan J. whereas the correspondence undisclosed by Carbon could only go to the formation of a view by the Court of the circumstances, which may or may not be different to the view put forward by Carbon, rather than give a complete answer to the issue raised.

Decision

43. In seeking an order pursuant to s. 3A of the Act, the petitioner was asking the Court to exercise an exceptional jurisdiction in its favour on an *ex parte* basis. As was highlighted by Hogan J. in *Re the Belohn* [2013] IEHC 157, [2013] 2 ILRM 407 the form of

protection available under s. 3A is tantamount to that provided by a prohibitory injunction granted on an *ex parte* basis. The Court stated that, for this reason, an order for interim protection must be viewed as provisional in nature and is liable to be set aside on the application of an affected party, in particular if the information before the Court is found to have been incomplete. This judgment neatly characterises the high burden on a petitioner to ensure that accurate information is put before the Court when an application for interim protection is made. It is as against that background that I have assessed the evidence available on this application.

44. In relation to my conclusions on this application, I would wish it to be noted that I have taken into account the duty imposed upon a petitioner in respect of information provided to the Court which arises by reason of the provisions of s. 4A of the Act, which is to act in "utmost good faith" and which obligation is considered in greater detail later in this judgment.

Facts

45. Part 3 of the petition addresses the reasons for which no IAR was presented with the petition. The petitioner notes its status as a creditor of the company, the implications for access to information of this status, the minimal publicly available financial information about the companies and a lack of cooperation from the companies' management. The two reasons for the absence of an IAR are stated at para. 3.3 as follows:-

> "Therefore, your petitioner has taken the decision to petition this Honourable Court without an Independent Accountant's Report ("IAR") as same could not be prepared due to:-
>
> (a) the lack of full cooperation by the Group's directors and the Principal Shareholders; and
>
> (b) the lack of access to both the Companies' books and records combined with the absence of publicly available information relating to the Companies."

46. The petitioner states its view that these reasons constitute exceptional circumstances outside its control and seeks an order of the Court for interim protection pending the completion of an IAR.

47. The exceptional circumstances as set out by the petitioner for the purpose of s. 3A were accordingly "a lack of full cooperation by the Group's Directors and Principal Shareholders" and "a lack of access to the Companies' books and records". Indeed, the overall impression created in Part 3 of the petition was one of significant non-cooperation and this was evident from the fact that Carbon also sought and obtained an order under s. 3A(4) directing the directors of the companies to co-operate in the preparation of the IAR.

48. In relation to the issue of lack of cooperation in general, I think it is relevant to point out that it is clear from the correspondence exhibited on this application, that a significant dispute existed between the parties in relation to the proper interpretation and application of the Facilities Agreement, with the Companies at one stage threatening an application to the Commercial Court to seek a construction of the relevant provisions. That threat was made in circumstances where the Companies appeared to be convinced that Carbon had adopted an erroneous construction of the provisions and to their detriment had departed from the manner in which those facilities had previously been operated by NALM. An acceptance of Carbon's construction, it is maintained would have had the effect of producing a cash crisis within the Group, given Carbon's insistence on its right to direct how proceeds from disposals should be applied.

49. As an example of cooperation the correspondence emanating from the Companies solicitors, P.J. O'Driscoll and Sons, aimed at resolving that dispute, is exemplary. The best examples of the correspondence are perhaps two letters written by Ms. Patricia O'Brien on the 24th and 30th June, 2014, both of which run to 10 pages. In the letter of 24th June, the Companies' view on the correct interpretation of the Facilities Agreement is set out point by point, by reference to the finance documents. In the letter of 30th June, a number of legal authorities relating to the interpretation of the contracts are referred to. In addition, she sets out her further analysis of the relevant provisions in the finance documents and refers to the manner in which these documents had been operated by NALM, in support of the Companies' position.

50. As to the alleged inability of Carbon to prepare an IAR as a result of an absence of full cooperation or a lack of access to the companies' books and records, once again the picture presented in the petition is one which is not matched by the *inter partes* correspondence. Letters written by Mr. Lenihan, Group Finance Director, over the months of June and July 2014, undermine in a significant way the impression created in the petition that the companies were being uncooperative in providing financial information available from its books and records. His letters of 10th and 16th July 2014 are but two examples of the Companies' apparent willingness to cooperate fully with Carbon. The speed and detail of the replies to requests for information and documentation is quite remarkable in the context of the apparently extensive nature of some of those requests. Further, when any dispute was raised regarding the lender's entitlements to any records or information, the grounds on which the Companies disputed such entitlement were, it appears, dealt with expeditiously and in great detail.

51. Insofar as the Companies may have resisted the provision of certain documentation or information, it made it clear in correspondence that it did so because it disputed Carbon's entitlement to that documentation, a matter not brought to the Court's attention in the context of the lack of full cooperation allegation. The impression created for the Court was that information and documents to which Carbon was entitled were outstanding as a result of non-cooperation rather than a dispute as to the validity of the request.

52. By way of example, it was stated in the petition, as an instance of the non- cooperation alleged and also in support of Carbon's assertion that it did not have sufficient access to Carbons books to prepare an IAR, that the 2013 Audited Accounts had not been furnished at all or in a timely manner. While the petition at para. 12.3 acknowledged a dispute between the parties as to the timeframe for providing these accounts, the petitioner did not tell the Court that the Companies had agreed to furnish these by the end of August 2014.

53. Further insofar as these accounts were used by the petitioner to instance why it had been unable to prepare an IAR, due to lack of access to information, it has since been established that these accounts were not, as it transpires, required for such purpose given that an IAR has since been prepared in their absence.

54. Also, in the context of alleged non cooperation on the part of the companies as going to the root of why it had not been able to prepare an IAR, the petitioner never advised the Court that it had not asked to meet management to furnish any such further information as was required for this purpose. Neither did it advise the companies of its intentions regarding the current process or ask it for whatever limited information it felt it needed in the context of the preparation of an IAR.

55. Lastly, insofar as the petitioner asserted, presumably in support of its claim that it was unable to prepare an IAR as a result of lack of access to the Companies' books, that it had "access to very little substantive information and so factual information in relation to the Companies in this petition is limited", the affidavits sworn on the Companies' behalf and the correspondence therein exhibited would seem to fundamentally undermine that assertion. This can be seen from the following:-

> (i) For the purposes of carrying out a due diligence in the course of acquiring the personal and corporate facilities, Carbon had access to a data room for two months where it had available to it the extensive range of documentation detailed at para. 19 of Mr. Lenihan's affidavit, a fact which is not disputed.
>
> (ii) Carbon had very significant financial information and documentation available at the time it made its application under section 3A. This is clear from Mr. Lenihan's letter dated 16th July, 2014, and from the averments contained at para. 21 of his affidavit where he sets out the timetable of compliance in terms of the delivery of substantial amounts of information and documentation regarding the Companies' finances to Carbon.
>
> (iii) The affidavit of Declan McDonald sworn on the Companies' behalf refers to what was available to Carbon as a result of its access to the data room documents and those which he understands from Mr. Lenihan's affidavit were available prior to the issue of the petition. He makes it clear that there was very limited outstanding documentation needed for the preparation of an IAR and this fact is not contested by the affidavit sworn by Mr. Taite on Carbon's behalf by way of reply.
>
> (iv) Insofar as Mr. McDonald stated that there was further limited information required for the purposes of the preparation of an IAR, he refers to the fact that this was required in order for the author to report upon whether or not the Companies' would be likely to survive as a going concern. In this regard, it is relevant to note that Carbon had come to this conclusion in any event without any such additional limited information, having regard to the fact that in the petition it expressed itself satisfied that the companies had a viable future post restructuring and could and would continue to survive and trade for the benefit of all creditors and employees.

It is clear from these facts that there was a very significant non-disclosure as to the extent of the information the petitioner truly had or that which it needed for the purposes of preparing an IAR.

56. I should also state that I do not accept that Carbon can escape culpability for the failure to bring all of the aforementioned matters relevant to the cooperation of the Companies to the Court's attention by relying on the fact that the petition went no further than to state that there had been an absence of "full" cooperation, leaving open the concession that they had provided some cooperation.

57. I am satisfied that by reason of the exceptional jurisdiction that the Court was being asked to invoke it was mandatory for the petitioner to place all information before the Court such that would allow it adjudicate upon the decision which it had to make, namely whether there were exceptional circumstances justifying the making of the order sought in the absence of an IAR. The petitioner was in my view in breach of that obligation.

58. While it was submitted by the petitioner that, for the order made under s. 3A to be set aside, the non-disclosure must be of a level that a Court would have decided the application differently had the disclosure been made, I do not accept that that statement is legally correct. The present application by the Companies is made in response to *ex parte* orders granted at the commencement of the examinership process. The exceptional nature of the jurisdiction and the fact that the orders were granted ex parte means that the appropriate standard of proof required of the Companies on this application is to establish that circumstances and or information relevant to the Courts considerations was not disclosed to the Court. The standard therefore, is relevance to the Court's considerations; the undisclosed information need not be determinative of the matter. In this matter, it was relevant to the existence of exceptional circumstances, characterised by the petitioner as an absence of full cooperation, that a dispute existed between the parties and that there was extensive engagement between the parties on the matter as it related to the financial information the petitioner asserted it required to produce an IAR. The omission of the factors to which I have referred above from the petition documentation meant that the Court was unable to form an accurate view as to the existence of exceptional circumstances in the petitioner's case. The companies do not need to go so far as to demonstrate that the Court's decision would have been different; it is the fact of non-disclosure of relevant information that is detrimental to the order made pursuant to section 3A. By reason of this failure to put all information relevant to the exceptional circumstances, which were put forward by the petitioner as the basis upon which the Court should exercise jurisdiction pursuant to s. 3A, the order of interim protection made must be set aside.

Section 4A of the 1990 Act

59. Section 4A of the 1990 Act provides:-

> "The Court may decline to hear a petition presented under section 2 or, as the case may be, may decline to continue hearing such a petition if it appears to the Court that, in the preparation or presentation of the petition or in the preparation of the report of the independent accountant, the petitioner or independent accountant—
>
> (a) has failed to disclose any information available to him which is material to the exercise by the Court of its powers under this Act, or
>
> (b) has in any other way failed to exercise utmost good faith."

60. This duty to act in good faith was inserted by the Companies (Amendment)(No.2) Act 1999 as a means of putting on a statutory footing the decisions of the High Court in *Re Selukwe Ltd* (20 December, 1991); *Re Wogans (Drogheda)(No.2)* (7 May 1992); and *Re Wogans (Drogheda)(No.3)* (9 February, 1993). It places a duty on all associated with the preparation and presentation of a petition for the appointment of an examiner to disclose all relevant information to the Court and to exercise the utmost good faith. Failure to do so gives the Court the power to dismiss the petition entirely.

61. In this application the companies seek an order dismissing the petition and an order discharging the interim examiner, Mr. McAteer, by reference to the failure of the petitioner to disclose all relevant material to the Court in accordance with section 4A.

Submissions

62. In this section, the best way to present the facts and submissions is to set out the six categories of alleged non-disclosures and then within each category go through the assertions in the petition and the submissions made by the companies and by the petitioner. The six categories are based on a document handed in to Court during the hearing by Mr. McCullough and on the written

legal submissions completed during the course of the hearing by counsel for the companies.

(1) Absence of any Default on Repayment

63. The first category of alleged non-disclosure relates to the absence of any default on the repayment of the corporate or personal facilities. This matter is not referred to in the petition. In oral submissions, there was a slight dispute between the parties as to the accuracy of this claim. The petitioner claimed that there had been a default on payment in March, 2013. However, the companies claimed that this arose from an incorrect date in the facility agreements and that the agreement should have given a date of December, 2013. The companies submitted that the date issue had come to the attention of NAMA in April, 2014 and that it had been agreed between the companies and NAMA at that time that if the companies did not default in 2014 then NAMA would concede on the March, 2013 date.

64. Mr. Cush for the companies submitted that the failure to mention the absence of default on repayment belied the sense of urgency set out by the petition papers. Mr. Cush submitted that an absence of default is so rare in the current climate both in general and in particular with loans taken over by NAMA that it should have been mentioned to the Court or at least referred to in the petition. In his reply, Mr. O'Moore highlighted the particular rarity of an absence of default in companies for which the appointment of an examiner is petitioned as an additional factor favouring disclosure of this fact.

65. Mr. McCullough for the petitioner submitted that there was not an absence of default, but an event of default, which had been waived by NAMA. He submitted that the absence, or otherwise, of default by the companies did not address the concerns of the petitioner as set forth in the petition, namely the companies' gross balance sheet insolvency, asset strategy and potential cash flow insolvency. As the companies' repayment history was not presented as a concern by the petitioner, Mr. McCullough submitted that Carbon had not acted in breach of good faith by omitting reference to this fact in the petition.

(2) Dispute on Construction of Finance Documents and Resultant Cash Flow Crisis

66. The second category of alleged non-disclosure relates to a dispute in existence between the parties as to the correct construction of the finance documents. The construction dispute related to provisions concerning the use of proceeds of an asset disposal by the companies and whether these proceeds could be used to pay down interest. The companies argued that proceeds could be used to meet any expenditure, including ongoing interest payments, while Carbon took the position that its consent was required. The companies argued that the position taken by Carbon would have serious effects on the cash flow of the companies and their ability to meet debts as they fell due.

67. The petition refers to the possibility of a cash flow crisis as an imminent or future event. At para. 4.5 of the petition it is stated that the companies are at risk of not being able to meet their debts as they fall due, at para. 8.1(h) it is stated that the Group's [meaning the wider corporate group, not just the companies in examinership] cash flow was insufficient to meet annual outgoings and, at para. 8.4, it is stated that the companies are at serious risk of becoming cash flow insolvent by December 2014, if not before. At para. 4.4 of the petition it is stated that it is the petitioner's view that the companies are currently cash flow insolvent.

68. Mr. Cush for the companies submitted that the absence of reference to the underlying problem for the companies' cash flow, namely the dispute with Carbon on the correct construction of the finance documents was a serious omission. The companies' position, as disclosed in the correspondence, is that management of the companies have complete control over the proceeds of asset disposal and its use for cash flow purposes. Mr. Cush noted that the construction of the documents was of such significant importance to the companies that at one point they threatened to bring proceedings in the Commercial Court for declaratory relief. These proceedings were ultimately put to one side to allow for continued discussion and negotiation with Carbon.

69. Mr. McCullough for the petitioner submitted that any future cash flow insolvency of the companies referred to in the petition was only ever a subsidiary matter when considered against the balance sheet insolvency of the companies. He submitted that the concerns of the petitioner in relation to cash flow had little to do with the correct construction of the finance documents. He submitted that the petitioner's concern was directed to an upcoming €41 million interest payment and a €235 million payment due at the end of this year.

70. It was submitted by Mr. Cush and by Mr. O'Moore in reply, that these upcoming payments had everything to do with the construction dispute. Mr. Cush noted the failure of the petitioner to exhibit the facilities agreement with the petition. He submitted this failure had particular relevance to the position taken by the companies both on cash flow and on the strategy for addressing the upcoming €235 million payment, which is addressed in category (3) below. Mr. Cush drew reference to an email from Mr. Brendan Lenihan, the finance director of the Group, to Ms. Lorna Brown on 24th July, in which Mr. Lenihan refers to a sum of €40 million being available to the companies to deal with emergency payments and to meet other obligations. Mr. Cush noted that this amount was not disputed in the response to this email from Situs, Carbon's agent, on 25th July.

71. Mr. McCullough acknowledged that the €40 million figure was different to the €5 million cash balance given in the petition. However, he submitted that this difference was one of opinion, which was not apparent to the petitioner, who thought it was appropriate to use the cash balance figure given in the accounts for January 2014.

(3) Failure to fairly report on the companies' asset strategy

72. The third category of alleged non-disclosure relates to the asset strategy of the companies and which is referred to at para 8 of the petition.

73. The petition at para. 8.3 states:-

> "Records provided by the Group and the behaviour of the Group suggest that it is the Group's strategy to dispose of assets to pay its current expenditure. For example, the Group recently disposed of a property at Clerkenwell in London. The Group asserted that the proceeds of that disposal must be used to firstly repay accrued interest under certain of the Corporate Facilities. This is completely at odds with proper management of a company's liabilities and in effect such a strategy would make the Group more insolvent not less so. This is not an acceptable position for the petitioner."

74. The Companies take the position that, as the asset strategy in the Facilities Agreement provides for the disposal of assets, it was misleading for the petition to describe such a strategy negatively, without referring to the relevant provisions of the contracts between the parties which not only anticipate but require the companies to engage in a managed disposal of its properties.

75. Mr. Cush drew the Court's attention to clause 21.35 of the facility agreement which provides:-

> "Asset Strategy
>
> Without prejudice to clause 21 and 34, implementation of strategic plan, the borrowers hereby agree with and undertake to implement the following specific asset strategies.
>
> (b) to use best endeavours to execute and manage disposal strategy of all of the properties in the period 2012 to 2019."

76. Insofar as the petitioner at para 12.7 condemned as improper management the companies' approach of using the proceeds of disposals to meet interest payments under the corporate facilities agreement, Mr. Cush submitted that the petitioner had failed to tell the Court that the companies maintained that they were entitled to direct and control the proceeds of disposals and that this entitlement had not only been the subject matter of intensive correspondence but it had also been the subject of threatened Court proceedings. To fail to bring this dispute between the companies and Carbon to the Courts attention was to display bad faith. The companies' position could not, he submitted, be legitimately categorised as a strategy.

77. The petitioner takes the view that any dispute about asset strategy is a new dispute between the parties. Mr. McCullough in his submissions to the Court submitted that the companies' position on clause 21.35 effectively amounted to a claim that they had a right to sell assets. He submitted that this interpretation of clause 21.35 was raised for the first time in the affidavit of Mr. Michael O'Flynn in these proceedings and, for this reason, the petitioner could not have been expected to disclose information in the petition about a dispute on disposal of assets that it had no idea was coming.

78. Further, Mr. McCullough submitted that any disposal would require the consent of Carbon under the terms of the Facility Agreement, in particular referring to clause 21.7, and, as Carbon would refuse consent to such a strategy, it was not a relevant matter to refer to in the petition as it was Carbon's view, based on the facility agreements, that such a strategy could not be embarked on by the companies alone. Mr. McCullough noted that it had become a matter of dispute between the parties as to whether this discretion had to be exercised reasonably or not. However, he reiterated that the view of the petitioner was that if Carbon's consent was required to disposals of assets then it was not necessary to mention this strategy to the Court as Carbon had taken the view that consent for such disposals would be refused. In relation to the concern of the petitioner as to the upcoming payment of €235 million and the companies' contention that disposal of an asset would address this liability, Mr. McCullough submitted that as it was open to Carbon to reject this plan it was not a matter that needed to be included in the petition.

(4) Financial Information available to produce an IAR

79. Unfortunately much of the information and material which will be dealt with under this heading has already been referred to in the earlier part of this judgment in which I considered the application to set aside the S.3A Order, an unavoidable consequence of the timeframe in which this judgment had to be delivered.

80. The fourth category of alleged non-disclosure relates to the financial information required to produce an IAR. At paras. 3.1, 3.3 and 10.7 of the petition, the petitioner refers to its limited access to substantial financial information as effectively prohibiting it from prepared an IAR in time to accompany the petition. At paras. 7.2 and 10.2, the petition refers to a lack of regular, detailed and reliable financial information and a lack of cooperation in providing substantive financial information in accordance with the finance documents, in a clear, concise and timely manner. Paras. 12.1 to 12.8 detail the attempts made by Carbon to obtain the 2013 Audited Accounts and to set up a meeting with the companies' auditors. Para. 12.4, in particular, notes that while responses to requests for information have been received, these responses have failed to set out the information sought either at all or in the level of detail and clarity required.

81. Both parties filed affidavits from accountants with significant experience acting in examinership matters. The affidavit filed by the companies was sworn by Mr. Declan McDonald, a partner in the insolvency and corporate restructuring practice of Price Waterhouse Cooper, on 31st July, 2014. In his affidavit, Mr. McDonald set out his opinion as to the sufficiency of information available to the petitioner on 29th July to enable the preparation of an IAR. He advised that there was very little additional information required beyond that which he understood was available to the petitioner as of 29th July 2014. The affidavit filed by the petitioner was sworn by Mr. Declan Taite, an insolvency practitioner and a managing director at Duff and Phelps (Ireland), on 4 August, 2014. In this affidavit, Mr. Taite sets out his opinion that, from his knowledge and experience of the preparation of an IAR in examinership proceedings, he would not have been satisfied that he had sufficient information to prepare an IAR, based on the information available to Carbon before the petition was moved on 29th July.

82. In relation to the level of information to which the petitioner had access, Mr. Cush drew attention to paras. 18 to 20 of an affidavit of Mr. Brendan Lenihan, in the examinership proceedings, sworn on 31 July, 2014. These paragraphs set out the information to which the petitioner had access for a period of two months in the form of data rooms during the due diligence process in respect of the sale of the loans. Paragraphs 19 and 20 of Mr. Lenihan's affidavit list out the categories into which the information available in the data rooms fell. At para. 21, Mr. Lenihan then sets out the requests for information from the petitioner since 19th May, 2014, and gives the date of reply by the companies, including a comment on the information provided. Mr. Cush, on the basis of this account, submitted that the claim that Carbon had access to "very little substantive information" was not an accurate account of its position.

83. In relation to the affidavits filed from the accountants, Mr. Cush noted the averment of Mr. McDonald that a significant amount of interaction with management is required for the preparation of an IAR. Mr. Cush submitted that such engagement was never sought by Carbon from the management of the companies for the purposes of preparing an IAR.

84. In relation to the audited accounts and the requested meeting with the companies' auditors, Mr. Cush broadly agreed with the summary contained in paras. 12.2 to 12.8 of the petition. However, he submitted that the emphasis placed on the necessity of the 2013 Audited Accounts for the production was an IAR was not accurate. Mr. O'Moore noted in his reply on day three of the hearing that an IAR had been produced in the continued absence of the 2013 Audited Accounts. Mr. Cush also drew attention to the fact that the companies had indicated in the correspondence that the 2013 Audited Accounts would be available by a date in August, 2014 and while the accounts were late in the strict sense, the time frame for delivery was reasonable in the circumstances outlined in the correspondence. Mr. Cush further submitted that the non-disclosures of the petitioner in relation to the significance of and the companies' position on the 2013 Audited Accounts facilitated the creation of a false sense of urgency by the petitioner, who Mr. Cush noted had never explained why it was necessary to move the petition on 29th July, a factor which would be relevant to the Court's consideration of "exceptional circumstances".

85. Mr. McCullough's disagreed with Mr. Cush's characterisation of the petitioner's course of action. Firstly, he submitted that as

Carbon was entitled to bring a petition as of 29th July, by reason of the insolvency of the companies and their reasonable prospect of survival, that the question should properly be whether the petitioner could prepare an IAR at that time. In this respect, Mr. McCullough drew attention to the affidavit sworn by Mr. Taite and his averment that there was insufficient material available to enable preparation of an IAR.

86. Secondly, Mr. McCullough, in response to Mr. Cush's submission on engagement, acknowledged that the petitioner had never sought the engagement of management for the purposes of preparing an IAR. He submitted that, as it was obvious to all concerned that the petition would be opposed by the companies, it was absurd to suggest that the petitioner should have attempted to engage management for the purposes of an IAR.

87. Thirdly, Mr. McCullough referred to the characterisation of the companies' responses in the petition as a lack of "full cooperation" and not "as cooperative as it [the petitioner] might reasonably have expected". He linked the latter expectation to the continued failure to provide the 2013 Audited Accounts, to which the petitioner is contractually entitled, and submitted that these characterisations did not exclude the fact that some engagement had occurred between the parties. His submission was, essentially, that the petition simply summarised what is set out in longer form in the correspondence, namely that the engagement from the companies was regarded by the petitioner as insufficient.

(5) Proposals in regard to facilities

88. The fifth category of alleged non-disclosure is in relation to proposals made for the refinancing of any of the facilities. The petition at para. 8.5 states that neither Mr. Michael O'Flynn nor Mr. John O'Flynn have come forward with any proposals to refinance or repay the personal facilities.

89. Mr. Cush submitted that there was correspondence between the petitioner and Mr. Michael O'Flynn on a without prejudice basis in relation to the refinancing of the personal facilities so the statement at para. 8.5 of the petition is inaccurate. The proposal made by Mr. Michael O'Flynn involved the write down of some of the personal liability and that he would forgo certain amounts due to him from the Group.

90. Mr. McCullough characterised this proposal as one of restructuring, rather than repayment or refinancing, and so rejected the submission that the statement in the petition had been inaccurate. In relation to the proposal of Mr. Michael O'Flynn to forgo certain amounts due to him, Mr. McCullough noted that these company debts would, in any event, be subordinated to the debt held by Carbon so the proposal contained little of financial interest to Carbon, in particular as it involved writing down debt due by Mr. O'Flynn on the personal facilities.

(6) Position on the 2013 Audited Accounts and Access to the Auditors

91. The sixth category of alleged non-disclosure related to the 2013 Audited Accounts and access to the companies' auditors. The petition at paras. 12.1 to 12.8 sets out a summary of the correspondence between the parties on both matters. Paragraph 12.3 refers to the Group's position that the entitlement to the 2013 Audited Accounts within 90 days of year end had been waived by NAMA to allow preparation of documents for the sale of the loans to Carbon. Paragraph 12.5 states that the petitioner is contractually entitled to meet with the companies' auditors but that subsequent to the first request for such a meeting, the companies sought to attach conditions.

92. The accuracy of the summary set out in the petition was acknowledged by Mr. Cush. In the affidavit of Mr. Brendan Lenihan the companies' position on the 2013 Audited Accounts is set out at paras. 25 to 36. He avers that a waiver was given by NAMA on the production of the 2013 Audited Accounts to enable preparation of financial information for the sale of the Group's loans. He avers that as the contractual requirement is to produce the accounts within 90 days of year end, the companies' position is that 90 days from the closing of the loan sale, i.e. August, is a reasonable timeframe to prepare the accounts. He states that while a request was made by the petitioner for the accounts to be made ready by July, this date was not practicable for the companies in the circumstances and he had advised Carbon of this fact in correspondence when promising the said accounts by the end of August.

93. In relation to the request for a meeting with the companies' auditors, Mr. Lenihan avers that it was put to Carbon that the best way to get an accurate and up to date position of the companies and the relevant information would be through management, rather than through the auditors. He avers that his understanding, based on a meeting with Ms. Lorna Brown of Carbon on 9th July, 2014, was that there would first be a meeting with management in advance of a meeting with the auditors. He states at para. 33 that he was "surprised and disappointed" at Carbon's subsequent requests to speak with the auditors alone.

94. Mr. McCullough's submitted that the petition gives a fair summary of what occurred in relation to the 2013 Audited Accounts. He submitted that, overall, the petitioner could not have done any more to present both sides of the story.

Decision

95. It is necessary, when considering the appropriate standard of disclosure required by s. 4A of the 1990 Act and the consequences of non-disclosure under this section, to have regard to the nature of the application made by the petitioner. The orders obtained, namely of interim protection, the appointment of an interim examiner, and directing cooperation by the directors of the companies, were sought and granted on an *ex parte* basis, as is the procedure required by O. 75A of the Rules of the Superior Courts. The granting of the orders *ex parte* is significant when considering the requirements of s. 4A of the 1990 Act and the consequences of a finding thereunder.

Existence of Non-Disclosures

96. On review of the six categories of alleged non-disclosure set out above by reference to the wording of the petition and the submissions of the parties, the Court finds that there was non-disclosure of information available to the petitioner which was material to the exercise by the Court of its powers under the 1990 Act, in breach of the obligations of a petitioner pursuant to section 4A. Of the six categories listed above, the only one for which an accurate picture was presented to the Court was in relation to the correspondence between the petitioner and the companies in respect of the 2013 Audited Accounts and the requested meeting with the auditors. The summary given acknowledged a difference of position between the parties on both points and, in relation to the 2013 Audited Accounts, referred to the companies' belief that a waiver had been granted by NAMA. In relation to the other five categories of information, there were non-disclosures by the petitioner of material information in all five.

97. The failure to refer to the dispute on the construction of the finance documents, particularly because the dispute related to cash flow, was material in light of the view expressed on a number of occasions in the petition that cash flow insolvency was a real possibility and the view expressed on one occasion that the companies were already cash flow insolvent.

98. The failure to refer the Court to the contractual origin of the strategy of asset disposals was material in view of the criticism advanced in the petition of such a strategy. It was not sufficient for the petitioner, as was submitted, to state that as its consent was required for and it would not give consent to such a strategy that reference did not need to be made to the relevant clause of the facilities agreement. The petitioner advanced a critique of asset disposal as an example of poor management; if a contractual basis existed for these actions of management then it was, of course, material to the Court's consideration.

99. As has been found above, the correspondence between the parties, which was not exhibited, significantly undermined the petitioner's contention that cooperation from the companies was, if not absent, then significantly lacking. There is no need to restate the Court's views in relation to the cooperation on the part of the companies referred to earlier in this judgment when referring to the companies' application to discharge the order made under section 3A.

100. There are two aspects to the petitioner's failure to meet it's good faith obligations referable to its stated position to the Court as to its access to financial information. The first has already been discussed in this judgment and relates to the petitioner's obligations to act with utmost good faith when seeking to meet the requirements of s. 3A and establish the existence of "exceptional circumstances". The second aspect is the obligation on the petitioner, as set out in s. 4A, to act with the utmost good faith in relation to all matters contained in the petition, which may not directly impact upon proof of the existence of "exceptional circumstances". This good faith obligation requires the petitioner in this case to give the Court an accurate picture of the overall circumstances pertaining to its access to information. I am satisfied that the petitioner was also in default in relation to this latter obligation in the way in which the nature of its access to financial information was addressed in the petition. There are a number of references in the petition, as noted above, to a lack of access to substantive financial information and a lack of cooperation from the companies in relation to the provision of same. This characterisation was not an accurate presentation of the circumstances. In the months leading up to Carbon's acquisition of the companies' loans in May, 2014 it had access to a data room, which contained significant amounts of financial information. When combined with the fact that cooperation in the provision of financial information was not lacking on the companies' side, the assertions made in the petition of a lack of full cooperation and a lack of access to financial information did not convey an accurate picture of the circumstances as they existed on the date of presentation of the petition. As such, the petitioner's assertions on access to financial information created an inaccurate impression of the circumstances and, for that reason, breached the petitioner's obligation of utmost good faith required by s. 4A of the 1990 Act, as well as failing to meet the standard required for the exercise of the Court's jurisdiction under section 3A.

101. Finally, the petitioner was in default in its failure to refer to proposals for the restructuring of the personal facilities by Mr. Michael O'Flynn. It was not a sufficient explanation for the failure to refer to this without prejudice correspondence to characterise the proposals made as "restructuring" and thus not excluded by the reference to an absence of proposals for "refinancing" or "repayment". Carbon put the absence of proposals before the Court. By failing to refer to the existence of proposals in this third category of "restructuring" the petitioner created and put before the Court, an incorrect impression of events. In addition, by expressly asserting that the principal shareholders had failed to provide any proposals, the petitioner created an impression for the Court of borrowers who were disengaged or disinterested in their loan obligations. It is clearly relevant to this portrayal of the borrowers that there had been no default in their obligations on the personal or corporate facilities and that all requirements were, as of the date of presentation of the petition, being met. The non-disclosure of the absence of default is, as such, also a material non-disclosure in relation to this assertion.

Consequences of Non-Disclosures

102. Counsel for the companies and for the petitioner made submissions to the Court as to the appropriate consequences for a failure in disclosure under section 4A. The outcome contended for by Mr. Cush was the dismissal of the petition by reason of the failure in duty by the petitioner pursuant to section 4A.

103. Mr. McCullough raised an argument about the correct interpretation of section 4A. He submitted that in order for a non-disclosure to have consequence, it must go to the particular power that was being exercised by the Court. Urging a pragmatic approach, Mr. McCullough submitted that for the orders granted to be set aside, it must be shown that a non-disclosure would have caused the Court to take a different decision.

104. On this submission, I am not satisfied that Mr. McCullough is correct. The relevant part of s. 4A reads "any information available to him which is material to the exercise by the Court **of its powers under this Act**" (emphasis added). The provision appears to be worded more broadly than contended for by Mr. McCullough as it refers to all powers of the Court pursuant to the 1990 Act rather than referring to powers exercised in a particular application.

105. Mr. McCullough urged the Court to take a pragmatic approach and to have regard to the purposes of the 1990 Act, in terms of the protection of jobs and the rescue of viable enterprise. In this regard, he noted the approach taken by Clarke J. in *Re Traffic Group Limited* [2007] IEHC 445, [2008] 3 I.R. 253. In the context of a hearing for the confirmation of a scheme of arrangement, Clarke J. found that the Court retained its discretion to confirm or reject a scheme of arrangement, even where there had been failures in disclosure by those bringing the petition and that these matters of non-disclosure were to be weighed in the balance by the Court. Clarke J. stated in its consideration of whether to exercise discretion that the Court should lean in favour of achieving the objectives of the 1990 Act, namely job protection and saving viable enterprise, particularly where measures may be put in place to ameliorate the consequences of the lack of candour. In reliance on *Re Traffic Group Limited*, Mr. McCullough submitted that the undisputed balance sheet insolvency and prospects of survival of the companies should tip the balance in the Court's consideration to allow the examinership proceed to the hearing of the petition.

106. There is an important distinction to be drawn between the circumstances facing the Court in *Re Traffic Group Limited* and the circumstances in which the present applications are made. In *Re Traffic Group Limited* the examinership process was effectively concluded by the time the lack of candour as to the companies' finances came to light and the Court had before it the final report and proposals of an examiner for a scheme of arrangement to give the companies a reasonable prospect of survival. In that context, the objectives of the 1990 Act were clearly relevant and, moreover, it was possible for the Court to have regard to the proposals for a scheme of arrangement to limit the benefits to those responsible for the lack of candour. In this regard, Clarke J. sought an undertaking from the petitioners that they would not have any involvement with the companies for a period of 18 months.

107. The circumstances of the present application differ significantly. The application is to set aside orders made *ex parte* on the grounds of non-disclosure. There are two aspects to this. Firstly, the application is, effectively, a response to the first stage of the examinership process. While it is undisputed between the parties that the companies are balance sheet insolvent and that they have a reasonable prospect of survival, these issues have not yet been decided by the Court as the petition has not yet been heard and an examiner has not yet been appointed. The only consideration that has been given to these issues to date by the Court is whether they are *prima facie* satisfied so as to allow the appointment of an interim examiner. In this first aspect, the stage of the examinership process, there is a distinction to be drawn with *Re Traffic Group Limited* in terms of how far the examinership process

has come, along the statutory trajectory, to achieving its objectives.

108. Secondly, the orders sought by the petitioner and made by McGovern J. were *ex parte* in nature. In that respect, the lack of candour has a different significance to the lack of candour which came to light at the disputed *inter partes* confirmation hearing in *Re Traffic Group Limited*. The nature of *ex parte* orders granted in the initial stages of an examinership was recently considered by Hogan J. in *Re the Belohn* [2013] IEHC 157, [2013] 2 ILRM 407, as has been noted above in the context of s. 3A of the 1990 Act. At p. 410, para. 7 of his judgment Hogan J. stated:-

> "Yet while there are obvious reasons why the Court has to have jurisdiction to make orders *ex parte*, it is equally clear from the established case law that an order of this kind is not – and could not constitutionally be regarded as – a final order."

109. Hogan J. then referred to relevant Supreme Court authority including *D.K. v. Crowley* [2002] 2 I.R. 744, *Dellaway v. National Asset Management Agency* [2011] 4 I.R. 1 and In re Custom House Capital Limited [2011] 3 I.R. 323, explaining that, in the interests of the constitutional guarantee of fair procedures, a party affected by orders made *ex parte* must have the right to apply to Court to have those orders set aside.

110. Of particular relevance to the submission in this case, is the following quotation, noted in *Re the Belohn* at p. 413, from the judgment of Hogan J. in *Re Custom House Capital* [2011] IEHC 298, [2011] 3 I.R. 323 at pp. 331 to 332, paras. 24 to 25:-

> "In the light of these authorities, I could not constitutionally sanction the appointment of inspectors by means of the making of a final order on an *ex parte* basis. It cannot be said that such an appointment represents merely some routine procedural step and that Custom House will have its opportunity of defending its position before the inspectors. It is rather a step which will have significant reputational issues for the company, whose business may be severely affected by the publicity attendant on such appointment. This is much more comparable to a decision by a professional body to commence an investigation into a professional person, a decision which in itself attracts the right to fair procedures…
>
> …
>
> If the *ex parte* nature of the original appointment can be justified on the basis that it was necessary so to act in order to protect investor funds, the principle of proportionality correspondingly requires that this must be counter-balanced by a stipulation that the appointment be in the nature of an interim order or on a provisional basis."

111. On this basis, the submission of Mr. McCullough on the consequences for a failure in disclosure cannot be correct. It is not an answer to failures in disclosure when an *ex parte* order is sought to say that the matter may be reviewed at some later time when the statute provides for an *inter partes* hearing. The nature of Orders granted *ex parte* place a high standard of disclosure on the shoulders of a party who seeks such an order to ensure that it will not be set aside when reviewed *inter partes*.

112. The current position of the companies in the examinership process should be referred to. While the Court has taken the decision in this judgment to set aside the order of McGovern J. granting interim protection, the companies remain under the protection of the Court as an IAR was filed in Court on 7th August, 2014. The interim examiner, Mr. McAteer, remains in place but it was acknowledged by the petitioner at the hearing that the position of interim examiner has few responsibilities in the period until the petition is heard. This is set out to clarify that the Court is considering the consequences of s. 4A at a very early stage of the examinership process, a process which is apt to damage interests if not applied correctly, for which the requirement set out by statute is not just good faith but utmost good faith.

113. In terms of considering appropriate consequences for breaches of this duty of utmost good faith and material non-disclosures, there is a need for clarity on the powers being exercised by the Court in response to the application of the companies. The purpose of the hearing these applications is not so as to engage in some form of pre-petition hearing; it to consider whether the orders granted *ex parte* should be set aside. In this regard the behaviour of the petitioner in relation to disclosures is highly relevant. It is not a defence to a failure to exercise the utmost good faith to say that the companies are suitable for the examinership process in any event. Suitability for examinership is a separate issue to the standard of disclosure required both by the nature of an order granted *ex parte* and the specific statutory requirements under s. 4A of the 1990 Act. If the companies are suitable ones for examinership then a petition complying with the good faith obligations of the 1990 Act should be brought so that the Court may consider the appointment of an examiner to the companies at the *inter partes* hearing of that petition.

114. Having regard to the nature of the orders granted and the purpose for which the Court is reviewing them, the stage of the examinership process and the statutory requirements of s. 4A, the Court is satisfied that the appropriate consequences for the petitioner's breaches of obligations under s. 4A in these circumstances is to discharge the interim examiner and to dismiss the present petition.

115. Even if the Court were to take the view that the objectives of the legislation are a relevant consideration in response to the exercise of its discretion in response to breaches of s. 4A at this stage of the examinership process, they do not assist the petitioner in this application. The petitioner is the main creditor of the companies. Creditors do not commonly seek the protection of the Court for companies owing them money; the directors of a company usually bring a petition to protect the company from the impending action of particular creditors. In the present circumstances the main threat to the survival of the companies comes from the petitioner itself; there was no evidence at the hearing of an impending threat from any other creditor. As such, the dismissal of the petition does not of itself pose a threat to the survival of the companies. Rather it places the prospects of survival in the hands of the party who has so recently petitioned the Court in this same matter.

Petition hearing and complaints about petitioner's conduct

116. At the hearing of the petition there are two aspects to the Court's consideration of whether to appoint an examiner. The first is whether the statutory requirements have been complied with, primarily whether or not the company has a reasonable prospect of survival as a going concern. Even where this threshold has been met the Court is not then obliged to appoint an examiner. The result of meeting this threshold is that the Court's discretion to appoint an examiner is triggered. In exercising this discretion, the Court may consider all of the relevant interests in a case. In *Re Gallium Ltd.* [2009] IESC 8, [2009] 2 I.L.R.M. 11 at pp. 21 to 22, paras. 46 to 48, Fennelly J. explained:-

> "A petitioner does not, by getting over that threshold, acquire a right to have an order made. I still think it is fair to say that the section confers a 'wide discretion' on the Court, or alternatively, that the Court should take account of all the circumstances. The establishment of a reasonable prospect of the survival merely triggers the power, which remains

discretionary … The Court has the power to appoint an examiner if satisfied that there is a reasonable prospect of survival of the company. The entire purpose of examinership is to make it possible to rescue companies in difficulty. The protection period is there to facilitate examination of the prospects of rescue. However, that protection may prejudice the interests of some creditors. The Court will weigh the existence and degree of any such prejudice in the balance. It will have regard to the report of the independent accountant.

The Court has to take account of all relevant interests. The independent accountant must consider whether examinership would be 'be more advantageous to the members as a whole and the creditors as a whole than a winding-up of the company…' This does not limit the range of interests to be taken into account by the Court under section 2. The interests of employees cannot be excluded. In the case of an insolvent company, it is natural that the creditors will have the greatest interest in the future, if any, of the company. The Court will take a balanced approach, as suggested by the reference to the creditors as a whole."

117. In the hearing of these applications, Mr. Cush submitted to the Court that the petitioner is using the examinership process for an improper purpose, namely as a means of wresting control of the underlying assets from the O'Flynns by engineering a situation of insolvency and default events to enable the bringing of a petition. The petition itself appears to acknowledge the aim of transferring ownership at paras. 8.7, 9.4 and 11.3 and it was also acknowledged by Mr. McCullough in submission. The matter of whether this is a valid complaint or a matter to be considered by the Court would appear a matter for the Court's consideration in the exercise of its discretion at the hearing of the petition rather than as a matter for the Court in deciding whether to set aside *ex parte* orders. It may be a point on which other interested parties wish to make submissions and the appropriate time at which all interested parties may do so is at the hearing of the petition.

Submissions in the Injunction Proceedings

118. Mr. Cush, S.C., maintains that the plaintiffs have raised a number of substantial and serious issues for the determination of the Court which justify the granting of the interlocutory relief sought in the notice of motion. These are:-

(a) that the demand letters in respect of the plaintiffs' personal facilities are invalid, as are all enforcement steps that have been taken on foot thereof, insofar as they afforded the plaintiffs' no time (or no reasonable time) to meet those demands;

(b) that the said demand letters are invalid insofar as they were sent for a collateral or improper purpose. Contrary to what was asserted in the demand letters, the very thing that Carbon did not want was repayment of those monies as that would have thwarted its strategy which was to use any default in respect of the personal loans for the purposes of engineering an event of default such as would entitle it to enforce its securities and call in the corporate loans. That was to act capriciously, arbitrarily and unreasonably; and

(c) that Carbon had assumed the obligations owed to the plaintiffs by NAMA and/or NALM to act fairly and reasonably in the exercise of any power exercisable by reference to the Facilities Agreement and had acted in breach thereof. He relied upon the relevant contract documents to this end.

119. Mr. Cush, S.C., relied upon the well rehearsed legal principles governing the granting of interlocutory relief for the purposes of establishing that he had raised a fair, substantial and *bona fide* question for determination of the Court in relation to each of the three issues referred to above.

120. In addition, Mr. Cush maintained that damages would not be an adequate remedy if his clients, at the trial of the action, were to establish that they were entitled to the relief claimed in respect of the validity of the demand letters.

121. Mr. McCullough, S.C., on behalf of the defendants behalf submitted:-

(i) that the plaintiffs had not made out an arguable case that the demand letters, or any of the subsequent enforcement steps, were invalid or unlawful. Reasonable time, he submitted, had been allowed for repayment in the circumstances of this case, which included the fact that the plaintiffs did not have the available funds to transfer to Carbon within the legally permitted time frame. That time frame, he argued, was to be determined by reference to how long, assuming the funds were available in some bank account, it would physically take to transfer them into the designated account.

(ii) that the plaintiffs had failed to establish any arguable case to the effect that there was anything improper in Carbon seeking to use the demand letters for the purpose of bring about an event of default that would entitle it, *inter alia*, to appoint receives and call in the corporate loans. That was how the finance documents had been set up and what the agreements provided for. It could not be illegitimate for Carbon to operate those documents as intended and that was what the plaintiffs, as extremely experienced businessmen, had signed up to.

(iii) without prejudice to his submission that there was nothing unfair about Carbons actions in calling in the personal loans or seeking to bring about an event of default for the purpose of calling in the corporate loans, he submitted that any obligations on the part of NAMA to act fairly and reasonably in the exercise of any power provided for under the Facilities Agreement stemmed from the public law duties imposed on NAMA by virtue of its statutory obligations and these were not obligations which were capable of assignment. Further, the plaintiffs personally were not parties to that assignment which was between NAMA and Carbon and it was not therefore possible to argue they were entitled to rely on the provisions of any such document.

Lack of Time to Meet Demands

122. The plaintiffs contend that there are two legitimate but differing schools of thought as to how the word "forthwith" should be construed in the context of a loan which is repayable on demand. The first is what is referred to in the relevant judgments as the mechanics of payment test. This is a very stringent test and the one that has been universally adopted by the English Courts in recent times. This test allows only such time as is reasonable in all of the circumstances to enable the debtor contact his bank and make the necessary arrangements for the sum in question to be transferred to the account of the creditor. The alternative test is what is described as the reasonable time or reasonable time in the circumstances test which has, according to the plaintiffs been applied in other jurisdictions. Applying that test the plaintiffs maintain that in determining what is a reasonable time the Court can take into account matters such as whether the debtor had any warning of a borrowers intended action and perhaps the time necessary to arrange for alternative finance to be put in place.

123. Notwithstanding an obiter statement by Charleton J. in *National Asset Loan Management Limited v. Barden* [2013] IEHC 32, to the effect that it might be possible for a borrower, who was trading in a satisfactory manner, to argue for an entitlement to reasonable notice of any contemplated demand for repayment of a commercial loan, the plaintiffs did not seek to argue that the demands for repayment of the personal loans could potentially be found to be invalid merely because of a lack of any prior notice of Carbon's intention to call for their repayment. It was however submitted that the lack of any prior notice was something that the Court would arguably be entitled to take into account in determining whether the time allowed for payment was sufficient if the reasonable time test were applied.

124. The plaintiffs submit that they can reasonably argue at the hearing of this action that the reasonable time test rather than the mechanics of payment test applies and that if they establish that argument they will succeed in their claim that Carbon's demand letters issued in respect of the personal loans are invalid as are all subsequent enforcement steps including the demand for repayment of the Group's corporate loans. However, even if the Court were to reject that argument they maintain there is still a serious issue to be tried as to whether on the facts of this case, applying the mechanics of payment test, the demands are valid.

125. There is some divergent case law on the question of how much time must pass following a demand by a creditor, where money is payable on demand, before the debtor who fails to make payment can be said to be in default. However, one principle seems to be well established and about which there is no dispute and that is that if the borrowers have made known to the lender that they are unable to pay the monies outstanding, then it is not necessary for the lender to allow any time to elapse after demand before seeking to enforce their security. As Blackburne J. stated in *Sheppard & Cooper Limited v. TSB Bank Plc* [1996] 2 All E.R. 654 at 660:-

> "The requirement that sufficient time be permitted to elapse to enable the debtor to effect the mechanics of payment assumes that that is the period needed if the debtor has the necessary moneys available. If, however, he has made it clear to the creditors that the necessary moneys are not available, then, provided a proper demand has been made, I cannot see that the creditor need allow any time to elapse before being at liberty to treat the debtor as in default."

126. This approach was adopted by McGovern J. in *Allied Irish Bank Plc & Anor v. Moran* [2012] IEHC 323, where at para. 23 of his judgment he adopted the observations of Harmon J. on the interlocutory application in *Sheppard & Cooper* when he stated:-

> "The question of notice becomes irrelevant in circumstances where the defendants are unable to pay the sums due. The law does nothing in vain and it would be pointless, in the circumstances of this case, to require further steps to be taken by the second named plaintiff before it can recover its debt where the claim would inevitably be brought again and the defendants would, on their own admission, have no answer to it."

127. In my view, the aforementioned principle is of little relevance to the facts of this case as the plaintiffs had never made it known to Carbon that they would be unable to pay the personal loans if they were to be called in. The O'Flynn's have never failed to meet the payments due under these personal facilities and Carbon has not exhibited, as was done in one of the cases to which I will later refer, documentation or correspondence demonstrating that they were clearly not going to be able to get the money, if demanded of them, within whatever the Court would consider to be a reasonable time. Also, there was no challenge to the averment made by Mr. Michael O'Flynn in his affidavit that he is more than able to meet all of his personal liabilities and that had he been given reasonable time to pay, he would have been able to do so.

128. The plaintiffs have found some small support for their contention that they may reasonably argue for the application of the reasonable time test by reference to the obiter decision of Charleton J. in *National Asset Loan Management Limited v. Barden* [2013] IEHC 32, where at para. 13 of his judgment he stated as follows:-

> "Were it to be the case that the bank jumped ahead of the business situation contemplated to be a success and demanded repayment notwithstanding that sales were progressing in a reasonable fashion it is possible that another argument might succeed. It might also be that a borrower would be entitled to reasonable notice of the change in the attitude of the bank and reasonable time to arrange another facility."

129. The proposition advanced by the plaintiffs that a borrower served with the demand for payment forthwith can be afforded some latitude beyond the time required to meet the mechanics of payment test does not, I believe, get any support from the decision of McGovern J. in *Allied Irish Banks Plc & AIB Mortgage Bank v. Moran*. In that case, the learned trial judge was dealing with loans which required the lenders to give prior notice to the borrowers of any default under the agreement and a time to remedy that default prior to making a demand for repayment. While the learned trial judge did indeed say that "in the absence of a fixed time, the notice should be reasonable", I read that statement as being one requiring the lender to provide the borrower with a reasonable time to remedy the default prior to the demand as opposed to a requirement that the lender afford the borrower additional time to meet a demand for payment.

130. While the plaintiffs rely upon the decision of Hogan J. in *Re Belohn Limited* [2013] IEHC 157 to support their submission that they have a reasonable argument to make that the Court should apply the reasonable time test, I feel this decision does not really advance their position. That judgment relates to an application to discharge an order appointing an interim examiner to *Belohn*. In the course of his judgment, Hogan J. referred to the manner in which Bank of Scotland had called in the personal loan of a Mr. Foley who was a director of Merrow, the sole shareholder of *Belohn*. Regarding the demand for payment of slightly over €1 million which was made by letter handed to Mr. Foley at 4:15pm and in respect of which it demanded repayment by 5pm the same day, Hogan J. stated as follows:-

> "Second, the time allowed for payment was quite impossibly and quite unrealistically short. Even if Mr. Foley's bank had actually been open at the time he received the letter, it would have represented an heroic feet of efficiency for Mr. Foley and his own bank to have ensured that the money was actually received in a particular account by the Bank of Scotland by 5pm, as anyone who has ever stood in a bank queue or tried to effect even the simplest banking transaction such as transferring money from one account to another would immediately understand. Of course, depending on the circumstances on the contractual terms governing the loan agreements, a demand letter may reasonably request payment within a matter of hours during the course of a banking day. But the time permitted for repayment must nonetheless be reasonable and realistic and in this case it was neither."

131. I do not believe this passage can be used to suggest that Hogan J. did not believe that mechanics of payment test was the one to be applied in the case of a borrower seeking to call in a loan facility that was repayable on demand particularly in circumstances where he expressed himself satisfied that it might be reasonable for a lender to demand payment within hours during the course of a banking day depending on the contractual terms. All that he was explaining was that at 4.15pm on a Friday, it would be simply impossible, in a practical sense, for anyone to make a transfer within 45 minutes given that it was outside normal banking hours, a

timeframe which would not meet the mechanics of payment test.

132. In the plaintiffs' written submissions when referring to a number of judgments significant emphasis was placed on words such as "reasonable" and "reasonable in the circumstances of the case" by referencing them in bold type. However, when the quotes concerned are read in the context of the overall decisions from which they are taken, it is clear that the Court in each instance was not departing from the mechanics of payment test but merely looking at what was reasonable in the circumstances of that test. An example of this is to be seen in the decision of Blackburne J. in *Sheppard & Cooper Limited v. TSB Bank Plc* where at 659, in considering the submissions of counsel, he states as follows:-

> "In my view, the question how much time must elapse after demand before a debtor can be said to be in default is essentially a practical one. As Goff J. observed in the Crypts case [1973] 2 All E.R. 606 at 616, [1973] 1 WLR 994 at 955:-
>
> > 'the cases show [where money is payable on demand] all the creditor has to do is to give the debtor time to get it from some convenient place, not to negotiate a deal which he hopes will produce the money.'
>
> What that time is must, in my view, depend on the circumstances of the case. If the sum demanded is of an amount which the debtor, if he has it, will be likely to have in a bank account – which will be the position in 99 cases out 100 – the time permitted must be reasonable in all the circumstances to enable the debtor to contact his bank and make the necessary arrangements for the sum in question to be transferred from his bank to the creditor. If the demand is made out of banking hours, the period of time is likely to be longer – involving waiting until banks reopen – than if the demand is made during banking hours."

To make his position crystal clear he then advises:-

> "In so stating, I do not consider that I am abandoning the mechanics of payment test in favour of some wider and less practical approach."

133. Insofar as the plaintiffs rely upon the decision in *Bunbury Foods PTY Limited v. National Bank of Australia Limited* [1984] HCA 10; (1984) 153 CLR 491, it is clear on reading that decision that the Court was in fact endorsing the mechanics of payment test rather than departing from it in favour of the more subjective test for which the plaintiffs contend, as appears from para. 28 of the Court's judgment where it was stated as follows:-

> "However, it is now a well established principle of law that a debtor required to pay a debt payable on demand must be allowed a reasonable time to meet the demand. Even in a case where a deed provided that the debt was payable 'immediately upon demand thereof in writing' it was held that the provision must be given a reasonable construction so that the debtor had a reasonable time to get the money from some convenient place (*Toms v. Wilson* [1862] 4 B&S 442, at pp. 453 – 455) [1863 EngR 991; (122 E.R. 524, at p. 529]. This does not mean that the notice calling up the debt is invalid unless it requires payment 'within a reasonable time'. It means no more than that the debtor must be allowed a reasonable opportunity to pay before it can be said that he has failed to comply with the demand. A notice requiring payment forthwith will be regarded as allowing the debtor a reasonable time within which to comply. Until a reasonable time in the sense discussed has elapsed the creditor cannot enforce his security."

The reference in this decision to the time required by the debtor "to get the money from some convenient place" again endorses the applicability of the mechanics of payment test.

134. Likewise in *Parras Holdings PTY Limited & Ors v. Bank of Australia* [1998] FCA 682, contrary to what was asserted on the plaintiffs' behalf, the Court did not conclude that a reasonable time for payment in the context of a demand for payment with immediate effect was considered to be fourteen days. In that case, the letter of demand under consideration by the Federal Court of Australia on its face allowed the borrower 14 days for repayment. Accordingly, the decision is no authority for the proposition that anything other than the mechanics of payment test is the one to be applied where monies are repayable on demand. Indeed, in upholding the validity of the demand notice, the Court endorsed the mechanics of payment test that had been applied in *Cripps (R.A.) & Son Limited v. Wickenden* [1973] 1 WLR 944 and *Bank of Baroda v. Panessar* [1987] 1 Ch. 335, both decisions which were subsequently approved of in *Sheppard & Cooper*.

135. From these authorities it is easy to see why the mechanics of payment test has proved itself so attractive to the Courts and why there is an almost complete dearth of authority to support an alternative test. This is probably because the mechanics of payment test involves the application of relatively objective criteria. Applying this test, a borrower can without too much difficulty determine when it is likely to be safe to proceed to enforce its security. This cannot be said of the reasonable time test which involves a great deal of subjectivity and is one that the Courts have considered imprecise and undesirable in the commercial context in which it usually arises.

136. Taking into account all that was submitted to the Court by way of written and oral submission regardless of the obiter pronouncement of Charleton J. in Barden, I am not satisfied that the plaintiffs may reasonably argue for a test other than the mechanics of payment test. Accordingly, the question I must now answer is, whether, applying that test, the plaintiffs may reasonably argue at the trial of the action that the letters of demand are unlawful and the consequential appointment of the receivers invalid.

137. It is important in this context to note the precise facts of what occurred on the 29th July, 2014. The account given by Mr. Michael O'Flynn regarding his movements that morning is not contested. He states that about 10.15am a letter addressed to him, marked "private and confidential – to be opened by the addressee only" was received at his home. At that time, he was at a meeting in the course of which he was made aware of the fact that certain emails from Carbon were awaiting his attention. As soon the meeting was over, which was at approximately 11.15am, he became aware of Carbon's demands for repayment of the loans and arranged for a conference call with his solicitors which took place at 12.30pm. By the time that call had ended, sometime after 1pm, the receivers had been appointed.

138. It is common case that the letters of demand required payment "forthwith" and specified the bank account into which the relevant funds should be transferred. As was its entitlement, Carbon did not specify the time at which it would treat non-payment as default for the purposes of any enforcement action.

139. Insofar as the mechanics of transferring monies to the account specified by Carbon, Mr. John Daly, a retired bank executive, has

made it clear that the forms required to effect an urgent/same day electronic transfer should be completed prior to 11am but may nonetheless be accepted up to 1pm. However, in either event the recipient will not receive the funds until later in the afternoon as transfers of that nature are only processed post 1pm. In these circumstances, applying the mechanics of payment test, prima facie it would appear that inadequate time was given to the plaintiffs to make the transfer. This being so, on these facts alone, I am satisfied that the plaintiffs may reasonably argue that the demands for payment should thereby be considered to be invalid and that all subsequent purported acts of enforcement are also rendered invalid.

140. Mr. McCullough, S.C., submitted that Mr. O'Flynn had not established that he had a good arguable case to content that the demands were invalid, even if the time was unreasonable, because he had not demonstrated to the Court that he had funds available to make the transfer had he been given the time referred to in Mr. Daly's affidavit. He submitted that the facts in this case are analogous to those in cases such as *Sheppard & Cooper* where the lender was aware that the defendant had no monies to pay and the Court therefore considered it reasonable for the lender to have moved on foot of a demand without allowing what normally would be considered a reasonable time for payment.

141. *Sheppard & Cooper* was a case involving monies payable on demand under a debenture, which led to the appointment of receivers. In this case, the precise time which elapsed, insofar as one can judge, between the time when the demand was made and the receivers were appointed was no more than 60 minutes. Ultimately, the Court had to determine whether the timeframe that had been allowed for payment was reasonable. However, what is relevant about *Sheppard* is that the borrower, unlike in the present case, had built up substantial indebtedness and had a history of non-payment. Further, the letter of demand was delivered to the borrower in the course of a meeting after which he stated the best he could do was to pay half of the sums outstanding within the following seven days. The Court held that the requirement that sufficient time be permitted to elapse to enable the debtor to make the necessary arrangements for payment assumed that that was the period needed if the debtor had funds available. If, however, the debtor had made it clear to the creditor that the required funds were not available, that admission established the necessary default and there was accordingly no need for the creditor to allow any time to elapse before treating the debtor as being in default of the demand made. It followed that the time allowed had been sufficient. These are facts far removed from those in the present case where there was no history of prior default, no prior or subsequent admission that the monies demanded could not be paid and an uncontested averment by Mr. O'Flynn that he would have been able to pay had reasonable time been afforded to him.

142. I believe it is certainly arguable that the cases are not analogous and I am not convinced that the Court's ultimate decision as to whether Carbon acted lawfully can or should be determined by reference to facts which were unknown to it at the time it issued its demands and moved to enforce its security. If the demand letters were prima facie invalid as affording insufficient time for the borrower to repay the sums demanded, is it by no means certain that a Court, having heard legal argument on the matter, will necessarily retrospectively validate Carbon's actions based on the happenstance that an equivalent sum of money was not at that time available for transfer to the lender's account. In any event, having regard to the averments made by Mr. O'Flynn in his affidavit, it would be wrong of me to conclude on this application that he would not have been in a position to effect repayment within whatever period this Court, applying the mechanics of payment test, determines was reasonable on the facts of this case.

143. Neither am I convinced that the plaintiffs' right to the relief claimed by way of interlocutory injunction ought to be rejected as a result of the decision of Hegarty J. in *Sullivan v. Samuel Montague and Company Limited (All England Transcripts, 8th May 1998).* I reject Mr. McCullough's submission that that case is authority for the proposition that there was an onus on Mr. O'Flynn in the context of the present application to prove that he had the funds available for transfer into Carbon's account within a reasonable time.

144. *Sullivan* concerned an appeal on affidavit brought by a Mr. Sullivan against a decision of Mr. Register Baister in which he refused to set aside a statutory demand for payment of over £2,000,000 which had been served on him by the respondent. The background to the case was that Mr. Sullivan had agreed to guarantee repayment to the respondent certain liabilities of a company with which he was closely associated. The monies under the guarantee were expressed to be payable on demand. There had been a serious history of default in repayment by the principal debtor prior to demand being made of Mr. Sullivan on foot of the guarantee. He was given only a short number of minutes, following the letter of demand, before the lender treated him as being in default.

145. In the course of his judgment Hegarty J. goes to the trouble of quoting one of a series of letters between Mr. Sullivan and the respondent in order to demonstrate his financial circumstances. In that letter Mr. Sullivan advised that he would only be able to pay £50,000 per quarter in the face of liabilities outstanding which were then in the region of £2,000,000. In commenting upon this letter Hegarty J., at p. 1 of his decision stated as follows:-

> "On its face, this is not a letter from a man who had readily available to him sums in the region of £2m in the event of any demand for repayment under the guarantee."

He went on to refer to the fact that in his affidavit the appellant had not set out "any information whatever" as to his financial status and had not put forward any suggestion whatever that he had monies available to him with which he could discharge the debt.

146. In dismissing the appeal Hegarty J. stated he was following the decision of Walton J. in *Bank of Baroda v. Panessar* and emphasised that part of the judgment which referred to the fact that in 99 out of 100 cases the argument about whether the time allowed was reasonable was irrelevant as the debtor hadn't got the money. He went on to state that "there is nothing before me which might suggest that he (Sullivan) had any means whatever to make such a payment" and that in the absence of a statement from the debtor showing how he would have gone about getting funds that he was entitled to nothing more than the most limited opportunity to consider the demand that had been served before it could be enforced. In other words, it was only because of Sullivan's acknowledgement of his inability to pay that such proof was required. The whole thrust of the judgment was to the effect that Sullivan came into the same category of debtor who was known to be incapable of meeting a demand for repayment and had accepted that this was so and in these circumstances if he wanted to challenge the reasonableness of the time afforded after the demand was made he would have to put forward some evidence to show he would have been in a position to pay. That is not what this case is about as there was no prior indebtedness, no admission of inability to pay and there is a positive averment by Mr. O'Flynn that he could have paid had he been afforded reasonable time. Also, as was pointed out by Mr. O'Moore, S.C., on Mr. O'Flynn's behalf, that statement was not challenged by Carbon as it might have been had a notice to cross examine been served.

147. For all of the aforementioned reasons, applying the threshold set out in *American Cyanamid* [1975] A.C. 396 and *Campus Oil v. Minister for Industry & Commerce (No. 2)* [1983] I.R. 88, I am satisfied that the plaintiffs have established that they have raised a fair question to be tried as to whether the demands for repayment of the personal loans in the circumstances of this case may be deemed to be invalid on the grounds that Carbon did not allow reasonable time for repayment prior to treating the plaintiffs as being in default such that they can also reasonably argue that the consequential appointment of the share receivers and demand for repayment of the corporate loans are also invalid.

Collateral or Improper Purpose
148. The plaintiffs also assert that it is arguable as a matter of law that Carbon was not entitled to act arbitrarily, capriciously or unreasonably in exercising its discretion to call in the personal loans and that on the facts that they have good grounds to maintain that Carbon's actions would be so construed at the trial of the action.

149. To demonstrate that they have an arguable case in this regard, the plaintiffs rely upon para. 21 of the replying affidavit of Ms. Lorna Brown where, she stated as follows:-

> "I do not understand Mr. O'Flynn's reference to the non-payment of the personal loans as demanded being a 'catalyst' to unravel the corporate loans. The plaintiffs, in their personal capacity and as shareholders, entered into binding legal agreements in February 2013 which linked the personal facilities to the corporate facilities through the share charge agreement. The waterfall of consequences which springs from demand being made in respect of the personal loans was negotiated by the very plaintiffs who now seek to impugn those arrangements and was done in order to achieve a personal advantage for the plaintiffs."

She goes on to state:-

> "It is undoubtedly the case that service of the personal demands on the plaintiffs was designed to bring about an event of default on the corporate facilities; the plaintiffs having bargained for this outcome when they linked their personal liabilities with the corporate liabilities of the O'Flynn Group.

150. Taking these facts into account the Court was asked to consider a number of decisions including that of Clarke J. in *ACC Bank v. Kelly* [2011] IEHC 7, *Abu Dhabi National Tanker Company v. Product Star Shipping Limited (No. 2)* [1993] 1 Lloyds Report 397 and *Paragon Finance Plc v. Nash* [2001] EWCA Civ. 1466.

151. In *ACC .v. Kelly*, a case in which the Court queried where on demand loans could be called in for no reason. Clarke J. at para. 7.7 advised as follows:-

> "There is, in my view, a possible legal issue as to whether a financial institution, having the benefit of a demand facility, is entitled for no reason at all to call in the loan in question. Certainly that seems to be what the normal meaning of the words used imports. However, it may be possible to argue that a financial institution needs at least some reason in order to call in the loan (at least in cases where the relevant facility contemplates a term arrangement) even though it may not be a reason which amounts to a breach of a term of the relevant facility. Indeed, one of ACC's witnesses indicated that he felt that a bank might have some difficulty in justifying exercising the demand nature of a facility unless there was some good reason. However, for reasons which I hope will become apparent, it does not seem to me to be necessary to resolve that legal issue in this case."

152. It is accepted fact in the present case that there had never been a default in the making of any payment due under the personal loans prior to the issue of the demand letters. Further, Carbon gave no forewarning of the intended action. Further, the demand letters did not identify the time at which it would consider the defendants to be in default. In addition, when it issued the demand letters, it was not setting out to recover the monies so demanded. To the contrary, the last thing it wanted was payment because that would have scuttled its plan, which was to procure an event of default that would allow it to enforce its securities and call in the corporate loans, as was advised by Ms. Brown in her affidavit.

153. The plaintiffs emphasise the allegedly capricious nature of Carbon's actions by reference to Ms. Brown's admission that the sole objective of the demand letters was precisely the opposite to that stated on their face. This being so, in the light of the other circumstances including the lack of any prior notice, an absence of any default in payment or allowing any reasonable time for repayment, the plaintiffs maintain that they can reasonably argue that the demand letters should be considered invalid on the grounds of collateral and/or improper purpose.

154. Having regard to Mr. McCullough's submission that his client merely operated the agreements which linked the corporate liabilities of the O'Flynn Group with the personal loans of the plaintiffs, these being agreements which they entered into with open eyes and the benefit of legal advice, I think he may have the better side of the argument. However, this is an interlocutory application and the threshold which the plaintiffs have to achieve is relatively modest. In these circumstances I am satisfied that they have established a serious issue to be tried as to whether Carbon in issuing the demand letters for the admitted sole purpose of seeking to procure an event of default that would allow them appoint receivers and call in the corporate loans, acted in a capricious, arbitrary or unreasonable manner such as to call into question the validity of such demands.

Assumption of the Obligations of NAMA
155. The final serious issue which the plaintiffs maintain can be advanced on their behalf relates to what are the established obligations of NAMA to act fairly and reasonably in the exercise of its discretion with reference to certain the relevant finance documents. Reliance was placed upon a series of cases to demonstrate the existence of such an obligation on the part of NAMA and NALM in their capacities as lenders. This obligation was not disputed on the defendant's behalf. The relevant cases are *Dellway Investments v. NAMA* [2011] IESC 14; *Treasury Holdings v. NAMA* [2012] IEHC 297; *Flynn v. NALM* (Unapproved, Cregan J., 25th July, 2014); and *Daly v. NAMA* (Unreported, Peart J., 12th September, 2011).

156. It is asserted, and this is not disputed by Carbon, that under the terms of the Assignment Agreement of 16th May, 2014, that Carbon is obliged to perform and comply with all of the former obligations of NALM subsequent thereto. In the Notice of Assignment dated 16th May, 2014, it was stated that Carbon :-

> "shall assume, perform and comply with all the obligations of the Assignor (NALM) under the Credit Documents as if it had been originally party to the credit documents"

The Assignment Agreement itself dated 16th May 2014 provides that Carbon:-

> "becomes a party as a lender and is bound by obligations equivalent to those from which the Existing Lender is released under par (b) above".

157. Based on these facts the plaintiffs maintain that they are entitled to contend that Carbon, in its decision to call in and enforce the personal loans, failed to act fairly or reasonably either substantially or procedurally. It was submitted that it was beyond any doubt that had NALM behaved in the same fashion as Carbon, that the demand letters would have been set aside by the Court given

that there had been no default, no prior warning, the letters had been issued in bad faith and solely for the collateral purpose of triggering an event of default in respect of corporate facilities in circumstances where it could not otherwise have achieved such purpose.

158. I think it fair to conclude that had NALM, at a time when it was contractually bound to the plaintiffs, behaved in the manner last referred, to the plaintiffs might have had some valid cause for complaint as to the lawfulness of the demands in question. However, I am not satisfied that the obligation of fairness, which the plaintiffs seek to enforce, is one which can arguably be said to have passed to Carbon under the Assignment Agreement regardless of the obligations which are stated to have passed to Carbon in that transaction.

159. The duties concerned are, I accept, public law duties arising from the statutory obligation of NALM to act in the public interest and in these circumstances it is unstatable to suggest that Carbon could owe any such duty to the companies concerned no mind to the plaintiffs personally who were not a party to that assignment.

Adequacy of Damages/Balance of Convenience

160. Having decided that the plaintiffs have established a number of serious issues to be tried, I must now consider, firstly, whether damages are an adequate remedy in this case should interlocutory relief be refused and then the question as to how the balance of convenience is best provided for. Significant assistance as to how the Court should approach these issues is to be found in the decision of McCracken J. in B&S Limited v. Irish Auto Trader Limited [1995] 2 I.R. 142, wherein he set out a very helpful summary of the test to be applied in circumstances where it has been shown, as here, that there is a serious issue to be tried. He described this test in the following fashion:-

> "1. An interlocutory injunction should be refused if damages would adequately compensate the plaintiff for any loss suffered between the hearing of the interlocutory injunction and the trial of the action, provided the defendant would be in a position to pay such damages.
>
> 2. Should this test be answered in the negative, an interlocutory injunction should be granted if the plaintiff' s undertaking as to damages would adequately compensate the defendant, should he be successful at the trial, in respect of any loss suffered by him due to the injunction being in force between the date of application for the interlocutory injunction and the trial, again assuming that the plaintiff would be in a position to pay such damages.
>
> 3. If damages would not fully compensate either party, then the Court may consider all relevant matters in determining where the balance of convenience lies, but these will vary depending on the facts of each case.
>
> 4. It is normally a counsel of prudence, although not a fixed rule, that if all other matters are equally balanced, the Court should preserve the status quo.
>
> 5. Again, where the arguments are finely balanced, the Court may consider the relative strength of each party's case as revealed by the affidavit evidence adduced at the interlocutory stage where the strength of one party's case is disproportionate to that of the other."

161. The first matter of relevance to the Court's consideration of this aspect of the case is the undisputed fact that the first named defendant will be in a position to pay any award of damages that may be made in the plaintiffs favour should they succeed in their action but the injunction sought be refused.

162. For the purposes of assessing whether damages would be an adequate remedy for the plaintiffs in respect of any loss they may suffer between now and the date of the trial, which I anticipate will be in early October, I believe it is relevant to reflect on what has occurred since 29th July, 2014, and what is likely to happen between now and the trial, should the relief sought be refused. These are also facts which are also material to the issue as to the balance of convenience.

163. Since 29th July, Carbon has appointed receivers over the entire issued share capital of a significant number of companies in the O'Flynn Group, including those of its parent company Colebridge. It has removed the existing directors, including the plaintiffs and they have been replaced by agents of Carbon. The plaintiffs have thus lost control over the management of these companies and will have no further say in what happens to them. It may be that unless restrained in the manner sought that Carbon will continue to use the event of default, which the plaintiffs maintain was unlawful, to remove them from control over other companies within the Group or potentially act to their detriment in relation to those from which they have already been removed. Having regard to the speed, diligence and determination which Carbon has demonstrated since 29th July last, it is hard to predict what the O'Flynn Group of companies is likely to look like by the time these proceedings come to trial, if the relief sought is refused.

164. Having considered the evidence and the submissions of the parties, I am not satisfied that damages will be an adequate remedy to compensate the plaintiffs for their losses should they succeed in their action in the absence of the granting of interlocutory relief. At the conclusion of these proceedings it will not be possible to parachute the plaintiffs back into the management roles in the companies from which they have already or may in the immediate future be removed, as those companies may no longer exist or be radically changed. In this regard the Courts have accepted that damages may not always be an adequate remedy where the livelihood of those who seek injunctive relief is concerned. Factors such as a plaintiff's ability to find equivalent work, particularly where they hold a very senior position or have specialised qualifications, have been considered to be factors in determining whether the relief sought should be granted. These plaintiffs, by reason of their seniority and their expertise, operate at the most senior level in the international building and construction industry and accordingly may find it difficult to obtain positions even remotely resembling those they held before 29th July, 2014, if the corporate and management structures supporting their present employment and income stream is unravelled through Carbon's potentially unlawful conduct in advance of the hearing of the action.

165. I also accept that the damage that may be caused to the reputation of the plaintiffs, in the absence of an injunction, may not be adequately met by an award of damages at the trial of the action, particularly in this case where the claim made is that the plaintiffs' have defaulted on their financial obligations to their lender to the tune of approximately €16 million. In this regard it is well established that damage to a person's reputation is compensatable by an award of damages, depending on the circumstances, as has been advised in many decisions including that of Carroll J. in *Foley v. Aer Lingus Group* [2001] ELR 193 and I believe that this is potentially one such a case.

166. It is not correct or fair for Carbon to suggest that the Court will ultimately not have to concern itself with the issue of damage to the reputation of the plaintiffs, should Carbon's actions prove unlawful, because their companies failed, their debts had to be taken over by NAMA and accordingly are to be considered failed businessmen with no reputation to protect.

167. The plaintiffs' reputations cannot be defined or metered by reference to such limited criteria. Reputation is concerned with a range of characteristics such as integrity, honesty and decency. A person possessing all of these traits may well become insolvent. Of course I accept that what is most relevant in the context of these proceedings is the reputation of the plaintiffs as businessmen within the construction industry. In this regard, it seems to me highly unlikely they could have built up and managed such a substantial international enterprise unless they are people who are and have been held in good standing by vast numbers of ordinary and influential people in the business community in those countries in which they have traded for so many years, regardless of the difficulties faced by them in recent times. If it transpires that they have been wrongfully accused of defaulting on their personal liabilities and have likewise wrongfully had their assets seized and been removed as directors from a wide range of companies, it is likely that these events will have a very significant adverse affect on their personal and professional reputation, a loss that I feel would be hard to replace with an award in damages. I fear that, unless restrained by Court Order, the reputation damage to which I have just referred may also adversely impact on the plaintiffs' ability to generate income into the future both for themselves and their families, a further matter to be taken into account on the present application.

168. It is however only possible for the Court to grant the relief sought if it is satisfied that the plaintiffs will be in a position to pay damages to the first named defendant for any losses it may sustain by reason of the granting of such relief and their failure at trial to establish the invalidity of Carbon's actions on 29th July 2014.

169. In circumstances where there will be an expedited trial date, it is difficult to see how Carbon is likely to suffer any significant financial loss between now and then, if restored to the position it was in prior to 29th July 2014. This is particularly so in circumstances where Carbon will, notwithstanding the dispute as to true construction of certain provisions in the Facilities Agreement, maintain significant control over these companies, as is readily apparent on any construction of the Facilities Agreement and the correspondence exhibited in the Examinership application. In this regard it is relevant to note that Carbon only took over the corporate and personal loans on 16th May of this year and only two weeks have elapsed since it first took action on foot of the demand letters. However, even if I am incorrect in this regard, the mere fact that the plaintiffs did not pay €16 million within a three hour time frame on 29 July last is no basis for the Court to assume that the they will not be able to pay or raise the funds required to discharge any such award of damages as been made in the future. The plaintiffs have deposed to the fact that they will be in a position to meet any such award of damages. Carbon has not sought to challenge that assertion by an application to cross examine Mr Michael O'Flynn on his averment to that effect and neither has it not put forward any evidence on affidavit to demonstrate that their personal circumstances are such that they will not be in a position to meet any award of damages as may be made in it's favour.

170. I feel I should also state that even if I was satisfied that damages could be considered to be an adequate remedy in this case, I feel that it would be a well nigh impossible task for the Court to engage upon such an assessment. I do not believe a Court would be capable of disentangling the steps which are likely to be taken by Carbon by way of enforcement between now and the hearing of the action to establish the likely long term financial losses to the plaintiffs in respect of shares, income and other benefits not to mention the reputation damage to which I have already referred.

171. Apart from being satisfied that the plaintiffs' financial and reputational losses may not be adequately compensated for or be capable of assessment in terms of damages, I am also satisfied that Carbon's actions to date have potentially infringed rights which the Court would normally consider appropriate to protect by way of interlocutory injunction and in this regard, the plaintiffs' shareholdings in the various companies the subject of the enforcement process are, of course, material.

172. It is well established that in circumstances where a plaintiff makes a claim that certain of their property rights have been infringed the Court will usually intervene on an interlocutory basis. In this regard, the decision of Clarke J. in *Metro International SA v. Independent News and Media Plc* [2006] 1 I.L.R.M. 414 is relevant. In that decision, Clarke J. stated:-

> "I am nonetheless of the view that in assessing the adequacy or otherwise of such damages as a remedy, the Court can and should have regard to the question of whether the right sought to be enforced or protected by interlocutory injunction is one which is of a type which the Court will normally protect by injunction even though it might, in one sense, be possible to value the extinguishment or diminution of that right in monetary terms."

173. Clarke J. went on to describe the types of cases where the Court would pursue such a policy and it is clear from his judgment that cases in which a plaintiff alleges an infringement of a property rights fall within the category which the Court will view favourably in terms of granting an injunction. At p. 432 of his judgment, he stated as follows:-

> "Thus in many cases where a plaintiff alleges an infringement of his property rights, the Court will intervene by injunction where those property rights have been established rather than compensate the plaintiff for the loss of those property rights. To take an extreme but illustrative example, a person who owns a house and whose house is occupied by others (assuming them to be a mark for the value of the house) would undoubtedly be entitled to an injunction to restrain such wrongful occupation even though there is a sense in which the aggrieved party could be fully compensated by being awarded compensation as against a defendant of means the value of the house together with any additional sums that might be necessary to compensate for the disruption caused. Thus, the mere fact that a property right (or indeed a diminution in such right) can be valued in monetary terms does not of itself mean that damages for an infringement of that property right can necessarily be said to be an adequate remedy."

There is no reason to distinguish the trademark rights at the core of that decision from the property rights which emanate from the plaintiffs' shareholdings in the present case.

174. I am also satisfied that the plaintiffs have demonstrated that the balance of convenience lies in favour of granting the injunctions sought. I have reached this conclusion having weighed the injustice that is likely to be perpetrated upon the plaintiffs should the relief sought be refused against the likely injustice and damage which will occur to the Carbon, if the relief is granted.

175. In coming to this conclusion, I have taken into account that the trial of these proceedings can be expedited and a date afforded such that the claim may be disposed of, at latest, by the end of October of this year. The issue surrounding the validity of the various demand letters and the appointment of the joint receivers is one which will require very limited evidence and most of the relevant facts are agreed. That claim will principally be a matter for legal argument and can be dealt with by a Court in relatively short order. As to the other reliefs sought in the proceedings, and in particular the declaratory relief relating to the construction issue, the positions of the parties have already been extensively rehearsed in correspondence and can accordingly be committed to pleadings with fairly immediate effect. Thus, the period over which damage may occur is unlikely to exceed a period of ten to twelve weeks.

176. If the injunctions are granted Carbon will find itself in the position it was in on 28th July, 2014, a time at which there had been no default in respect of payment on foot of the personal or corporate loans. I have no reason to believe that in the event of the

injunctions being granted that these loans will not be fully serviced provided Carbon does not by its actions; act so as to impede the performance of such obligations. This being so, I believe that in granting the interlocutory relief sought, the Court may be said to be preserving the status quo pending the trial of the action.

177. I have no reason to believe that if I grant the injunctions sought prohibiting any further steps being taken by Carbon to enforce either the personal or corporate loans and discharge the receivers already appointed that the plaintiffs, in retaining control over Colebridge and other companies within the Group, will act otherwise than in the best interests of the companies' creditors including Carbon.

178. In contradistinction, if the Court were to refuse the relief sought, the risk of irreparable damage is clear as has been earlier described. I am accordingly satisfied that the balance of convenience and the interests of justice require that the companies within the O'Flynn Group remain under the control and management of the plaintiffs, as has been the case for so many years, until the trial of the action. Such share or other receivers as have been appointed by Carbon have only been in situ for approximately two weeks. Accordingly I do not believe that the revocation of those appointments, at this stage of the process, will cause much by way of disruption or potential damage.

179. For all of the aforementioned reasons, I will grant the relief claimed at para. 2 to 6 inclusive of the notice of motion.