Neutral Citation Number: [2009] IEHC 494

THE HIGH COURT

2009 381 COS

IN THE MATTER OF

TIVWAY LIMITED

IN EXAMINATON (UNDER THE COMPANIES (AMENDMENT) ACT 1990)

AND IN THE MATTER OF

JOHN J. FLEMING CONSTRUCTION COMPANY

IN EXAMINATION (UNDER THE COMPANIES (AMENDMENT) ACT 1990)

AND IN THE MATTER OF

J.J. FLEMING HOLDINGS

IN EXAMINATION (UNDER THE COMPANIES (AMENDMENT) ACT 1990

AND IN THE MATTER

OF THE COMPANIES ACTS 1963-2009

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 13th day of November, 2009

1. This matter comes before the court by way of an application under s. 24 of the Companies (Amendment) Act 1990 (hereinafter referred to as "the Act"), for confirmation of a Scheme of Arrangement in respect of each of the companies referred to in the title herein.

2. Section 24(4) of the Act provides that, *inter alia* -

> "The court shall not confirm any proposals -
>
> (a) unless at least one class of creditors whose interests or claims would be impaired by implementation of the proposals has accepted the proposals, or
>
> (b) if the sole or primary purpose of the proposals is the avoidance of payment of tax due, or
>
> (c) unless the court is satisfied that -
>
> (i) the proposals are fair and equitable in relation to any class of members or creditors that has not accepted the proposals and whose interests or claims would be impaired by implementation, and
>
> (ii) the proposals are not unfairly prejudicial to the interests of any interested party."

2. Between 12th and 13th October, 2009, the Examiner convened meetings of seven separate classes of creditors of Tivway Limited (hereinafter referred to as "*Tivway*"). The interests of the following classes of creditors of Tivway are impaired by the implementation of the proposals:-

(i) Secured Creditor

(ii) Contingent Secured Creditor

(iii) Connected Creditor

(iv) Unsecured Creditors

(v) Contingent Creditors

Although the meetings of the Secured Creditor, Contingent Secured Creditor and Connected Creditor did not have a quorum, the sole creditor in each of these classes was represented at the meeting. The representatives at the Contingent Secured Creditor and Connected Creditor class meetings voted in favour of the Scheme of Arrangement. ACC Bank plc. (hereinafter referred to as "ACC"), which was the only member of the Secured Creditor class, voted against the Scheme of Arrangement.

3. A majority in number representing a majority in value of the following classes voted in favour of the Scheme:-

(i) Unsecured Creditors

(ii) Contingent Creditors

4. Between 12th and 13th October, 2009, the Examiner convened meetings of eight separate classes of creditors of John J. Fleming Construction Company (hereinafter referred to as "*Construction*"). The interests of the following classes of creditors of Construction are impaired by the implementation of the proposals:-

(i) Secured Creditors

(ii) Connected Creditors

(iii) Unsecured Creditors

(iv) Contingent Creditors

(vi) Leasing Creditors

(vii) Litigation Creditors

There was no quorum at the meetings of the Leasing Creditors and Litigation Creditors.

5. A majority in number representing a majority in value of the following classes of impaired creditors voted in favour of the Scheme of Arrangement:-

(i) Secured Creditors

(ii) Contingent Creditors

(iii) Connected Creditors

6. Although it was classed as a Contingent Creditor, ACC argued that it should have been designated an Unsecured Creditor of the Company and cast its vote against the approval of the Scheme. Two hundred and ninety one votes were cast in favour of the Scheme and three votes - including that of ACC - were cast against. If ACC is regarded as properly belonging to the class of Unsecured Creditors, then the majority in value voted against the proposals, while the majority in number - almost 99% of the votes cast - voted in favour. If ACC does not belong to the class of Unsecured Creditors, then the Unsecured Creditors voted overwhelmingly in favour of the Scheme of Arrangement.

7. Between 12th and 13th October, 2009, the Examiner convened meetings of three separate classes of creditors of J.J. Fleming Holdings (hereinafter called "*Holdings*"). The interests of the following classes of creditors of *Holdings* are impaired by implementation of the proposals:-

(i) Contingent Creditors

(ii) Connected Creditors

(iii) Unsecured Creditors

8. A majority in number representing a majority in value of the following classes of impaired creditors voted in favour of the Scheme of Arrangement:-

(i) Contingent Creditors

(ii) Connected Creditors

ACC was classed as a Contingent Creditor, but, again, it argued that it should have been designated an Unsecured Creditor of the Company and cast its vote against approval of the Scheme. The only other member of the class of Unsecured Creditors - the Company's auditor - cast his vote in favour of the Scheme. If ACC is regarded as properly belonging to the class of Unsecured Creditors, then the majority in value voted against the proposals, while in terms of numbers, the members of the class were evenly divided. If ACC is not properly regarded as an Unsecured Creditor, then the entirety of this class voted in favour of the Scheme of Arrangement.

9. The position can therefore be summarised as follows:-

(a) In respect of *Tivway,* two classes of creditors whose interests are impaired have voted in favour of the Scheme;

(b) in respect of *Construction,* three, or - depending on the view adopted by the court regarding the classification of ACC - four classes of creditors whose interests are impaired have voted in favour of the Scheme;

(c) in respect of *Holdings*, two, or - depending on the view adopted by the court regarding the classification of ACC - three classes of creditors whose interests are impaired have voted in favour of the Scheme of Arrangement.

10. Accordingly, it is argued that the court has jurisdiction to approve and confirm the Scheme under s. 24 of the Act. Where the court has jurisdiction, it has a number of options. It can confirm the Scheme, it can confirm the Scheme with modification, or it can refuse to confirm the Scheme.

11. Where a class of members or creditors have not accepted the proposals and their interests would be impaired by the implementation, the court cannot confirm the proposals unless it is satisfied that the proposals are fair and equitable in relation to such class of members or creditors. (See s. 24(4)(c) of the Act).

12. In this case, ACC comes within the ambit of s. 24(4)(c) being a:

> *". . . class of members of creditors that has not accepted the proposals and whose interests or claims would be impaired by the implementation."*

The court has to determine whether the Scheme is fair and equitable in relation to ACC.

13. The Examiner has laid before the court a Scheme of Arrangement in respect of each of the companies and he urges the court to approved the Schemes. He is supported by the companies and all the creditors, with the exception of ACC.

14. I am satisfied that the court has jurisdiction to confirm the Schemes of Arrangement. Insofar as ACC opposes confirmation of the Schemes, the grounds upon which it is entitled to do so are set out in s. 25(1) of the Act, which provides *inter alia*:

> *"At a hearing under s. 25 in relation to the proposals, a member or credit whose interest or claim would be impaired by the proposals may object, in particular, to their confirmation by the court on any of the following grounds-*
>
> *(a) that there was some material irregularity at or in relation to a meeting to which s. 23 applies,*
>
> *(b) that acceptance of the proposals by the meeting was obtained by improper means,*
>
> *(c) that the proposals were put forward for an improper purpose,*
>
> *(d) that the proposals unfairly prejudiced the interests of the objector."*

15. ACC argues that they are unfairly prejudiced by the proposals and that the proposals were put forward for an improper purpose. ACC also argues that the proposals must, as a minimum, comply with the purpose of examinership as provided for in s. 2 of the Act, which includes the court being satisfied that there is a reasonable prospect of the survival of the Company and the whole or any part of its undertaking as a going concern. Since this is necessary at the time when the petition is presented, it must also be necessary to demonstrate that a Scheme in respect of which an examiner seeks the approval of the High Court will achieve this objective.

16. In support of this argument, ACC makes a number of points. In the case of *Tivway*, it argues that there is no reasonable prospect of survival as a going concern, as the Examiner's proposals contain no financing or injection of working capital. It says that Tivway will still be insolvent, even if the proposals are implemented, and that it will have no further ongoing trade, even if the proposals are implemented.

17. In the case of *Construction*, it argues that the proposals are designed to facilitate the Company's only profitable asset being sold, thereby leaving behind substantial liabilities in what is left of the Company, and that there is no investment being made in the Company. ACC argues that employment in the Company is not being maintained but is being transferred to Dunban Limited. There will be an orderly wind down of what remains of the Company and it argues that the business will not be maintained as a going concern.

18. So far as *Holdings* is concerned, ACC argues that this company does not constitute a going concern in the first instance. The only investment being made (a sum of €259,900) is being paid in return for the shares in Biomedy Ltd., being transferred out of the company, and that accordingly, there is no investment in the Company, but rather, the purchase of an asset. It also argues there is no prospect of survival of the Company.

19. ACC submits that in the Schemes, it is treated in a manner that is unfairly prejudicial and is not fair and equitable within the meaning of s. 24(4) of the Act, for the following reasons:

> (a) In *Tivway,* the proposals provide that ACC will be confined to its fixed charge and will have no recourse to its floating charge. There will be no dividend for ACC arising out its floating charge, whereas there will be a dividend for Unsecured Creditors.
>
> (b) In none of the three companies will members' rights be impaired, and in *Constructions* and *Holdings*, where the companies are unlimited liability companies, there is no contribution being made by the members to the debts of the companies, notwithstanding the companies' insolvency.
>
> (c) ACC is wrongly classified as a Contingent rather than an Unsecured Creditor in both *Construction* and *Holdings.*
>
> (d) ACC's treatment is far inferior to that of the Preferential Creditors who are to be paid in full.
>
> (e) ACC's guarantees, which had been taken from the companies whose members had unlimited liability, are now, by these proposals, rendered valueless.
>
> (f) The proposed payment from the "Residual Debt Fund" (as provided for at s. 5 of the Examiner's Explanatory Memorandum) are postponed for such a long period of time (until 31st March, 2020) and are so uncertain as to be virtually meaningless.

20. In short, ACC argues that it would be far better off if it was able to pursue the security provided to it by *Tivway, Construction* and *Holdings.* Mr. Kieran Wallace, a Chartered Accountant with considerable experience in examinership, has prepared a report on behalf of ACC in which he says that the potential recovery, based on the crystallisation of the floating charge held by ACC over the "Aldi" building, would be in the order of €7.5 million. The Scheme of Arrangement for *Tivway* does not compensate ACC for this loss and it argues that if the Scheme was confirmed by the court, ACC would lose its right to recover under the floating charge, as floating charges are extinguished under the *Tivway* Scheme.

21. ACC has a floating charge in *Tivway*. It argues that this charge is now crystallised as a result of demand for repayment of the debt and the appointment of a receiver on foot of its security. ACC argues that on a liquidation of *Tivway,* it would rank in priority to Anglo, which holds a fixed charge. ACC argues that Anglo is a Contingent Creditor of *Tivway* but is not in a position to enforce its security as no debt is presently owing by Tivway to ACC. It claims that the floating charge held by ACC is now fixed as a result of the crystallisation of the charge on foot of the demand for repayment, and that it could therefore have access to the "Aldi site" on foot of its security in order to recover monies due to it. In effect, ACC says that because of the crystallisation of its floating charge over the Aldi site, it leapfrogs the pre-existing fixed charge of Anglo. This is rejected by counsel for the Examiner, the companies and Anglo.

22. Counsel for Anglo informed the court that the Anglo fixed charge in *Tivway* was created on 19th June, 2006, and was

registered on 4th July, 2006. The ACC floating charge was created on 29th April, 2008, and was registered on 16th May, 2008. Counsel for Anglo argues that there cannot be any doubt but that the charge of Anglo is first in time as well as being a fixed security. He also argues that a floating charge cannot trump a fixed charge, particularly when it is behind it in time. Counsel for the companies supports this argument. In an affidavit sworn on 29th October, 2009, Mr. Robert Ole, a special assets manager employed by ACC, described how a floating charge held over the assets of *Tivway* extended to *Tivway's* interests in the Aldi site, and that this ranked second to a mortgage granted by *Tivway* to Anglo over the Aldi site. He argued that the first ranking security granted to Anglo secures only a contingent liability on foot of a guarantee granted by *Tivway* to Anglo in respect of liabilities of other group companies. He argued that on the basis of the proposals for a Scheme of Arrangement put forward by the Examiner, it appears that the guarantee has not been called in by Anglo and, accordingly, there is no money due by *Tivway* on the first ranking security, although there is a substantial contingent liability.

23. Mr. Kieran Wallace of KPMG, who provided an expert report for ACC, argued that as ACC's floating charge in *Tivway* has now crystallised, that on a liquidation of *Tivway,* ACC would rank in priority to Anglo who hold a fixed charge. He says that this arises as a result of Anglo being a Contingent Creditor of *Tivway,* but not being in a position to enforce its security as no debt is presently owning by *Tivway* to Anglo.

24. I have been referred to the case *Re Holidair Limited* [1994] 1 I.R. 416, in which the Supreme Court held that while a floating charge crystallises on the appointment of a receiver, it de-crystallises on the appointment of an examiner.

25. I do not accept the argument made by ACC that their charge has, in some way, obtained a priority over the fixed charge of Anglo.

26. The Examiner and others supporting the Schemes of Arrangement reject the argument of ACC that it is unfairly prejudiced. Counsel for the Examiner submitted that there was no suggestion at any stage by ACC that the acceptance of the Examiner's proposals at the various meetings called by him was obtained by improper means, and that appears to be so. It is not quite so clear that no suggestion was made by ACC that the Schemes of Arrangement were put forward by the Examiner for an improper purpose because ACC has argued that, in effect, there was an attempt to "cram down" the claims of the bank, and also, the Scheme effectively amounted to asset stripping. This latter claim is rejected by counsel for the Examiner.

27. Under the Schemes, the bank creditors, other than ACC, have entered into a Memorandum of Understanding to develop the integrated Sandyford site over an extended period in cooperation with a legacy business of *Construction's* undertaking which will continue to trade within *Construction* in the post-protection period. The banks which are currently funding the activities of *Construction* will continue to support the trade and undertaking of the development business remaining in the companies in the group into the future. This bank support is conditional on confirmation of the Scheme of Arrangement.

28. In order to put the arguments of the various parties in context, it is useful to set out some of the features of the Schemes as described in the Explanatory Memorandum of the Examiner. In the first place, there will be purchase of business assets by Dunban Limited. Dunban will purchase the following trading activities of the group, namely:

> (1) The third party contracting trade and trading assets of *Construction.*
>
> (2) The trade and trading assets of Vision.
>
> (3) The trade and trading assets of Fusion.
>
> (4) The shareholding of Biomedy Ltd., a subsidiary company of *Holdings*.
>
> (5) The consideration for the purchase of the above consists of the following:
>
> (i) Payment of a sum of €3,610,000 to *Construction* for the trade at (1) above, which monies will be used to discharge the cost of the examinership and provide a dividend pool for the creditors of *Construction*.
>
> (ii) Payment of a sum of €259,900 to *Holdings* for the shares in Biomedy Ltd., which monies will be used to provide a dividend pool for the creditors of *Holdings.* A nominal payment of €100 is to be paid to John and Noirin Fleming for the transfer of their shareholding in Biomedy Ltd. to Dunban Limited.
>
> (iii) Payment of a sum of €130,000 to *Tivway,* a subsidiary company of *Construction,* which monies will be used to provide a dividend pool for the creditors of *Tivway*.
>
> (iv) Transfer of the employment contracts of the majority of the employees of *Construction* to Dunban Ltd., which will eliminate statutory termination costs (estimated at €1 million) in *Construction* for those employees and preserve their employment in Dunban Limited.
>
> (6) In addition to the consideration at (5) above, the investor is providing for:
>
> (i) Working capital facilities in Dunban Ltd. to support the transitioned third party trades of *Construction,* Fusion and Vision, going forward.
>
> (ii) Payment of consideration to both Vision and Fusion for their trade and trading assets.
>
> (iii) Transfer of the employment contracts of the employees in Vision and Fusion to Dunban Ltd., which eliminates redundancy costs in those companies for those employees and preserves their employment in Dunban Limited.
>
> (iv) Transfer of the third party trading liabilities of Vision and Fusion to Dunban Limited.

29. The company structure of the group will remain largely the same, with only some amendments such as the sale of

shares in Biomedy Limited. The trades carried on in subsidiaries of *Holdings* and *Construction* are unaffected by the restructuring and will continue to trade as normal.

30. There will be a preservation of the legacy development's business of *Construction* in the post-protection period which will be facilitated by a management agreement, a cooperation agreement and bank support.

31. The Schemes involve the creation of a Residual Debt Fund in *Construction, Holdings* and *Tivway* to meet residual contingent liabilities.

32. The Schemes provide that it will take up to ten years to determine whether the inter-company accounts and investments in subsidiaries will have any value, as it is anticipated it will take this length of time for the orderly development and realisation of the property work in progress and inter-company balances in each company and the other companies in the group.

33. A critical feature of the Schemes is the way in which various creditors are categorised. ACC were deemed to be Contingent Creditors by the Examiner in *Holdings* and *Construction.* They objected to this categorisation and insisted on being regarded as an Unsecured Creditor. The Examiner explained in an affidavit how he separated the various creditors into different categories. He did so on the basis of a commonality of interest between the respective parties. He said that when categorising the trade creditors who had a trading relationship with the Company, and the related companies, and who held no security, they were designated as Unsecured Creditors. By contrast, if creditors held guarantees, they were denominated as Contingent Creditors. Where banks were classified as Contingent Creditors, the primary liability to those banks was that of another entity. The Examiner explained that the banks all had obtained security from that other entity which was the primary borrower. Where the primary borrower was in examinership, the banks, in addition to being included in the Contingent Creditor class on foot of a guarantee, were also in a Secured Creditor class in the Scheme of Arrangement of the primary borrower. He explained that that is the way in which ACC was treated. They were a Secured Creditor in respect of *Tivway* and they were regarded as a Contingent Creditor in respect of the two other companies.

34. ACC maintained it was not a Contingent Creditor of either *Holdings* or *Construction* and had been wrongly put in that category. It had guarantees from these companies. These guarantees could be called in and were contingent on a demand being made. But once the demand was made, the money was owing under the terms of the guarantee, and in those circumstances, the Company then became a debtor. Since these claims were made before the companies went into examinership, ACC argued that it was a creditor of both *Holdings* and *Construction* in the amount of approximately €21 million, and, as it does not have security from these companies in respect of that indebtedness, it is therefore an Unsecured Creditor.

35. Counsel for Anglo relies on the decisions of *Sovereign Life Assurance Co. v. Dodd* [1892] 2 Q.B. 573, and *Re Hawk Insurance Co. Ltd*. [2001] B.C.L.C. 480. He argues that the Examiner was correct in classifying creditors and classes of creditors into groups whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest, or who have a common consensus of their position. Anglo says that the fundamental difference between ACC and the other Unsecured Creditors is that the only right the other Unsecured Creditors have is to chase their own debts by suing the debtor. On the other hand, ACC has two rights: namely, the right to prove its security or, at its option, to sue the surety or a combination of both. Counsel for Anglo argues that the Examiner was entirely correct in refusing to treat ACC as an Unsecured Creditor.

36. In the *Sovereign Life Assurance Co*., case, the Court of Appeal considered what was meant by "a class" of creditors in a winding up. At p. 583, Bowen L.J. stated that the term "class" must, ". . . *be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest".* In the *Hawk Insurance Company* case, the court had to consider a Scheme of Arrangement and determine whether creditors fell into separate classes. It approached the issue by considering whether the rights of the various creditors were so dissimilar as to make it impossible that the creditors had been entitled to consult together with a view to their common interest.

37. In the Schemes of Arrangement, the Examiner has treated ACC the same as other bank creditors with guarantees. The rights of ACC are the same as the rights and interests of the other bank guarantee creditors. The fact that ACC does not agree with the other creditors within that classification does not mean that they do not have a commonality of interest. In an affidavit sworn on 29th October, 2009, the Examiner sets out his approach to the categorisation and treatment of creditors in each of the companies. He set out his reasoning as follows:-

> "7. I say and believe that in separating the various creditors of the Company and the Related Companies into different categories, this Deponent discerned a commonality of interest between the respective parties. For example, when categorising the trade creditors - who had a trading relationship with the Company and the Related Companies, and who held no security in respect of their liabilities and whom it was hoped will continue to do business with the Company and the Related Companies into the future - I denominated them as 'Unsecured Creditors'.
>
> 8. By contrast, if creditors held guarantees, I denominated them 'Contingent Creditors'. If banks were classified as Contingent Creditors, the primary liability to those banks was those of another entity. The banks all had obtained security from that other entity - the primary borrower. Where the primary borrower was in examinership, the banks, in addition to being included in the 'Contingent Creditors' class on foot of a guarantee, were also in a 'Secured Creditors' class in the Schemes of Arrangement of the primary borrower.
>
> 9. The purpose of the nomenclature which I adopted was to describe the key distinguishing features which were indicative of the commonality of interest between the members of each class. In naming the Contingent Creditors class, the contingency which I envisaged was the claim following the realisation of the secured asset in the primary borrower. In determining the treatment of the Unsecured Creditors and the Contingent Creditors in the Schemes of Arrangement, I had regard to the fact that in my opinion, in a liquidation of the related companies, neither the Contingent Creditors nor the Unsecured Creditors would receive any dividend.
>
> 10. Having regard to the foregoing, the process in which I engaged was the same process that I have employed in previous examinerships. I discerned a commonality of interest between different creditors and I assembled those

creditors into different classes which I then labelled with suitable titles. ACC, as holder of a fixed charge and the holder of a guarantee, was included in the class of 'Secured Creditor' in the primary borrower (*Tivway)*, and was included in the class of creditor which I called 'Contingent Creditors' in the Related Companies (*Construction* and *Holdings)* which gave the guarantee. The class of creditors denominated 'Unsecured Creditors' hold neither security nor guarantees and are trade creditors."

38. Having considered the documents before me, and the submissions made by counsel for the various parties, I have come to the conclusion that the methodology used by the Examiner was entirely rational and was fair and reasonable. I have already stated that I do not accept the argument of ACC, based on the crystallisation of its floating charge. I am satisfied that there is nothing in the classification used by the Examiner which is unfairly prejudicial to ACC.

39. In considering whether or not ACC have been unfairly prejudiced, I had regard to the decision of McCracken J. in *Re Antigen Holdings Limited* [2001] 4 I.R. 600. At p. 604, the Judge stated:

"I should add, generally, when considering whether creditors have been unduly prejudiced, the position must be considered in the light of the particular circumstances of each case. What might be unfair in one case may be fair in another. In this case, I have to consider the detriment, or indeed, prejudice to the banks, but I must consider it in the light of the fact that this is a Scheme which, in my view, has a very high prospect of success and also in the light of the fact that the company employs over three hundred people whose jobs are at risk, and the fact that all creditors will probably be paid in full, albeit with a delay."

40. I have been informed by counsel that my judgment should include a decision as to whether or not the Examiner was correct in the classifications he made of the various creditors. I hold that he was correct in the manner in which he classified the creditors and, in particular, the manner in which he classified ACC.

41. That brings me to the issue of the protection of jobs which is provided for in the Schemes. The Schemes of Arrangement have as their aim the preservation, not only of the enterprise comprised in the companies, but also 137 jobs which will continue in the event that the proposals are confirmed. It is clearly proper for the court to take into account this purpose of the Schemes in deciding whether or not to confirm them. In *Re Traffic Group Limited* [2008] 3 I.R. 253, at p. 260, Clarke J. stated:

"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."

He went on to say 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. In making these observations, Clarke J. adopted the views which Costello J. expressed in his judgment in *Re Selukwe Limited* (Unreported, 20th December, 1991), in which he held that the main consideration in evaluating the Scheme of Arrangement before him was the issue of jobs, and he felt that the court should not turn down the proposals before him if there was any prospect of saving those jobs.

42. In the Schemes of Arrangement which I have to consider, I am told that the jobs of 137 workers will be saved by the Scheme. Under the Scheme, the two discrete business undertakings of *Construction,* namely, third party contracting business and development projects will be separated. The third party contracting business will be sold to a new investor, Dunban Ltd., and the preservation of the development side of the business in *Construction* as a legacy business will be achieved. The legacy business of *Construction's* undertaking will continue to trade in a controlled and structured fashion, with bank support, which has been pledged. There is, in my view, a reasonable prospect of survival of the restructured companies under the Schemes of Arrangement and this will save jobs and be of benefit to the community at large. To enable *Construction* to survive as a going concern or enable part of its undertaking to survive, the Examiner deemed it necessary to dispose of the third party contracting business. This business is by and large profitable, but the profits are being used to service debts which are crippling to the Company and interest on the payments have to be made to banks on assets which have been overvalued. The Schemes put together by the Examiner involved the third party trade assets being sold to an investor who will invest in that business to ensure it will survive. He will pay for the trade assets which will provide investment into the three companies, but primarily for the legacy development business. The banks have made it clear that they would not have been interested in remaining involved with a company that had a third party contracting business in which the possibility of litigation existed for non-performance of building contracts or, where the obligation to maintain unfinished building sites continued. What is achieved by the Schemes of Arrangement is a development property business which the banks have indicated they are willing to support and to which they will provide finance in order to realise a reasonable return on their investments, albeit over a lengthy period.

43. Since I am satisfied that the support being pledged by the banks is substantial, I believe that there is a reasonable prospect of survival of the companies under the Schemes. If the Schemes are carried out as intended, the debts owed to the Secured Creditors will be eliminated over the ten-year period proposed.

44. I want to deal with a number of points which were raised by ACC. Counsel for the bank referred to the fact that O'Keeffe J. had stated in his judgment of 21st September, 2009, that ACC ranked, so far as *Holdings* and *Construction* are concerned, as Unsecured Creditors in the sum of €21.5 million. It is clear that these remarks were made *obiter* and I am satisfied from what counsel told me that the question of whether the bank was a Contingent Creditor or an Unsecured Creditor did not arise before him. In any event, I have already decided this issue and I am satisfied that ACC were correctly classified by the Examiner as Contingent Creditors of those companies.

45. Another criticism made of the Schemes by ACC relates to investment which is to be made in the companies. The bank claims that there was no investment, but rather, asset stripping.

46. It seems to me that this is an exercise in sophistry. Counsel for ACC informed the court that Vision and Fusion were each sold for €100. While that is undoubtedly correct, the purchaser of Fusion is assuming liabilities of €2.5 million. In Vision, the purchaser assumes liabilities of €3.9 million. The employees of the companies are being taken on by the purchaser and this will improve the balance sheet of *Construction*. €260,000 is being paid for Biomedy. The banks have indicated that they will give continuing support to the companies under the Scheme.

47. Viewed in its entirety, it is clear that many of the Company's debts have been taken over and working capital will be provided into the future to ensure the continuance of the Company's core business and the disposal of assets in an orderly fashion which will be to the benefit of the creditors, the employees and the community at large. I am satisfied that, taken as a whole, these support mechanisms are, in the context of the Schemes, "investment".

48. The Railway Procurement Agency ("RPA") made submissions on the basis that it is a statutory body that benefits from supplementary development contribution schemes which can be made by local authorities requiring contributions from developers whose developments benefit from public infrastructure projects. Dun Laoghaire Rathdown County Council imposed a levy of €1,091,890 on the development known as Sentinel, which is one of the properties affected by the Schemes of Arrangement. The RPA was concerned that clause 10.30 of the Scheme of Arrangement for *Tivway* would prevent the RPA or Dun Laoghaire Rathdown County Council from taking proceedings against *Tivway* or *Construction* for the payment of any such levies due from them. Counsel for the Examiner handed into court a proposed amendment to the Scheme in *Tivway Limited,* which meets the concerns of the RPA. This would provide an additional clause in the *Tivway Scheme* which would read as follows:-

> *"10.31 Nothing in the proposals shall preclude either the Local Authorities or the RPA from bringing proceedings for the non-payment of levies as may arise in the future, should development proceed."*

That amendment seems fair and reasonable.

49. If these Schemes of Arrangement are not confirmed by the court, it is almost certain that the companies will go into liquidation and a substantial number of jobs will be lost. The Schemes of Arrangement which have been proposed will, I believe, turn the fortunes of the companies around, and will preserve employment and eventually give a return to the creditors way beyond what would be achieved in a liquidation. The secured creditors will realise the assets over which they are secured, albeit over a prolonged period. This will be achieved by the co-operation of the companies in the development of the Sandyford site in a structured way, which would not occur if the companies went into liquidation. The exposure of the companies to Secured Creditors will be capped in the sense that the Secured Creditors will only have resort to the residual debt fund in the event that realisation of the securities does not discharge the amounts due to them. The Secured Creditors will not be permitted to appoint a receiver under a floating charge, but will go into the residual debt fund to get a dividend. This provides great certainty for the companies in knowing that once the assets have been developed and the Secured Creditor has obtained its money, it gets a dividend from the residual debt fund which effectively clears out the balance sheet in respect of that Secured Creditor.

50. Having regard to the classification of creditors by the Examiner - which I find to be correct - the overwhelming majority of creditors in number and value support the Schemes of Arrangement. I am satisfied that ACC have not been unfairly prejudiced by the Schemes of Arrangement which are proposed, that having regard to the purpose and scheme of the Companies (Amendment) Act 1990, as amended, I should approve the Schemes of Arrangement.

51. Accordingly, I approve and confirm the Schemes of Arrangement proposed by the Examiner, and in the case of the *Tivway* proposals, I confirm the Scheme with the addition of clause 10.31 as set out above.