Neutral Citation Number: [2009] IEHC 409

THE HIGH COURT

2009 450 COS

IN THE MATTER OF VANTIVE HOLDINGS

AND IN THE MATTER OF VILLEER DEVELOPMENTS

AND IN THE MATTER OF PEYTOR DEVELOPMENTS

AND IN THE MATTER OF CARRAGH ENTERPRISES LIMITED

AND IN THE MATTER OF PARLEZ INTERNATIONAL LIMITED

AND IN THE MATTER OF MORSTON INVESTMENTS LIMITED

AND IN THE MATTER OF ROYCETON

AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

JUDGMENT of Mr. Justice Clarke delivered on the 11th day of September, 2009

1. Introduction

1.1 This is the second petition to appoint an examiner to a number of related companies ("the companies") which form part of what is known as the Zoe Group ("the Zoe Group"). In this second application, the six companies represented in the original application are joined by a seventh related company, Royceton. It will be necessary, in due course, to look briefly at the procedural history of the original examinership application in relation to these companies ("the first petition"). In particular, it will be necessary to look at the reasons why the first petition was rejected, both by this Court (Kelly J.) and by the Supreme Court on appeal. However, in simple terms, the first petition failed because there was insufficient evidence before the court to enable a proper evaluation to be carried out as to the prospects of survival of the companies concerned.

1.2 There is no doubt but that more detailed evidence is now placed before the court which at least enables the court to approach the task of carrying out an evaluation as to whether the companies, or any of them, have a reasonable prospect of survival as a going concern. However, it is also fair to say that there have been other changes since the original application.

1.3 It is unnecessary to rehearse in any detail the case which was made on the first petition. Details of that case appear from the judgments delivered both in this Court and the Supreme Court (High Court [2009] IEHC 384; Supreme Court [2009] IESC 68). However, it is clear that significant reliance was placed on the fact that the Zoe Group as a whole had put together a business plan in December 2008, which had at least received a reasonable measure of support from its bankers. That business plan was not, however, placed before the court in evidence on the previous occasion. The business plan concerned was available to me. However, it is fair to say that the business plan itself would, on any view, have needed a significant reappraisal in the light of developments in the economy generally, and in the property sector particularly, since December 2008.

1.4 On that basis, the broad outline of a possible survival plan contained in the independent accountant's report presented in relation to this petition ("the revised business plan") differs not only in detail but also in its general approach to that contained in the December 2008 business plan. It will be necessary to address those changes in due course.

1.5 In addition, it should be noted at this stage that initial objection to the presentation of this second petition was taken by ACC Bank plc. ("ACC") (who object to the appointment of an examiner) on the basis of an absence of jurisdiction and allied points. That matter was determined by Cooke J. on 21st August, 2009, on the basis that a full hearing on the merits of this second petition should go ahead. Full written reasons were delivered by Cooke J. on 24th August, 2009, [2009] IEHC 408. The hearing before me was conducted on 1st, 2nd and 7th September, 2009. It is also of some importance to record what occurred yesterday, on 10th September, 2009. It had been my original intention to deliver this judgment on that day. While I was finalising some detailed aspects of that judgment, a number of questions seemed to me to arise in relation to the figures presented on behalf of the petitioners, as set out in the evidence and materials before me. I came to the view that it would, potentially, be in breach of the rules of fair procedure, to have regard to those questions (which had not arisen in the course of the hearing before me) without affording the petitioner an opportunity to comment. On that basis, rather than deliver this judgment, I felt it appropriate to address some additional questions to counsel for the petitioner to enable the petitioner to clarify matters. Where appropriate, in the course of this judgment, I will refer to those additional answers and the issues addressed in the course of dealing with them.

1.6 It should also be noted that, during the course of the hearing, I raised the issue, alluded to in the judgment of Cooke J., of whether the true petitioner on this application was the company itself or its directors. It was agreed that, whether technically speaking, the proper petitioner was the company or the directors, there was no issue as to the capacity to present the petition or the validity of the petition being heard on its merits. The only issue which might arise would be in respect of costs. Counsel for the provisional liquidator indicated that, irrespective of whether the court refused or granted the application, there was a potential issue as to costs from the provisional liquidator's perspective. In those circumstances, it is not necessary to deal with that issue at this stage. References in this judgment to "the petitioner" should be considered accordingly.

1.7 In those circumstances, it seems appropriate to turn, first, to the procedural history.

2. Procedural History

2.1 The first application: 2009/402 COS

The financial difficulties of the Zoe Group, and in particular, the companies, arise from the collapse in the Irish property market. As a result of these difficulties, in December 2008, the Zoe Group's management met with their banks, which are their principal creditors, to address the situation which had arisen and prepared a three-year business plan. With one exception, the relevant banks were supportive of the Zoe Group's business plan and agreed (at least in general terms) to continue to support the companies, in particular by providing (in the case of some of the banks concerned) funds to enable the companies to settle with their other creditors and, in some cases, by allowing the roll-up of interest.

2.2 However, on 29th June, 2009, ACC made demands, as required by s. 214 of the Companies Act 1963, on Vantive Holdings ("Vantive") for repayment of the sum of €63,960,000 and on Morston Investment Ltd. (a Jersey company) ("Morston") for repayment of the sum of €72,111,000. In default of discharging these liabilities within 21 days, Vantive and Morston would be deemed insolvent and ACC would have been in a position to petition the court for their winding-up. The relevant 21-day period was due to expire on Monday, 20th July, 2009.

2.3 It was against this background that a petition for the appointment of an examiner was presented late in the afternoon on Friday, 17th July 2009. Application was immediately made to this Court for directions as to the hearing of that petition. Appropriate procedural directions were given. It should be noted that no application was made for the appointment of an interim examiner.

2.4 On 28th July, 2008, the petition was heard by Kelly J. who gave judgment on 31st July [2009] IEHC 384. Kelly J. concluded that the companies were related companies within the meaning of the Companies Acts and that the business and prospects of the companies were interdependent; in particular, the relationship between Vantive and Morston (which provided the finance for other companies within the group) and the other companies (to which this finance was then provided for the development of property and related activities) was described as "symbiotic". Kelly J. was also satisfied that Morston, the Jersey company, was a company in respect of which the Court could make a winding-up order and that the necessary resolutions authorising the application had been passed by the boards of the petitioner and each of the related companies. While Kelly J. found there to be inaccuracies in the petition and the independent accountant's report, as originally presented, Kelly J. gave leave to the petitioner to present the petition in amended form and took note of an amended independent accountant's report as well as additional affidavit evidence which had been filed.

2.5 Kelly J. found that the independent accountant's report was based on projections which envisaged a "remarkable turnaround in the fortunes of the companies" and which he considered, in light of the prevailing market conditions and prospects, as bordering on the fanciful. He considered these projections as lacking in reality and regarded the valuations on which they were based as being out-of-date and not truly independent. As a result, Kelly J. was not satisfied that the petitioner had discharged the onus of proof resting upon it. Even if he had been so satisfied, Kelly J. indicated that he would have been disinclined to exercise his discretion to appoint an examiner because the application appeared to be designed to protect the shareholders of the companies rather than their creditors or employees. In these circumstances, Kelly J. ordered that the application to appoint an examiner be refused and the petition dismissed. A stay on this order was given until Tuesday 4th August.

2.6 On 4th August, a notice of appeal against the order of the High Court was lodged in the Supreme Court and an application was made to the Supreme Court for a continuation of the stay concerned, pending the hearing of the appeal. The Supreme Court gave a stay until 11th August, when the appeal was heard. On that date, the Supreme Court, in a unanimous judgment, dismissed the petitioner's appeal and upheld the order of the High Court: [2009] IESC 68. Murray C.J. (speaking for the court) held that the petitioner had failed to discharge the onus of proof resting upon it to show that it had a reasonable prospect of survival, in particular because of the failure to adduce direct evidence of the relevant banks' commitment to provide future financing to the companies and, crucially, because of the absence of valuations and of any objective evidence of the likely future development of the property market in support of the contention that there could be an orderly disposal of the companies' assets.

2.7 Following the judgment of the Supreme Court, on Wednesday 12th August, ACC applied to this court (O'Neill J.) to appoint a provisional liquidator to Vantive and Morston. This court acceded to the application. The full hearing of the application to confirm the appointment of the liquidator was listed for hearing on 9th September, 2009, but was then adjourned by McGovern J. until after the giving of this judgment due to its obvious implications on that matter. In addition to the appointment as provisional liquidator of Vantive and Morston, O'Neill J. also appointed Mr. Declan Taite as a receiver to Villeer Developments ("Villeer"), Peytor Developments ("Peytor"), Carragh Enterprises Limited ("Carragh") and Parlez International Limited ("Parlez").

2.8 The second application: 2009/450 COS

On 14th August 2009, the petitioner, now joined by a further related company, Royceton, applied *ex parte* for directions in respect of a further petition for the appointment of an examiner which had been filed in this court. Because it was the second such petition, and in light of the interventions on behalf of ACC and of the provisional liquidator of Morston, the Court (de Valera J.) adjourned the application for directions.

2.9 As indicated at the outset, this second application relates to the six companies which were the subject of the original unsuccessful application and another company, Royceton, an unlimited company, which is held in equal shares by Vantive Holdings and Stradbally Investment Company.

2.10 The application for directions was immediately heard by Cooke J. As his written judgment of 24th August, 2009 [2009] IEHC 408, makes clear, "the only issue to be decided by the Court" was "whether this petition should be given a hearing". Cooke J. described the second petition as being "almost identical" to the earlier petition. However, Cooke J. noted that the petitioner had informed the court that it was in a position to supply the deficiencies of evidence and information identified by the Supreme Court. It should be noted that although some of the relevant new or additional material was available at the time of the hearing of the first petition, a decision had been taken - at the insistence, it would appear, of one of the controlling shareholders and Managing Director, Mr. Liam Carroll, and against legal advice - to withhold this information. The Court was informed that Mr. Carroll, who had since been admitted to hospital, was no longer able to give instructions. Instructions were now coming from the other controlling shareholder, Mrs. Roisin Carroll, and the resolutions of the boards of the companies had been passed by the other directors of the companies, Mr. John Roland Pope and Mr. David Torpey.

2.11 Counsel on behalf of ACC argued that, having regard to the dismissal of the first petition which had been upheld by the Supreme Court, this second petition constituted an abuse of process.

2.12 On Friday 21st August 2009, Cooke J. found that there were good grounds to give the second petition a hearing. As previously pointed out, written reasons for that decision were delivered on 24th August 2009. Cooke J. held that there was nothing in the Companies (Amendment) Act 1990 ("the Act"), which prohibited the presentation of a second petition but that the intervention of some special circumstance or explanation would be required. Cooke J. noted that, as well as the additional evidence which the petitioners proposed to adduce, the petition was now based on a new independent accountant's report. Cooke J. stated that "for present purposes this court is satisfied that the material is of sufficient apparent cogency and detail to warrant that the petition be heard and that the material be considered". Cooke J. noted that the application had the support of all the relevant banks with the exception of ACC, together with employees, subcontractors and trading creditors. Cooke J. rejected the arguments that the application was an abuse of process or that the matter was *res judicata*. In those circumstances, the Court concluded that "to ascertain whether [there is a reasonable prospect of survival] in the present case on the basis of the evidence and information now

proposed to be presented", it would be necessary to hear the petition. It is this issue with which the Court is now concerned.

2.13 In those circumstances, it is for me consider the petition on its merits. Having heard the evidence, the submissions of the main parties (being the petitioners and ACC), together with brief submissions made on behalf of some other parties supporting the petition (and also noting support in affidavit form from other interested parties), I reserved judgment until today's date.

2.14 There was only a limited dispute between counsel as to the legal principles to be applied and in those circumstances it seems to me to be appropriate to turn, first, to those legal principles.

3. The law

3.1 As the Supreme Court noted in its judgment on the first petition [2009] IESC 68, the test to be applied by the Court on an application of this kind is "uncontroversial". In the course of his judgment, Murray C.J. set out this test which has two steps.

3.2 The first step is as to whether, on the evidence placed before it, the Court "is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern": s. 2(2) of the Act (as substituted by the Companies (Amendment) (No.2) Act, 1999). There is an onus on the petitioner concerned to satisfy the court that this is so and the court must be so satisfied before it has jurisdiction to make the appointment.

3.3 In this regard, the Supreme Court emphasised that it was not sufficient simply to demonstrate that the assets could be disposed of in a more orderly fashion to the benefit of the creditors or that liquidation might be a far less attractive option for the petitioner. Moreover, the support of creditors was a relevant but not a determinative consideration. The court must have before it sufficient evidence or material which permits it to arrive at such a conclusion on the basis of an objective appraisal of that evidence or material. While due weight must be given to the opinion of the independent accountant, the weight which is due to that opinion depends on the degree and extent to which it is supported by the accountant's objective reasoning and appraisal of the material relied on in reaching his or her conclusions. It is not, however, necessary to show that the company will probably survive. The period of protection offered by examinership is a breathing space, which is short in time and which enables the examiner to look into the financial state of the company.

3.4 In the event that this first step (*i.e.* that there be a reasonable prospect of survival) is fulfilled, the second step for the court is the exercise of its broad discretion as to whether, in all the relevant circumstances of the case, an examiner should be appointed. Satisfying the first step does not automatically lead to the appointment of an examiner. It merely triggers the power to make such an appointment and the court retains a broad discretion in exercising this power.

3.5 Factors which may be of relevance in this regard include: the prejudice to the interests of creditors; the interests of employees and employment generally; the implications of alternative courses such as liquidation (s. 3B(g) of the Act (as amended), requiring the opinion of the independent accountant as to whether an attempt to continue the undertaking would be likely to be more advantageous to the members as a whole and creditors as a whole than a winding-up) and so on.

3.6 Murray C.J. referred, *inter alia,* to the following passage from the judgment of Fennelly J. in *Re Gallium Ltd.* (now reported in [2009] 2 I.L.R.M. 11, at para. 47):

> "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."

3.7 In this court, Kelly J. had referred to my judgment in *Re Traffic Group Ltd.* (now reported in [2008] 2 I.L.R.M. 1, at para. 5.5) where I said the following:

> "It is clear that the principal focus of the legislation is to enable, in an appropriate case, an enterprise to continue in existence for the benefit of the economy as a whole and, of equal, or indeed greater, importance to enable as many as possible of the jobs which may be at stake in such enterprise to be maintained for the benefit of the community in which the relevant employment is located. It is important both for the court and, indeed, for examiners, to keep in mind that such is the focus of the legislation. It is not designed to help shareholders whose investment has proved to be unsuccessful. It is to seek to save the enterprise and jobs."

3.8 Therefore, the general principles to be applied are clear. The court must firstly consider whether the petitioner has discharged the onus of proof in establishing that any relevant company has a reasonable prospect of survival. Thereafter, certain discretionary factors have to be taken into account to determine whether an examiner should, in fact, be appointed.

3.9 However, in the course of argument, two additional questions emerged which it is necessary to deal with. The first concerns the timescale by reference to which the survival of the company needs to be considered. The second concerns the approach which the court should take in relation to the separate companies in respect of whom the protection of the court is sought. As a result of the way in which the relevant legislation is drafted (a point to which I will turn), and the fact that some, but not all, of the companies within the Zoe Group generally are now seeking the protection of the court, questions arise under this heading, not least because most of the evidence as to the prospects of survival of the companies, generally, is presented by reference to the Zoe Group as a whole, rather than in relation to individual companies. I turn, first, to the timing question.

3.10 Section 2 (2) of the Act, precludes the court from making an order placing a company into examinership "unless it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern". The term "undertaking" is not, itself, defined in the Act. Nor does the section specify for precisely how long the court should feel that the prospect of survival exists. There is, in my view, good reason for such an approach in the legislation. In most applications for examinership which come before the courts, the basic underlying position tends to fit (at least in general terms) into a model whereby it is suggested that the relevant company's current difficulties are due to a particular cause (for example, an unwise diversification or investment or failure to react in a timely fashion to changing market conditions) which has given rise to losses, rendering the company currently insolvent. Sometimes it can be said that a scheme which would allow the company concerned to deal with those losses would, of itself, have the potential to render the company solvent and likely to survive indefinitely. On other occasions, it is acknowledged that further measures need to be taken (such as cost cutting, closure of non-profitable aspects of the business or the like), but a case is presented which suggests that such measures are realistic and that, provided that such measures can be adopted, the company could return to profitability. Thus, in the ordinary way, the court is required to assess whether there is a realistic prospect of dealing with the historical insolvency of the company which has arisen, and whether there is some realistic basis

being proposed for suggesting that, once that historical insolvency has been addressed, what is left of the company (with any adjustments of the type I have identified as may be necessary) ought to be capable of trading profitably in the future. By and large, the court is not being asked to assess matters much beyond the likely date on which any scheme of arrangement which might be negotiated would come into force.

3.11 It is true to say that the court is not, at the time of deciding whether to appoint an examiner, addressing the details of any scheme of arrangement which might, arguably, be negotiated. Rather, the court is considering whether there is a realistic basis on which a scheme of arrangement might be put in place and whether, if such a scheme of arrangement as might realistically be considered to be possible, is put in place, the company has reasonable prospects of survival into the future. In the normal sort of examinership to which I have referred, any such scheme of arrangement may involve the writing off of debt (which has, of course, to be seen in the context of the fact that a liquidation of the company - which is normally the only alternative - will probably lead to the writing off of the same, or a greater amount of debt, in any event), together with, in many cases, the injection of new capital. Any shortfall in the net assets of the company is normally proposed to be addressed in that way. On that basis, the court can form a reasonable estimate of whether the combination of debt write off and capital injection that might be anticipated would be sufficient to solve the problem. Likewise, the court will normally want to be satisfied that, providing that any such net deficiency in the company's assets can be met, what remains of the undertaking of the company, as of the date of the implementation of a possible scheme of arrangement, is such as will have reasonable prospects of survival into the future from that date.

3.12 Given that the whole purpose of the legislation is to facilitate the survival of enterprises and employment (see *Re Traffic Group*), then it seems to me clear that that survival must be measured over a reasonable timeframe such as there would be some point from the perspective of society as a whole in facilitating that survival even at the cost of some creditors having to forgo their strict legal entitlements. In those circumstances, there does not seem to me to be any magic formula for the length of time which a company should be anticipated to survive after it comes out of a successful examinership. Each case needs to be considered on its own facts.

3.13 To explore this issue further, it is necessary to note that what is, in general terms, suggested as the possible means of survival of the petitioners in this case, and the Zoe Group as a whole, is a scheme whose general parameters are to the effect that there should be a partial interest moratorium for a period of time (perhaps two years) after which it is said that the relevant companies would have a broad equivalence of assets and liabilities (a slight surplus is suggested) and would also, in general terms, to be able to meet their interest and other current liabilities as they fell due. It will be necessary to explore in more detail the parameters of what is suggested in due course. It is also important to note that it is not my function at this stage to assess any possible scheme that might emerge, should an examiner be appointed. However, it does seem to me that it is inevitable, in the context of assessing whether a company has a reasonable prospect of survival, that the court must address the question of whether there is a reasonable prospect of putting in place some sort of scheme of arrangement which would address the company's problem.

3.14 It is trite to say that any company will be able to survive as long as its creditors do not look to be paid. Any company will, therefore, have a prospect of survival for so long as a moratorium is placed on it having to make payments to its creditors (or at least make payments which go beyond its income). What would be achieved, however, by placing a moratorium on any payments which the company could not meet unless, at the end of the period of the moratorium concerned, the company was in a fit state to operate into the future with a reasonable prospect of survival. The answer is simple. All that would be achieved in such circumstances would be an orderly wind-down of the company's affairs followed by a final liquidation (or receivership) at the end of the moratorium period. As pointed out by the Supreme Court in its judgment in relation to the first petition in this case, such is not the purpose of an examinership.

3.15 It seems to me, therefore, that in the context of a case (such as this) where the only realistic scheme which can be put forward which can, even arguably, give rise to a reasonable prospect of survival is one which involves a significant moratorium on debt repayment (at least, in part), it follows that the court must assess the company concerned as it might be expected to emerge from that period of debt moratorium to consider whether its prospects thereafter are such that they can be characterised as having a reasonable prospect of survival for the whole or any part of its undertaking as a going concern. There is no evidence to suggest that there is any reality to a scheme of arrangement based on anything other than a moratorium, although, obviously, the precise way in which any such moratorium might operate is a matter which could only come to be determined, if at all, in the course of an examinership.

3.16 In all those circumstances, I am satisfied that, on the facts of this case, what needs to be assessed is whether any relevant company would, on emerging from the protection of an agreed partial interest moratorium period, and in the light of the circumstances that might reasonably be expected to then prevail, have a reasonable prospect of survival on a going concern basis. That is the test which I propose to apply.

3.17 The second question which I have earlier identified stems from the identity of the specific companies which are the subject of this application for examinership. In that context, it is appropriate to set out the provisions of s. 4 of the Act, which concern the court's jurisdiction to appoint an examiner to a related company. The section reads as follows:

> "4 (1) Subject to subsection (2), where the court appoints an examiner to a company, it may, at the same or an time thereafter, make an order -
>
> (a) appointing the examiner to be examiner for the purposes of this Act to a related company, or
>
> (b) conferring on the examiner, in relation to such company, all or any of the powers or duties conferred on him in relation to the first-mentioned company.
>
> (2) In deciding whether to make an order under *subsection (1),* the court shall have regard to whether the making of the order would be likely to facilitate the survival of the company, or of the related company, or both, and the whole or any part of its or their undertaking, as a going concern, and shall not, in any case, make such an order unless it is satisfied that there is a reasonable prospect of the survival of the related company, and the whole or any part of its undertaking, as a going concern."

3.18 As is clear from that provision (and in particular subsection (2)), before an examiner can be appointed to a related company, the court must be satisfied of two things:

> (i) that admitting the related company into examinership would be likely to facilitate the survival, either of the principal company or the related company or both, together with at least the survival of some part of the undertaking of one or

other of those companies as a going concern; and

(ii) that the court must be satisfied that there is a reasonable prospect of survival of the related company (and the whole or any part of its undertaking) as a going concern.

3.19 As previously noted, much of the evidence presented on the hearing of this petition concerning the survival prospects of the companies relates to the position of the Zoe Group as a whole. That is not, in itself, a difficulty. On all the evidence, there seems to be a clear interdependence between all of the companies within the Zoe Group such that, at least in general terms, the survival of any one of them is likely to be dependent, to a large extent, on the capacity of the group, as a whole, to survive. For example, even companies which may, so far as their own balance sheet or current payments are concerned, be solvent, such companies would appear, frequently, to have given cross-guarantees for other companies within the group such that the failure of the Group as a whole would lead, inevitably, to insurmountable difficulties for those companies as well. It follows, therefore, that an important part of the assessment of the survival prospects of any individual company within the group requires an analysis of the survival prospects of the Group as a whole. However, the fact that that is so, in the circumstances of this case, should not divert attention from the clear statutory requirement to assess each company in respect of whom a petition is addressed on an individual basis, having regard to the two criteria which I have set out at paragraph 3.18 above.

3.20 I propose, therefore, to consider, first, the prospects of survival of the Zoe group as a whole. Clearly, if it has not been established that the Zoe Group has a reasonable prospect of survival, then it follows that, in the circumstances of this case, the individual companies within the group are likewise unable to establish a reasonable prospect of survival. However, the analysis of s. 4, in which I have engaged, makes it clear that, even if I am satisfied that the Zoe Group as a whole has a reasonable prospect of survival, a further analysis needs to be conducted to ascertain whether the statutory test has been met in respect of each company in relation to which the protection of the court is sought.

3.21 Arising from that analysis, it seems to me to be appropriate to consider, first, the survival prospects of the Zoe Group as a whole. With that in mind, I propose turning, first, to the revised business plan and the case made on behalf of the companies for the proposition that that plan, and the evidence and materials put forward in support of it, demonstrate a reasonable prospect of survival. I, therefore, turn to the revised business plan.

4. Zoe's revised business plan

4.1 The Zoe Group consists of 51 companies, the businesses of all of which are interdependent. In its petition, the petitioner states that Vantive and Morston also provide finance to a number of other related companies in which the group's employees are employed. These include Oze Construction (employing the group's directors and senior managers, numbering 8 in total); Danninger (a building company providing services to the entire group, currently employing 58 people, with a further 200 subcontractors); Bronzone Ltd. (a crane and concrete pumping company employing 12 people); Fabrizia Developments (a maintenance company with 1 employee); Essential Apartments Ltd. (a property letting company with 2 employees); and Essential Property Management Ltd. (a property management company with 1 employee). The businesses of all these companies are said to be interdependent and, as I have pointed out, it is said that their fates are intertwined, in the sense that the survival of many of the other related companies is dependent on the survival of the companies which are represented in this petition. The petitioner states that the winding up of Vantive and Morston "would inevitably precipitate the collapse of the entire group and the unemployment of [these] individuals". It should be recalled, however, that it is only in respect of the seven named companies that the petitioner has chosen to seek the protection of the court.

4.2 For the purposes of context and clarity, it may be useful to set out in broad terms the nature of the group's business and its difficulties notwithstanding that much of this ground has already been covered in the earlier judgments.

4.3 The group owns a very substantial portfolio of assets, the most important of which are said to be two six acre sites at 69 Sheriff Street Upper (known as Castleforbes Business Park) and at 1 - 3 East Road, Dublin. Planning permission has been obtained for 32,357m² of office accommodation at the Sheriff Street site and plans have been prepared for the development of the remainder of that site. In respect of the East Road site, an application has been made to Dublin City Council for permission for a mixed-use development of offices, retail space and residential units. The petitioner states that "despite the current slowdown, when confidence in the market returns, these sites will be at the forefront of the future development in Dublin".

4.4 The group has faced a number of difficulties, some of which are of a general nature and are very well known. In particular, the economic downturn has resulted in a deterioration in the residential and commercial property sectors in which the group is so heavily involved and a tightening of credit availability. As Murray C.J. observed in his judgment in relation to the first petition, these sectors are "in grave recession". In this climate, the Zoe Group has faced a number of setbacks. There has been a significant slowdown in the market for apartment sales. The Zoe Group has faced short-term difficulties in meeting trade creditors. Contracts with local authorities for what it says is the purchase of social and affordable housing units have fallen through. There has been a significant decline in the value of equity in separately quoted companies in which the Zoe Group has invested. The group has also faced other problems such as planning difficulties in relation to the significant office developments at North Wall Quay. These problems have pushed out the timeframe for the potential development of the group's sites – which have effectively been frozen - and interfered with its ability to service its indebtedness. As a result, the companies are insolvent and unable to pay their debts as they fall due.

4.5 In the context of these difficulties, in December 2008, the Zoe Group (together with two other groups of companies controlled by Mr. Carroll - Dunloe Ewart and Orthanc) compiled a business plan in conjunction with KPMG accountants for the three year period, from 2009 to 2011. As noted by Murray C.J. in his judgment in respect of the first petition and set out here for the purposes of clarity, this plan involved a number of elements including the following:

– disposal of much of the group's residential stock through aggressive marketing and competitive pricing;
– disposal of a number of equity positions held by the group;
– sale of a number of development sites (with the benefit of planning permission);
– limited new development, other than pre-let or pre-sold properties;
– active management of the development portfolio to improve planning status and enhance value;
– some compromise with trade creditors;
– negotiated moratorium on certain interest payments and on loan capital repayments to the banks;
– employment of group employees and subcontracting staff over different phases of the business plan estimated at circa 600 persons in total.

4.6 The response of the Zoe Group's banks to this business plan was as follows:

1. Allied Irish Banks plc ("AIB") - which holds 43.7% of the group's debt – and Bank of Scotland (Ireland) Ltd. ("BOSI") – which holds 22.2% of the group's debt – agreed to provide additional finance to deal with the group's unsecured creditors

and to provide interest roll-up (net of rental income). This has allowed the group to discharge the vast majority of its unsecured creditors.

2. Bank of Ireland (holding 9.3% of the debt), Anglo Irish Bank Ltd. (3.1%) and KBC Bank Ireland plc. (1.9%) agreed to provide interest roll-up net of rental income to the extent that such was necessary.

3. Ulster Bank Ltd. (6.7%) and EBS Building Society (0.7%) agreed to provide similar arrangements on a short-term basis, support on a long-term basis not being required.

4. ACC (10.7%) was not willing to provide interest roll-up and indicated its intention to seek to wind up two of the companies represented in this application, Vantive and Morston.

While dealing with the position of the various banks which are owed money by the Zoe Group, it is of some relevance to emphasize that the extent to which any individual bank may have adequate security, both for the amount of its loan, and in respect of cover for interest payments as they fall due, differs significantly from case to case. It would seem that some of the banks have, at least in present market conditions, full cover for interest payments as they fall due, by reason of having a charge over income (such as rent) from assets owned by the Zoe Group. In the case of other banks (most particularly, those which have lent money for the purchase of development land in cases where no development has yet taken place), there is no such rent available, for obvious reasons. Likewise, it appears that, in general terms, the exposure of each individual bank to losses, in the event that the properties over which the bank concerned has a charge were to be sold within any appropriate timeframe, varies considerably. The position of the banks should not, therefore, be seen to be largely the same so far as security is concerned.

4.7 As ACC is the only secured creditor opposing this petition, it is important to set out in some detail its relationship with the Zoe Group.

4.8 In 2007, ACC advanced a loan facility in the sum of €62,000,000 to Vantive for the purposes of re-financing loan facilities previously provided by another institution (Barclays) and of financing a loan by Vantive to Danninger Ltd., a company in the construction arm of the Zoe Group. This loan was to be repaid over a twenty-four month period but was repayable on demand in any event. This loan is presently in arrears, amounting to €753,530.88, as of 30th April 2009. At that stage, ACC indicated that it reserved its right to make demand on Vantive and enforce any security which it held. The security held by ACC in respect of this facility included an "All Sums Guarantee and Indemnity" from Villeer and a First Legal Charge over the development lands at East Road held by that company. On 24th June 2009, ACC wrote to Vantive demanding immediate repayment of the sums advanced under this loan facility together with outstanding interest, which stood at €1,934,620.91. This demand was followed by correspondence from the firm of Irish solicitors acting on behalf of ACC, indicating that, in default of payment within three weeks, ACC intended to apply to wind up the company.

4.9 In 2008, ACC advanced a separate loan facility in the sum of €69,200,000 to Morston for the purpose of refinancing a loan facility previously provided by another institution and of financing a loan to Peytor to enable the purchase of a mixed-use development site forming part of the larger Sheriff Street site. Again, this loan was to be repaid over a twenty-four month period but was repayable on demand in any event. This loan is also in arrears, amounting to €2,079,269.13 as of 30th April 2009, and in that respect, ACC also indicated that it reserved its right to make demand on Morston and enforce its security. The security held by ACC in respect of this facility included a guarantee and indemnity from Peytor and a first legal charge over the lands held by Peytor. On 24th June 2009, ACC wrote to Morston demanding immediate repayment of the outstanding balance on the loan together with outstanding interest in the sum of €2,882,324.87. There followed correspondence from a firm of Jersey solicitors acting on ACC's behalf, indicating its intention to commence *desastre* proceedings in Jersey (which are broadly equivalent to winding-up proceedings in this jurisdiction) in default of payment.

4.10 The 21-day period, within which payment was to be made, expired on 20th July 2009. On 13th July 2009, ACC wrote to Villeer, Peytor and Carragh demanding payment in full of the liabilities of Vantive and Morston respectively on foot of inter-company guarantees executed by these companies. It was in advance of the expiry of this 21-day period that the companies applied to the Court for protection under the 1990 Act.

4.11 As described in detail in the procedural background, this first petition was ultimately unsuccessful before both this court and the Supreme Court. However, notwithstanding these decisions, the petitioner now brings this second petition, leave for the hearing of which has been granted by Cooke J. in the circumstances already outlined.

4.12 The petitioner now presents this second petition in the light of the judgment of the Supreme Court which outlined a number of deficiencies in the first petition, and, in particular, the evidence supporting it, and because the consequences of failing to secure protection are, it is said, "so drastic", as borne out by the appointment on 12th August of Mr. Declan Taite as provisional liquidator to Vantive and Morrison and receiver to four of the related companies. The petitioner seeks to "adduce in support of it (this petition) material which seeks to address the lacunae identified in that judgment" (para. 70 of the Petition). As discussed in the judgment of Cooke J., some of this material was available to the petitioner at the time of the making of the first petition but it was not presented. Certain other material was not available at that time and the petitioner has commissioned a new report from an independent accountant pursuant to s.3(3B) of the Act.

4.13 It should also be noted that, on 14th August 2009, the board of the petitioner passed resolutions in the following terms:

> "(i) it was resolved that the Company forthwith petition the High Court for the appointment of Ray Jackson as Examiner pursuant to Section 3 of the 1990 Act;
>
> (ii) John Pope to be authorised to swear the affidavit grounding the petition and execute any other documents and take any other actions required in connection with the said petition with the support of both the Board and the Company."

Resolutions in similar terms were also passed by each of the related companies.

4.14 Thus, the petitioner seeks the appointment of Mr. Ray Jackson as examiner. The petitioner has filed an affidavit of suitability sworn by Mark Homan, of Lavelle Coleman Solicitors, on 14th August 2009 and exhibited Mr. Jackson's consents to act, dated 14th August 2009, in relation to each of the companies.

4.15 The second petition is supported by a new independent accountant's report prepared by Mr. David Wilkinson of KPMG. Mr. Wilkinson records in his report that, with other colleagues at KPMG, he "advised the management of the group in preparing this plan

and in presenting it to their lending banks so [he is] familiar with the financial position and plans of the Group and the risks and opportunities associated with it, which has enabled [him] to prepare this report in a very short timeframe" (the plan referred to is the December 2008 business plan). At para. 83 of the petition, it is stated that "the Independent Accountant has confirmed that he is not aware of any conflict of interest which arises in respect of the preparation of the report…". In light of the affidavit of Mr. O'Mahony, of the petitioner's solicitors, that the second petition was first contemplated on 12th August 2009, it is clear, and indeed acknowledged on a number of occasions in the report, that the new independent accountant's report was commissioned and prepared within a very short time-frame prior to the presentation of the new petition on 14th August.

4.16 The petitioner seeks to secure the ultimate implementation of a suitable scheme of arrangement (to be prepared by an examiner and approved by the court) which will serve to restructure the Zoe Group's debt. It is envisaged that the Zoe Group's debt repayments would be subjected to a two-year partial moratorium. It is stated that the Zoe Group is currently in a position to discharge 68% of its interest liabilities from income it receives from rent and other sources. At the end of a two-year period, it is said that the income from these sources would enable the Zoe Group to discharge all of its interest payments as they fall due. If this is so, it is said that the banks concerned would ordinarily be willing to renew their facilities to the Zoe Group. During this partial interest moratorium period, it is envisaged that the Zoe Group would continue to trade to an extent by completing certain developments and increasing the value of other sites through obtaining planning permission. It is worthy of note that the precise claims made in respect of the Zoe Group's ability to meet its liabilities, as they would fall due, after the partial interest moratorium period, was the subject of much of the debate which occurred as a result of my addressing certain questions to counsel for the petitioners, yesterday.

4.17 As I have noted at para. 4.5 above, the principal focus of the original December 2008 business plan envisaged the disposal of a significant portion of the group's assets (*i.e.* much of its residential stock, its equity positions in third party companies and a number of development sites). The revised business plan, which is identified in Mr. Wilkinson's independent accountant's report on this petition (together with a supplemental report to which reference will be made) is, it seems clear, different in its focus. Rather than concentrating on a significant disposal of assets, the new business plan seeks to focus on bringing about a situation where the Zoe Group will be able to meet its liabilities as they fall due.

4.18 It is a matter of some comment that the difference between the case made on this petition and that made on the first petition relates not just to the provision of additional evidence and material, but also to the focus of the plan put forward as representing the Zoe Group's prospects of survival. The fact that the revised business plan has, in the manner which I have just described, a significantly different focus from the December 2008 business plan, reflects the comments made by Kelly J. in his judgment rejecting the first petition which noted that there had been significant changes from that time which needed to be addressed. It now appears that the way in which the changes in the marketplace since December 2008 have been addressed relates not only to reappraising the valuation placed on the Zoe Group's property assets, but also a significant refocus on the manner in which it is asserted that the Zoe Group may have a prospect of survival. The essentials of the business plan, which was the subject of the first petition, are to be found in the judgment of Murray C.J., as noted in summary form at paragraph 4.5 above. The plan now put before the court places much less emphasis on the disposal of assets and focuses to a very high degree on attempting to establish that the company will have sufficient income to meet its outgoings by the middle of 2011.

4.19 Be that as it may, on the basis of the assumptions set out in the revised business plan (including those contained in the supplemental report to which I have already referred and which was filed as an exhibit to a replying affidavit put in on behalf of the companies responding to affidavits filed on behalf of ACC), the overall position of the Zoe Group, so far as income and interest are concerned, is said to be as set out at Table 4.1 on page 15 of that supplemental report. The relevant table contains the following information:-

Table 4.1 Summary income and interest cost for the Group

	2009	**2010**	**7 Months from January to July 2011**
	€	**€**	**€**
Residential rents	10,484,158	8,381,401	4,282,243
Commercial rents	17,108,429	19,886,946	15,872,717
Dividend income	10,834,273	9,497,214	8,538,631
Total income	38,426,860	37,765,561	28,693,591
Interest cost	54,681,957	43,859,309	25,852,568
Surplus/(Deficit)	(16,255,097)	(6,093,748)	2,841,023
% Interest cover	**70%**	**86%**	**111%**

4.20 In fairness, it is conceded by Mr. Wilkinson in the following paragraph that:

> "The 111% interest cover in the seven month period to 31 July 2011 is flattered by inclusion of the entirety of the annual ICG dividend which is typically paid during this period. On an annualised basis, I estimate interest cover of approximately 100%, still continuing the improving trend."

On that basis, however, it is suggested that by the end of a two-year period, ending in July 2011, the Zoe Group's investment assets are projected to generate sufficient income to fully service interest and debt related to them and to finance group overheads. Furthermore, it is said that the same income will "make a significant contribution to the interest cost on the non-cash generating development property assets, with the balance to be financed by interest roll-up while the assets are being held prior to and during development - it is commented that such interest roll-up prior to and during development is the norm". On that basis, it is said that the group would, subject to financing, be solvent at that stage. This assertion is a key part of the case made for the survival of the Zoe Group and was emphasized by counsel for the petitioner in his submission.

4.21 One of the queries which I raised with counsel for the Zoe Group, yesterday afternoon, concerned the calculations set out in Table 4.1, to which I have already referred. It is important to record that that table was described by counsel on behalf of the petitioners (see transcript, day one, page 168) as "the key table". As will have been seen, that table estimates the position of the Zoe Group, on certain assumptions, for the first seven months of 2011. It is important to analyse the contents of that table to

understand what occurred yesterday.

4.22 I have already noted the *caveat* included in the independent accountant's report concerning the interest payment cover of 111% which is derived from the calculations set out in the table. The independent accountant's report notes that that figure somewhat flatters the position because all of the dividend receipts expected in 2011 from ICG fall into that seven-month period. On that basis, it is accepted that the figure given in the table somewhat exaggerates the extent to which those dividend receipts would provide interest cover at that time. I did not, as of the time of drafting most of this judgment, have available to me a precise means of calculating the appropriate reduction in interest cover to reflect that fact. However, counsel for the petitioner informed me that the assumption on which the table was calculated, insofar as it related to dividends, was that the total dividends for 2011 would be of the same order as the total dividends for 2010, and, thus, approximate to €9.5 million. On a proportionate basis, the amount attributable to the seven-month period from January to July, was, therefore, €5.54 million (being 7/12ths of €9.5 million). If, instead of the actual figure given in Table 4.1 of €8.538 million, a figure of €5.54 million was included, this would reduce the available income by the difference being almost exactly €3 million. As the surplus projected in the table was, itself, €2.84 million, it is clear that, making proper allowance for what is described as the flattering inclusion of the entire annual ICG dividend by reference to a seven-month period, would have the effect of reducing the interest rate cover of 111%, calculated in accordance with the table, to a figure as near as makes no material difference to 100%. Indeed, in fairness to the independent accountant's report, that is what it said in the paragraph quoted at section 4.10 above.

4.23 The problem is that there was a further sense in which Table 4.1 flattered the position of the Zoe Group in that seven-month period, which is not adverted to in the independent accountant's report, and which leads to an additional significant reduction being required to be made. The problem stems from the figure of €15,872,717 included in respect of commercial rents. A look at the cash flows presented in support of the independent accountant's report, (the cash flows are annexed to the original report rather than the supplemental report which contains the table under consideration) reveals that that figure represents the entire commercial rental income anticipated to be obtained by the Zoe Group for three full quarters, being the quarters ending in January, April and July 2011. It will be immediately seen that, in effect, nine months' commercial rent has been included in a calculation which is otherwise referable only to seven months. This has the effect of exaggerating the true level of cover available from commercial rent by a sum of approximately €3.63 million.

4.24 When questioned on this matter, and having taking instructions, counsel suggested that the only error was that there should also have been reference to this commercial rental question in the narrative included immediately under Table 4.1. However, that explanation is simply incorrect. The narrative refers to interest cover of approximately 100%. For the reasons which I have already analysed, a figure of approximately 100% is arrived at, simply by making an appropriate allowance for the problem concerning the ICG dividends. A further allowance in respect of the proper treatment of the commercial rental income, to which I have just referred, would reduce much further the interest cover to a figure well below 90%. In those circumstances, I am satisfied that there was an error in Table 4.1 of some material significance and that the explanation tendered by the petitioners that the error related simply to the narrative, rather than the calculations, is not tenable in the light of the fact that the reduction to 100% (which is mentioned in that narrative) covers only an appropriate allowance for the overstatement of dividend income, which is referred to in that narrative, and, clearly, makes no allowance for any equivalent reduction referable to the overstatement of commercial rental income.

Note: This note did not form part of the judgment which I originally delivered on 11th September, 2009. It arises out of comments made by counsel for the companies immediately before judgment was delivered. In the course of those comments, counsel did note (and I should record) that Mr. Wilkinson, the independent accountant, was not in court on the previous day and was not, therefore, available to give assistance in relation to answering queries concerning the revised business plan. I accept that clarification. However, it should also be noted that there were a number of senior officials of the Zoe Group in court. To the extent that there may have been any confusion in the way in which queries put by me to counsel may have been answered, the availability of those officials (with whom counsel consulted) needs, also, to be noted. If senior officials of the Zoe Group itself, were insufficiently familiar with the structure of the revised business plan so as to be able to give counsel clear instructions to enable the queries which I had raised to be answered in a clear fashion, then that, in itself, is a matter of some comment.

In addition, I should comment on the suggestion made by counsel that the purpose of Table 4.1 was to demonstrate an improving interest rate cover position, rather than to attempt to analyse the position of the Zoe Group as of the middle of 2011. I had emphasized, in the judgment which I delivered, the fact that the case made in oral submission to me, on behalf of the companies, was that Table 4.1 was the key table and demonstrated the cash flow solvency of the Zoe Group as of that time. I can only consider the case that is made to me. In addition, I should record that what led me to question the accuracy of Table 4.1 in the first place, was the suggestion that it demonstrated an improvement of interest rate cover from a projected 86% in 2010, to approximately 100% for the first seven months of 2011. The difficulty with that assertion was that it was not immediately obvious as to what change in circumstances could lead to such an improvement. The projected receipt of residential rents for the first seven months of 2011 is given at €4.282 million. Comparing that figure with the €8.381 million projected in respect of residential rents for 2010 (a full year), suggests a projected €607,000 reduction (€8.381 million x 7/12 = €4.889 million which is €.607 million above the 2011 projection) in residential rents. This makes sense, given that it is projected that some of the relevant residential property will be sold. On an annualised basis, €607,000 amounts to €1.040 million. Dividend income is taken not to have varied at all between 2010 and 2011. Commercial rental income (on an annualised basis and in the absence of any new lettings) is taken to increase from the €19.886 million projected for 2010, to €21.16 million, which can be derived by multiplying the figure of €5.29 million per quarter found in respect of commercial rents in the cash flows by four. The annualised increase is, therefore, €1.27 million. So far as interest cost is concerned, the figure of €25.852 million projected for the first seven months of 2011, is actually somewhat higher (on a proportionate basis) than the figure of €43.856 million projected for the entire year 2010. The increase appears to be of the order of €269,000 for the seven-month period (43.856 x 7/12 = 25.583 which is .269 below the 2011 projection). On an annualised basis, €269,000 amounts to approximately €.462 million. From that analysis, it will be seen that any increase in the rate at which commercial rents are coming in (attributable to the fact that all rent-free periods would have ended by 2011) is fully offset by the decrease in residential rents (because properties were sold) and increase in interest (presumably, because of the added cost of servicing a higher debt deriving from the fact that interest had been rolled up). If anything, it appears that the interest rate cover is slightly worse in the first seven months of 2011 than it was in 2010. [The net position seems to be €1.27 million minus €1.040 million minus €0.462 million or a net disimprovement on an annualised basis of €232,000]. If, therefore, the true purpose of Table 4.1 was to demonstrate a continued improvement in interest cover, it seems to me that, properly analysed, it does no such thing.

4.25 One of the points made in that narrative is that "the Group's investment assets are projected to generate sufficient income to fully service interest and debt related to them and to finance Group overheads". It is the Zoe Group, and its advisers, who chose to characterise the matter in that way. It will be necessary to return, briefly, to the question of group overheads, in due course. However, it will be seen from the above analysis of the figures, that there is a shortfall of the order of €3.63 million, based on a proper view of the figures for the first seven months of 2011, and having regard to both of the matters which can be said to "flatter" those figures in the ability of investment asset income, to meet the projected interest cost. Against that, it must, in fairness, be

pointed out that some of the interest included in that table is interest which would be the subject of a so-called "roll-up" provision, such that the interest would not immediately have to be paid, but, rather, would be added to the amount of the debt on the loan concerned. By my calculations, the relevant interest roll-up for the seven months concerned would, taking the figures in the cash flows, amount to approximately €4.8 million. In other words, of the €25, 852, 568 of interest referred to in the table, some €4.8 million would not actually have to be paid during that period, but, rather, would be rolled up. Thus, it would, in fact, be possible for the Zoe Group to meet that part of the interest which was required to be paid. This is because the rolled up interest amounts to €4.8 million, while the shortfall, on the analysis which I have conducted, amounts to €3.63 million. However, the difference, which is €1.2 million, is wholly insufficient to meet the overheads of the Zoe Group which, for that seven-month period (again, based on the cash flows), seem to come to €4.26 million. The statement in the independent accountant's report to the effect that the group's "investment assets are projected to generate sufficient income to fully service the debt related to them and to finance Group overheads" is not, therefore, in my view, correct. Before leaving this issue, two further points need to be made. First, some reference was made in the course of argument yesterday to the use of the phrase "annualised basis" in the narrative to which I have referred. My understanding of that term is that it is used simply to indicate that figures given have been adjusted proportionately to reflect an equivalent annual figure. For example, if inflation for one quarter is actually 0.3%, then it is reasonable to refer to that as an annualised rate of 1.2%. There is nothing in that phrase to suggest that any calculations were intended to be conducted by reference to what might be expected to happen in the last five months of 2011. This leads to the second point.

4.26 There were no materials before the court, whether in the cash flows to which I have referred, or otherwise, which dealt with the remainder of 2011. The cash flows ended with the quarter to July 2011. In the course of the hearing before me yesterday, a further table was produced which purported to give figures for the full calendar year 2011. However, there was no evidence or materials from which any analysis of that table could be conducted. I have already noted that the petitioner has significantly altered the focus of the case which it has made on this second petition as compared to the case made on the first petition (it was not simply a question of adducing evidence to cover the gaps identified both by Kelly J. and the Supreme Court, but, rather, the revised business plan was significantly different in its focus). This second petition is, therefore, a second bite at the cherry for the petitioner. It chose to present its case on the basis of figures for the first seven months of 2011. It did not appear to me to be open to the petitioner, when difficulties were encountered in relation to the way in which those figures were presented, to have a yet further third bite of the cherry, where different figures were put in without there being any basis for conducting an objective analysis of the validity or otherwise of the figures concerned. In those circumstances, it seemed to me that I should continue to treat the petitioner's case as resting in the way in which it did, when the substantive hearing before me concluded on 7th September, 2009. It is also necessary to record that in the course of yesterday afternoon's hearing, reference was made by counsel on behalf of the petitioners to the fact that the independent accountant's report does suggest that the Zoe Group overheads are capable of being met from other income (that is to say, outside rent and dividends) anticipated in the cash flows. That there is some income stream from continuing works anticipated to be carried out by the Zoe Group is clear. It is, quite frankly, difficult to tell whether that income stream would be sufficient to meet the projected overheads, particularly having regard to the fact that for the critical period (that is to say, the first seven months of 2011), group overheads seem to be projected to increase significantly such that the amount of income needed to cover them during that period, and prospectively, looking forward into the future, would be larger. In addition, insofar as there may be any confusion in relation to group overheads, same is at least in significant part attributable to the fact that it is the independent accountant's second report itself which makes the assertion (which is not, for the reasons which I have set out, in my view, sustainable, on the evidence and materials) that not just interest payments, but group overheads as well could be met from rental and dividend income. It is next appropriate to turn to the assets and liabilities of the Zoe Group.

4.27 So far as the assets and liabilities of the Zoe Group are concerned, Mr. Wilkinson included, in s. 7 of his report and in Appendix A thereto, a projected consolidated balance sheet for the Zoe Group as of 31st July, 2009. That projected balance sheet shows a surplus of assets over liabilities in the sum of €19.065 million, although it should be noted that that figure is derived from total assets of €1.319 billion with liabilities of €1.300 billion. It seems to me that a projected asset surplus of the order of €19 million needs to be seen in the light of the overall projected picture for the group. A company with assets of approximately €20 million and liabilities of €1 million (and thus with net assets of €19 million) is in a very different position to a company in the position projected in Mr. Wilkinson's report for the Zoe Group, even though the same net assets appear. A very marginal shortfall, for example, in the valuation of the company's assets (of an amount less than 1.5%) would be sufficient to entirely wipe out the net surplus. Likewise, other relatively minor variations could have a similar effect.

4.28 Be that as it may, the overall case made on behalf of the companies is that the revised business plan sets out a realistic set of circumstances in which, with the benefit of an approximately two-year partial interest moratorium, the Zoe Group would emerge from that moratorium in the latter part of 2011, in a position where the Group would have a slight surplus of assets over liabilities and to be able to meet interest payments as they fell due. In those circumstances, it is said that the companies would have a realistic prospect of survival. It is that case, and ACC's opposition to it, that it is next necessary to assess. I, therefore, turn to ACC's critique of that case.

5. The ACC position

5.1 So far as this aspect of the case (that is, whether the revised business plan, and the evidence and materials put forward in support of it, are sufficient to establish a reasonable prospect of survival in the sense in which that term is used in the Act) is concerned, ACC makes two general criticisms which, it is said, render the plan flawed and not such as could establish a reasonable prospect of survival.

5.2 First, criticism is made of the way in which the plan approaches the payment of interest by the Zoe Group. The second criticism concerns the prospects for the property market, generally. I propose outlining the position taken by ACC in respect of both matters and making some general comments concerning the proper approach of the court to dealing with issues such as those raised, before going on to consider the two specific questions raised by ACC.

5.3 So far as the interest issue is concerned, the revised business plan is based on an assumption concerning interest. In order to understand that assumption, it is necessary to briefly note the typical terms on which commercial companies, such as those involved in this petition, pay interest to such banks as have provided funding to them. Those terms normally require the company concerned to pay a margin over so-called "cost of funds". Cost of funds varies in accordance with the marketplace for interest rates. The bank facilities will typically be referable to a specified interest rate determined in the marketplace. The margin over that rate that the company concerned is to pay is negotiated at the time when the company enters into its borrowing arrangements. If, therefore, for example, funds are currently available in the marketplace at 1%, and a company has entered into a loan agreement requiring it to pay (say) 1.25% above cost of funds, then the interest currently payable by that company will be 2.25%. However, if interest rates in the marketplace, generally, increase, then the interest rate actually payable by the company concerned will likewise increase by the same amount. In addition, it is also important to note that it is possible for companies (like private individuals) to "fix" an interest rate for a period of time. Thus, instead of the interest rate actually payable varying in accordance with the defined market rate (a variable rate), the interest rate may be fixed for a particular length of time. However, the rate at which it is likely to be fixed will be referable

to what the market anticipates will be the flow of interest rates during the period for which the rate is to be fixed. If, for example, the market anticipates that, over a three-year period, interest rates will increase significantly, then the price to be paid for fixing an interest rate now for a three-year period will reflect that fact and is likely to be significantly above the variable rate currently available.

5.4 Against that background, it is said by ACC that the interest rate assumptions underlying the revised business plan are wholly unrealistic. As a matter of fact, the interest rate assumption is that cost of funds will be 1% for the duration of the cash flow period (two years) specified in the report. This is an issue to which I will have to return.

5.5 So far as the second issue is concerned, it is said, on behalf of ACC, that, on the evidence, I should conclude that the prospects for the property market, generally, in Ireland, are significantly more pessimistic than is reflected in the revised business plan. In that regard, reliance is placed, in particular, on the evidence of Professor Morgan Kelly of University College Dublin, which, it is said, is the only evidence placed before the court of any detail from an economic expert which deals with the likely movement in property prices in Ireland over the relevant period.

5.6 As will be seen, both of these issues raise questions where, at least to some extent, there appears to be some degree of difference of opinion between experts on economic and other questions relevant to the prospects of survival of the Zoe Group. Before going on to consider the two specific issues which I have identified, I should deal, therefore, with the proper approach of a court, in hearing a petition such as that with which I am concerned, when faced with such a difference of expert opinion.

5.7 Even where a court is required to form a view on the likely course of future uncertain events for the purposes of determining the legal rights of parties (such as, typically, when a court, in the course of assessing damages, has to estimate what is going to happen in the future in order to fairly assess such damages), a court does not simply consider any relevant competing expert evidence and decide, as a matter of probability, what the likely course of relevant future events is going to be. This is in distinction to the way in which a court considers contested events which either did or did not happen. In those circumstances, the court hears the evidence and decides, on the balance of probabilities, whether the event concerned did or did not, in fact, happen. If the court views the event as having happened, on the balance of probabilities, then it proceeds to consider the case on the assumption that the event did, in fact, happen. Likewise, if the balance of probabilities points in the other direction, the court will assume that the relevant event did not happen. On the other hand, where the court is considering what might happen in the future (such as, for example, a risk of further adverse consequences arising from wrongdoing established), the court will assess damages based on a broad assessment of the likelihood, or otherwise, of further adverse consequences arising. The damages concerned would be quite different in a case where the court considered that the further adverse consequences concerned were almost certain to occur, on the one hand, and a case where the court considered that the relevant future adverse consequences were most unlikely to occur. See, for example, *Philip v. Ryan* [2004] 4 I.R. 241.

5.8 It seems to me that this position applies to an even greater extent in a case, such as this, where a court is not being asked to determine legal rights, but, rather, to decide whether a company has a reasonable prospect of survival. In reaching its assessment, the court should review the available evidence and materials on the basis of the objective appraisal of which Murray C.J. spoke in the decision of the Supreme Court in relation to the first petition. However, the court should not simply reach a conclusion, on the balance of probabilities, as to which expert view is correct. Rather, the court should form a broad view, on the basis of an objective appraisal of the relevant evidence and materials, as to the range of possibilities that exist, weighted, as appropriate, for the likelihood of such eventualities occurring, with such weighting again based on an objective appraisal of the evidence and materials. Against the background of the range of possibilities (and their weighting) which the evidence and materials suggest, the court should then approach the question of the reasonable prospects of survival of any relevant company.

5.9 I should not go on to deal with the specific issues raised by ACC without also mentioning one further point. I am conscious of the fact that the exercise with which I am concerned is different from the exercise which faces a court in considering whether it is appropriate to approve a scheme of arrangement presented by an examiner after a period of examinership. It is not the function of the court, at this stage, to predict, with any precision, the precise terms of any scheme of arrangement which might come forward. However, as has already been noted, it is impossible to give any realistic consideration to the prospects of survival as a going concern of an insolvent company, without paying some regard to the type of scheme that might be put in place.

5.10 However, it is unnecessary at this stage to attempt to predict the details of any such scheme. What details might be brought forward, and whether it would be appropriate to approve of them as part of a scheme, is a matter for another day. Therefore, in assessing the prospects of survival of the Zoe Group as a going concern, it is appropriate to have regard to the type of scheme arrangement which might conceivably be put in place, but not to place any significant weight on questions of detail in relation to any such scheme which are more properly a question for a confirmation hearing at the end of an examinership process.

5.11 Against that general proposition, I now turn to consider the specific issues identified in the opposition of ACC. I turn first to the interest question.

6. Interest rates

6.1 ACC put in evidence a report from Mazars Chartered Accountants. At para. 4.0 of that report, the question of possible interest rate rises is addressed, together with questions concerning the interest rate assumptions which underline the revised business plan and the detailed cash flows contained in it.

6.2 As pointed out earlier, the revised business plan assumed an interest rate of 1%. It is in that context that the question of likely future movements in interest rates needs to be considered. For the reasons which I have already set out, it seems to me that one of the most important considerations which should influence my decision in this case is to look at the prospects of survival of the companies as of the time when any likely partial interest rate moratorium might come to an end. I am mindful of the fact that the cash flows presented in evidence relate to a two-year period, while any interest rate moratorium which might be negotiated by an examiner and included in a scheme of arrangement to be presented to the court, might not necessarily be for that period. However, it seems to me that an appropriate starting point is to look at the position of the Zoe Group, looking forward from the beginning of August 2011, for that is the period by reference to which evidence and materials relating to the survival prospects of the Zoe Group have been presented. What is set out in the next three paragraphs was written before the events which occurred yesterday afternoon, and what is said in those paragraphs needs to be considered in the light of the additional information which emerged in the course of that hearing, to which I have already referred. The position is, for the reasons which I sought to analyse, if anything, less favourable, from the Zoe Group's point of view.

6.3 In the analysis of the company's rent and dividend receipts, together with its interest liabilities, contained in the revised business plan (to which I have already referred at para. 4.19 above) it will be recalled that a figure of 111% was given as to the cover

provided by receipts as against interest for the first seven months of 2011. It will also be recalled that the independent accountant accepted that the Zoe Group was somewhat flattered by the 111% figure because of the timing of the receipt by the Zoe Group in 2011 of its dividend income from its holding in "companies". On that basis, it seems clear that, to project the position of the Zoe Group, looking into the future from that date, it is necessary to make some adjustments to the figures set out in the table to which I have referred.

6.4 The Zoe Group has a significant shareholding in both Greencore plc. ("Greencore") and Irish Continental Group plc. ("ICG") and at para. 4.32 of the supplementary report of the independent accountant, it is noted that the entirety of the annual ICG dividend for the year 2011 is likely be paid in the period from January to July of that year. It is, therefore, quite properly, accepted that the figures set out in Table 4.1 (which I have already set out) exaggerate the extent to which the interest and dividend receipts of the Zoe Group, as of the middle of 2011, are capable of meeting its interest payments.

6.5 From other elements of the materials, it would seem that the ICG dividend represents approximately two-thirds of the total dividend likely to be received in any one year. Without having an exact figure for the balance of the Greencore dividend expected to be received in the balance of 2011, it is impossible to do an exact calculation as to the extent by which the position set out in Table 4.1 flatters the Zoe Group. The proper calculation would be to take 7/12ths of the entire dividend income expected for 2011, and attribute it to the period January to July of that year. Such an exercise would be an appropriate basis for considering the prospects, looking forward from that time, of the Zoe Group being in a position to meet its interest payments out of rent and dividend income.

6.6 However, that analysis assumes no change in interest rates.

6.7 One of the papers exhibited in the course of the affidavits filed, is a paper produced by Mr. Jim Power, Chief Economist with Friends First. The paper concerned was a general commentary by Mr. Power (as of late June 2009) concerning the Irish economy and was not in any particular way directed towards the issues which arise in this case.

6.8 Mr. Power's estimation, in respect of interest rates, as of that time, was that the current rate of 1% is likely to double to 2% by the end of 2010, and thereafter, gradually edge up towards 4.25% by 2012. It is, of course, the case, that there may be other estimates available as to the likely movement in interest rates over the next three years or so. It is also true that some measures (such as fixing interest rates now) can be engaged in by any company which wishes to protect itself against any particularly large future increase in interest rates. In that context, counsel for the companies made reference to the fact that the published five-year the fixed interest rate of one major bank, as of the last hearing day, was of the order of 2.7% while the fixed interest rate for one year was of the order of 1.17%. The inference from those figures is clear. The market expects a small but not particularly significant increase over the next year. This is reflected in the fact that a fixed interest rate for one year is only slightly higher than the current rate. However, the market also expects a significant interest rate increase in the medium term such that, even allowing for the fact that there will be no significant rate increase over the next year, it is nonetheless considered prudent to fix a significantly higher five year rate to reflect that future increase.

6.9 On all the evidence it seems to me to be clear that there is a very high probability indeed that the company will experience a significantly higher interest rate environment than currently enjoyed, starting in the second half of 2010 and, in particular, being significant throughout 2011 and 2012. While it is neither necessary nor possible for me to be precise about the extent of such interest rate increases, the interest rate regime against which the companies will have to operate looking forward from the middle of 2011 is a significant factor that needs to be taken into account in assessing whether the companies, when they might come out of any putative period of partial interest moratorium, would have a reasonable prospect of survival.

6.10 A number of other factors need to be taken into account in assessing the ability of the companies to meet their interest payments looking forward from the middle of 2011. The first issues concern the likely rent receipts of the Zoe Group in that timeframe. The cash flows produced from the companies suggest that the Zoe Group will have the benefit of increased rent receipts during the period from now until the middle of 2011. The reason for this is that a number of properties currently let in the commercial sector by the Zoe Group are subject to so-called rent free periods. Such periods arise where a developer, in order to secure a beneficial letting of a commercial property, agrees to allow the relevant tenant a rent-free period before the rent reserved by the lease concerned actually has to be paid. On the final day of the hearing before me, a schedule of all such leases (together with other properties which it is hoped might be leased in the future) was produced. From that schedule, it is clear that, in respect of all of the properties which have a lease in place and in respect of which a rent-free period currently exists, the rent free period concerned will come to an end no later than 2010 and in all but two cases, in the first half of that year. In the circumstances, there will be no anticipated uplift in the rent to be obtained by the Zoe Group from 2011 onwards, unless either further properties are let or there is an increase in rent deriving from rent review clauses. I will turn to the question of further properties being let in early course. However, it is clear that commercial rents have fallen appreciably in recent times and there does not seem to me to be any evidence or materials from which it could reasonably be inferred that there is any realistic prospect, in the short to medium term, of significant upward rent reviews. The fact that leases may well have review clauses which preclude downward review may be of some assistance to the Zoe Group. However, there does not seem to me to be any basis for incorporating the prospect of higher rents for properties already let into the calculation.

6.11 So far as additional rental income accruing from properties not currently occupied by tenants is concerned, the following appears to be the case.

6.12 There are a series of eleven properties in respect of which a lease is in place but a rent-free period is currently enjoyed. It is clear that rent accruing for a period subsequent to the expiry of the relevant rent free period is included in the cash flows presented in the papers in respect of eight of those properties. The rent attributable to the other three of the properties is not included in the cash flows at all (for reasons not explained). It is clear, therefore, that the figures contained in Table 4.1 already give the Zoe Group credit for most of the €4.2 million to €4.3 million in rent arising from leases already in place, which rent ought to be received by the Zoe Group by 2011 as the relevant rent-free periods run out.

6.13 In addition, there are four properties where it is said that heads of terms have issued but no lease has been entered into and where the potential rent deriving from any lease which might be entered into (which totals of the order of €0.75 million) has not been included in the cash flows. Some regard should be had to those items. In addition, it is said that there is a potential rent of €8,400,000 which would arise in the event that an office block under construction for Anglo Irish Bank ("Anglo") is, in accordance with agreements already entered into, leased to that bank as its headquarters. The relevant premises is currently the subject of planning difficulties to which some reference has already been made. However, it is also clear that Anglo is prepared, subject to planning, to advance additional funds to enable the premises to be completed and also appears willing to go ahead with the leasing arrangement which has already been entered into. However, the precise time at which any such premises might be available for occupation is by no means clear. The papers suggest that there will be a further drawdown of monies in respect of the completion of the premises

concerned in 2011, which, in turn, suggests that the premises will not be completed until then, at the earliest. Whether, and to what extent, there may follow a rent-free period is equally not disclosed. Thus, the precise time at which any such rent might be expected to become available to the Zoe Group as an actual payment, is by no means clear.

6.14 While it will be necessary to address the general economic conditions pertaining to the property market over the next number of years in more detail under the next heading, it seems to me that it is speculative in the extreme to hope that there will be any significant further lettings of the properties currently not the subject of even heads of agreement, within any timeframe that would be likely to have a material effect on the position of the Zoe Group, looking forward from the middle of 2011, or any other period immediately after any putative partial interest moratorium might have come to an end. Some regard also needs to be had to the prospects in respect of the Anglo building and the other properties where no lease is yet in place. However, these upsides to the equation need to be seen in the context of likely movements in interest rates. As pointed out earlier, the additional cost to the Zoe Group of a 0.5% increase in interest rates would be of the order of €4 million per annum. A little needs to be said about that figure. It is clear that the total bank liabilities of the Zoe Group are, and are likely to remain, of the order of €1.3 billion. Such a level of indebtedness would, of course, if it all attracted variable interest, result in a 0.5% interest rate increase giving rise to an extra cost of €6.5 million (being 0.5% of €1.3 billion). This apparent discrepancy is explained by the fact that, it is said, some of the current banking arrangements which the Zoe Group has with its bankers, are at fixed rates so that a change in current variable interest rates will not affect the amount actually paid by the Zoe Group, at least for as long as the fixed rate contract continues. While I was given some details in respect of some of those loans, it is by no means clear to me, at a global level, precisely how long the company will be able to have the benefit of those fixed rates. On the basis of the evidence concerning likely movements in interest rates in the future, it seems highly likely that, in the event that a fixed rate period expires, the Zoe Group could be exposed to a significant increase in interest rates. Even leaving aside that factor, it is clear, that, if Mr. Power's estimate of likely variable interest rates in 2012 is borne out, the Zoe Group would be exposed to an additional €26 million per annum in interest payments. That figure is derived by taking Mr. Power's figure for 2012 of 4.25% and noting that it represents an increase of 3.25% over the interest rate used for the purposes of the Zoe Group's calculations. Given that each 0.5% increase is said to generate an additional €4 m. in interest, a 3.25% increase would lead to the figure of €26 million. For the reasons which I have just sought to analyse concerning the expiry of fixed interest rate periods, it seems likely that the risk exposure of the Zoe Group may be even larger. It is true to say, as was pointed out by counsel for the Zoe Group, that it may be possible to ameliorate very high interest rates by fixing, for a period of time, some or all of the interest payments due by the Zoe Group in the current relatively benign interest rate environment. However, even noting the figure mentioned by counsel concerning the five-year fixed rate of 2.7%, it seems that that rate would expose the Zoe Group to an immediate additional payment of the order of €14 million per annum with again a risk of further increases as banking contracts subject to a fixed interest rate expire. All in all, it is impossible to avoid the conclusion that there is a very substantial risk (involving a high degree of likelihood) that anyone viewing the prospects of the Zoe Group, looking ahead in the latter part of 2011 and into 2012 (whenever the putative partial interest moratorium may be about to run out), will be faced with viewing a group of companies which will have to meet interest rate payments of the order of €15-€25 million per annum more than those envisaged in the business plan.

6.15 On the other side of the equation, it is appropriate to consider that there may be additional rent deriving from the prospect of the Anglo lease and possible other lettings. However, in the event that the future interest rate regime is anywhere near where the mainstream of economic opinion appears to place it, there does not appear to be any real basis for believing that rent receipts are likely to increase by anything like a sufficient amount to cover the additional interest.

6.16 Even the lower end of the interest rate increases which the company is likely to face at that time would give rise to interest costs which would not be met by giving the company the value of the entire rent projected for properties currently not included in the calculations.

6.17 Although it is not a very significant factor in the overall scheme of things, it is appropriate, also, to say something about the prospects of the Zoe Group's income from residential lettings. First, it is clear that the revised business plan does envisage some sale of residential property. There is the potential from this fact of a negative impact on residential rental receipts as it follows that, if properties are sold, they can no longer be let. In addition, there is little in the evidence or materials from which any real view as to the likely level of rent for residential property might be, looking forward from the middle of 2011, or the extent to which, even properly managed residential letting properties may, nonetheless, be vacant for periods of time while new lettings are sought to be secured after the departure of existing tenants. On the basis of the evidence and materials, and applying an objective analysis to same, it seems to me that there is likely to be more risk on the downside in respect of residential property letting income than on the upside. However, the extent to which any such risk affects the overall picture under this heading is relatively limited.

6.18 It is necessary, now, to turn to the company's potential balance sheet as of the same timeframe.

7. The balance sheet

7.1 As indicated earlier, the "projected" balance sheet of the Zoe Group, as of 30th July, 2011, included in the revised business plan, suggested net assets of €19 million. There are two factors that need to be taken into account in assessing the likelihood of that balance sheet representing a true picture of the group as of that time. The first is a knock-on effect of the interest rate regime. As pointed out in the immediately preceding section of this judgment, it may be possible to ameliorate any peak in the interest rate cycle by fixing interest rates for a period of time, most particularly if that action is taken during the current relatively benign interest rate regime. However, there is a price to be paid for that. If, for example, the Zoe Group were to fix interest rates for five years, along the lines of the current interest rate mentioned by the petitioner's counsel, that would improve the interest rate regime for the company, looking forward to 2012. That improvement would, however, as is always the case, come at a price. As economists say, there is no such thing as a free lunch. The price that would have to be paid is that, for the next two years, the Zoe Group would have to pay significantly higher interest than would be the case by keeping those banking contracts which are currently based on a variable rate in the same form. It must be remembered that, by delaying any move to fixed interest rates, it is likely that the rate fixed would increase significantly because the current fixed rate reflects the current expectation of the market that for the next year or so, there may not be any significant change in variable interest rates. It would not, therefore, be likely that fixing rates in one or two years time would give rise to the same level of interest rates as can presently be achieved, precisely because interest rates would have, by that time, either risen or be expected to be about to rise. While there are a whole range of measures which might, conceivably, be put in place, it is important to note that the price of achieving the lower end of the possible scale of interest rate exposure for 2012 and thereafter, identified in the immediately preceding paragraph (that is to say, the end nearer €15 million) would be at a price of paying at least an additional €14 million or €15 million per annum for the next two years. That would be at a cost of the order of €30 million which would, of course, entirely wipe out the projected net asset balance of the Zoe Group, looking forward from 2011.

7.2 In addition, there is the vexed question of how the property market is likely to move during that period and the effect that any such movement is likely to have on the capital value of the Zoe Group's properties which will, of course, represent a significant portion of the positive side of its balance sheet at any time in the future. First, it is clear that there is a relatively general consensus among economic commentators, on the basis of the evidence and materials before me, that it is likely that much of the European and

world economies will improve (albeit at a relatively modest rate) in 2010. The balance of opinion seems to suggest that an improvement in the Irish economy will somewhat lag behind the rest of Europe, with the timing of any such improvement being placed either at the end of 2010 or 2011. It seems reasonable, therefore, to base any assessment of the Zoe Group's prospects, looking forward from 2011, on the basis of a modest improvement in economic conditions generally in Ireland. Where there appears to be a dispute amongst the experts is as to the extent to which that fact (which they all appear to accept) will necessarily lead to an improvement in the position in respect of the property market. Professor Kelly's opinion is that it will not. He bases his view on an analysis of what can loosely be called property bubbles in a range of OECD countries (38 in number) over a significant number of years. In all cases, Professor Kelly suggests that there is a fall of between 50% and 66% in property values arising from the "bursting" of the bubble concerned, and a prolonged period of recovery which leaves property values very significantly below their peak level for at least a decade. It is fair to say that there is no detailed economic analysis presented on the Zoe side, although some questions are raised in respect of aspects of Professor Kelly's report. However, attention is drawn to the views of certain economic commentators who have suggested that there might be a modest improvement in the property market sometime after the Irish economy begins to improve.

7.3 On the basis of the evidence and materials before me, it does not seem to me that it is either necessary or appropriate for me to choose between the competing economic views on the likely movement in the property market. There are, inevitably, a range of possibilities. The current situation is undoubtedly complicated by the fact that it would appear that a bubble in Irish property prices burst at the same time as (and doubtless was precipitated by) the so-called credit crunch which has led to very severe economic impacts across all economies. The precise task of disentangling the extent to which aspects of the current property situation in Ireland can be attributed to the consequences of the bursting of the Irish property bubble, on the one hand, or the general international economic conditions, on the other hand, is complex. However, having reviewed all of the evidence and materials presented to me, I have come to the view that it is necessary to build into any assessment of the likely prospects for property over the type of timescale with which I am concerned, the real possibility that the estimates of Professor Kelly may be correct. If that be so, then the prospects for the Zoe Group could be affected under a number of headings.

7.4 While, as I have pointed out, the principal focus of the revised business plan was on the ability of the Zoe Group to meet its interest liabilities looking forward from the latter part of 2011, nonetheless, that business plan involved the disposal of at least some assets. The extent to which a disposal in the manner contemplated by that business plan may be realistic in the timeframe specified is, to a significant extent, dependent on at least some recovery in the property market (at least to the extent that there is a market and property is being sold, even though there may not be a significant increase in the price at which it can be sold). Likewise, the capital value of the assets, as of the latter part of 2011, has, on the basis of the same analysis, a much greater risk of downside rather than upside.

7.5 Furthermore, it is necessary to recall, as was pointed out in s. 6 when dealing with the manner in which it was intended that the Zoe Group would deal with its interest payments, that it is envisaged that interest payments in respect of development property would continue to roll-up until such time as the development property concerned was either sold or was developed. It is said that such an arrangement is typical of the arrangements entered into between banks and development companies in respect of development land. That may well be so. However, it is important to note, in that context, that these are not typical times. The problem with an interest roll-up is, of course, that the debt charged on the development land concerned increases. In times of growth, this may not be a problem in that the capital value of the development land concerned may also be growing. Likewise, the prospects of a relatively speedy development of the land concerned, with a consequential enhancement of its value, means that the prospect of allowing interest to roll-up is not particularly daunting. However, in the context of a declining or stagnant property market with little immediate prospect of development actually being carried out, the downside of a relatively extended interest rate roll-up is clear. Any such problem is likely to be exacerbated by a less benign interest rate regime, in that the extent to which the monies owing on any particular property will grow, will increase by reference to the interest rate being applied to the relevant debt. The ability of a company, in those circumstances, to secure a prolonged interest roll-up period in relation to development land in a stagnant or declining market, must be open to very significant doubt. To the extent, therefore, that it is necessary to have at least regard to the possibility that the market for property in Ireland over the next decade will operate at the end of the spectrum identified by Professor Kelly, the impact of such an eventuality on a company whose cash flows anticipate being able to roll-up interest on development land until it is sold or developed, is potentially quite significant.

7.6 In all the circumstances, it seems to me that it is likely that the values projected for the Zoe Group properties as of late 2010, are somewhat higher than are likely to actually be available at that time. However, in assessing the extent of any such difference, it is important to have regard to a number of factors. First, it is necessary to acknowledge that the current estimates of the values of the various properties likely to be owned by the Zoe Group at that time is based on a significant reduction from the estimated peak value of those properties in the latter part of 2006. This is not a case where Zoe is suggesting that the value of the properties concerned will return to their peak value any time soon. While it was suggested in argument that the reductions concerned do not exceed those predicted by Professor Kelly, I am not sure that that is fully so, for a reading of Professor Kelly's report suggests that the ultimate trough in property prices may well come out below 50% of the peak prices.

7.7 In summary, under this heading, I am satisfied that there is a real and significant risk that the value of the property assets of the Zoe Group will, when looked at in 2011, or so, be less than that projected. However, the extent to which that is likely to be so, and the degree of likelihood that it will be so, are not of the same order as to the likely difficulties to be encountered in relation to income and interest payments which I have sought to analyse in the previous section. In addition, there is a further potential downside from the perspective of the Zoe Group associated with the difficulty which it would encounter (based on its cash flows) in meeting interest payments on development land unless it were able to secure that such interest payments would be rolled up until the land concerned was sold or developed. In a stagnant or declining property market, such an eventuality might well prove difficult.

7.8 In that context, it is appropriate, therefore, to turn to an overview of the likelihood of the Zoe Group being in a position to survive as a going concern when any putative partial interest moratorium comes to an end. I now turn to that overview.

8. An overview

8.1 As I have pointed out earlier in this judgment, it is not necessary for the petitioner to establish that the Zoe Group (or more particularly, the companies) will probably be able to survive as a going concern. Rather, it is necessary to establish that there is a reasonable prospect of such survival. For the reasons which I have also set out, it seems to me that, in the context of this case, where the only realistic prospect for immediate survival involves a partial interest rate moratorium, the question which I must ask is whether there is a reasonable prospect that the group would survive, looking forward from the end of that interest rate moratorium. That question involves looking at the reasonable prospects for the Group, looking forward from the time (perhaps in the second half of 2011 or even the earlier part of 2012) when any such partial interest rate moratorium might be likely to come to an end.

8.2 For the reasons which I have set out in the section 6, it seems to me that the prospects of the Zoe Group of being able to meet

its interest rate requirements as of that time are, to a very considerable extent indeed, significantly less optimistic than the position presented in the revised business plan. While there are a number of factors, which I have sought to analyse, bearing on that question, the likely increase in interest rates is by far the most significant. It is the Zoe Group which chose to present the revised business plan on the basis that the Group would become solvent by having sufficient rental and dividend income to meet its interest rate payments looking forward from the middle of 2011. To do so without having regard to the very high likelihood that the interest rate regime at that time would be very different from the highly benign regime which applies at present, seems to me to be a very significant flaw in that plan.

8.3 I have attempted to take proper account of any countervailing factors that might operate in the opposite direction. It is also important to note that there is an interaction between interest rates and economic activity generally. Central banks throughout the world (and the European Central Bank in particular) will move to increase interest rates when economic activity is moving ahead at a significant pace, thus creating inflationary pressures. The existence of a more benign interest rate regime in two to three years time is only likely to occur if the anticipated improvement in the European economy (with its consequent knock-on effect on the Irish economy) does not materialise. In order for there to be a better interest rate regime, there would have to be a worse economic situation with undoubted consequences on the ability to let property both in the commercial and residential sector and on the capital values of such properties. It is virtually impossible to envisage circumstances where there would be a benign climate, both in respect of interest rates and capital values and letting capabilities.

8.4 It is important to emphasise that what I am concerned with is the reasonable prospects of the Group (or the companies) surviving as a going concern. My attention was drawn to an order made by Finlay Geoghegan J. on the 17th February, 2009 in a preliminary issue arising in the case of *Sharmane Limited*. In that order, Finlay Geoghegan J. declared that the Act requires that a scheme of arrangement "be such that it then renders the company to which it applies solvent on the date of entry into force of the scheme of arrangement in the sense of then being capable of paying its debts (as per the scheme of arrangement) as they fall due". Counsel did not have any note or account of the reasoning which led to that order being made. However, it is clear that, if a company is not able to pay its debts as they fall due on its emergence from examinership, then its prospects for survival are remote as it will be clearly insolvent and any creditor will have a strong case to have the company wound up. A reading of the order suggests that the true issue which Finlay Geoghegan J. had to address in *Sharmane* was as to whether the measures contemplated by the scheme of arrangement had to be in place as at the time of the putting into effect of the scheme of arrangement so as to immediately render the company capable of paying its debts as they fall due.

8.5 Be that as it may, it seems to me that the ability of a company to pay its debts as they fall due is an important, but not the only, factor to be taken into account in assessing its prospects of survival. To take but a simple example a company which, as of a particular date, had a contractual entitlement from its creditors not to enforce their liabilities for a period of (say) one or two months would be technically solvent. However, in the absence of some reasonable basis for believing that those creditors would not seek to enforce their entitlements as soon as they became contractually entitled so to do, the company concerned would have little or no prospects of surviving the expiry of the contractual arrangements concerned. Likewise, a company or group of companies, which, like the Zoe Group, has, as its dominant creditors, its bankers, will be dependent on those bankers continuing to support the company or group concerned. The terms on which banking contracts may be entered into vary but will almost invariably provide for some periodic review of the relevant arrangements which would allow the bank concerned to withdraw its facilities in circumstances where the relevant company or group had suffered a material change in its financial circumstances. Thus, in reviewing the prospects of survival of such a company or group, the likely attitude of its bankers must be taken into account but that attitude in turn is likely to depend on the overall prospects for the company or group concerned which would involve an analysis both of its balance sheet (which would impact on the likelihood of the relevant bankers being able to recover their loans) and the ability of the company to fund interest payments and other current expenditure from its revenue.

8.6 In that context, it is appropriate to briefly touch on the appropriate inferences to draw from the support (or lack of opposition) of Zoe Group's bankers, with the exception of ACC. It was tentatively suggested on behalf of the Zoe Group that I should infer that the attitude of its bankers indicated confidence in its business plan. It is true to say that BOSI did indicate, in a letter placed in evidence before the court, that it, BOSI, was of the view that the Zoe Group had a reasonable prospect of survival. None of the other banks did likewise. In that context, it is important to note that the understandable interest of a bank faced with a non-performing loan is simply to improve its position as best it can. It seems reasonable, therefore, to infer from the support or lack of opposition of the other banks (with the exception of ACC) that those banks believe that their position will be likely to be improved by allowing the business plan (or some reasonable variation of it) to go ahead. That is, however, a very different thing from suggesting that those banks believe that the Zoe Group is likely to survive. A simple example will suffice. A bank currently faced with (say) a shortfall of €50 million in its asset cover for a loan which it has given to a company may be presented with a proposal which will allow the company to attempt to continue in existence with a view to improving its position. In such a context, the bank concerned may even be asked to provide further funding to enable this to happen whether in the form of allowing interest to roll up or by actually advancing further monies for the company's purposes. If the bank forms the view that providing such further monies or affording the company further time was likely to improve the bank's chances of collecting more of its debt, then it would make obvious sense for the bank concerned to go along with the plan. If, for example, the bank felt that its net exposure could be reduced from €50 million to €25 million it would make absolute sense for the bank concerned to go along with the plan in the reasonable expectation that the "hit" that it would ultimately have to take might be reduced significantly. That would not mean, however, that the company would necessarily survive. In the example given the company would ultimately have to be liquidated with a net deficiency of €25 million rather than €50 million. That difference does not affect the survival of the company (it would be wound up in either case) and would not affect its shareholders. It would, however, affect the position of the bank concerned which would ultimately have halved the loss which it would have to face by reason of its exposure to the company concerned.

8.7 While it is, therefore, appropriate to take into account the position of BOSI, it does not seem to me that support or the absence of opposition from any of the other banks carry with it any inference other than that those banks believe that the business plan is likely to improve their position rather than any inference concerning the survival prospects of the Zoe Group itself.

8.8 In the same context, it is also appropriate to say something briefly about the proposed National Assets Management Agency ("NAMA"). As was pointed out by counsel for the ACC, there is currently a proposal to enact legislation to establish NAMA which in turn would lead to significant property related loans from banks covered by the NAMA legislation being taken over by NAMA. A number of points need to be made. There is, obviously, a very important question of national policy involved in considering how best to deal with the banking crisis with which the country is undoubtedly faced, with particular reference to the exposure of banks to the property sector. It is no part of my function in dealing with this case to comment in any way on how best the undoubted difficulties which arise in that sector should be addressed. In that context, it is important to emphasise that I am concerned with the specific circumstances of the Zoe Group rather than with the exposure of banks generally to property related loans generally. Likewise, I am concerned with the survival prospects of the Zoe Group within a timescale during which it is realistic for the Zoe Group to expect to be able to roll up its interest payments to the extent that they cannot be met out of income. It seems highly likely that that

timeframe is much shorter than the timeframe with which NAMA (should it be enacted) is likely to be concerned.

8.9 However, it does have to be noted that in excess of fifty per cent of the bank indebtedness of the Zoe Group is to banks likely to be covered by the NAMA scheme should it come into force. In that context, it is necessary to have regard to the fact that it is likely, at the time when the Zoe Group might come out of the benefit of any interest moratorium that might be imposed, that its liabilities (at least to that extent) would be to NAMA rather than its current banks. A point was made on behalf of the ACC that there was no evidence as to the attitude likely to be adopted by NAMA to these liabilities. That is true. It is impossible to speculate on the view which NAMA might take should it be in existence at that time. However, it is relevant to have regard to the fact that the overall interests of NAMA would be, at least in general terms, not dissimilar from those of a commercial bank. It would be owed money by Zoe. It would wish to recover as much of the money concerned as it could. It is likely to be motivated in its policies and actions by whatever it believes is likely to maximise the chance of recovering as much money as possible. Whether, having regard to the timescale within which it might operate, or other factors, it might view the best course of action somewhat differently from a commercial bank, is not a matter on which I can, or should, express any view.

8.10 At the end of the day, it seems to me that the judgment which I must exercise is as to whether there is a reasonable prospect that the financial state of the Zoe Group as it might be expected to emerge from a period during which it had the benefit of any partial interest payment moratorium, would be such that it could be said to meet the statutory test for survival. In the light of the matters which I have sought to analyse, it seems to me appropriate to characterise the prospects for survival of the Zoe Group after any partial interest payment moratorium had run out, as being at the further ends of optimism. There are a significant number of matters that would need to fall the Zoe Group's way for it to be able to survive emergence from the contemplated partial interest payment moratorium. It would need the interest rate regime at that time to be significantly more benign than is reasonable to predict at this stage. It would need to have been lucky under a number of headings in respect of its rental income. The prospects of additional rental income (particularly from Anglo) would need to be immediate rather than well into the future. Its residential rental income receipts would need to have been maintained at or very close to their existing level. Further lettings of commercial property would need to have been put in place in circumstances where an immediate or very proximate availability of additional rent could be taken into account. There would need to be no further falls in either residential or commercial property values. These and other factors would all need to be in place.

8.11 While it is possible to make an argument under each of the relevant headings which is favourable to Zoe (although on the interest rate movement question, this possibility is remote), it is the fact that it needs to be right on so many independent factors before it could even approach both balance sheet solvency and cash flow solvency that leads me to the conclusion that it is significantly improbable that the financial status of the Zoe Group, at any time when it is likely to come out of an interest payment moratorium, would be such as would give it a reasonable prospect of survival. In particular, it is the interest rate regime which has the potential to cause most difficulties for the Zoe Group. For the reasons set out in section 6, it seems unlikely that, even taking an optimistic view of the Zoe Group's rental income prospects, the Zoe Group will, in fact, be fully in a position to meet its liabilities as they fall due, on emergence from the contemplated interest payment moratorium. Any prospect that it might be able to meet its liabilities, as they fall due, in those circumstances, is, in my view, on the evidence and on the materials presented, a very remote possibility, and therefore, the case made does not meet the test of establishing a reasonable prospect of survival.

8.12 In addition, given the potentially significant income/revenue shortfall, even taking a relatively optimistic view of the additional rent that might come in, it does not seem to me that the possibility that there might be a write down in any of the banks' loans would affect that position. I am more than aware of the fact that the petitioner does not advocate such a course of action although, of course, recognising that an examiner, if appointed, might come up with such a plan. I must also take into account the fact that at least one bank has expressed itself in fairly striking terms against any such write down and it must be inferred that ACC would be of like mind. A further complication arises from the fact that the position of the various banks varies considerably in relation to the extent to which each bank has security over assets which might be sufficient to meet that bank's liabilities and the extent to which interest attributable to assets over which a relevant bank has security may be sufficient to cover the interest payments to that bank.

8.13 However, this factor is by no means decisive. In truth, it is an issue that would probably need to be addressed in the context of a scheme of arrangement. It, nonetheless, needs to be noted that there would, potentially, be very significant difficulties in attempting to deal with the fact that the security of each of the banks concerned, both as regards cover for its loan and cover for its interest payments, varies enormously. There is an extent to which the global picture presented on behalf of the Zoe Group, in which all of its rental and dividend income is set against all of its interest payments, may not give a full picture. Certainly, as its affairs are currently arranged, the Zoe Group is not in a position to allocate all of its income to whatever interest liabilities it may choose. Much of that income is allocated, as a result of its current banking arrangements, to particular banks. The fact, therefore, that there may be a surplus in one bank and a shortfall in another, does not mean that it will necessarily be possible to allocate the surplus in respect of one bank's lending arrangements to meet a shortfall in another. That is a further reason why the global picture of the group as a whole may present an overly optimistic view of the ability of the group to deal with each of the individual loans and the interest payments on them.

8.14 In those circumstances, I am not satisfied that the petitioner has established that the Zoe Group as a whole has a reasonable prospect of survival, and for that reason alone, the petition would necessarily have to be dismissed. However, lest I be wrong in that conclusion, I should also deal with the position of the individual companies in respect of which the protection of the court is sought.

9. The individual companies

9.1 Two of the companies in this application – Carragh and Parlez – acquired the property at Sheriff St. (known as Castleforbes Business Park) which was transferred to another of the applicant companies, Peytor, in March 2008. According to the petitioner, these companies continue to exercise a landlord's agent function on behalf of Peytor, collecting rents from its tenants. Their continued existence also allows the Group to avail of an inter-group stamp duty exemption which is conditional on the transferor companies remaining part of the Group for two years following the transfer. Thus, if these companies ceased to exist prior to March 2010, Peytor would face a potential stamp duty exposure of 9% of the transfer price (which, according to the petitioner's best estimate, would be in the region of €4.5m).

9.2 While admitting Carragh and Parlez to examinership might well satisfy the first limb of the test earlier outlined – in that it would be likely to facilitate the survival of the principal company or some part of its undertaking as a going concern – it is difficult to conceive how it could satisfy the second limb of that test. In circumstances where their activities are confined to the collection of rents on behalf of Peytor and (for the period to March 2010) shielding that company from a potential stamp duty exposure, these companies would not have a reasonable prospect of survival as a going concern at the end of the moratorium period and there would be no undertaking within these companies with a reasonable prospect of survival as a going concern at the end of that period.

9.3 Peytor and Villeer own two substantial properties within the Group's portfolio, the sites at Sheriff St. (Castleforbes Business Park)

and at East Road respectively. The stated intention of these companies is not to develop the lands concerned, but to enhance their value through planning gains, applications in respect of which are currently at various stages of the planning process. According to the petitioner, this would enable the companies to sell the land so as to repay ACC. If there was any surplus from such a sale, this would be available to the companies for re-investment or indeed, if it became more beneficial for the companies to develop the lands, they could seek to re-finance the projects so as to take ACC out.

9.4 The current debt owed to ACC in respect of these properties is €136m, which would rise to €143m within a two year period on the basis of the interest rate assumption contained in the revised business plan. Given the view which I have formed on interest rates, the true figure might possibly be higher depending on relevant banking contracts. The value of these companies' assets, as set out in the business plan of December 2008, was €180m. Since that time, according to the petitioner's own evidence, a further reduction in the range of 15% to 25% must now be applied to that aspect of the commercial property portfolio. The independent accountant based his report on the more conservative 25% reduction, giving these assets a value of €135m. Thus, on the petitioner's own valuations and without taking any account of transaction or other costs, the value of these properties would be insufficient to fully discharge the relevant liabilities to ACC (at the end of the moratorium period). In order to be able to discharge these liabilities, a significant uplift in commercial property values would be required. Such an uplift in that timescale seems highly improbable.

9.5 Therefore, on the basis of the evidence before the court, even assuming that the admission of Peytor and Villeer to examinership might facilitate the survival of the principal company (or some part of its undertaking) as a going concern (thereby satisfying the first limb of the test), the relevant companies themselves would not have a reasonable prospect of survival as a going concern at the end of the moratorium period and would not have the basis for any undertaking at all as of that time. Any prospect of survival would, therefore, be highly speculative.

9.6 The function of Vantive and Morston is to provide finance to other companies within the group. Their liabilities are the bank borrowings for this purpose and their assets consist of inter-group debts. Accordingly, their financial wellbeing is dependent on the financial wellbeing of the group as a whole. In particular, as I have already outlined, in 2008, Vantive borrowed €62 million from ACC and Morston borrowed €69.2 million from the same bank in respect of the East Road and Sheriff Street sites, respectively. It is the statutory demands in relation to these debts, and the interest which has accrued on them, which have triggered the companies' petitions for the appointment of an examiner. In respect of these particular debts, the same considerations apply to Vantive and Morston as apply to Peytor and Villeer. In respect of the wider financial position of Vantive and Morston, this is inextricably linked to that of the Zoe Group as a whole. Therefore, if I had considered that the Group as a whole had a reasonable prospect of survival, there would be no reason not to admit these particular companies to examinership.

9.7 Royceton, the seventh and additional company included within this second petition, differs from the other six companies in at least two respects. First, it appears that this company continues to be actively engaged in trading, with a number of employees and unsecured creditors. Second, Royston has not borrowed from or provided guarantees to ACC. Indeed, while it is clearly the liabilities to ACC which have led the other companies to seek the protection of the court, the petitioner provided no real explanation as to why Royceton (as opposed to any of the other forty-odd companies with the group) was included in this second petition. The main function of Royceton, according to the petitioner, is the provision of architectural and similar services to other companies within the group. However, Royceton also acted as a financier within the Group, borrowing from Vantive and Morston to lend to other companies. Royceton has assets of €126 million and liabilities of €129 million. These figures were described as relating to trade debtors and trade creditors in the first IAR. However, their description was corrected in the supplemental IAR to refer to Showlay, the ultimate parent company within the Group. Thus, because its financial position, as reflected in the supplemental IAR, is entirely dependent on that of Showlay, the ultimate parent company within the Group, and thus on that of the Zoe Group as a whole, Royceton's prospects of survival are also inextricably linked to those of the Group as a whole. Royceton also seems to have its own undertaking.

9.8 Therefore, in the case of these three individual companies, if I had considered that the group as a whole had a reasonable prospect of survival, I would have admitted these companies to examinership. However, in light of my finding that the Group has no such prospect of survival, these companies could not, in their own right, be regarded as meeting the statutory test. Moreover, even if I had been satisfied that the Zoe Group, taken as a whole, had a reasonable prospect of survival, I would not have been satisfied that the statutory test was made out in respect of Carragh, Parlez, Peytor and Villeer. As pointed out in the judgment of the Supreme Court in respect of the first petition, the statutory test is a jurisdictional requirement. If the statutory test is not met, then the court has no jurisdiction to bring a company into examinership and afford it the protection of the court. It is important, in that context, to mention, briefly, some of the submissions made on behalf of the petitioner which were referable to my decision in *Traffic Group Limited*. In that case, I mentioned the public benefit which the Act is designed to achieve by facilitating the preservation of enterprise for the benefit of the economy as a whole, and employment for the benefit of the communities in which that employment takes place. It is important to emphasize, however, that no question of the public interest, generally, arises in relation to the jurisdictional question as to whether the court has an entitlement to appoint an examiner. The policy questions which arise in relation to the circumstances in which a court has such an entitlement, are determined by the Oireachtas in framing legislation such as the Act. The Oireachtas has chosen to fix the jurisdictional test which the courts must apply by reference solely to the reasonable prospects of survival of relevant companies and all or part of the undertakings of such companies. This is unlike the position which pertains in the United Kingdom where the analogous administration legislation confers a wider jurisdiction.

9.9 So far as this jurisdiction is concerned, the first question which the court must ask itself is whether it has jurisdiction to appoint an examiner in the first place. That depends on the petitioner satisfying the court as to the reasonable prospects of survival of the company or companies concerned. No wider public interest is involved in deciding whether any relevant company has met that jurisdictional hurdle.

9.10 It is, of course, the case that in circumstances where the jurisdictional test is met, the court also retains a broader discretion as to whether to appoint an examiner on the facts of the individual case. Having taken the view that the jurisdictional test is not met in this case, that broader discretion does not, obviously, arise. However, lest I be wrong in the view which I have taken concerning whether the jurisdictional test had been met, I propose briefly setting out my views on the exercise of the broader discretion.

10. Discretionary matters

10.1 It was urged on behalf of ACC that a factor which I could properly take into account for the purposes of exercising my discretion was the procedural history of this matter. I am not satisfied that that is an appropriate matter to take into account. It may be that ACC will be able to persuade the Supreme Court that Cooke J. was wrong in determining that this second petition should be given a hearing on its merits. However, for the purposes of this court, it remains the case that Cooke J. has determined that it is appropriate that the petition be heard on its merits and, indeed, has found that there was no abuse of process involved in the way in which the second petition was presented. In those circumstances, it does not seem to me that the relevant procedural history would be a material factor in the exercise of the broader discretion to appoint an examiner which the court clearly enjoys.

10.2 Secondly, it is important to note that the situation with which I am faced, on this occasion, appears to be significantly different from the situation with which Kelly J. was faced on the hearing in this court of the first petition. First, there are a number of employees of some of the companies within the Zoe Group who have appeared for the purposes of supporting the petition. Likewise, there are a number of creditors who have taken a similar stance. However, it may be observed that the vast majority of the group's employees and creditors are related to companies within the group, other than those which have sought the protection of the court in this application. In particular, with the exception of Royceton none of the other companies has any employees. Similarly, of the thirteen unsecured creditors who have filed affidavits in support of this second petition, only two have listed debts owed to them by one of the applicant companies (specifically, in both cases, Royceton). The vast majority relate to another company within the group, Danninger. It might also be observed that, in the context of the scale of the job losses which are such a regrettable feature of the current economic climate generally, and in the property sector particularly, and relative to the scale of the group, the number of employees is modest. Just as the presentation of the financial position of the companies on a group basis is ripe for confusion, so too the presentation of these issues within the context of the group, rather than the specific companies joined in this application, might be said to raise issues about the manner in which this petition has been presented to the court. Nonetheless, the protection of employment and of unsecured creditors is undoubtedly an important factor properly to be taken into account in the court's exercise of its discretion. I have annexed hereto a table of creditors/employees and subcontractors which participated in the process.

10.3 Of perhaps more importance, however, is the fact that the revised business plan does not have as its focus a large scale disposal of the company's assets (as appeared to have been the case in the 2008 business plan). The revised business plan focuses on what was said to be an attempt to restore the company to a position where it was able to meet its liabilities as they fell due. For the reasons analysed in the course of this judgment, it did not seem to me that that plan stood up to analysis. However, if it had stood up to analysis, it would have provided a reasonable prospect for the survival of the companies and the Zoe Group generally, and there would have been a reasonable prospect of there being an enterprise or undertaking continuing in existence to the benefit of the community. In that regard, I accept the views expressed by Mr. John McStay, the experienced insolvency practitioner, who gave affidavit evidence to the effect that a continuing development company is nonetheless an undertaking as that term is ordinarily understood.

10.4 In those circumstances, had I been satisfied that the companies and the Zoe Group generally had a reasonable prospect of survival, I would have exercised my discretion in favour of the appointment of an examiner.

11. Conclusions

11.1 For the reasons which I have sought to analyse, I am not satisfied that the companies of the Zoe Group generally has a reasonable prospect of survival in the sense on which that term is used in the Act. In those circumstances, the court has no jurisdiction to appoint an examiner and the petition must fail.