Neutral Citation: [2015] IEHC 74

THE HIGH COURT

[2010 No. 550 COS]

IN THE MATTER OF PIERSE CONTRACTING (IN LIQUIDATION AND IN RECEIVERSHIP) AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT 1990 AND SECTION 56 OF THE COMPANY LAW ENFORCEMENT ACT 2001

BETWEEN

SIMON COYLE

APPLICANT

AND

FEARGHAL O'NOLAN, CHARLES NORBERT O'REILLY, GERARD THOMAS PIERSE, KIERAN DUGGAN, MARTIN MURPHY, MICHAEL MCNAMARA, MICHAEL O'REILLY, MATHEW DUGGAN AND BRENDAN CAHALIN

RESPONDENTS

JUDGMENT of Mr. Justice Cregan delivered the 30 day of January, 2015

Introduction

1. This is an application by the Liquidator of Pierse Contracting (in liquidation and in receivership) (hereinafter referred to as "the company") for a declaration that the respondents should be restricted from acting as directors of a company pursuant to s.150 (3) of the Companies Act, 1990 (as amended) for a period of five years.

2. All the respondents were directors of the company either at the date of, or during the twelve months prior to, the commencement of its winding up. (Mr. Coyle in his grounding affidavit sets out the full details of each respondent's directorship.)

Company history and group structure

3. At the time when the company went into liquidation the company was part of the Pierse group of companies. The shareholders of the company were a company called Birmayne (which owned approximately 99% of the company) and Pierse Unlimited (a Jersey registered company which owned approximately 1% of the company.)

4. Birmayne itself was a 100% subsidiary of Pierse Limited (another Jersey registered company) which was itself a 100% subsidiary of an unlimited company called Bolongo. A company called Remayne Holdings Limited owned 33.3% of the shares in Bolongo.

5. The company had some 19 subsidiaries in Ireland and the UK and had also 15 associated or joint venture companies.

6. The company was incorporated on 1st May, 1978 and at that time was called McInerney (Civil Engineering) Limited. It formed part of the McInerney group. In 1988 the company changed its name to McInerney Contracting Limited. In 1991 there was a management buyout of the company from the McInerney Group conducted through a company called Birmayne Limited and in May 1991 the company changed its name to Pierse Contracting Limited.

7. The total consideration for this buyout was £5 million and 50% of the purchase consideration was provided by the company itself, funded by bank debt. A s.60 "white wash" – as it is called - was carried out at the time of the transaction. This funding was then passed on to Birmayne Limited (by way of an inter- company loan of £2.5m. from Pierse Contracting Limited). The shareholders provided the remaining £2.5m. to finance the acquisition.

8. As of the date of the commencement of the liquidation Birmayne was indebted to the company in the sum of £2.5m. (€3.09m.) which was the remaining balance of the original loan. This transaction is relevant because it is similar in nature to a transaction carried out in 2004 about which the Liquidator complains.

Recent developments

9. The grounding affidavit of Simon Coyle, the Liquidator, sets out the history of recent developments in the company in considerable detail. It also sets out in full the details of the change in management and the buy- out event which occurred in or about November 2004 which has relevance to the issues in this application.

10. Paragraphs 17- 21 of Mr Coyle's affidavit states as follows:

> *" 17. On 18 November 2004, the directors of Birmayne noted that some of the founder members of that company had retired or wished to retire, and that it was proposed to make changes in the management of the company including, in particular, the appointment of Norbert O' Reilly, the second named Respondent herein, as Chief Executive with effect from May 2005.*
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> *18. In order to achieve these objectives, Remayne Holdings Limited had been incorporated on 3 November 2004. Remayne Holdings Limited purchased one- third of the shares in Birmayne for a total consideration of €39.8 million, and the purchase monies were provided to Remayne Holdings Limited by way of an inter- company loan from the Company. A section 60 whitewash was carried out at the time of the transaction.*
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> *19. I say and believe that the members of Birmayne who sold shares to Remayne Holdings Limited and the details of those sales are as follows:-*
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> > *(a) Gerard T. Pierse 194,580 shares €21,800,000*

(b) C. Norbert O' Reilly 60,695 shares €6,800,000

(c) Michael Flick 35,703 shares €4,000,000

(d) Fearghal O' Nolan 30,348 shares €3,400,000

(e) Martin Murphy 17,851 shares €2,000,000

(f) James Kavanagh 17,851 shares €2,000,000

20. As of the date of the commencement of the liquidation, Remayne Holdings Limited was indebted to the Company in the sum of €39.812 million. Remayne Holdings Limited's only asset was its holding in Birmayne.

21. Accordingly, the two loans receivable from Birmayne and Remayne Holdings totalled €42.9 million as of the commencement of the liquidation, and their repayment to the Company was entirely dependent on the performance of the trading companies in the Pierse Group, and in particular the Company itself."

Performance of the company in recent years
11. It appears from the company accounts that the company went from making a profit of €17 million (approximately) in 2007 to making a loss of €16 million (approximately) in 2008 and a loss of €30.9 million in 2009. The Liquidator stated that, in his view, the company was trading profitably in Ireland up to 2007 but that some of the other group companies in the UK were experiencing trading difficulties from 2003/2004 onwards. Moreover the Liquidator noted that the company's domestic trading deteriorated in 2007 when it (and its related companies) could not sell on major property developments in Carrickmines, Santry, Clongriffin, (all in Dublin) and Blackrock in Cork. The inability to sell these developments had a significant cash flow impact on the company (and indeed on the Pierse Group generally) as they were unable to pay some of their bank debt or to meet their creditor liabilities. Moreover the lack of sales of development properties meant that some of the profits from the company's contracting projects had to be used to service property development loans.

12. This reduction in cash flow meant that the company was dependent upon the goodwill and patience of its creditors and some subcontractors from at least January 2009 onwards.

Events leading to the collapse of the company
13. The major precipitating event which lead to the collapse of the company was that the company had undertaken the construction of a major development at The Grange, Baldoyle in Dublin for Gannon Developments. It appears that although the contract price was approximately €86 million (plus VAT) no formal written agreement had been entered into. The company was advised by its lawyers that it had a valid claim against Gannon Developments for a sum of approximately €25 million and it commenced Commercial Court proceedings to recover these monies. Following extensive negotiations the company agreed to accept the reduced sum of €13million in order to expedite payment and improve its cash flow.

14. However despite this settlement agreement the company was unable to secure payment by Gannon Development of the €13million and in September 2010 NAMA – which had taken over the Gannon Development debts – confirmed to the company that the €13 million would not be paid. As a result the company immediately sought the protection of the High Court and the appointment of an examiner.

15. On 12th October, 2010 the company presented an examinership petition to the High Court and Mr. John McStay was appointed as interim examiner to the company.

16. The petition was made returnable to 28th October, 2010. However on that date a creditor of the company (Kilsaran Concrete) voiced concerns about the level of the company's indebtedness to unsecured creditors and the high level of inter-company indebtedness within the group. The High Court (Kelly J.) directed that the interim examiner prepare an additional report addressing these issues. When the matter came back before the High Court on 4th November, 2010 the company indicated that it was no longer seeking the appointment of an examiner and wished to have the company placed in liquidation. The company was put into liquidation on 4th November, 2010.

17. On 10th November, 2010 Bank of Scotland Ireland appointed Ernst and Young as receiver over specified assets of the company and on 17th November, 2010 Bank of Ireland appointed a receiver over certain other assets of the company.

18. The Liquidator has set out in his affidavit in considerable detail much of the financial information relating to the company and much of the financial intricacies in relation to the company and its subsidiaries. He also sets out five major reasons why, he says, the directors should be restricted. During the course of the four day hearing on this application the submissions of all parties focused principally on these five major issues.

19. The five issues are as follows:

1. The original company loan to Birmayne for €39.8million

2. The company loans to UK subsidiaries

3. The revaluation of the Marino student accommodation development

4. The revaluation of three major developments at Santry Cross, Carrickmines, and Eden, Blackrock, County Cork

5. The fact that the respondents had an over optimistic view of the contracting side of the business and overstated its prospects.

20. I propose to deal with each of these issues in turn and to consider the arguments and counter arguments put forward by the various parties.

21. Before I do that however there are certain important factors which should be set out in order to outline the context in which this

application is being brought.

22. In addition I should also note that this application is only opposed by the second respondent, the third respondent, the fourth respondent and the sixth respondent. The first respondent, the fifth respondent, the seventh respondent and the eighth and ninth respondents did not contest the application and High Court orders were made against them under s.150 at an earlier stage in these proceedings.

The context of this application

23. The Applicant accepts that the company was trading profitably up to 2007. As stated above, the company made a profit of €17m. in 2007 but made a loss of €16.3m. in 2008 and a further loss of €30m. in 2009. The company went into examinership in October 2010 and into liquidation on 4th November, 2010.

24. Moreover the Applicant fairly stated that *"I am satisfied that there is no evidence to suggest that the respondents acted other than honestly in relation to their conduct of the affairs of the company. I believe it is also appropriate to record that the respondents have cooperated with me in my conduct of the litigation"*.

25. Thus the application by the Applicant is that the respondents have not satisfied him that they acted "responsibly" in relation to their conduct of the company's affairs. As he states at para. 88 of his grounding affidavit:

> *"While they undoubtedly took steps to try and address the company's difficulties, their plans did not appear to recognise the enormity of the many and interlinked challenges facing the company and the group especially in a situation where the company and other key group companies benefited from a structure where they did have to file accounts and the creditors were relying on the actions of the respondents".*

26. It is also of considerable importance to emphasise (as the respondents point out in their various affidavits) that in this application to restrict the directors, there are no allegations:

> 1. that the company failed to account properly to the Revenue Commissioners or
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> 2. that the company failed to keep adequate books or records or
>
> 3. that the company failed to deal fairly and honestly with employees and subcontractors or
>
> 4. that any improper preferential payments were made by the company

27. In other words the majority of the allegations appear to be in respect of the commercial judgment of the company's directors. Moreover the allegations of the Applicant in relation to the directors are in relation to a period of time which, as the directors state, "arose towards the end of the company's trading history, mainly in 2008 and 2009 at a time of unprecedented uncertainty in the Irish banking and property market" (see affidavit of Gerard Pierse para. 5).

28. Mr. Pierse also states in his affidavit (at para. 6) that, with the benefit of hindsight, the Liquidator is arguing that the company's directors were too optimistic in their assessment of the prospects for the Irish property markets throughout this period but that the same allegation could be made against many players in the property market including the Irish government and large financial institutions at the time.

29. In my view, it is also important to consider the actions which the Respondents did take during this two to three year period. These actions are as follows:

> (i) In early 2009 the company commissioned a report from KPMG in relation to its financial affairs. Following consideration of that report Bank of Ireland agreed to advance substantial facilities of approximately €150m. to the company to enable the company carry out P.P.P. projects which it had won and which were projected to be very profitable. This one fact alone is of great significance. The fact that Bank of Ireland - (which itself had been bailed out by the government-) decided in the midst of a severe credit crunch to advance loans of approximately €150m. to the company clearly showed that Bank of Ireland believed that the company was capable of surviving throughout 2009 and thereafter.
>
> (ii) In addition in July 2009 the Bank of Ireland renewed the company's overdraft facilities.
>
> (iii) The company commissioned an update of this KPMG report in late 2009 and following receipt of the updated report Bank of Ireland continued to support the company and in October 2009 Bank of Ireland funded the N.R.A. P.P.P. which involved contract work for the company of approximately €60m.
>
> (iv) Moreover in July 2010 N.I.B.C. (a German development bank) and the European Investment Bank provided funding jointly (with Bank of Ireland) to fund another P.P.P. project – the Schools Bundles 2 project which involved contract work for the company of approximately €50m.
>
> (v) Moreover the KPMG report was also given to Allianz, the company's insurance company which provided the company's performance bonds and continued to do so on foot of this report. Indeed the affidavit of Mr. Kieran Duggan states that *"the board was informed by the relevant executives in the company that both Bank of Ireland and Allianz reviewed the KPMG report in great detail"*.
>
> (vi) As a result of the company carrying out these contracts- which were profitable for the company- the amount of creditors was reduced from approximately €95million in April 2008 to €53million in April 2010.
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> (vii) As of September 2010 the company was in a strong position to obtain further business from P.P.P. and other government/ local authority contracts.
>
> (viii) In addition the directors loaned the company substantial amounts of their own money. Mr. Gerard Pierse loaned/invested €9million of his own money in the company during 2007 and up to August 2008. He did not recoup any of this money and he is the company's largest single creditor apart from Anglo Irish Bank. As he says *"I would not have invested those monies if I did not have an honest and genuine belief in the company's prospects for survival which was based on my knowledge of the company's business and my long experience at the Irish and British contracting and*

property market".

(ix) Moreover Mr. Gerard Pierse also gave a personal guarantee to the financing banks (on behalf of the company) in the sum of €1m. in respect of the company's participation in a P.P.P. project involving school construction known as "Schools Bundle 1". However when the company entered liquidation in November 2010, the works were not completed. Mr. Pierse's guarantee was called in and paid for in full by him at that time. Again, as he states, he would not have given that personal guarantee if he did not have an honest and genuine belief in the company's prospects for survival.

(x) In addition Charles Norbert O' Reilly loaned/ invested approximately €4.5 million of his own money into the company at this time.

(xi) Mr. Michael O'Reilly (who did not contest the current proceedings but who swore an affidavit) stated that in order to contribute to the efforts being made to steer the company through the difficult period he took out a personal loan in February 2009 in the sum of €200,000 and provided the entire sum as a loan to the company. No portion of that loan has ever been repaid to him.

(xii) Thus shareholder directors put in over €10 million of their personal money into the company thus demonstrating that they were confident that the company had a future.

(xiii) Moreover the company believed, on the advice of its solicitors, (A & L Goodbody,) until the middle of 2010 that it was likely to recoup €25m. in the context of debt litigation brought against Gannon Developments. Even when the company settled the proceedings against Gannon Developments it believed that it would receive this sum of €13m. Moreover if Gannon Developments had paid over these funds, it would have enabled the company to finish the profitable contracts then in progress- thus further strengthening its financial position and enabling it to win further contracts. The evidence of the directors is that their belief was that if the debts owed to the company had been paid – particularly the one by Gannon Developments then the company could have survived in 2010.

(xiv) Throughout this time (i.e. September 2008- October 2010) the company continued to win important new contracts particularly in the area of state contracts and public private partnerships throughout 2008/2009 (for example Schools Bundles 1 and 2 and the NRA Service Stations Contract).

(xv) Thus in 2009, which is the year in which the official Liquidator contends the directors should have liquidated the company, the company had a substantial and profitable workload, the banks were continuing to support the company and in fact the company managed to reduce its level of overdue creditors from €16.5m. to €8.4m.

(xvi) The overheads of the company were cut from approximately €18m. per annum to approximately €4.5m. per annum as a reaction to the reduction in new business.

(xvii) In addition the executive directors took substantial salary cuts and pension reductions.

Legal Principles

30. Section 150 of the Companies Act 1990 provides:

"(1) The court shall, unless it is satisfied as to any of the matters specified in subsection (2), declare that a person to whom this Chapter applies shall not, for a period of five years, be appointed or act in any way, whether directly or indirectly, as a director or secretary or be concerned or take part in the promotion or formation of any company unless it meets the requirements set out in subsection (3)…

(2) The matters referred to in subsection (1) are-

(a) that the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company and that there is no other reason why it would be just and equitable that he should be subject to the restrictions imposed by this section…"

31. It is settled law that the onus is on the Respondents to establish that they have acted responsibly.

32. The seminal test as to whether the Respondents have acted responsibly, was laid down by Shanley J in *La Moselle Clothing Ltd and Rosegem Ltd v Soualhi* [1998] 2 ILRM 345 at p. 351, (which criteria were subsequently adopted by the Supreme Court in *Re Squash (Ireland) Ltd* [2001] 3 IR 35) Shanley J stated:

" [I]t seems to me that in determining the "responsibility" of a director for the purposes of Section 150(2)(a) the Court should have regard to:-

(a) The extent to which the director has or has not complied with any obligation imposed on him by the Companies Acts.

(b) The extent to which his conduct could be regarded as so incompetent as to amount to irresponsibility.

(c) The extent of the director's responsibility for the insolvency of the company.

(d) The extent of the director's responsibility for the net deficiency in the assets of the company disclosed at the date of the winding up or thereafter.

(e) The extent to which the director, in his conduct of the affairs of the company, has displayed a lack of commercial probity or want of proper standards."

33. The Court must also assess the Directors' actions by reference to an objective standard, (see McGuinness J in *Re Squash Ireland Ltd.*)

34. The Court should also have regard to the duties owed by the Respondents at common law. In *Kavanagh v Delaney (the Tralee Beef & Lamb case*) [2005] 1 ILRM 34, Finlay- Geoghegan J at (p.41) held that directors *"owe a duty to the company to exercise skill and diligence in the discharge of their functions"* and further agreed with the statements of Jonathan Parker J in *Re Barings plc (No. 5)* ([1999] 1 BCLC 433 (at p. 435).

35. Finlay- Geoghegan J further agreed with three general propositions derived by Jonathan Parker J from the latter's review of earlier authorities, namely:-

> *"(i) Directors had, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors.*
>
> *(ii) Whilst directors were entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation did not absolve a director from the duty to supervise the discharge of the delegated functions.*
>
> *(iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it has been discharged, depended on the facts of each particular case, including the director's role in the management of the company."*

36. This aspect of Finlay- Geoghegan J's decision was subsequently approved by the Supreme Court (in *Re Tralee Beef & Lamb Ltd* [2008] 3 IR 347 at p. 357, see also *Re Mitek Holdings Ltd* [2010] 3 IR 374 at p. 393).

37. The Applicant further accepts that it is not incumbent on a board of directors to immediately place a company in liquidation at the first moment at which it is apparent that debts may not be capable of being paid as they fall due and- as Peart J noted in *Re USIT World plc*, [2005] IEHC 185- to attempt to trade out of a difficulty is not necessarily an irresponsible act.

38. As McMenamin J noted in *Re MDN Rochford Construction Ltd* ([2009] IEHC 397 at para. 50):-

> *"While each case must be judged on its facts, there comes a point where optimism becomes hubris, and where belief that a company can trade out of its difficulties is simply wilful self- delusion. Commercial acumen is necessary. Hope must be matched by verification and objectivity. The absence of all of these necessary characteristics constitutes irresponsibility."*

Assessment of the five issues

39. I now turn to consider the five issues raised by the liquidator in the context of these legal principles.

The first issue - the company loan of €40m. to Remayne Limited

40. The first issue about which the Liquidator complains is the inter-company loan to Remayne Limited. As stated above, the company was 99% owned by a company called Birmayne and 1% owned by a company called Pierse Unlimited. In 2004 the founding directors of the company wished to retire. They considered selling the company but decided against this. However they wished to realise the true value of their shareholdings in the company. Thus, whatever about the intricacies of the transaction, the purpose of the transaction was to enable certain directors to realise the full value of their shareholding in the company. The transaction was carried out in or about November 2004. A company called Remayne Holdings Limited was incorporated in November 2004. It purchased 33% of the shares in Birmayne for approximately €40m. The funds to purchase these shares were advanced by the company to Remayne Holdings Limited. Remayne Holdings Ltd. then purchased 33% of the Birmayne shares from the directors. Thus after the transaction Remayne Holdings Limited owed the company the sum of approximately €40m.

41. The essential complaint made by the Liquidator is that, although the company was now owed €40m. by Remayne Holdings, (and showed this loan as an asset on its balance sheet), the reality was that these loans were never going to be repaid, that the directors should have realised this and they should have written off the loan in the company's accounts. This would have reduced the company's assets by approximately €40m. The Liquidator was of the view that he was not satisfied that the directors ever held out any realistic prospect that the loans would be recovered. The Liquidator therefore believes that the directors over-stated the assets of the company by approximately €40m.

42. The Liquidator also submits that the loan had the effect of significantly reducing the capital available to the company after 2004 when trading conditions started to deteriorate.

43. Mr. Pierse, in his affidavit, rejects these allegations. He says that the structure of the share purchase was agreed at arms length and advised upon by the company's solicitors and tax consultants at the time. At the time the transaction was entered into, in 2004, the company was highly profitable and had been for many years. The balance sheet of the company was well able to sustain the loan to Remayne which funded the share purchase. He rejected the idea that this loan contributed to the company's insolvency. Indeed he says that the fact that the loan to Remayne was ultimately irrecoverable was as a consequence of the downturn in the economy and the property market and not because of the original share purchase.

44. Mr. Michael O'Reilly in his affidavit (although he did not contest this application) stated that *"with regard to that loan, the company was trading profitably at the time that it was made and at that time I fully believed that it would be repaid to the company although no time was specified for its repayment"*.

45. Mr. Kieran Duggan in his affidavit (at para. 63) stated that his understanding was that the funding for the transaction in 2004 was from surplus cash and new bank debt in the company. He also noted that the surplus cash *"represented undistributed after tax profits and the bank debt was repaid over about two years from further undistributed after tax profits. The loans effectively were funded from retained after tax profits of the group which had not been paid out as dividends. In relation to these loans I was always advised by the company's finance director that the loans were never intended to be repaid in the short term and it is my understanding that the existence of these loans was not a contributing factor to the subsequent insolvency. As evidence that these loans would have been repaid in due course the directors noted that in the five years from April 2002 to April 2007 the Pierse Group made after tax undistributed profits of €42m. The Board reasonably expected similar profits would be generated in the future and that the loans would be repaid in full"*.

46. Mr. Charles Norbert O'Reilly in his replying affidavit also takes issue with the Liquidator's concerns in respect of the 2004

transaction. He also emphasised that the structure of the share purchase was agreed at arms length and advised upon by the company's solicitors and tax consultants. He also confirmed that at the time the company's balance sheet was comfortably able to sustain the loan to Remayne Limited which funded the share purchase. He says *"Nobody could have anticipated the downturn in the country's and the Pierse Group finances which occurred from 2008 onwards. The fact that the loan to Remayne Limited was ultimately irrecoverable is a consequence of that downturn not of the original share purchase"*.

47. In response, the Liquidator accepted that the transaction was carried out entirely in accordance with the relevant statutory provisions. His point was that in the perilous trading circumstances of the company prior to its liquidation the respondents should have recognised the company's inability to repay these debts and made provision in the financial statements for those "assets" of the company.

48. However I do not agree with the Liquidator's contentions in this regard. It is clear that this transaction was carried out in a bona fide manner and for bona fide commercial reasons in 2004. Moreover it was carried out at arms length, with full advisors involved and in full conformity with the statutory requirements. In addition it was done at a time when the company could comfortably afford this loan on its balance sheet. Moreover I accept the evidence of the directors that it was anticipated that the loan could be comfortably repaid over time. I also accept the submission that it was the downturn in business and liquidation of the company which caused the irrecoverability of the loan; it was not that the loan caused the liquidation of the company.

49. Thus the Liquidator's concern appears to be that the Directors should have written off this loan in the company accounts and did not do so. When expressed in these terms, it is clear that the Liquidator's real concern is about the accounting treatment of an inter-company loan. However in that regard, I note that the accounts of the company were approved by the auditors in 2007, 2008 and 2009. The auditors gave an unqualified opinion in respect of the accounts and certified that the accounts represented a true and fair view of the financial position of the company. If the Liquidator was correct in his assessment then the auditors would have challenged this treatment of this loan or would have put in a qualification to the accounts. They did neither.

50. In those circumstances I am of the view that the first allegation of the Liquidator that the defendants did not act responsibly is unfounded.

The second issue – the recovery of UK inter-company loans.

51. The second allegation made by the Liquidator against the respondents is as follows: In the year ended 30th April, 2006, and April 2007 the company advanced loans of approximately €23m. to loss-making subsidiaries of the company in the UK. These losses arose in the UK because of the slow down in the property market in the UK at that time. These sums were shown as an asset in the company's accounts. The loans of €23m. to the UK companies were written off in the financial statements for the year ended 30th April, 2008.

52. The position of the Liquidator on this point is somewhat nuanced. He states (at para. 59 of his first affidavit) that the respondents decided when preparing the 2008 audit accounts, to write off the company's investment of €23.5m. to its UK subsidiary companies but to still show the inter-company balances as collectible as of 30th April, 2008. The Liquidator stated that it was only when Liquidators were appointed to the UK subsidiaries during 2009 that these loans were written off and the amount of the write off included in the 2009 financial statements was some €21.6m. He states *"I am at a loss to understand how the respondents saw fit to write off the investment in the UK companies and not provide against the recoverability of the inter company balances".*

53. Mr. Pierse in his affidavit at para. 17 accepted that the UK subsidiaries had been underperforming for a number of years and noted that he was himself critical of their performance. However he stated that he did not believe it would have been reasonable to expect him to intervene as a non-executive director to instruct the company to write off monies owed by its subsidiaries including its UK subsidiaries. He also noted that the UK property market had recovered in the years since 2009 to a higher level than that seen during the previous decade and he believed that if the company had continued to trade, its UK subsidiaries would have performed well and that the loans would have been substantially recoverable.

54. Again however it is clear, in my view, that the point which the Liquidator raises against the respondents is one of the accounting treatment of inter- company loans in the accounts. It is clear that the company made loans to its UK subsidiaries in 2006 and 2007. It is also clear that these loans were written off in the year ended 30th April, 2008. Insofar as they were written off but also shown as inter company balances which were collectible as of 30th April, 2008 this clearly is a matter which the auditors approved of and consented to and to which they saw no reason to qualify their opinion. In this case the clear evidence is that the accountants signed off on the company accounts and gave the company an unqualified audit opinion. In these circumstances I do not believe the directors could be held to have acted irresponsibly in anything they did in relation to this issue.

The third issue - the Marino revaluation

55. The Liquidator's third allegation is as follows: One of the company's numerous subsidiaries is a wholly- owned company called Balpir Properties Limited ("Balpir"). In 2005 Balpir acquired student accommodation built by the company in Marino for €26m. The company financed the purchase by raising a loan of €26m. from private investors in a tax driven scheme. These loans were non-interest bearing and repayable in 2015. In the company's 2008 audit accounts, the investment loans were carried at a value of €22.9m. However, in preparing the company's accounts for 2009, the company changed its accounting policies with regard to property valuation and revalued this property upwards by approximately €10m. The effect of this was to increase group assets by €10m. Thus the Liquidator's essential complaint is that the respondents engaged in a process which yet again misstated the correct net assets of the company.

56. In response Mr. Gerard Pierse stated that any such revaluation was carried out by the company's expert valuers. In addition this revaluation would have been approved by the company's auditors. Moreover he states that the valuation given to the Marino property appeared to be reasonable as it was student accommodation which had not been affected by the downturn and would continue to provide a strong income for many years once it was returned to the company's beneficial ownership.

57. Mr. Kieran Duggan stated in his affidavit at para. 55 that

> *"at the time of the revaluation [of Marino] in 2009 the Board was informed that this was a requirement of the auditors in order to have consistency in relation to the method of asset valuation through all the group's investment properties".*

58. Mr Duggan also stated that he relied on the role and professional experience of John McNally as head of property development in the company from 2008. Mr. McNally was a senior executive of the company with substantial surveying and valuation qualifications and a wide range of relevant experience. He was a member of the Royal Institute of Chartered Surveyors, and the Society of Chartered Surveyors and held a BSc degree in Surveying. He had also been a member of the Society of Chartered Surveyors RICS

Planning and Development Committee. Mr. Duggan said that he relied on the role and professional expertise of John McNally as a valuer and that he also relied on the auditors.

59. Mr. Charles Norbert O'Reilly, in his affidavit, stated that he believed that any such revaluation was carried out by the company's internal valuers, that the property had in excess of 25 years cash flow available to it under a concession agreement with the college, that to the extent that the revaluation comprised a change in accounting treatment such treatment would have been given "the imprimatur of the company's auditors KPMG", that the valuation appeared to him to be reasonable as it was student accommodation which had not been effected by the downturn and which would continue to provide a strong financial return for many years.

60. The response of the Liquidator to these arguments was that the valuations given by the company's internal valuers were too aggressive. The Liquidator exhibited the opinion of DTZ Sherry Fitzgerald in this regard.

61. However, in my view, having considered the affidavit evidence and the submissions of all parties, I am of the view that the allegations of the Liquidator on this issue are also unfounded. Any revaluation which had been done was based on the professional advice of the company's internal valuer who was apparently a person of considerable professional skill, experience and judgment in these matters. In addition the evidence was that he consulted widely outside the company with other industry experts to consider the valuation. Moreover the revaluation of the asset was done - if not at the request or direction of the accountants - then certainly with their approval and consent. There is nothing in the auditor's reports on these accounts for these periods which would suggest that the auditors qualified the accounts to deal with this issue. (There is some issue taken by the Liquidator on the inclusion of a "matter of emphasis" by the auditors in their report on the accounts and I will deal with that later in this judgment). Again, this concern of the Liquidator appears to be about the correct accounting treatment of an asset in the company's balance sheet. In my view, this was a matter for the company's auditors and the evidence is that the auditors approved this revaluation treatment of Marino in the company accounts. That being so, I see no basis on which I could conclude that the directors were not acting responsibly on this issue either.

The fourth issue – that other major property investments of the company should have been revalued downwards
62. The fourth issue for which the Liquidator contends, to establish that the directors did not act responsibly, is that there were three other major property developments of the company which should have been revalued downwards in the company accounts given the downward trajectory of the property market. These property developments were:

1. Santry Cross, Dublin
2. Eden at Blackrock in Cork
3. Carrickmines, Dublin

63. In relation to Santry Cross the allegation is this: Another subsidiary of the company – Pierse Santry Cross Limited – developed a hotel and apartments. The company failed to sell the development in 2007 and decided to lease the hotel for an annual rent of €1.3m. However the tenant was unable to pay the agreed rent and sought a substantially reduced rent of €400,000. per anum. The costs of this development were capitalised in the accounts in the sum of approximately €28m. - €31m. as at 30th April, 2007. In the company accounts to 30th April, 2009 the company recognised an impairment of €6m. on this amount which reduced it to €25m. However it then transferred €4m. from work in progress to investment properties and therefore increased the combined carrying value of these assets to €29m. In addition it also carried forward a further sum of €2.2m. as work in progress which gave a total value in respect of this development of €31.3m.

64. The Liquidator was of the view that there did not seem to be any reasonable basis for this valuation - given the location of the apartments, the vacancy levels and the prevailing economic climate at the time. He also submitted that there was no evidence of these values being the subject of independent third party professional valuations. He contended that the yields used by the respondents to give the development a capital value were excessive and allowed them not to recognise significant impairments on the values attributed to these assets. Thus, in a nutshell, the Liquidator's argument is that the valuation of the Santry Cross development in the company accounts was excessive; it overstated the net assets of the company, it should have been valued downwards and the net asset value of the company would have been reduced accordingly.

65. The second property development was at Eden in Blackrock, County Cork. The company had developed this property through Pierse Developments Blackrock Limited, a joint venture development company between the company and Firestone Developments Limited to develop the latter's residential developments site in Blackrock County Cork. By late 2006 Firestone indicated that it no longer wished to continue with the project. Its interest was bought out by the company for €8m.

66. As at 30th April, 2009 only 256 units out of a planned 623 units had been completed. Of these 256 units 95 units had been the subject of a block purchase agreement between the company and Liberty Asset Management. The sales value of this purchase contract was €36m. However in December 2008 Liberty indicated that it no longer wished to proceed with the purchase and it was released from the contract on payment of a compensation sum of €7.5m.

67. The Liquidator's argument is that the fact that Liberty Asset Management was withdrawing from the project should have sent alarm bells ringing for the directors. It should have been clear that the value of the units in this development was falling. However despite this the respondents applied a yield factor of 4.5% to the forecasted rental value of the entire 110 units. As a result of this forecast the respondents then capitalised the value of the development at €28m. The Liquidator was of the view that the Eden project was capitalised at a value in the accounts which was too high, that it overstated the net assets of the company and that the actions of the directors in this regard were not responsible.

68. The third development property was Carrickmines. This property development consisted of 337 residential units and a significant retail development. The company established a company called Carrickmines Manor Limited in 2005 as a joint venture with Redquartz Boundary Limited to develop the site. As of 30th April, 2009 the company had developed 255 units of the total development. By September 2009 the joint venture partner had been placed in liquidation.

69. Again, the Liquidator's complaint against the directors is that the valuation attributed to this development was excessive.

70. Thus the essential argument of the Liquidator is that all three properties were overvalued in the companies accounts; therefore the net asset value of the company was overstated and the accounts did not present a true and accurate reflection of the company's actual financial position and the directors were not acting responsibly in relation to these matters.

71. Again however it is clear that, on this issue - just as on the previous issues - the essential compliant of the Liquidator appears to be the accounting treatment of certain assets of the company.

72. The Liquidator's position in this regard is rejected by the directors. Mr. Pierse states in his affidavit (para. 13) that the valuation given to those properties by the company was arrived at by the company's internal valuation unit headed by John McNally, an experienced and eminent professional valuer. Moreover the directors were of the view that whilst there was widespread agreement throughout 2008 and 2009 that the Irish property market was in decline there were differing views as to the extent of such decline. Mr. Pierse also states that, in his view, the Sherry Fitzgerald valuations used by the Liquidator which were completed in May 2011 were simply "wise after the event" and had the benefit of hindsight.

73. Mr. Duggan, in his affidavit, again highlighted the role and professional experience of John McNally as head of property development in the company.

74. In addition Mr. Duggan and other directors make the point that the accounting treatment of these properties and their valuations were approved by the auditors.

75. Moreover Mr. Duggan stated in his affidavit (para. 66) that in relation to Eden Developments in Blackrock the company did take a significant impairment charge of €11m. in respect of this development.

76. Mr. Duggan also stated that the asset valuations were based on internal professional advice received by the board which in turn was backed up by wide ranging external advice and approved by the auditors.

77. The essential point made by the Liquidator in his replying affidavit is that the estimates used for arriving at these valuations were unrealistic and aggressive and served to inflate the true value of the properties. However this view is based on the Sherry Fitzgerald report rather than the Liquidator's own assessment as he clearly is not an expert in this area. The Court is then presented with the issue of internal expert valuations at the time they were done in 2008 and 2009 and an external expert valuation carried out years after the event in 2011 with the benefit of hindsight. In addition I have had regard to the significant fact that the treatment of these valuations were approved by the auditors in the accounts.

78. Moreover it is also clear that the properties were written down to some extent. Therefore the issue which arises is whether the write- down was sufficient. Again this boils down to a question of the valuations given to the properties at the time and the auditor's approval of such valuations in the accounts. This leads to a consideration of the auditor's report on the accounts.

Matter of emphasis issue

79. Mr. Coyle, in his second affidavit, takes issue with the argument of the respondents that the valuations on the properties were endorsed by the company's auditors, KPMG. In this regard he says *"I say and believe that there is a subtle but real difference in the stance taken by an auditor in giving a clear/unqualified auditor's report and one in which the auditor recognising the significance of the matter draws the attention of the reader to the issue by way of a "matter of emphasis" note in the auditor's report. Far from endorsing the position taken by the directors who are primarily responsible for the accounts, the auditor in such circumstances is distancing himself from the judgements made by the directors. The auditor in such circumstances is signalling to the reader the materiality of the issue and placing greater onus on the reader to be mindful in interpreting the accounts"*.

80. However Mr. Kieran Duggan in response to this, filed a second affidavit and also retained an expert accountant, Mr. Sean Murray. Mr. Murray swore an affidavit on behalf of Mr. Duggan, the fourth named respondent in this matter. Mr. Murray is a chartered accountant and his affidavit evidence was, in essence, an expert report on this "emphasis of matter" issue.

81. Mr. Murray states at para. 3 of his report as follows

> *"KPMG in their capacity as auditors to Pierce Contracting reported on their independent auditor's report for the year ended 30th April, 2009 on 25th September, 2009. The 2009 financial statements were approved by the directors on 25th September, 2009. KPMG in their independent auditor's report issued their audit opinion on a "true and fair view" of the financial statements without qualification (i.e. a "clean" audit report).*
>
> *Having given their opinion on the "true and fair view" KPMG added an additional paragraph entitled*
>
> *"Emphasis of matter – valuation of property – related assets, availability of financing and going concern",*
>
> *in which they drew the attention of users of the auditors report to uncertainties affecting the carrying value of certain assets. In so doing, KPMG were reporting in accordance with the international standards on auditing (UK and Ireland) and specifically in accordance with ISA (UK and Ireland) 700 "The Auditor's report on financial statements" (ISA 700).*
>
> *Simon Coyle in his affidavit states*
>
> *1. that he believed there is a subtle but real difference in a clear/unqualified audit and one containing a "emphasis of matter" and*
>
> *2. the auditor in such circumstances is distancing himself/herself from the judgment made by the directors.*
>
> *I disagree with both such affirmations on the part of Simon Coyle as such opinions as expressed by him are contrary to generally accepted auditing practice as regards audit reporting and are specifically not in accordance with the then relevant standard with respect to audit reporting i.e. ISA 700.*
>
> *Paragraph 30 of ISA (UK and Ireland) 700 states as follows:*
>
> *"In certain circumstances an auditor's report may be modified by adding an emphasis of matter paragraph to highlight a matter affecting the financial statements which is included in a note to the financial statements that more extensively discusses the matter. The addition of such an "emphasis of matter" paragraph does not affect the auditor's opinion. The paragraph would preferably be included after the opinion paragraph and would ordinarily refer to the fact that the auditor's opinion is not qualified in this respect".*

82. Mr. Murray then comments as follows

"As the above extract from ISA (UK and Ireland) 700 clarifies

1. The "emphasis of matter" paragraph is to highlight a matter included in a note to the financial statement that more extensively discusses the matter

2. The addition of such a paragraph does not affect the auditor's opinion

3. [It] is included after the opinion paragraph to reflect the fact that the auditor's opinion is not qualified.

Arising from the above it is submitted that there cannot be any legitimate endeavour on the part of the auditor, including an emphasis of matter paragraph in the auditor's report, to "distance himself" from the judgment made by the directors".

Paragraph 32 – 5 of ISA 700 states

"An unqualified opinion indicates that the auditor considers that appropriate estimates and disclosures relating to significant uncertainties are made in the financial statements. It remains unqualified notwithstanding the inclusion of an "emphasis of matter" paragraph describing a significant uncertainty".

83. *Arising from the above, it is clear that KPMG were satisfied that appropriate estimates and disclosures relating to the uncertainties with respect to property related assets outlined in the relevant notes to the financial statements were appropriate. If the reporting auditors were of the opinion that any of the estimates or disclosures with respect to the uncertainties identified in the specified notes to the financial statements were not appropriate, a qualified opinion would have ensued. In this regard para. 32-6 of ISA 700 states*

"When the auditor concludes that the estimate of the outcome of a significant uncertainty is materially misstated or that the disclosure relating to it is inadequate, the auditor issues a qualified opinion".

Accordingly there is no basis for Simon Coyle's view suggesting either

(1) A subtle but real difference between a clean audit report and a clean audit report containing an "emphasis of matter" paragraph or

(2) [that] the auditors are seeking to distance themselves from the judgment made by the directors."

84. Mr Murray then concludes

"For the reasons previously stated by me, the incorporation of an "emphasis of matter" paragraph in an audit report does not affect the auditor's opinion and further such unqualified opinion indicates the auditor was satisfied that appropriate estimates/disclosures were made in the financial statements."

85. In relation to the Marino revaluation Mr. Murray also commented as follows

"The uplift to which Simon Coyle refers to arose as a result of a change in accounting policy and such change was informed by the necessity to ensure the application of uniform accounting policies across the group. In response to Mr. Duggan's assertion that such change in accounting policy was at the request of the auditors, Simon Coyle states that he has been unable to find any evidence of this request from the company's auditors. I have no such evidence either. However in the preparation of consolidated financial statements, Generally Accepted Accounting Policies (GAAP) require the application of consistent accounting policies across all companies in the group i.e. uniform accounting policies. It further follows that as KPMG make no reference to this matter whatsoever in their auditor's report, they were satisfied that the change in accounting policy was appropriate and the adjustments arising from such change were properly reflected in the financial statements".

"…Accordingly Simon Coyle's expression of suggested peculiarity attaching to the change in accounting policy is devoid of any sustainable basis".

86. Mr. Murray then also considers Mr. Coyle's statements in relation to the consistency of property valuations and he states

"With respect to the auditors, it would border on recklessness on their part if they did not consider whether an impairment charge was necessary in circumstances where there was a change in accounting policy giving rise to an uplift in the valuation of "fair value" in respect of the property concerned".

87. Having considered all the affidavit evidence and submissions on this part, I am satisfied that the Liquidator's concerns on this issue are also unfounded. The valuations on all properties were reviewed and approved by the company's auditors. The Respondents were entitled to rely on their auditors, on this matter. I am satisfied that, on this issue also, the directors acted responsibly.

The Fifth Issue - that the respondents had an over- reliance on the contracting side of the business and therefore overstated its prospects.

88. The fifth issue for which the applicant seeks to contend that the respondents were not responsible in their conduct of the business as directors was that they placed too great a reliance on the civil engineering side of the business to generate profits to reduce the debts in the company as a whole (which debts had accumulated from the property development side of the business).

89. The applicant notes the fact that the company undertook an extensive exercise with a view to splitting the company into two divisions namely civil contracting and property investment. The applicant was of the view that because the property investment side of the business was so significantly challenged and because the civil/ contracting side of the business was also difficult, he believed that this exercise was questionable. Indeed the applicant states that, in his view, it was evident that the respondents were aware that the property side of the business was so significantly challenged that it would result in the failure of the group if it was not isolated. He also submits that the level of earnings on the civil/contracting side of the business would not have been sufficient to discharge the level of creditors which it built up in the company as a whole. In this regard the applicant notes that one of the principal requirements of the company was to ensure that it had an appropriate bond in place given by the company's insurance underwriters. In order to ensure that it had such a bond the net assets of the group had to be in excess of €50m. for 2009 and €40m.

for 2010. The Liquidator's view was that if the respondents had recognised that inter- company loans were not recoverable, if they had taken write-downs of certain loans and taken a more realistic approach to the valuation of its property development investments, that the group would have failed to obtain the requisite insurance bond for a number of assignments which it won in 2008/2009 and the respondents would have been obliged to recognise the insolvency of the company at a much earlier time. The Liquidator was of the view that if the respondents had ordered the company to cease trading based on the financial information to 30th April 2009, the group would not have incurred losses of €24.5m. in the year to 30th April 2010 when the group's actual turnover was €144m. compared to the budget of €259m.

90. The response of Mr. Gerard Pierse is that he believes that the position adopted by the Liquidator in this regard is "somewhat simplistic". He noted that the backlog of the company's overdue creditors including subcontractors was reduced from €16.6m. to approximately €8.5m. in the year prior to the commencement of the liquidation (although he notes that fresh liabilities were also accrued). However he emphasised that the reduction in balances owing to creditors and subcontractors during this period was an important priority for the company and was part of the company's recovery strategy. Mr. Pierse also stated that another important aspect of the company's recovery strategy was to win new contracts particularly in the area of state contracts and public private partnerships and that the company obtained significant contracts (including Schools Bundles 1 and 2 and the NRA service station contracts) during this time. He also says that the profits and returns on these projects should have been far greater than they were, because such contracts and work in progress thereon was lost when the company entered into liquidation.

91. Moreover Mr. Pierse emphasised that the company believed until the middle of 2010 that it was likely to recoup €25m. from its debt litigation brought against Gannon Developments. Ultimately the failure of Gannon Developments to pay over this sum was the immediate cause of the liquidation. But Mr. Pierse stated that if Gannon Developments had paid over even the settlement amount then the receipt of the funds would have allowed the company to finish the contracts then in progress which would have generated further profits thus further strengthening its financial position and enabling it to win further contracts. Thus a positive domino effect would have occurred. In fact a negative domino effect occurred because the monies were not paid over.

92. It is also of great significance (as Mr. Kieran Duggan points out in his affidavit) that in early 2009 when the company commissioned its report from KPMG in relation to its financial affairs, that, following consideration of that report, Bank of Ireland agreed to advance substantial facilities of approximately €150m. to enable the company to carry out P.P.P. projects which it had won and which were projected to be profitable. The report was also given to Allianz who provided the company's insurance bonds and continued to do so on foot of this report. Moreover in July 2009 Bank of Ireland also renewed the company's overdraft facility. Moreover in October 2009 Bank of Ireland funded the NRA PPP project and in July 2010 NIBC (a German development bank) and the European Investment Bank provided funding (jointly with the Bank of Ireland) to fund Schools Bundle 2 which involved contract work for the company of approximately €50m. In those circumstances it is difficult to see on what basis the Liquidator says that directors acting responsibly should have liquidated the company.

93. Any assessment of the actions of a director of a company who is accused of not acting responsibly must be considered in the round. The court must have regard to all the positive factors which might permit a board of directors to make a commercial decision that a company could survive and also must have regard to the negative factors which might persuade a board that a company might not survive. However loans of approximately €150m. by Bank of Ireland to enable a company carry out two major private public partnership projects which it had won and which were projected to be very profitable would clearly be significant factors in any director's assessment as to whether to carry on. The fact that legal advice was obtained to the effect that a debt of €25m. from Gannon Developments would be recovered is another major factor.

94. Mr. Duggan also states in his replying affidavit that although there was a minimum net worth clause in the bond facility with Allianz and, whilst this was an important matter, his view was that it was not the board's main concern. He stated that the company's relationship with Allianz was very strong and that "*I believe that if necessary they would alter the terms of the bond facility. In addition due to the downturn in the level of contracting business, the level of bonding required was also dropping and this would also have assisted in any real negotiation of the minimum network covenant with Allianz. Furthermore Allianz were a party to both KPMG reports and therefore understood the company's trading position and balance sheet.*"

95. Therefore I am of the view that the arguments put forward by the Liquidator on the fifth issue that the directors were not "responsible" in their management of the company also fail. In my view in regard to all of the above the directors did act responsibly in their stewardship of the company in its final years.

Conclusions

96. Having considered all the affidavits and exhibits, the legal submissions and other submissions made in court, I am of the view that the respondents in this matter have acted responsibly in the conduct of their roles as directors of the company. I say this for the following reasons:

> 1. The central allegation in the case made by the Liquidator is that although the directors put the company into liquidation in September 2010 they should have done so approximately one year earlier - at some time during 2009.
>
> 2. It is therefore necessary to look at what actions were taken by the directors during the relevant period. In particular in my view it is reasonable to examine the actions of the directors between September 2008 – after the collapse of Lehman Brothers in the United States and the collapse of the Irish banks in Ireland- and the time the company was put into liquidation (in September 2010).
>
> 3. It is clear that from this time – and indeed for some time beforehand that the property market was slowing. However before September 2008 there were many reputable economists and policy makers who were of the view that the property market was in for a soft landing rather than a property crash. Whilst we know with the benefit of hindsight that they were completely wrong, nevertheless it was not an unreasonable position for the directors of the company to take. Moreover property is a cyclical business and the directors clearly saw some clouds on the horizon. For this reason they ceased purchasing sites in 2005 and ceased any further building on sites from in or about 2007/2008.
>
> 4. It is also clear that from 2008 onwards and indeed for some time before that sales of property units at property developments funded and constructed by the company were slowing down. After 2008 sales of such units more or less stopped altogether. The directors of the company did what any responsible directors would do. They cut costs and overheads. They took reductions in salaries and pensions. They did whatever they could to reduce the overheads of the company and to bring the overheads in line with the revenues. In addition they reduced creditors whenever possible and agreed with creditors on a "pay when paid" approach.

5. In addition – and this is, in my view, a very significant fact – members of the board of directors put in over €10m. of their own funds into the company. This was an extraordinary act on their part and one which was not required. Nevertheless they put in their own funds and it is a clear sign not only of the view they took that the company would survive but also of their sense of responsibility as directors. In my opinion such an act is the very essence of taking responsibility as a director for the proper conduct of the company.

6. Another important fact in this case is that the company was owed approximately €40m. However 50% of this sum was due from one creditor Gannon Developments. The directors of the company had taken legal advice from a reputable legal firm (A & L Goodbody) that it had a good chance of success in its litigation against Gannon Developments in recovering at least €25m. Subsequently the proceedings were settled for €13m. The company settled it at this level to ensure a quick payment to assist cash flow. Again this was a responsible decision. The evidence before the court was that if this payment had been made the company would have survived as it would have caused a positive domino effect and enabled it to obtain more jobs, create more profits and survive. However NAMA intervened and indicated that the debt would not be paid. This was the act which precipitated an application for examinership and subsequently an application for a liquidation. However it was not unreasonable for the directors to continue to assume that this debt would be paid.

7. It is also a significant feature of this case that the Bank of Ireland advanced funds to the company in the sum of €150m. for the completion of public private partnership projects in which the firm was involved. The evidence was that these projects were profitable.

8. Moreover it was not only Bank of Ireland who were prepared to advance funds but indeed The European Investment Bank and a German Development Bank who were prepared to advance funds in 2010.

9. In addition the company was successful and continued to be successful in being awarded public private partnership contracts. The evidence was that these contracts were profitable. They contributed to the cash flow of the company and they allowed the company some breathing space and also allowed the company to pay off its creditors.

10. The first allegation against the directors relates to the accounting treatment of the inter- company loan taken out in 2004. The auditors in this case clearly approved this arrangement in the company's audited accounts. I do not see any basis on which the directors could be held not to be responsible when the auditors of the company approved this arrangement.

11. The next issue about which the Liquidator takes issue is the treatment of inter- company loans to UK subsidiaries in the accounts. Inter-company loans were written off in the accounts. Any further treatment of these loans in the accounts was clearly approved by the auditors. There is no reason in my view, why directors of a company acting responsibly should seek to reject or overrule auditor's treatment of such matters in the accounts.

12. The third issue is the revaluation upwards of Marino. Again however I reject the Liquidator's submissions in this regards. There is some evidence before the court that this revaluation took place to reflect a revaluation methodology elsewhere in the company and therefore to ensure that all properties were revalued in a similar manner. Again however it is an accounting issue and in my view the directors cannot be held to be not responsible simply because they did not agree with an accounting treatment of a particular issue.

13. The fourth issue was in relation to the possible overvaluation of a number of property developments which were assets of the company. Again however I do not believe the Liquidator's submissions on this issue are well founded. As stated above the evidence was that the company employed a reputable professional valuer. In addition this valuer also took advice and counsel from outside valuers. Moreover these valuations were approved by the auditors. Whilst one can produce a valuation from another valuer some years after the event to establish that the valuations taken earlier were aggressive this in my view is classic "hindsight" thinking. The directors are entitled to rely on their internal valuer's external valuers and auditors in such circumstances. I do not believe that any of their actions in this regard were irresponsible.

14. On the fifth issue- that the directors should have realised that the profits from the civil/ contracting side of the business would not be sufficient to cover the losses of the property development side of the business, again- I am of the view that the Liquidator's submissions are not well- founded. The directors were entitled to make these commercial judgements. They acted responsibly.

97. I am also satisfied in the light of the above that there is no other reason why it would be just and equitable to make a restriction order against the Respondents.

98. In all the circumstances for the reasons set out above I am of the view that the Liquidator's application for restriction under s.150 should be dismissed.