Neutral Citation Number: [2014] IEHC 86

THE HIGH COURT

[2013 No. 501 COS]

IN THE MATTER OF CAMDEN STREET INVESTMENTS LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2012

IN THE MATTER OF CAMDEN STREET TAVERNS LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2012

IN THE MATTER OF

CAMDEN STREET PROPERTIES LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2012

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 28th day of February, 2014.

1. This judgment is given on the application pursuant to s. 24 of the Companies (Amendment) Act 1990, by Mr. Neil Hughes ("the Examiner") as examiner of each of the companies named in the title for confirmation of proposals for a scheme of arrangement relating to each of the companies. Initially, the application was opposed by the secured creditor of all three companies upon the ground of unfair prejudice to it. Subsequent to the initial hearing, there was a commercial settlement with the secured creditor and modifications proposed to the scheme. Also, regrettably, an issue arose in relation to a breach by the Examiner of his duties to the Court. Both these matters necessitated additional hearings and the Court reserved its decision. It is necessary to set out in some detail the facts and events which give rise to this decision.

Background

2. On 5th November, 2013, Camden Street Taverns Ltd. (CST) petitioned for the appointment of Mr. Neil Hughes as examiner of CST and as examiner of two related companies; Camden Street Investments Ltd. (CSI) and Camden Street Properties Ltd. (CSP). CSI is the only shareholder of each of CST and CSP and all three will be collectively referred to as the 'Companies'.

3. CST operates a public house known as 'Flannery's' in Camden Street, Dublin. CSP owns adjacent properties, part of which is used as a beer garden for Flannery's. CSI's activity is the management of its subsidiary companies.

4. The insolvency of each of the Companies at the time of presentation of the petition was principally by reason of an admitted inability to repay loans which had then been called in by Vanguard Property Finance Ltd. ("Vanguard") a private equity fund. The liability of the Companies to Vanguard arose out of loans obtained by CSI from Bank of Scotland Ireland (BOSI) in connection with the purchase of Flannery's and the adjacent property in November, 2008. The original loans were in the order of €13 million. The amount due to Vanguard by each of the Companies is in the order of €11 million.

5. In November 2012, CSI was notified by BOSI that the loan had been transferred to Vanguard and the formal transfer appears to have been completed about 11th February, 2013. The Companies never chose to do business with Vanguard.

6. On 24th September, 2013, Vanguard, then owed in excess of €11 million by the Companies, demanded repayment of the loans. The Companies immediately commenced plenary proceedings and obtained an interim injunction restraining the appointment of a receiver. There was subsequently a disputed interlocutory hearing and on 5th November, 2013 ([2013] IEHC 478, Cross J.) delivered judgment refusing the application for an interlocutory injunction. The reasons included non-disclosure by the plaintiffs at the interim application stage.

7. On 5th November, 2013, at an *ex parte* hearing following presentation of the petition, the Court appointed Mr. Hughes as interim examiner of each of the Companies and gave the usual directions for the advertisement and hearing of the petition. A copy of the judgment of Cross J. was made available to the Court.

8. There then followed a significant exchange of affidavits between the Companies and Vanguard and a hotly contested petition hearing. Relations between Vanguard and the Companies had totally broken down. The Companies had never chosen to do business with Vanguard whom they believed had purchased their loans and related security over Flannery's and the adjacent properties at a significant discount and were seeking to realise same and make a profit. Many matters were in dispute and are not relevant in this judgment. However, the fact of the bitter dispute is relevant. The background to the strength of Vanguard's opposition to the appointment of an examiner was that it believed, prior to September 2013, that the Companies were working with it towards a consensual sale of Flannery's Pub and also the non-disclosure to the Court in the plenary proceeding. Vanguard contended that it had received an offer from the Mangan Group (subject to due diligence etc.) for the purchase of Flannery's. Mr. Berg, the deponent on behalf of Vanguard, disclosed in the course of the affidavits that the potential sale to the Mangan Group was at "a level of approximately €8.5m (without taking into account the value of the adjacent site at 7, 8 and 8a Camden Street)". One of the grounds upon which Vanguard objected to the appointment of an examiner was that a scheme of arrangement that would only ever be capable of passing an "unfair prejudice" test if it was one which would secure for Vanguard at least the amount of the Mangan Group offer, and by implication, that this was not achievable in a scheme which would also give the Companies a reasonable prospect of survival as going concerns.

9. Notwithstanding the objections made, for the reasons then set out, principally relating to the evidence of the reasonable prospect of survival of the Companies as going concerns and the position of approximately 39 employees, the Court appointed Mr. Hughes as examiner of CST pursuant to s. 2 of the Companies (Amendment) Act 1990, and to CSI and CSP as related companies pursuant to s. 4 of the 1990 Act.

10. By reason of the position of Vanguard as secured creditor, the order appointing the Examiner was only made in circumstances where the Examiner (who was satisfied by reasons of arrangements reached with the petitioners in relation to discharge of his remuneration, costs and expenses) gave to the Court an undertaking that in the event he did not obtain approval for a scheme of arrangement, he would not seek to have any remuneration, costs or expenses discharged out of the property of the Companies. This

was for the purpose of avoiding any potential prejudice alleged on behalf of Vanguard by reason of the priority afforded to the expenses of examinership in s. 29 of the 1990 Act. The order appointing the Examiner also provided that he should not issue any s. 10 certificate without either the consent in writing of Vanguard or leave of the Court. Vanguard applied to the Court for a direction pursuant to s. 21 of the 1990 Act for the appointment of a committee of creditors and the Examiner indicated he was willing to appoint such a committee. In the circumstances, the Court made no order. The Examiner did appoint a committee of creditors upon which both Vanguard and the Revenue Commissioners were represented.

11. At the hearing of the petition, the Court had before it a report from Mr. Hughes as interim Examiner. Mr. Hughes is an experienced examiner who has been appointed by the High Court as examiner in many cases. In that report, he set out for the Court the manner in which he would propose seeking investments with a view to preparing proposals for his scheme of arrangement and stated, inter alia, that he would ensure that "a transparent and competitive investment process is undertaken which should generate the most appropriate investment to firstly secure the future of the Companies, and secondly to ensure that no creditor is unfairly prejudiced in any Scheme of Arrangement that I may formulate". The Court relied on that stated intention in making its decision to appoint Mr. Hughes as Examiner.

12. Mr. Hughes also indicated in his interim report that he had obtained in recent time a valuation from CBRE and indicated that this would assist him in formulating any proposals relating to the Vanguard debt, and added "however, it is clear that the valuation will be a guide only and that the robust investment process I envisage will determine what the true value of the Companies is and therefore what a fair return to the creditors of the Companies might be".

13. The matter was next listed before the Court on 19th December, 2013, when, on the basis of a report dated 17th December, 2013, and affidavit of 18th December, 2013, an application was made and granted for the extension of time for the delivery of the Examiner's report pursuant to s. 18(3) until 16th January, 2014. The timeline indicated by the examiner for receipt of investment proposals was 11th December, 2013. In his report of 17th December, 2013, he indicated that he had received four proposals by that date; convened a meeting with the Board of directors on the morning of 12th December, 2013, and canvassed the views of the Board regarding the proposals in the light of specific criteria set out in the information memorandum. Further, that "following the conclusion of the Board meeting and following some discussion with certain of the interested parties, I identified a preferred investor consortium. I wrote to other interested parties informing them that they were not preferred investors".

14. The Examiner also told the Court in his report on that date in relation to the requirement for any proposals he would formulate to deal with the debt owed by the Companies to Vanguard "I can confirm to the Court that the proposal from the preferred investment consortium provides for a sum payable to Vanguard which is substantially in excess of the open market 'Red Book' valuation placed on the property by CBRE".

15. The Court, in reliance upon the Report then made to it by the Examiner and the apparent progress being made towards a scheme of arrangement, granted the extension of time. The Court did not seek at that stage either the identification of the "preferred investor consortium" nor the amount of the CBRE valuation or proposed investment.

16. The matter was again before the Court on 16th January, 2014, and the Examiner, in his report dated 14th January, 2014, stated to the Court that it remained the position that "the proposal from the preferred investment consortium provides for a sum payable to Vanguard which is substantially in excess of the open market Red Book valuation placed on the property by CBRE in the opening days of the examination".

Section 18 Report

17. On 5th February, 2014, the Examiner presented his s. 18 report recommending proposals for a scheme of arrangement for CST, CSI and CSP. Vanguard and the Revenue Commissioners were on notice of this and it was immediately indicated that confirmation of the scheme would be opposed by Vanguard. The Revenue Commissioners supported confirmation of the scheme. Directions were given for the exchange of affidavits and 14th February, 2014, fixed as the hearing date.

18. The proposals were based upon an investment agreement entered into between Mr. Paul Clinton and the Companies in accordance with which, subject only to sanction from the Court, Mr. Clinton was to acquire the entire issued share capital of CSI in consideration of €1 and to invest in CSI by way of non-interest bearing loan note sum of €7,099,999. CSI in turn was to make a loan in the sum of €6,084,077.54 to CST by way of non-interest bearing loan note and to CSP the sum of €1,015,922.46 by way of non-interest bearing loan note. Under the proposals, the super preferential creditor was to be paid in full, the preferential creditors of each of the Companies to be paid in full, albeit 80% on a deferred basis, and the unsecured trade creditors to be paid in full, with 90% thereof on a deferred basis and there was provision for other creditors. Vanguard, as secured creditor, was to receive from CST the sum of €6,084,714.29; from CSP the sum of €1,014,285.71 and from CSI €1,000. In aggregate, it was to receive €7.1 million from the three Companies. This equated to the investment from Mr. Clinton. The balance of the scheme payments were to be paid out of cash flow from future trading of CST. An estimated cash flow was included.

19. The Examiner, in the s. 18 report, clearly anticipated objection from Vanguard to the scheme and explained to the Court in some detail the reasons for which he considered that confirmation of the scheme of arrangement would give each of the Companies a reasonable prospect of survival as a going concern, and also why it would not be unfairly prejudicial to Vanguard, having regard to the amount proposed to be paid to it. The total debt due to Vanguard was in the order of €11 million and it was to be paid €7.1 million under the scheme.

20. There is not and was not at any point in time during the s. 24 hearing any dispute in relation to the evidence adduced in support of the proposition that confirmation of the scheme of arrangement would give each of the Companies a reasonable prospect of survival as a going concern. The historic EBIDTA returns, the average weekly turnover during the period of examination and the exhibited cash flows of CST all indicate that it has a reasonable prospect of survival as a going concern, and as a consequence, CSI and CSP.

21. The Examiner, at the time of the s. 18 report, was clearly aware that the principal issue which would arise at the s. 24 confirmation hearing was whether or not the proposals for the scheme of arrangement, insofar as they related to Vanguard as the secured creditor of each of the three Companies, would or would not be considered by the Court to be unfairly prejudicial to the interests of Vanguard as a secured creditor.

22. Section 24(4)(c)(ii) of the 1990 Act precludes the Court from confirming any proposal for a scheme of arrangement unless the Court is satisfied that "the proposals are not unfairly prejudicial to the interests of any interested party". The Examiner was aware that he had to satisfy the Court that these proposals were not unfairly prejudicial to the interests of Vanguard.

23. The Examiner exhibited in that context with the s. 18 report the valuation he had obtained from CBRE at the outset which valued Flannery's at €6 million and the adjacent CSP property at €1 million giving a total of €7 million. He then states at pp. 16 to 17 of his report:

> "The valuation was carried out to provide a guide as to the level of dividend that would be required in order to ensure that the Secured Creditor was treated fairly in this case . . . I am satisfied that the figure of €7m represented the open market value of the premises on the date of my appointment as examiner.
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> However, the CBRE valuation was not the decisive factor in determining what would represent a fair treatment of the Secured Creditor under any Proposals I might formulate. Ultimately, a valuation is simply an opinion of value on a given day from someone who has expertise in a particular sector. The true value can only be determined by testing the market in a fair, open and transparent process, governed by strict timelines. Accordingly, I wish to now turn to the examinership investment process that I conducted."

24. The Examiner then set out in his report the process conducted by him which included, *inter alia*, the receipt of four indicative investment proposals by 11th December, 2013; the Board of directors meeting held on the morning of 12th December over which he presided as Chairman, and at p. 19 states that subsequent to that meeting and following consultation with his legal advisors he "identified two parties as preferred investors". He then identifies the two preferred investors as being "Mr Paul Clinton and Mr Tom Anderson". He explains that in the three weeks running up to the signing of an investment agreement he exhorted the parties to resolve all outstanding issues to achieve the best result possible and that, ultimately, "Mr Anderson withdrew from the process leaving Mr Clinton as the sole investor as identified in the proposals". The Examiner then explains to the Court (as the issue had been raised at a meeting of the Committee of Creditors) why he rejected the two further investment proposals received by him, one of which came from Vanguard and the other from the Mangan Group, the latter of which had indicated an investment in the range €9 million to €10 million. The reasons for rejection by the Examiner are no longer relevant to any issue in this judgment. It was relevant to the issue of unfair prejudice that the Examiner had rejected two proposals which Vanguard contended were in excess of the investment then agreed to by Mr. Clinton.

25. The Examiner, at p. 21 of his report, then, under a heading of 'The Preferred Proposal', having identified the preferred investor as Mr. Clinton, stated to the Court as follows:

> "The preferred investor set out a detailed 49-page proposal which included comprehensive details of his background and experience, letters of support from 16 members of staff together with details of the plans for the future development of the public house and adjacent site. The plan also included reference to the further prospects of job creation based on the architectural plans for the development of the site which in turn would lead to increased capacity on busy nights.
>
> Critically, the proposal included unequivocal proof of funding at a level that seemed clear to me would provide for the survival of the Companies and not unfairly prejudice any creditor taking into account the valuation of the premises and the subsequent testing of that valuation by way of the investment process that I had just conducted.
>
> . . ."

The 49-page proposal from the preferred investor identified as Mr Clinton was not exhibited.

26. Mr. Berg, on 10th February, 2014, swore an affidavit setting out the basis upon which Vanguard opposed confirmation of the scheme. He set out the facts upon which Vanguard contended that the proposals were unfairly prejudicial to it as secured creditor. Firstly, he exhibited valuations from three further valuers of the secured assets obtained by Vanguard: a valuation from Younge Auctioneers in the sum of €10.6 million including the adjoining site; a valuation from Morrissey's for Flannery's in the sum of €6.75 million (or €7.5 million if vendor finance were used) and a valuation from Kelly Walsh of the adjoining site in the sum of €1.5 million.

27. Mr. Berg also referred to the offers made by Vanguard itself and the Mangan Group and contended that they demonstrated that the market would pay a lot higher than the €7.1million on offer in the proposals and expressed a belief at para. 14 that "it is inconceivable that a proper and fair, competitive process could have yielded as low an offer as that being advanced by the Examiner".

28. In support of the above contention, Mr. Berg expressly stated at para. 15 of his affidavit that "Vanguard is very concerned that the CBRE valuation (if not the Report itself) may have been disclosed to or otherwise made available to the investor in advance of his bid. Vanguard's concerns in this regard arise in part from the description given to Mr. Clinton's bid at page 21 of the Report and, in particular, the reference to the bid containing letters of support from 16 members of staff".

29. Mr. Berg, in his affidavit, also challenged the process followed by the Examiner and, *inter alia*, at para. 25, made the point that the proposals received by the Examiner had not been exhibited and contended that the Court should be shown the documentation.

30. The Examiner swore a further affidavit in response to Mr. Berg's affidavit. He rejected the criticisms made by Mr. Berg and under a heading of 'Investment Process', set out for the Court, in greater detail than had previously been done in his s. 18 report the investment process followed by him. He referred to the complete breakdown of relationship between Vanguard and the Companies and also disharmony within the Board itself by particular reference to Mr. Anderson who was a beneficial shareholder of 25% of the company and then stated at paras. 8 and 9:

> "8. Therefore, I took the view from the outset that the investment process would have to be rigid in nature with strict criteria in the Information Memorandum and stringent adherence to timelines. I took the view that if I stepped outside this approach, the examinership could unravel very swiftly. An example of this would have been to initiate side discussions with any party, following receipt of the investment proposals or allowing other preferential treatment such as allowing parties to mend their hand or alter their proposals after the deadline. I believe that there was a very real risk of being accused of favouritism in that scenario.
>
> 9. I decided that the integrity of the process depended on me making a judgment call regarding the preferred investor based solely on the evidence that was before me following the deadline given to all twenty six investors. It was on this evidence alone that the decision was made, initially to prefer Mr Clinton and Mr Anderson jointly and ultimately just Mr Clinton following Mr Anderson's withdrawal."

31. The Examiner, at para. 20 of his affidavit, then deals with Mr. Clinton's proposal and averred:

> "20. Firstly for the avoidance of any doubt I wish to confirm that the valuation of the premises was not furnished by me to Mr Clinton. Secondly, there is absolutely no attempt to conceal that Mr Clinton previously provided mezzanine finance to certain of the directors.
>
> . . .
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> 22. As set out in my report pursuant to section 18 . . . Mr Clinton's proposal included plans for the future development of the public house and adjacent site. The plan also included reference to the further prospects of job creation based on the architectural plans for the development of the site which in turn would lead to increased capacity on busy nights.
>
> . . .
>
> I beg to refer to a copy of Mr. Clinton's plans for the business which form part of his investment proposal upon which is marked with the letters 'NH6' . . ."

The exhibit is architectural plans attached to a letter dated 5th December, 2013, from Dempsey Architects to the Examiner's firm. This letter and plans form part of the Clinton Dolan investment proposal, later referred to in this judgment.

32. There were further affidavits sworn in advance of the hearing, principally relating to the underlying basis upon which CBRE and Morrissey's had carried out their valuations, and in particular, to adjustments made to EBITDA figures by the former. There was also an affidavit from a Mr. Courtney on behalf of the Mangan Group in relation to the rejection of its bid and availability of funding. None of this is now directly relevant to the Court's decision by reason of the intervening events.

The Initial Section 24 Hearing

33. The primary issue in dispute between the parties was whether the Examiner, on the evidence before the Court, could satisfy the Court as he was required to do by s. 24(4)(c)(ii) of the 1990 Act, that the proposals were not unfairly prejudicial to the interests of Vanguard as secured creditor. Whilst the affidavits sworn by Mr. Berg on behalf of Vanguard had raised a number of issues in relation to the process followed by the Examiner, counsel for the Examiner submitted to the Court that as Vanguard had not sought to cross-examine the Examiner that the Court should not have regard to those criticisms.

34. The primary submission made by counsel on behalf of the Examiner in favour of the proposition that the proposals were not unfairly prejudicial to Vanguard was that the Examiner had conducted an open and fair process by which he sought investment and that the true test of the market value of the property was the amount of the investment which he had been able to secure following the testing of the market by the process followed. Counsel submitted to the Court that, as acknowledged in the reports of the valuers, there had been few sales of similar properties in the recent past; that insofar as there were sales disclosed for public houses, none were of the order of €6 million (being the value placed by CBRE on the public house) and that the true test of the market value was what the Examiner had been able to achieve by the open and fair process undertaken by him.

35. Counsel for the Companies supported the submissions of Counsel for the Examiner and the Revenue Commissioners also supported confirmation of the scheme.

36. Counsel for Vanguard, submitted *inter alia*, that the Court should not accept the process undertaken by the Examiner as a true test of market value of the properties. He drew attention to the earlier reports from the Examiner in which he had told the Court that the proposal from the preferred investment consortium provides for a sum payable to Vanguard which is "substantially in excess of the open market (Red Book) evaluation placed on the property by CBRE", whereas the proposals would only give Vanguard marginally more i.e. €7.1 million, or €100,000 in excess of the valuation of €7 million. He also referred to many of the averments of Mr. Berg, some of which are reproduced in this judgment in relation to the alleged unsatisfactory nature of the investment process undertaken and an alleged connection between Mr. Clinton and the existing directors/shareholders.

37. There were also submissions made in relation to an issue raised by the Court as to whether the Court did or did not have jurisdiction to approve the proposals in the form of a single scheme of arrangement which purported to relate to all three Companies. Counsel for the Examiner submitted that in his experience, this had been done in other examinerships but also acknowledged that in other instances, the Court had insisted upon separate schemes for each of the relevant companies.

38. At the end of the s. 24 hearing, the Court indicated that it was reserving its judgment and:

> (i) The Court, having regard to the submissions made on behalf of Vanguard, requested and was given the document which had been referred to by the Examiner in his reports and affidavits as being a 49-page investment proposal from the preferred investor identified as Mr. Paul Clinton. The document was furnished to the Court with the agreement of Vanguard without the necessity of disclosure to Vanguard consistent with the practice of disclosure to the Court in the course of examinerships of documents with commercially sensitive information.
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> (ii) The Court referred to its jurisdiction to modify proposals and indicated that as it was reserving its decision that it was not too late for the relevant parties to reconsider the proposed investment and scheme, but indicated that this would have to be done promptly and that if there were to be any application to modify the proposals, this would have to be done by the following Tuesday.

Post-Section 24 Hearing

39. To the absolute astonishment of the Court, the document handed into Court at the end of the s. 24 hearing was not, as it had understood from the s. 18 report, affidavits of the Examiner and submissions made, an investment proposal from Mr. Paul Clinton but, rather, was a joint investment proposal from Mr. Paul Clinton and Mr. Colin Dolan. Mr. Dolan is one of the three existing directors of each of the Companies and one of the shareholders of CSI. The document is entitled 'The Clinton & Dolan Investment Proposal'. The document states it is prepared for the Examiner and the High Court. The document states that Mr. Clinton will act as "lead investor" and that Mr. Dolan was to be the lead operator for Flannery's Bar. It states that Mr. Clinton and Mr. Dolan are the only directors and shareholders in this bid with "a 25% (Colin Dolan) and 75% (Paul Clinton) shareholding". The proposal states that Mr. Clinton and Mr. Dolan "have allocated funds to cover the scheme for creditors and the cost of the examination". It specifies that the secured creditor would be paid €7.02 million and specifies percentage amounts to be paid to the other creditors.

40. At p. 12, under the heading of 'Investment Offer', the document states:

"After careful consideration, a review of circumstances and a belief in the future potential of Flannery's Bar, Colin Dolan and Paul Clinton would like to submit an offer for €7.02m. They would also like to show proof of funds of €10m for which an additional investment of €2.25m would be used to complete upgrade of first floor, as intended, and development of Phase 2 of the plans set out for the adjoining properties and associated costs."

The proof of funds attached is from a bank confirming that Mr. Clinton has in excess of €10m on deposit with them.

41. The investment proposal also refers to attached letters of support from staff. Those letters are individual letters in different terms. All refer to support for and happiness with the current owners and management of Flannery's. Not one letter makes any reference to Mr. Paul Clinton. The document also includes as Appendix F the letter of 5th December, 2013, from Dempsey Architects and attached architectural plans, an extract from which is exhibited in the affidavit of the Examiner of 12th February, 2014.

42. The Court considered that the joint investment proposal was not easily reconcilable with certain parts of the affidavits and reports of the Examiner to the Court. These related to matters which were objectively material to the issues in dispute and relevant to the Court's determination as to whether or not the proposals of the Examiner were unfairly prejudicial to Vanguard.

43. The Court took the unusual step of issuing a direction on 18th February, 2014, which is appended to this judgment and which the Registrar furnished to the solicitors for each of the parties appearing at the s. 24 hearing. The matter was listed in accordance with the direction for 2.00pm on Wednesday 19th February, 2014.

44. The Registrar was then informed, late on the evening of Tuesday 18th February, 2014, that a commercial settlement had been reached between the relevant parties in dispute and that the Examiner wished to put before the Court on Wednesday 19th February, 2014, modified proposals. The affidavit of the Examiner exhibiting the modified proposals makes no reference to any issue raised in the Court's direction of 18th February, 2014.

Hearing on 18th February 2014

45. The Examiner put before the Court modified proposals arising out of the commercial settlement between the Companies, Mr. Clinton and Vanguard. The proposed modifications in broad terms are:

(i) The investment from Mr. Clinton is increased to €7,358,915;

(ii) the loan from CSI to CST is increased to €7.1 million;

(iii) the loan from CSI to CSP is to be €1,636.75;

(iv) Vanguard is to receive the following payments:

(a) from CSI €1,000 immediately;

(b) from CST €7,099,000 immediately;

(c) from CSP €1,500,000 payable by 27 equal monthly instalments in the sum of €50,000 each from 1st December, 2014, with a final payment of €150,000 payable on the first business day of March, 2017.

(v) Vanguard is to release its security on Flannery's Pub upon payment of the €7.1 million and to retain security on part of the adjoining premises owned by CSP until the final payment of the €1.5 million.

46. The Examiner also put before the Court amended cash flow statements indicating the ability of CST, through its projected trading, to pay the additional €50,000 per month from 1st December, 2014.

47. Vanguard, through its counsel, withdrew any objection to confirmation by the Court of the modified proposals. The Revenue Commissioners continued to support confirmation by the Court of the modified proposals.

48. The Court explained its concern about the apparent inconsistencies between the Clinton and Dolan Investment Proposal and certain parts of the reports of the Examiner and affidavits sworn by the Examiner, having referred to the relevant principles set out below. Counsel for the Examiner did not dispute the duties owed by the Examiner (and his lawyers) to the Court in accordance with those principles.

49. The Examiner then gave evidence and answered questions put to him by the Court. In summary, his evidence was to the following effect. The Examiner confirmed that the 'Clinton & Dolan Investment Proposal' handed into Court at the end of the s. 24 hearing was the document to which he had referred in his s. 18 report and affidavits as the investment proposal from Mr. Clinton. He confirmed that he had nowhere in his reports and affidavits told the Court that this was a joint investment proposal with Mr. Dolan. He initially attempted to justify the exclusion of any reference to Mr. Dolan by reason of the reference in the joint proposal to Mr. Clinton as the "lead investor". He also referred to the fact that the proof of funding related to Mr. Clinton alone. He acknowledged, however, that the joint investment proposal indicated that Mr. Dolan was to have a 25% interest in the bid.

50. The Examiner explained to the Court that after receipt of the joint proposal and the three other proposals on 11th December, 2013, there was the Board meeting on 12th December, 2013, referred to in his reports. He said that in the course of that Board meeting, it was disclosed that Mr. Clinton and Mr. Anderson, who had made a separate investment proposal, would work together and that this was the basis upon which matters moved forward and to which he had referred as the "investor consortium" and that Mr. Dolan then dropped out of the picture as an investor. He also told the Court that he did not appreciate the significance of Mr. Dolan being a joint investor. At no point did he indicate to the Court that he had forgotten that the initial investment proposal received from Mr. Clinton on 11th December, 2013, was, in fact, a joint investment proposal with Mr. Dolan.

51. The Examiner told the Court that the CBRE valuation which he had obtained at the commencement of the examinership had been paid for by the Companies and that the directors, including Mr. Dolan, were aware of the content of the report. He confirmed that Mr. Dolan was therefore aware of the content of the report when he and Mr. Clinton made the joint investment proposal on 11th December, 2013, to him. When asked by the Court to explain his averment at para. 20 of his affidavit of 12th February, 2014, in response to the concern expressed by Mr. Berg on behalf of Vanguard that the CBRE valuation may have been disclosed to or

otherwise made available to Mr. Clinton in advance of his bid, the Examiner acknowledged that he should have disclosed to the Court that Mr. Dolan was aware of the valuation and that he may have disclosed it to Mr. Clinton. He apologised to the Court for this omission.

52. The Examiner told the Court that he did not intend to mislead the Court; that he understood the concern expressed by the Court and apologised to the Court. The Examiner confirmed that he had given a copy of the Clinton & Dolan Investment Proposal to his solicitors.

53. Vanguard requested a short opportunity to consider the detail of certain aspects of the modified proposals and some points of clarification sought by the Court in relation to same. The matter was adjourned to 21st February, 2014.

Hearing of 21st February, 2014
54. There was a further short hearing on 21st February, 2014, in relation to points of detail in the modified proposals, and subsequent thereto, the solicitors for the Examiner have furnished to the Registrar the modified proposals. Those modified proposals are dated 20th February, 2014, and are the final modified proposals which are the subject matter of this judgment.

55. The modified proposals provide at para. 16.2.3 for CSP and Vanguard to enter into a deed in relation to certain retained security and the release of other security. The solicitors for the respective parties were requested to agree the terms of that deed on or before 27th February, 2014, and to notify the Court of such agreement. The Court reserved its decision until Friday 28th February, 2014.

Duties of an Examiner
56. An examiner appointed pursuant to the 1990 Act is an officer of the Court. As such, he owes duties to the Court in addition to his express statutory obligations pursuant to the 1990 Act. Courtney *The Law of Companies* 3rd Ed., (Dublin, 2012) at p. 1432, para. 22.113 succinctly states those obligations:

> "In general terms, an examiner must act honestly, reasonably, and with the fullest candour to the court in respect of all matters which, on objective criteria, could be material."

57. Costello J. in his judgments in *Re Wogans (Drogheda) (No. 2)* (Unreported, High Court, 7th May, 1992) and the related case of *Re Wogans (Drogheda) (No. 3)* (Unreported, High Court, 9th February, 1993) explained in his 7th May, 1992, judgment, in the context, both of duties of good faith owed by directors and all those associated with applications (including their professional advisors) and of examiners that "[t]his duty involves an obligation to disclose all relevant facts material to the exercise by the Court of its discretion".

58. Costello J. also referred to the necessity for compliance with these obligations because, *inter alia*, the Court must depend to a considerable extent on the truth of what it is told by, in the first instance, the company, as petitioner, and thereafter, by an interim examiner or examiner. I respectfully agree. In many examinerships, unlike the present one, there may be no creditor or other interested party who takes an active role in opposing any aspect of the applications before the Court. The Court is required to make decisions, either at a petition hearing or subsequently on an application to confirm a scheme which may have an immediate and sometimes adverse impact on creditors, employees and others who are not present and not represented before the Court. The Court is absolutely dependent upon being able to rely upon petitioners, in the first instance, and thereafter, examiners and their professional advisors giving to the Court a full, frank and clear picture with all the objectively material or potentially material facts relevant to any decision which it is required to take, or to the exercise by it of its discretion.

59. The role or participation by an existing shareholder or director of a company to which an examiner has been appointed and which, by definition, is insolvent in any proposed investment and scheme of arrangement for which sanction is sought, is always and obviously objectively material. Clarke J., in an oft cited decision given in the High Court in December 2007, in *Re Traffic Group Ltd.* [2007] IEHC 445, [2008] 3 I.R. 253, stated at p. 260, paras. 5.4 and 5.5:

> "5.4 It is important to note that the Companies (Amendment) Act 1990 is not designed to immunise the principals or shareholders of a company from the consequences of the company concerned getting into financial difficulties. The value which shareholders may have in a company (whether they are involved in its management or not) may, in practice, be extinguished or greatly diminished by bad judgment in investing in the company in the first place, by bad management (either on the part of the investors themselves or those whom they trusted to run the company) or, indeed, plain bad luck. Whatever may be the cause, it does not seem to me that it is any part of the purpose of the Act to solve the difficulties of such shareholders howsoever those difficulties may have arisen. If the Act were so designed it might well give some truth to the verse penned at the time of the introduction of limited liability companies into our legal scheme, which suggested that such companies amounted to a conspiracy by gentlemen (and at the relevant time it almost always would have been gentlemen or those who claimed to be such) whereby they met together to decide by how much they would not pay their debts.
>
> 5.5 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."

60. The above principles set out by Clarke J. are well known to all experienced examiners and their advisors and regularly cited in this Court. Counsel for the Examiner, in the initial s. 24 hearing, referred to these principles and the judgment of Clarke J. in *Re Traffic Group* for the purpose of distinguishing the position of Mr. Clinton as an investor who was not a prior shareholder or director. Counsel also stated that in other judgments, albeit not in written form, Clarke J. had stated that where a proposed scheme was dependent on investment from existing shareholders, that the Court has to be particularly careful in considering the issue of unfair prejudice to creditors by reason of the above principles. There is no objection to an existing shareholder being an investor but it does give rise to special considerations.

61. The Court, having reconsidered all the evidence in this case, including the reports, affidavits and oral evidence of the Examiner, must conclude that the Examiner is in breach of his duties to act with fullest candour in putting all material matters before the Court in connection with this application for confirmation of his proposals for a scheme of arrangement. My conclusion is that he is in breach of his duty to the Court in failing to disclose to the Court that the original investment proposal from Mr. Clinton was, in fact, a joint investment proposal from Mr. Clinton and Mr. Dolan. Regrettably, I cannot accept that the Examiner, who is a very experienced

examiner and must be aware of the principles referred to above, did not appreciate the significance of Mr. Dolan, an existing shareholder of CSI and a director of all three Companies, having made a joint investment proposal with Mr. Clinton. Further, once the issue of Mr. Clinton's knowledge of the CBRE valuation was raised by Vanguard, it was clearly objectively material that Mr. Clinton had made a joint proposal with Mr. Dolan, who was aware of the CBRE valuation.

62. As accepted by the Examiner, he was also in breach of his duty to the Court in making the averment at para. 20 of his affidavit sworn on 12th February, 2014, as a response to the allegation made on behalf of Vanguard that the CBRE valuation had been disclosed to or made available directly or indirectly to Mr. Clinton in advance of his making his bid. It was a clear breach of the Examiner's duty to the Court on the facts then known to him simply to aver that he had not disclosed the valuation to Mr. Clinton (which he may not have done) without also telling the Court that Mr Dolan was aware of the valuation and that the bid was in fact a joint bid with Mr Dolan.

63. Counsel and solicitor acting for the Examiner must accept some responsibility for the above breaches of duty by the Examiner. Counsel has informed the Court that both he and the solicitor were furnished with a copy of the Clinton & Dolan Investment Proposal in December, 2013. However, counsel also states that when advising and settling the s. 18 report and affidavits relating to the s. 24 hearing, neither recalled that the investment proposal of Mr. Clinton was a joint proposal with Mr. Dolan. I accept that explanation from both counsel and solicitor. It is inconceivable that counsel and solicitor would have settled the affidavit of 12th February, 2012, (which they acknowledge they did) in its present form, nor could counsel have made the submissions in the form made at the s. 24 hearing if they had recalled that fact or were aware of the content of the joint investment proposal. Nevertheless, the Court must conclude that they failed to make appropriate enquiries of the Examiner prior to settling the affidavit, and in particular, para. 20 thereof, and in deciding upon the submissions which could properly be made to the Court in relation to the alleged unfair prejudice. Proper enquiries of the Examiner's knowledge of relevant facts, and in particular, as to whether the CBRE valuation had been directly or indirectly disclosed to Mr. Clinton should and probably would have elicited afresh the information in relation to the joint investment proposal and the obvious conclusion that Mr. Clinton was aware of the CBRE valuation when making the joint investment proposal with Mr. Dolan. The content of the joint investment proposal specifying, as it does, that Vanguard should be paid €7.02 million i.e. only €20,000 more than the CBRE valuation, which was known to the joint investors at the time of making the bid, was objectively material to the submissions subsequently made by counsel and the Court's decision on unfair prejudice.

Decision

64. The express statutory constraints on the Court confirming proposals for a scheme of arrangement are those set out in s. 24(4) and (4A) of the 1990 Act. The Examiner established that in respect of each company, CSI, CST and CSP, one class of creditors whose interests are impaired accepted the proposals and, hence, s. 24(4)(a) is satisfied. I am satisfied that there is no evidence to suggest that the sole or primary purpose of the proposals is the avoidance or payment of tax due, and hence, am not precluded by section 24(4)(b). As Vanguard is agreeable to the modified proposals, the Court can be satisfied for the purposes of s. 24(4)(c)that they are not unfairly prejudicial to its interests. Section 24(4)(A) does not arise on the facts.

65. The Court is given a wide discretion by s. 24(3) to confirm the proposals subject to modifications. The modifications made and outlined in this judgment are matters which, it appears to me, may properly be the subject of modification at a s. 24 hearing and are unlikely to adversely impact on any class of creditor not appearing or represented at the hearing. The additional sums payable to Vanguard by CST are provided for by the investment monies from Mr. Clinton. The additional sums payable by CSP on a deferred basis are not to commence until December, 2014. It is intended that those monies be paid out of the cash flow created by the trading in CST, presumably by way of inter-company loan. The revised cash flow statements indicate that the envisaged turnover and expenses of CST are such that it should be capable of providing for these additional payments. They are only to commence in December, 2014. By that date, the payments to preferential creditors and unsecured trade creditors under the scheme should be complete.

66. The Court is also satisfied that the modified proposals for the scheme of arrangement on the facts before the Court give to each of the Companies a reasonable prospect of survival as a going concern.

67. By reason of the finding made that the Examiner was in breach of his duties to the Court, it is necessary to consider whether notwithstanding the Court should now exercise its discretion to confirm his proposals for the scheme of arrangement. In reaching a decision on this issue, the principles set out by Clarke J. in *Re Traffic Group Ltd*. [2007] IEHC 445, [2008] 3 I.R. 253, are applicable. In that case, there had been a finding of a lack of candour by the petitioners in the lead up to the presentation of the petition. Nevertheless, it appears to me that the principles are equally applicable to a situation where the lack of candour is by the Examiner in the lead up to a s. 24 hearing. It is clear that these are matters which the Court should properly take into account in exercising its discretion under s. 24, but the underlying object of the 1990 Act must also be weighed in the balance. Clarke J. in *Re Traffic Group Ltd.*, having considered the earlier decisions of Costello J. in Re *Selukwe Ltd*. (Unreported, High Court, 20th December, 1991) and *Re Wogans (Drogheda) Ltd. (No. 2)* (Unreported, High Court, 7th May, 1992), then stated at p. 261, paras. 5.7 to 5.10:

> "5.7 It seems to me, therefore, that a court should lean in favour of approving a scheme where the enterprise, or a significant portion of it, and the jobs or a significant portion of them, are likely to be saved. That is not to say that the court should disregard any lack of candour or other wrongful actions. It does, however, seem to me that the court's approach to such matters should take into account the following.
>
> 5.8 Firstly it needs to be recognised that there may be cases where the wrongful actions of those involved in promoting the examinership are so serious that the court is left with no option but, on that ground alone, to decline to confirm a scheme which would otherwise be in order. It is necessary, as Costello J. pointed out in *Re Wogan's (Drogheda) Ltd.* (Unreported, High Court, Costello J., 7th May, 1992) to discourage highly wrongful behaviour.
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> . . .
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> 5.10 Where there is a high level of likelihood that the company can survive with a consequent saving of a significant enterprise and at least a significant proportion of the jobs at stake, the court should lean in favour of confirmation, especially if appropriate remedial measures can be put in place to mark and deal with the consequences of any lack of candour or other inappropriate action on the part of those charged with the management of the company."

68. On the facts herein, there is no question of remedial measures to mark or deal with the consequences of any lack of candour as it was not by those charged with the management of the company and the Examiner is not making any application to the Court in respect of his fees, costs and expenses.

69. As previously stated, even at a time when there was bitter disagreement with Vanguard in relation to the proposals for the scheme of arrangement, the one matter about which all were agreed was that there was a high likelihood that CST can survive and

be a profitable company with positive consequences for both CSI and CSP. The scheme is unusual in that the trade creditors are being paid in full albeit 80% on a deferred basis and there are approximately 39 employees. In accordance with the principles set out, in such circumstances, the Court should lean in favour of confirmation. I have determined that notwithstanding the findings made, the Court should exercise its discretion to confirm the proposals for the scheme of arrangement.

70. There is one final issue in relation to the form in which the proposals were put before the Court. This is not a matter of substance but is relevant to compliance with the requirements of the 1990 Act.

71. The proposals prepared by the Examiner are for a single scheme of arrangement, albeit that it does set out in separate and distinct provisions the treatment under the scheme for members of each of the three Companies and separately provides for the treatment of each class of creditor of each of the three Companies. All the general provisions of the scheme apply to each of the three Companies. It also sets out in the appendices the relevant information in relation to each company separately.

72. A consideration of the relevant provisions of the 1990 Act leads to a conclusion that the Act requires a separate and distinct scheme of arrangement for each company to which an examiner is appointed, whether pursuant to s. 2 or as a related company pursuant to s. 4, unless the Court has given a contrary direction in relation to a related company pursuant to section 4(4). This sub-section provides that an examiner appointed to two or more related companies shall have the same "powers and duties in relation to each company, taken separately, unless the court otherwise directs". No such contrary direction was given herein.

73. Section 18(1) of the 1990 Act, as amended, obliges the examiner to formulate proposals for "a scheme of arrangement in relation to the company concerned". This provision objectively appears to require an individual scheme for each company.

74. The requirement for an individual scheme for each company is emphasised also by the requirements of s. 22(1)(a), (2) and (3) in relation to the contents of proposals for a scheme of arrangement. Section 24 itself, and in particular, sub-sections (2), (5), (6), (7) and (10) are only consistent with a distinct and identifiable scheme relevant to an individual company.

75. Hence, I am satisfied that the Act of 1990 requires an individual scheme of arrangement in relation to each company. In this instance, whilst the Examiner has prepared proposals for a single scheme which, on its face, purports to relate to all three Companies, he has, in respect of each individual company, included in the scheme in distinct sections the individual matters required by s. 22 in respect of each individual company and set out separately and distinctly the treatment of each class of members and creditors of each Company. Hence, whilst the proposals have been drafted for a single scheme, it appears that the Court may properly treat them as proposals for three distinct schemes relating to each company with common provisions which apply to all three schemes. There is no ambiguity in the proposals, as drafted, as to which provisions apply to each individual company.

76. By reason of the very significant difficulties which have been overcome in these particularly difficult examinerships, I do not require a further modification so as to isolate and divide into three separate schemes the relevant provisions of the scheme applicable to each of the Companies. Hence, I propose, exceptionally, in this application confirming the proposals for each of the schemes applicable to each of the Companies as contained in the proposals for the modified scheme submitted by the Examiner and dated 20th February, 2014.

77. I will direct that the modified scheme be attached to the orders confirming the proposals in relation to each of the three Companies named in the title and direct pursuant to s. 24 (10) of the 1990 Act, that three copies of the order with the scheme scheduled be furnished to the Registrar of the Companies for registration on the Company Register relating to each of the Companies.

78. I wish, however, to point out that, the better practice, for an examiner appointed to several related companies is to prepare an individual scheme in relation to each company. Where he wishes to do otherwise, he should seek, in advance of preparation of the proposals, a direction from the Court pursuant to s. 4(4) of the 1990 Act.

Addendum
79. Subsequent to completion but prior to delivery of the above judgment the Examiner filed an affidavit exhibiting a further modified scheme dated 28th February 2014. The additional modifications principally address the deed of release in relation to CSP which is now agreed and do not require any change in the decision of the Court save in relation to the identification of the final modified scheme.

Relief
80. There will be an order pursuant to s. 24 of the Companies (Amendment) Act 1990, confirming the proposals for the schemes of arrangement in relation to each of Camden Street Investments Ltd., Camden Street Taverns Ltd. and Camden Street Properties Ltd. as contained in the modified proposals submitted by the Examiner dated 28th February, 2014, and to be appended to the order. Three copies of the order of the Court are to be furnished to the Registrar of Companies for registration on the Company Register relating to each of the said companies.

APPENDIX

THE HIGH COURT

2013 501 COS

IN THE MATTER OF

CAMDEN STREET INVESTMENTS LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2012

IN THE MATTER OF

CAMDEN STREET TAVERNS LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2012

IN THE MATTER OF

CAMDEN STREET PROPERTIES LIMITED

AND IN THE MATTER OF THE COMPANIES ACTS 1963-2012

Direction of Ms Justice Finlay Geoghegan given 18th February 2014

1. The Court requested and was furnished at the end of the s.24 hearing with the 49 page Investment Proposal stated to have been received by the Examiner from the preferred investor whom he had identified as Mr. Paul Clinton. The document had been referred to by the Examiner in his affidavits and reports to the Court but not exhibited.

2. This document was furnished to the Court with the agreement of Vanguard, the party opposing the confirmation of the proposals for the Scheme of Arrangement without the necessity of disclosure to Vanguard consistent with the practice of disclosing to the Court documents with commercial sensitive information in the course of Examinerships.

3. Regrettably the document furnished to the Court is not easily reconcilable with certain parts of the affidavits and reports of the Examiner to the Court. The Court needs explanations from the Examiner prior to making a decision on his application for confirmation of his proposals for a Scheme of Arrangement. Fair procedures dictate that this be done in the presence of Vanguard and other parties present at the s.24 hearing. Also, subject to the issue of redaction of any commercially sensitive information, the disclosure of the document furnished to the Court to Vanguard and the other parties and the re-listing of the s. 24 hearing.

4. Given the basis upon which the document was furnished to the Court, it is intended in the first instance, the Court would hold a hearing in the presence only of the Examiner, his solicitor and counsel and, if they wish to be present, Mr. Clinton and the other person named in the title to the Investment Proposal and any solicitor and counsel they may wish to retain for the purposes of hearing submissions as to what if any redactions should be made from the Investment Proposal to avoid unnecessary disclosure of commercially sensitive information prior to disclosure of the Investment Proposal to Vanguard, the Revenue Commissioners and the Companies who were represented at the s.24 hearing.

5. This direction is to be furnished by email to the Solicitors for all parties represented at the s.24 hearing. The Solicitor for the Examiner is to furnish it to Mr Clinton and the other person named in the title to the Investment Proposal.

6. The matter will be listed before the Court for the initial hearing referred to in paragraph 4 above at 2pm on Wednesday 19th February.