Neutral Citation Number: [2011] IEHC 494

THE HIGH COURT

2011 621 COS

IN THE MATTER OF MCSWEENEY DISPENSERS 1 LIMITED

AND IN THE MATTER OF THE COMPANIES (AMENDMENT) ACT 1990 (AS AMENDED)

AND IN THE MATTER OF

MCSWEENEY ASSETS GROUP HOLDINGS LIMITED

MCSWEENEY DISPENSERS 7 LIMITED

MCSWEENEY DISPENSERS 14 LIMITED

MCSWEENEY DISPENSERS 15 LIMITED

MCSWEENEY DISPENSERS 17 LIMITED

MCSWEENEY DISPENSERS 22 LIMITED

MCSWEENEY DISPENSERS 24 LIMITED

MCSWEENEY DISPENSERS 26 LIMITED

MCSWEENEDY GROUP LIMITED

KILCLEGGAN LIMITED

AS RELATED COMPANIES WITHIN THE MEANING OF SECTION 4(5) OF THE COMPANIES (AMENDMENT) ACT 1990 (AS AMENDED)

JUDGMENT of Mr. Justice Clarke delivered the 21st December, 2011

1. Introduction

1.1 On 26th October, 2011, a petition was presented seeking the appointment of an examiner to the above companies (collectively "McSweeney" or the "group"). For practical reasons, it was not possible to make the application for directions required by the Rules of the Superior Courts until the following day.

1.2 Therefore, on the 27th October, 2011, that directions motion was moved and as a result of a further application an interim examiner was appointed to McSweeney. Following exchanges of affidavits, the matter then returned before me for a substantive hearing of the petition on the 8th November, 2011, and after hearing almost two days of argument, I adjourned the matter on the 9th November, 2011, to consider my decision in the light of the evidence and the submissions of the parties present.

1.3 In substance, there was opposition to the appointment of an examiner only from Allied Irish Banks plc ("AIB"). In addition, I was satisfied that the formal proofs for the appointment of an examiner were established and that the only issue of substance on which it might have been appropriate to decline to appoint an examiner was the issue raised on behalf of AIB.

1.4 The issue of the appointment of an examiner, therefore, turned on the merits of the opposition of AIB. Having regard to the urgency of the matter, I reserved judgment for two days and delivered a ruling on the 11th November, 2011. On that occasion I indicated that I would, at a later stage, deliver a written judgment as to the reasons for concluding that an examiner should be appointed. This judgment is directed to that end. Given that the only issue of substance which arose stemmed from AIB's opposition, it is necessary to start by setting out the basis of that opposition.

2. The Opposition

2.1 While the opposition of AIB was put forward under a number of headings, each heading had, as its basis, an alternative put forward on behalf of AIB which derived from its stated intention to appoint what was described as a "trading receiver" to McSweeney. For reasons which I will analyse in a little more detail later in the course of this judgment, a number of features of the group were important to that opposition.

2.2 First, it was accepted by counsel on behalf of McSweeney, when moving the application for the appointment of an interim examiner, that it was unlikely that a scheme of arrangement could be put in place which did not write down, in some way, the liability of the group to AIB. Second, the petition was only presented in respect of some, but not all, of the companies which were originally within the group. The group operates principally as a series of pharmacies. It is proposed to allow a number of pharmacies to close and consequently the companies which operated those pharmacies were not the subject of an examinership application.

2.3 In addition, it was contended on behalf of AIB that the group had not been managed in the most efficient way possible. Furthermore, an issue of significant controversy was raised arising out of the fact that, in late 2007, a significant number of pharmacies previously owned by the group were sold in circumstances where €51.73m was realised. The manner in which those monies were applied is set out later in this judgment and is not a matter of dispute. However, on the basis that a significant amount of the money which derived from that sale had been used to benefit the shareholders or other ventures in which the shareholders had an interest, it was argued that there was now an obligation on the shareholders, if they wished to interfere with the amount owing to AIB, to make a significant contribution themselves. In addition, it should be noted that an indicative proposal had been made on behalf of the existing principal shareholder, Mr. Geert Hof, for the introduction of further funds in the context of a scheme of arrangement.

2.4 Against that background, AIB suggested that the principal purpose behind the examinership was to enable the existing shareholder to retain control of the company by means of a significant reduction in bank debt but in circumstances where the business had been badly run and significant capital extracted. It was argued that that was not an appropriate purpose for examinership. Before turning to the specifics of the issues raised, it is appropriate to set out a relatively brief history of the relevant facts.

3. The Facts

3.1 In 1987, Mr. Hof acquired Tohers The Chemists in Co. Sligo through McSweeney Asset Group Holding Limited, which is now the parent company for the wider McSweeney group of companies. From 1995, the group aggressively expanded increasing its portfolio from four premises to 21 by 1999. In 2003, the group was reorganised for the purposes of minimising audit, compliance and administration effort, to facilitate easier security on loans and to enable the pooling of cash within the group. Later, the group again expanded such that in the period between 2002 and 2006 a further ten shops were acquired.

3.2 In 2007 and 2008, two of the shareholders, who between them owned 50% of the shareholding in McSweeney, respectively retired from the group. As such, in order to reduce bank debt but also to buy back their shares, it was decided to dispose of a number of outlets. The units chosen were those which had reached maturity in terms of development, turnover and profitability. Each trading unit was then moved into an individual company and then in November 2007, the relevant companies were sold to Celesio for €51.73m. Messrs. Geert Hof and Patrick Durkin became the only shareholders of the remaining pharmacies within the group. According to an exhibit attached to an affidavit sworn by Mr. Durkin dated 8th November, 2011, the sale price was used in the following manner:

> (i.) €29.9m was paid to AIB to discharge existing bank debt;
>
> (ii.) €10.05m was used to redeem the shares of the two minority shareholders;
>
> (iii.) €5.8m was used to invest in other businesses (described as "Hof entities");
>
> (iv.) €3.63m was used to pay creditors and to provide working capital;
>
> (v.) €1,350,000 was paid out by way of dividend to Mr. Hof; and
>
> (vi.) €1m was paid for transaction fees.

The group also closed two other shops which were not profitable and Celesio separately bought two further retail pharmacies in Ireland from McSweeney. In June 2008, another pharmacy was sold to a different third party.

3.3 As noted at the time of the disposal, McSweeney discharged approximately €30m to AIB but it should also be recorded that McSweeney then took a new facility of €15m which was apportioned among different companies within the group as respectively borrowers and guarantors. Separately, an overdraft facility of €500,000 was provided by AIB to McSweeney. In consideration for both of those facilities, McSweeney charged the assets and undertaking of certain of its group companies to AIB. That security, given the fall in property prices, is now worth less and consequently McSweeney is in breach of its loan to value covenants to AIB. Negotiations took place between AIB and McSweeney with a view to negotiating the restructuring of the group's debt. As part of that process AIB requested and McSweeney agreed to the retention of Grant Thornton for the purposes of conducting an independent review of the group's business. In 2010, Mr. Hof offered AIB a personal guarantee covering the group's capital and interest payments for a two year period in return for a restructuring of McSweeney's debt. The offer has since lapsed and was neither accepted nor rejected by AIB.

3.4 On the 25th October, 2011, a meeting was held between Mr. Hof, Mr. Colin O'Brien and Mr. Kieran Wallace of KPMG, who had been advising the group in respect of its difficulties, and representatives of AIB. AIB were apprised of McSweeney's difficulties, including that its balance sheet needed restructuring, and were invited to indicate whether a consensual approach to the financial restructuring of the group was possible. When it was made clear that AIB would countenance neither a consensual approach in respect of any restructuring nor would any debt forgiveness be possible, the meeting terminated. Thereafter, the petition seeking the appointment of an examiner to each of the named companies within the group was presented to the court.

3.5 Before going on to the specific issues which arise, it is also of some importance to note the position of United Drug plc ("United Drug"). United Drug is a very significant creditor of the group which claims to have a retention of title in respect of goods supplied. Indeed, there was an initial problem in the examinership when, after the presentation of the petition, United Drug sought to take back some of the goods which were said to be the subject of a retention of title entitlement. However, that matter resolved itself and did not trouble the court.

3.6 It is, of course, the case that a number of pharmacy chains, particularly those built up during the boom years, have run into financial difficulties not least because of significant debt associated with acquisition or high rents agreed to be paid. In some cases pharmacies or chains of pharmacies have gone into receivership. In other cases, an examinership process has been approved by the court. United Drug states that it has experience of both. It is worthy of some note that the solicitor on behalf of United Drug indicated that it was United Drug's view that its chances of recovery of the monies owing to it were better under examinership than the sort of trading receivership which AIB wishes to put in place. That is an issue to which I will return.

4. The legal framework

4.1 In *Re Traffic Group Ltd.* [2008] 3 I.R. 253, at 260, I held that:

> "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."

I went on to hold that:

> "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."

These latter comments were later cited with approval by Kelly J. in *Missford Ltd t/a Residence Members Club v Companies Acts* [2010] IEHC 11.

4.2 In *In re Atlantic Magnetics Ltd. (In receivership)* [1993] 2 I.R. 561, at 573, Finlay C.J. expressly approved the approach adopted by Lardner J. in this Court which was to pose the question:

> "[…] does the evidence lead to the conclusion that in all the circumstances it appears worthwhile to order an investigation by the examiner into the company's affairs and see can it survive, there being some reasonable prospect of survival?"

4.3 This approach was described as "pragmatic" and followed by the Supreme Court in *In the matter of Gallium Limited* [2009] 2 ILRM 11 and again by Murray C.J. in In the matter of *Vantive Holdings* [2010] 2 ILRM 156, where he held that the approach to be adopted by the court was the following:

> "[…] the first step which a Court must take in examining an application for the appointment of an examiner is whether, on the evidence or material placed before it the Court it is satisfied that the company has a reasonable prospect of survival, as regards the whole or any part of its undertaking, as a going concern. A Court must be so satisfied before it has jurisdiction to take the further step so as to exercise its broader discretion whether, in all the relevant circumstances of the case, an examiner should be appointed. It is at this second step that the other factors, including those that are mentioned by Fennelly J. [in In re Gallium Ltd.], may be taken into account on their own. The general circumstances may of course be part of the factual matrix to which the Court has regard when deciding whether there is a reasonable expectation of survival."

4.4 The factors mentioned by Fennelly J. were in the following terms:-

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

4.5 The jurisprudence thus appears to make clear that the examinership regime does not have as its purpose the saving of shareholders from their unsuccessful investments; that said, the legislation is equally designed to prevent the interests of any single creditor being advanced above those of the creditors as a whole or indeed those of the other interested parties. In addition it is clear that a threshold jurisdictional issue arises as to whether the petitioner has established that the companies have a reasonable prospect of survival. If that matter is not established then the court cannot appoint an examiner. If that matter is established then the court can go on to consider a range of other factors which can have a bearing as to whether it is appropriate, on the facts of the case in question, to make the appointment. In those circumstances, it seems to me that it is appropriate to turn, first, to the question of whether the companies in this case have a reasonable prospect of survival.

5. Do the Companies have a Reasonable Prospect of Survival?

5.1 By the end of the hearing before me it did not seem to me that AIB seriously contested the proposition that McSweeney had a reasonable prospect of survival. It must be recalled that AIB criticises aspects of the management of McSweeney. Whether those criticisms are justified or not is an issue on which I express no view at this stage. However, if those criticisms be justified then it follows that the underlying business is capable of generating a higher degree of gross profit if it be managed more efficiently. As pointed out earlier, Grant Thornton was appointed to conduct an analysis of the business. That analysis suggests that the underlying pharmacy business is capable of generating a level of cash surplus although not one sufficient to meet and service the current level of debt. To the extent that an increased cash surplus might be anticipated from better management then any shortfall would, correspondingly, be reduced. It does not, it has to be said, appear likely that there is any realistic scenario on which the level of EBITDA could service the existing level of debt of McSweeney.

5.2 However, it is now clear that, at the level of principle, a scheme of arrangement can be approved which reduces the liability of a company to its secured creditors provided that the scheme is not unfairly prejudicial to those secured creditors (see the judgment of O'Donnell J. in *McInerney Homes Ltd v Cos Acts 1990* [2011] IESC 31). I saw no reason in principal why it would not be possible for an examiner to come up with a scheme of arrangement which would reduce the debt of AIB in a way which was not unfairly prejudicial to that bank, which addressed other aspects of the outgoings (including rent) and left the group in a state where it could reasonably be anticipated that it would generate a sufficient EBITDA to service whatever borrowings would remain. I was, therefore, satisfied that it had been established that McSweeney had a reasonable prospect for the survival of all or part of its undertaking as a going concern and that the threshold requirement had, therefore, been met.

5.3 Before leaving this topic I should also comment on the stated position of AIB in relation to the appointment of a so called trading receiver. It may not necessarily follow from the proposition that AIB intends to put in a trading receiver that AIB believes that McSweeney can survive as a going concern. As I pointed out in my judgment in In the matter of *Vantive Holdings* [2009] IEHC 409, banks might support an examinership because of a view that a scheme of arrangement might minimise their exposure to losses even though those measures might not result in a relevant company ultimately surviving. In the context of *Vantive*, I was concerned with whether it was appropriate to infer, from the neutral or positive position adopted by most of the banks in the case in question, that those banks believed that the Zoe Group had a reasonable prospect of survival. I pointed out that it was equally possible that the banks simply thought that the outcome of an examinership might lead to an increased recovery and thus a reduced shortfall. *Vantive* was, of course, concerned with a company whose assets were almost entirely made up of property. Somewhat different considerations may well apply in the case of a trading company.

5.4 It may well be that banks consider that the value of trading companies in the current economic situation are below the value that might reasonably be expected to pertain in a normally functioning market with adequate liquidity available to assist in the prudent purchase of such trading assets. In those circumstances, banks may well view it as being in their interests to allow companies to

continue to trade until such a time as the value of the companies concerned has increased and thus the exposure of the bank concerned to losses reduced. However, in the case of a relevant trading company it seems unlikely that a bank could reach such a view unless it felt that the trading company had some reasonable prospect of survival. It is possible that a bank might take the view that keeping a company going for a few years until such a time as its underlying property assets had improved in value, might be a strategy that could work to the bank's advantage. However, it seems unlikely that that equation could work out to the advantage of the bank unless the company were perceived as being likely to be able to trade at a level which would at least service the bank debt to a sufficient extent that it too did not increase in a way that would set at nought any increase in the value of its property. In those circumstances, it is reasonable to infer that the relevant bank must view the business as being likely to have some reasonable prospect of survival given that it is anticipated as being at least able to service its existing debt (in the sense of paying interest) and would, in the hands of a putative purchaser, be likely to be able to repay both principal and interest on a lesser debt.

5.5 If, on the other hand, what the bank concerned had in mind was the ultimate sale of the business as a going concern (when trading assets had returned to more normal values), then such a view would undoubtedly support the contention that the company concerned had a reasonable prospect of survival for its beneficial sale at some stage in the future when asset values had improved, and would be predicated on the company not only surviving until that future time but also looking like an attractive prospect to a potential purchaser who might not burden the company with the same level of debt as its existing shareholders.

5.6 All in all it seems unlikely (in the absence of special or unusual circumstances) that a bank would favour a trading receivership where the bank did not consider that the company had a reasonable prospect of survival. In the absence, on the facts of this case, of any obvious reason why AIB might consider a trading receivership while not considering that the companies had a reasonable prospect of survival, it seemed to me that AIB's stated intention offered support for the contention that McSweeney has a reasonable prospect of survival.

5.7 Having been satisfied that the threshold issue was met, it then seemed to me to be appropriate to next turn to the discretionary issues raised on behalf of AIB against the proposition that an examiner be appointed.

6. The Discretionary Issues

6.1 Much of the argument under this heading centred around the contention that the intention of Mr. Hof was to use (or from AIB's prospective, abuse) the examinership process to significantly write down secured debt while avoiding making a very significant further capital contribution himself to McSweeney's current shortfall (notwithstanding the fact that he, or companies associated with him, received significant payments out from McSweeney in the circumstances already described). It was correctly pointed out on behalf of AIB that the purpose of examinership is not to absolve shareholders from the consequences of a failed venture. I have, in particular, in a number of recent examinerships emphasised the importance of scrutinising schemes of arrangement where the only additional capital being introduced comes from the existing shareholders or persons or entities connected with them. In such cases it is important for the court to analyse with some care the extent to which the scheme as a whole is fair not only as and between the various categories of creditors but also between the creditors on the one hand and shareholders on the other. Such a scheme may well be unfair if the shareholders get to keep their company (and frequently retain additional financial benefits such as contracts of employment or director's fees which go with it) for the introduction of very limited additional capital in circumstances where the creditors are expected to take huge write downs. If the examiner in this case was to ultimately come up with a scheme of arrangement which was unfair on that basis then there can be little doubt but the scheme would not be confirmed.

6.2 However, it seems to be that the argument put forward by AIB concentrated far too much on the possibility of a potential scheme of arrangement being one in which Mr. Hof retained ownership of the company. I have no doubt that the examiner will properly and fully advertise for potential investment in McSweeney. There are other companies (either directly involved in the business of running pharmacies or in the pharmaceutical business in a general way) who may have an interest in acquiring individual pharmacies and who may regard it as sensible to investigate the possibility of investing in McSweeney. Obviously the extent to which any such company may regard the particular portfolio of pharmacies which are sought to be brought into the examinership process as representing a beneficial fit with their own business is a matter on which it is only possible to speculate. However, I should not rule out the possibility that there may be others out there who would consider the McSweeney business as providing synergies with their own business and to whom McSweeney may, therefore, appear to be an appropriate vehicle for investment. If, as AIB alleged, McSweeney has not been well managed then that fact may enhance the attraction to other industry investors who may feel that they will be able to bring their own expertise to improving the underlying profitability of the business.

6.3 It did not seem to me, therefore, that this case could be characterised as one in which it necessarily followed that the only likely or reasonable prospect for a successful scheme of arrangement would be one which led to the existing shareholders retaining the business whether on the basis of a modest further investment or otherwise. There seemed to me to be a real prospect that there might well be others out there who would be very interested in at least investigating the possibility of making an investment. Whether that turns out to be so or not will become clear in the course of the examinership process. However, at the stage of the appointment of an examiner, I am only concerned with reasonable prospects. On that basis, it seemed to me that those grounds of opposition relied on by AIB which focussed on the prospect of Mr. Hof retaining control, and the terms on which that might realistically be likely to be achieved, were not factors to which any great weight should be given at this stage for there were realistically many alternatives at least potentially still available. For example, questions were raised as to the absence of any evidence of the ability of Mr. Hof to make a very significant investment. However, Mr. Hof is not the only show in town. Proving that he might be able to make any particular level of investment is not, therefore, a necessary proof. What the court needs to be satisfied of is that there is some realistic prospect of an investor being prepared to put up enough money that could generate a scheme of arrangement which might arguably avoid any unfair prejudice. I was satisfied that that test was met.

6.4 The next set of grounds relied on by AIB concerned the contention that there was, in reality, no great difference between, on the one hand, a successful examinership and, on the other hand, the trading receivership which AIB proposed, insofar as both would secure broadly the same survival of enterprise and jobs which, as I pointed out in *In Re Traffic,* is the principal concern of the legislation. However, as has been pointed out in a number of the judgments to which reference has been made, part of the purpose of the examinership legislation is to prevent the single, large and secured creditor being necessarily enabled to arrange events in a way designed solely to suit its own interests. A debenture holder who has a charge over the entire assets of a company cannot, under the examinership legislation, use that fact to trump, in all circumstances, the interests of other creditors or stakeholders (see the comments of McCarthy J. in *In re Atlantic Magnetics Ltd. (In Receivership)* [1993] 2 I.R. 561, at 578-579). The problem with a debenture holder who has security over the entire undertaking and who is, thus, able to, in effect, take over the running of all of the business, is that such a creditor is perfectly entitled to take action (within the law) designed principally to meet its own advantage. While such a party cannot sell at an undervalue (without facing the risk of legal action) it can choose a time of selling best designed to meet its own interest. As pointed out by O'Donnell J. in *McInerney,* part of the benefit which such a debenture holder has is that it retains the flexibility to decide just how get the maximum repayment of its loan possible. That factor needs, as O'Donnell J. pointed

out, to be taken into account in assessing unfair prejudice where it is suggested that the liabilities of the secured creditor in question are to be crammed down. However, it also follows that such a secured creditor can, for example, determine the time of sale in a way best designed to meet its own interests.

6.5 To illustrate, I take a simple example. The current value of a company which has given full security over all its assets to its bank, might only be 75% of the relevant bank debt. The bank concerned might take the view that allowing the company to trade for a period of time might lead to an improvement in the value of the company. If, after (say) two years, the company had recovered in value to a position where its sale price might be expected to clear the bank debt, but no more, then the bank would be under no obligation to wait any longer, even if further improvements in value might be expected. Provided that the conditions for the exercise by the bank (or by a receiver) of the power of sale of the company's assets had arisen, and provided that the sale price achieved was reasonable in the circumstances prevailing at the time of the sale, then it is unlikely that the bank concerned or any receiver appointed by that bank could be criticised or subjected to legal process in relation to such a sale. However, the other creditors of the company might well suffer.

6.6 The difference between a trading receivership and a restructured company after the confirmation of a scheme of arrangement arising out of an examinership is that, in the trading receivership, the bank concerned will remain able to make decisions based solely on its own interests and to the exclusion of the interests of other creditors. Under a scheme of arrangement, and provided that that scheme is not unfairly prejudicial, the rights of all creditors are as per the scheme of arrangement. It does not necessarily follow that the rights of other creditors will not, therefore, be impaired in the context of the trading receivership as opposed to the position which those creditors might hope to achieve under a possible scheme of arrangement. It is in that context that the views of United Drug are of some importance. Given United Drug's experience of both trading receiverships and examinerships in this sector, it is appropriate to place some weight on its view that its interest (as a major creditor) would be best protected by an examinership.

6.7 It does not, of course, follow that it will be possible to put in place a scheme of arrangement which is fair to the secured bank creditor, but also leaves some or all of the other creditors in a better position than would pertain in the case of a trading receivership. However, that possibility cannot be ruled out. It follows that, while it may well be the case that a trading receivership would provide much the same protection for jobs and enterprise, it might not provide the same benefits to other creditors. In those circumstances, it did not seem to me that the alternative of a trading receivership should be necessarily preferred at this stage to the possibility of a beneficial scheme of arrangement. The time to assess those options is when the detail of a scheme of arrangement (if one can be secured) is available. On that basis, it seemed to me that the appropriate course of action was to appoint an examiner and see whether the examiner can come up with a scheme of arrangement which is beneficial to the other creditors but not unfairly prejudicial to AIB. It seemed to me that there is a reasonable prospect of such a scheme being produced but, of course, it is far from guaranteed. That does not mean that the examiner should not be given a chance to see if such a scheme can be put in place.

6.8 The final point made on behalf of AIB was that the existence of an examinership, having regard to the fact that some of the pharmacy companies in the original group are not intended to be put into examinership, is of itself prejudicial to AIB's interests. AIB is, of course, entitled to appoint receivers to those pharmacies and would be able to close or continue with the business of the pharmacies concerned as it thinks fit. As the companies which own the pharmacies in question are not in examinership, there is no barrier to AIB taking whatever action on foot of its security that it considers appropriate. If a scheme of arrangement if proposed, then it will, of course, be open to AIB to advance whatever argument it can concerning prejudice arising out of that scheme and the extent to which AIB would be deprived of the benefit of putting in a receiver by the confirmation of the scheme. The benefit of putting in a receiver will, of course, include whatever benefits can be established as flowing from the fact that that receiver would then have control, not only over the companies which are the subject of this examinership application, but the other companies which do not form part of same.

6.9 In that context, it seems to me that any disadvantage caused to AIB, by the fact that most of the companies would be in examinerhship but some of them will not, is short term and, in the overall scheme of things, potentially marginal compared with the other interests involved. In those circumstances, it seemed to me to be appropriate to appoint an examiner.

7. Conclusions

7.1 For those reasons, I was persuaded to appoint an examiner. It seemed to me that most of the issues raised by AIB are questions that can more properly be addressed if and when a scheme of arrangement is put forward. Nothing in this judgment should be taken as implying that any of the arguments put forward by AIB may not be legitimate matters to be considered in the context of any possible confirmation hearing.

7.2 While it doubtless does not need to be reemphasized, I should again note that the examiner will be expected to pursue all realistic lines of potential investment and not just those which may come from the existing shareholders. In that context, it is worth reminding all concerned that there have been some prominent examinerships in the recent past which were commenced at the instigation of the existing owners of the companies concerned on the anticipation that they might, by the injection of some additional capital, retain control of the companies concerned but where the diligence of the relevant examiner unearthed other investors willing to put up greater funding. That is the duty of examiners and I have no doubt but that the examiner in this case will fully meet his obligations. Even if, after such investigation, it turns out that there is no better offer on the table than that of Mr. Hoff, then any scheme of arrangement based on the further injection of capital from Mr. Hoff will require to be assessed as to its fairness, not only as and between the creditors, but also as and between the shareholders and the creditors. Those issues are best dealt with if and when a scheme of arrangement and its detail are actually before the Court.