

In the Matter of Tivway Limited (In Examination) & ors And The Companies Acts.

Enclosed is a copy of the Supreme Court Judgement for the above matter delivered on the 4th March 2010. In this instance, the Supreme Court overturned a High Court decision to appoint an Examiner to Tivway Limited, John J. Fleming Construction Company and J.J. Fleming Holdings.

The application for reversal was made by ACC Bank as it felt that examinership allowed a "free for all" among the banks. The Supreme Court ruled that from the schemes of arrangements put forward, there was not sufficient evidence to suggest that the company would survive as a going concern.

Judgment Title: In the Matter of Tivway Limited (In Examination) & ors And The Companies Acts

Neutral Citation: [2010] IESC 11

Supreme Court Record Number: 440/09

High Court Record Number:

Date of Delivery: 04/03/2010

Court: Supreme Court

Composition of Court: Murray C.J., Denham J., Hardiman J., Geoghegan J., Fennelly J.

Judgment by: Denham J.

Status of Judgment: Approved

Judgments by	Link to Judgment	Result	Concurring
Denham J.	Link	Appeal allowed - set aside High Court Order	Murray C.J., Hardiman J., Geoghegan J., Fennelly J.

Outcome: Allow And Set Aside

THE SUPREME COURT

Murray C.J.
Denham J.
Hardiman J.
Geoghegan J.
Fennelly J.

In the matter of Tivway Limited (In Examination 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 delivered the 4th day of March, 2010 by Denham J.

1. This is an appeal by ACC Bank Plc, referred to in this judgment as “ACC”, from an order of the High Court (McGovern J.) made on the 16th November, 2009, which confirmed Schemes of Arrangement pursuant to s.24 of the Companies (Amendment) Act, 1990 in respect of the three companies named in the title of this case.
2. The three companies are as follows: Tivway Limited, referred to as “Tivway”; John J. Fleming Construction Company, referred to as “Construction”; and J.J. Fleming Holdings, referred to as “Holdings”.
3. ACC filed thirty five specific grounds of appeal. However, this case turns on fundamental issues relating to the nature of an examiner, the jurisdiction of the court, and the purpose of the legislation.

The High Court

4. These matters came before the High Court by way of applications under s.24 of the Companies (Amendment) Act, 1990, as amended, referred to in this judgment as “the Act of 1990”, for confirmation of Schemes of Arrangement in respect of each of the three companies.
5. On the 20th July, 2009 an examiner was appointed to Tivway. On the 21st September, 2009, on the application of the examiner, he was appointed examiner of Construction and Holdings also.
6. ACC is a secured creditor of Tivway and for the purposes of the schemes was classed as a contingent creditor of Construction and Holdings. ACC submitted that it should have been classified as an unsecured creditor of these two companies. ACC claims that it is owed approximately €21.5 million.
7. The examiner proposed three schemes to the High Court, one for each company, which schemes were supported by the companies and all creditors except for ACC. ACC claimed that the proposals were put forward for an improper purpose and that it would be unfairly prejudiced.

It was submitted that there was no reasonable prospect of the survival of Tivway as a going concern. It was submitted that, as regards Construction, the proposals were designed to facilitate the sale of the only profitable asset and that the remaining business would not be a going concern. It was submitted that Holdings was not a going concern. ACC submitted further that it was being treated unfairly, that it was prejudiced, and that the schemes were inequitable within the meaning of s.24(4) of the Act of 1990.

8. The learned High Court judge was satisfied that the examiner had classified the creditors correctly, that ACC had not been unfairly prejudiced, and he approved the Schemes subject to a minor modification.

9. The learned High Court judge described the Schemes as follows:-

“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.

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 [*sic*]. Dunban [*sic*] 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 Biomed 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 Biomed 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 Biomed Ltd. to Dunban Limited [*sic*].

(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. [sic], which will eliminate statutory termination costs (estimated at €1 million) in Construction for those employees and preserve their employment in Dunban Limited [sic].

In addition to the consideration at (5) above, the investor is providing for:

(i) Working capital facilities in Dunban Ltd. [sic] 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. [sic], which eliminate redundancy costs in those companies for those employees and preserve their employment in Dunban Limited [sic].

(iv) Transfer of the third party trading liabilities of Vision and Fusion to Dunban Limited [sic].

The company structure of the group will remain largely the same, with only some amendments such as the sale of shares in Biomed Limited. The trades carried on in subsidiaries of Holdings and Construction are unaffected by the restructuring and will continue to trade as normal.

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.

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

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.”

10. The learned High Court judge addressed the way in which various creditors were categorised. He stated that in the Schemes of Arrangement the examiner treated ACC the same as other bank creditors with guarantees. Having considered the documents in the submissions, the learned High Court judge concluded that the methodology used by the examiner was rational, fair and reasonable.

11. The learned High Court judge considered whether or not ACC had been unfairly prejudiced. He held that the examiner was correct in the way in which he classified the creditors, and in particular the classification of ACC.

12. The learned High Court judge considered the issue of the protection of jobs. He stated that:- “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.”

13. The learned High Court judge held:-

“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. [*sic*], 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.

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.”

14. The learned High Court judge addressed the submission by ACC that what was proposed was asset stripping, which the companies described as an investment. The learned High Court held:-

“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. €60,000 is being paid for Biomed. The banks have indicated that they will give continuing support to the companies under the Scheme.

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”.”

15. The High Court concluded that the Schemes of Arrangement proposed would turn around the fortunes of the companies, would preserve employment and eventually give a return to the creditors way beyond what would be achieved in a liquidation. Over a long period of time the secured creditors would realise the assets over which they are secured. He envisaged this occurring by the cooperation of the companies in the development of the Sandyford site in a structured way, which would not occur if the companies went into liquidation. He noted that the exposure of the companies to secured creditors would be capped in that the secured creditors will have resort only to the residual debt fund in the event that realisation of the securities does not discharge the amounts due to them.

16. The High Court approved the three Schemes of Arrangement proposed by the examiner, and in relation to the Tivway proposal confirmed the modification of the proposal by the addition of clause 10.31.

Grounds of Appeal

17. The ACC filed many grounds of appeal. The purpose of the legislation was raised and with it the issue that the Schemes of Arrangement were contrary to the purpose of the Act of 1990. The grounds on the notice of appeal included that the learned trial judge erred:

- In approving the Scheme in respect of each company without reaching any finding and in the absence of any evidence as to whether or not they had a business or trade capable of surviving as a going concern;
- In failing to consider or give appropriate weight to the absence of a financial investment in Tivway to facilitate its survival as a going concern;
- In failing to give appropriate weight to the fact that Tivway would have no future trade under the Scheme and would remain insolvent;
- In failing to evaluate properly that none of the members’ rights will be impaired, and that the effect of the Scheme is to relieve the members of unlimited liability;
- In failing to consider appropriately the inappropriate action of the shareholders in Holdings and Construction in moving substantial assets into a trust fund in May 2009;
- In failing to evaluate properly the absence of any evidence as to the solvency of the companies subsequent to the confirmation of the Schemes;
- In concluding that ACC was not unfairly prejudiced by the proposals;
- In reaching findings that were unsupported by, or contrary to, the weight of the evidence;
- In holding that the examiner was correct in classifying ACC as a contingent creditor of Holdings and Construction;
- In misconstruing the position of ACC in relation to its floating charge over the assets of Tivway.

Submissions

18. Written submissions were filed on behalf of ACC, Tivway, Holdings, Construction, the examiner, Anglo Irish Bank, and unsecured creditors. Oral submissions were heard over a number of days on behalf of the above mentioned and the Revenue Commissioners.

19. In essence Mr Paul Sreenan, S.C., counsel for the ACC, submitted that the purpose of an examinership is to have a company survive as a going concern. He referred to the three companies and submitted that the three Schemes were contrary to the purpose of the Act of 1990. He also submitted that the Schemes were unfairly prejudicial to ACC.

20. Counsel for the examiner, Mr Mark Sanfey, S.C., made submissions supporting the three Schemes. He pointed out that all the banks supported the Schemes except ACC. He submitted that there was a reasonable prospect of survival of the three companies. He argued that there was no unfair prejudice to ACC.

21. Counsel for Anglo Irish Bank, Mr John O’Donnell, S.C., submitted that while the matter of creditors’ support for the Schemes is not determinative of the issue, it is significant, and that all creditors except ACC support the Schemes, and that the Court should not lightly ignore these creditors. Nor, he submitted, was it appropriate for the Court to substitute its own commercial judgment. He pointed out that the creditors have a stake in the future of the companies and they have decided to support the Schemes. He referred to the employees, the trades people who are affected, and the community in West Cork and Bandon which rely on the continuation of the company. A letter was produced, dated 16th December, 2009, from Anglo Irish Bank to the examiner which referred to a recent request by the Fleming Group for a working capital facility.

This was in two parts. First, €61,945 was sought to fund site security, insurances and overheads. Secondly, €93,952 had been sought for planning consultant fees. The letter informed the examiner that the sum of €61,943 had been approved by the bank. The sum for planning consultant fees was said to have been approved in principle but that prior to draw down of any part of this facility the bank required the borrower to provide detailed submissions (when the need for funds arises) in respect of each planning permission. This letter was produced as further evidence of the confidence held by Anglo Irish Bank in the examinership.

22. A succinct and moving submission was made on behalf of ordinary unsecured creditors of Construction, a significant number of whom are in West Cork. The ordinary unsecured creditors of Construction are primarily small businessmen. It was submitted that it was crucial that the Scheme be approved, that if Construction does not survive it will lead to much direct and indirect unemployment in West Cork, especially in Bandon. If the Scheme is not approved, it was submitted, the ordinary unsecured creditors will get nothing but if the Scheme is approved they will get between 25%-45% of what is due to them. It was submitted that there was significant goodwill from these businesses to Construction.

23. On behalf of the Revenue Commissioners, Brian Kearney, B.L., stated that the submission of the notice party was that the Commissioners were neutral on the issue. Counsel for the companies informed the Court that the companies' Revenue payments were paid up to date.

Statutory law

24. This case came before the High Court by way of an application pursuant to section 24 of the Act of 1990, for confirmation of Schemes of Arrangement for Tivway, Construction and Holdings. Section 24(1) provides that the report of the examiner, made in accordance with section 18 of the Act of 1990, shall be set down for consideration by the court as soon as may be after the court receives the report. Such reports were before the High Court, and this Court on the appeal. Section 24(4) provides:-

"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 have 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."

25. The High Court, and this Court on appeal, has a discretion. Section 24(3) provides:-

"At a hearing under subsection (1) the court may, as it thinks proper, subject to the provisions of this section and section 25, confirm, confirm subject to modifications, or refuse to confirm the proposals."

Thus the Court has a discretion to make an order "as it thinks proper". Insofar as the discretion is to be exercised on issues arising under s.24 and s.25 the terms of those sections apply. However, the court also has its inherent duty to apply the law, which includes the other sections of the relevant statute. A court could not confirm a Scheme of Arrangement in an examinership contrary to the statute.

26. The power to appoint an examiner is a statutory power given to the Court by section 2 of the Act of 1990. Section 2 provides:-

"(1) Subject to subsection (2), where it appears to the court that—

(a) a company is or is likely to be unable to pay its debts, and

(b) no resolution subsists for the winding-up of the company, and

(c) no order has been made for the winding-up of the company,

it may, on application by petition presented, appoint an examiner to the company for the purpose of examining the state of the company's affairs and performing such duties in relation to the company as may

be imposed by or under this Act.”

However, there is a proviso. Section 2(2) provides:-

“The court shall not make an order under this section unless it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern.”

These statutory provisions have been considered in cases to which I shall refer later.

Facts

27. Between the 12th and 13th October, 2009 the examiner convened meetings of seven separate classes of creditors of Tivway; he convened meetings of eight separate classes of creditors of Construction; and he convened meetings of three separate classes of creditors of Holdings. The learned High Court judge summarised the position as follows: (a) In respect of Tivway, two classes of creditors whose interests are impaired 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 by the proposals voted in favour of the Scheme; (c) in respect of Holdings, two, or, depending on the view taken by the court of the classification of ACC, three classes of creditors whose interests are impaired voted in favour of the Scheme of Arrangement.

28. In the High Court, and in this Court, the only person or body opposed to the Schemes of Arrangement was the ACC.

Schemes of Arrangement

29. There were three separate Schemes of Arrangement proposed to and accepted by the High Court – one each in favour of Tivway, Construction and Holdings.

30. Tivway is a property holding company which owns lands in Sandyford, being the Sentinel building, and the Aldi site where Tivway holds two thirds of the site, the balance being held by an associate company. These properties are part of a larger mosaic of development plans in Sandyford owned by related companies. They are linked by proximity, with joint access and shared services. The development of these two properties is dependent on the mosaic of plans being built out. Tivway has contracted with Construction for the development of the Sentinel building. ACC has provided €21.5 million to Tivway.

31. The examiner deposed an affidavit on the 4th September, 2009 stating that Tivway was more tightly bound to the Fleming Group of companies than he had initially perceived. He stated that the prospects of the survival of Tivway were inextricably linked to Construction and Holdings and that the inter-relationship of the businesses of the three companies required all three companies to be associated in any Schemes of Arrangement.

32. On the 21st September, 2009 the High Court (O’Keeffe J.) appointed the examiner to be examiner also of Construction and Holdings.

Judgment of O’Keeffe J.

33. In his judgment O’Keeffe J. referred to the intertwined nature of the companies. He referred to the Sentinel and Aldi sites. He stated:-

“There is a detailed plan of the Sentinel and Aldi site, which was opened extensively before the Court. It is provided that Construction, pursuant to a building contract, provides the building services for the entire development. It is then stated that the business of Tivway and the related companies (Construction and Holdings) are completely and inextricably entwined with the business of the wider Group. In real terms, as one walks around the development site (which has been mapped) it is not possible to say with any certainty where the property which one company owns finishes and that owned by another company [begins]. The difficulties in relation to that were all demonstrated to me in the presentation by counsel on behalf of the Examiner.

There is [sic] further details in relation to that highlighted by the fact that it says that in order to enter the car park a motorist has to pass over land belonging to various companies to simply traverse the car park to the spaces allocated to the Sentinel building. The services to the Sentinel building are accessed through property belonging to various companies; while the building itself is effectively landlocked, being hemmed-in by property belonging to another company called Sipter. These difficulties would not have created any problems on the ground if everything proceeded as one entity. It was also said in the course of the submissions that McGovern J. when he made his order was told that there may well be an application in relation to other companies, and no details were furnished in relation to that until the Examiner brought this application.

I have to say that in the light of the comments which are set out in these paragraphs of the

affidavit, it is very difficult to understand why, with such a complicated structure, it was solely an application in relation to Tivway that was brought at the time of the application and that other companies were not joined in the matter. I do, however, appreciate the circumstances in which the application came to be made as a result of the threatened appointment of a Receiver by ACC, but I think my comments are still valid.

Tivway then, as I say, has contracted with Construction for the development of the Sentinel building; it is done on an arm's length basis. ACC has provided 21.5 million to Tivway; this is supported by a guarantee and indemnity from Construction and from Holdings. It is emphasised that so far as Construction and Holdings are concerned, both of which operate with a deficit presently, an even larger deficit if there was to be a liquidation, that nevertheless they rank in an unsecured capacity whilst they had security in Tivway; but they are unsecured in relation to Construction and Holdings.

Construction is described as the engine of the Group, employing 137 individuals. It is stated that each of the companies within the Group is heavily reliant upon Construction for the performance of building works, with Tivway being entirely dependent also in this regard.

Holdings' activities are set out, namely that it is a general holding company for the Group, in addition it also acts as an investment agent for the Group, making and holding investments for the benefits of other companies, and it borrows and lends down monies on an inter-company basis to fund development and construction work by the Group."

This judgment describes the nature of the companies, highlights the inter connection which exists between Tivway, Construction and Holdings, and, indeed, between them and other companies in the Fleming Group.

34. The examiner devised a Scheme of Arrangement for each of the three companies. As described earlier in this judgment, the three Schemes of Arrangement came before the High Court by way of an application pursuant to s.24 of the Act of 1990 for confirmation, were confirmed by the learned High Court judge, and ACC has appealed against that determination.

Decision

35. I am of the view that the three schemes do not provide for the survival of each of the companies as a going concern. Rather the schemes provide for the survival of the companies in a holding plan over the next ten years in the hope that during that time the property market will improve and the banks will support a build out. This does not meet the legal parameters provided in the legislation. I would allow the appeal.

Explanatory Memorandum

36. In his explanatory memorandum the examiner provided, *inter alia*, a summary of the proposals and their effect. He stated that the overall objective of the schemes was to secure the future of Construction, Holdings and Tivway. To achieve this objective a new business model is proposed which would involve the separation of the two discrete business undertakings currently present in Construction, being the third party contracting business and the developments side of the business. It would involve the sale of the third party contracting business in Construction to Donban Limited, a stand alone entity, and the preservation of the developments side of the business in Construction as a legacy business. The restructuring would involve Tivway, Construction, Holdings and a number of other companies in the Group not in examinership, but stated to be relevant to the schemes as they have trades which are interlinked with Construction and are required by Donban. In his explanatory memorandum the examiner explains that agreements have been reached with Donban Limited to purchase certain of the trading activities of the Group, namely:-

"3.5. 1. The 3rd 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 Biomed 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 Biomed 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 Noreen Fleming for the transfer of their shareholding in Biomed Limited to Donban.

(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 Donban which will eliminate statutory termination costs (estimated at €1m) in Construction for those employees and preserve their employment in Donban."

The banks (except ACC) support the schemes. Certain banks have agreed to provide further support by way of advancing funds to Construction to supplement the monies available for provision of a dividend to the unsecured creditors subject to certain conditions. These funds will be available, with the funds from the sale to Donban Limited, to finance the pool available to the creditors.

The schemes will involve the creation of a Residual Debt Fund in Construction, Holding and Tivway to meet residual contingent liabilities. This will be partly funded by an allocation from the monies received from Donban Limited. Where applicable, the Residual Debt Fund will be supplemented from the eventual realisation, if any, of inter-company account receivables due and with any surplus funds arising, if any, following the realisation of investments held by each company. The examiner explained that it will take up to ten years to determine whether the intercompany accounts and investments in subsidiaries will have any value as it is anticipated that it will take this period of time for the orderly development and realisation of the property work in progress and intercompany balances in each company and the other companies in the Group. He further explained that at the expiry of the ten year period any residual creditors qualifying to rank for a dividend from the Residual Debt Fund will receive a distribution of the fund available on a pro-rata basis to their claim. After ten years there would be a cap applying to admission of claims to the Residual Debt Fund at which point any residual contingent liabilities unrealised will be deemed to have nil value. However, should any surplus be subsequently realised beyond the ten year period from assets in existence at the effective date, they will be designated to the Residual Debt Fund to provide for a further dividend to the creditors of the fund who qualify. The payments date proposed from the Residual Debt Fund is 31 March 2020.

The examiner was of the opinion that the outcome for creditors is significantly better under the terms of the proposals than the alternative financial outcome that would arise in the event of receivership or liquidation.

Statement of Assets and Liabilities

37. In the proposals for the Schemes of Arrangement the examiner provided statistics as to the companies. For example, in the proposals in relation to Tivway he annexed in Appendix C a statement of the assets and liabilities prepared by the company (including contingent and prospective liabilities) of the company as at the date of the proposals.

38. This provides as follows:-

"Tivway Limited in Examination (Under the Companies (Amendment) Act, 1990)

Appendix C – Statement of Assets and Liabilities as at 30 June 2009

Note/

Appendix Net Book Value

€

Fixed assets

Financial assets 0

Current assets

Stock 1 36,000,000

36,000,000

Creditors

Secured Creditors F (21,761,395)

Contingent Secured Creditors G (168,000,000)

Preferential creditors H (29,374)

Agreed and unagreed unsecured creditors I (109,270)

Connected creditors J (1,470,930)

Contingent Unsecured creditors K 0
Deferred Contingent creditors L 0

(191,370,969)
Net current liabilities (155,370,969)
Net liabilities (155,370,969)

The "stock" is described in Note 1 as:

"Name
2/3 Aldi Site Sandyford 30,000,000
Block C Site and Building Works 6,000,000
Total 36,000,000"

These current assets, the 2/3 Aldi Site and the Sentinel building, have been affected by the property crash. It is not necessary to determine the value of the sites in this appeal. However, counsel for ACC submitted that the Sentinel building may now be worth between €500,000 and €1,000,000, and the Aldi site between €7,000,000 and €8,000,000. Thus the total assets, he submitted, would be €8,000,000 to €9,000,000 and not €36,000,000.

The "secured creditors", set out in Appendix F, is the ACC, with its sum of (€21,761,395). The "contingent secured creditors" in Appendix G, is Anglo Irish Bank, with its sum of (€68,000,000).

Jurisdiction

39. In deciding whether a court may appoint an examiner the court must have evidence or material before it upon which the court is satisfied that the company has a reasonable prospect of survival, in whole or in part of its undertakings, as a going concern. It is only if a court is so satisfied that it has jurisdiction to exercise its discretion to determine whether, in all the circumstances, an examiner should be appointed. The requirement of such evidence or material is clearly implicit given that it is an express fundamental requirement to the obtaining of an order for the appointment of an examiner in the first place. Further steps in an examinership may be taken only upon such a statutory foundation.

40. A court has jurisdiction to appoint an examiner or make consequential orders only if the statutory requirements are met. This Court held in **In the Matter of Vantive Holdings and Ors** [2009] IESC 68, in a judgment of the Court delivered by Murray C.J.:-

“In order to be satisfied that a company has a reasonable prospect of survival as a going concern the Court must have before it sufficient evidence or material which will permit it to arrive at such a conclusion on the basis of an objective appraisal of that evidence or material. Mere assertions on behalf of a petitioner that a company has a reasonable prospect of survival as a going concern cannot be given significant weight unless it is supported by an objective appraisal of the circumstances of the company concerned and an objective rationale as to the manner in which the company can be reasonably expected to overcome the insolvency in which it finds itself and survive as a going concern.

The opinion of the independent accountant as set out in the report which a petitioner is required to provide to the Court under the provisions of the Act, must be given due weight. Again, the weight to be attached to the accountant’s opinion will depend on the degree and extent to which he supports that opinion by his or her own objective reasoning and the appraisal of material or factors relied upon for reaching his or her conclusions.

Since, the court may not make an order appointing an examiner unless it is satisfied that there is a reasonable prospect of the survival of the company as a going concern, it follows that there is an onus on the appellant to satisfy the court that such a reasonable prospect exists. The applicant must provide objective evidence to satisfy the court of

this fact. Examinership is a process designed to facilitate the rescue or survival of companies in financial difficulties. Whether the appointment of an Examiner is supported by creditors of the company and the extent and reasons for that support is a relevant consideration but not determinative in considering whether there is a reasonable prospect of survival.”

I apply that analysis to the facts of this case.

41. The Court is required to be satisfied that the terms of the legislation are met. Consequently, there is an onus on those who are requesting a court to exercise this jurisdiction. Primarily this burden is carried by the examiner.

42. For an examinership to proceed in relation to each company the Court is required to be satisfied that there is a reasonable prospect of survival as a going concern of Tivway, Construction and Holdings. Section 2(2) of the Act of 1990, indicates a firm policy by the Oireachtas that a court does not have jurisdiction to make an order appointing an examiner unless the court is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern. That is the foundation upon which all orders may be made.

43. Thus the purpose of the legislation is clear – its objective is to assist companies by enabling an examiner be appointed, but only if the court is satisfied that there is a reasonable prospect of the survival of the company as a going concern.

Section 24(4)

44. This is an appeal from the High Court on a decision pursuant to s.24 of the Act of 1990. It is an appeal by ACC, opposing the examinerships. The burden falls largely on the examiner to establish that the Court has jurisdiction to approve the Schemes of Arrangement.

45. The terms of section 24(4) have been set out earlier in this judgment. However, in addition to specific issues on the terms of s.24, a party may raise fundamental issues arising on the legislation. Thus, for example, the statutory purpose may be raised, and it may be argued, as here, that the Schemes of Arrangement do not fulfil the legislature’s object for the survival of the company or companies in whole or in part as a going concern.

46. Indeed the purpose, as stated in section 2(2) of the Act of 1990, is so fundamental a principle that the Court would not have a jurisdiction to proceed under s.24(4) of the Act of 1990 unless the terms of s.2(2) of the Act of 1990 had been met.

The Companies

47. Tivway, Construction and Holdings are companies within the Fleming Group, which is referred to in this judgment as the "Group".

48. Construction is an unlimited company. It has two distinct undertakings. The active part is a third party contracting business which is said to be thriving and which employs 137 persons. This has been described as the engine of the Group. The other undertaking is a property development business which has been impaired substantially by the downturn in the property market. The original investor envisaged is no longer part of the scheme. The examiner has stated that he has found an alternative "investor". Under the proposed Scheme this "investor" would purchase the third party contracting business of Construction. It was submitted that this would preserve the jobs as they would be transferred to the new company – Donban Limited. This is described as an investment – and it is for €6,000,000. Construction would receive monies (€3,610,000) which would be used to discharge the cost of the examinership and provide a dividend pool for creditors of Construction.

49. I am satisfied that this in fact is a sale of the viable undertaking of Construction to Donban Limited.

50. The proposed sale does not secure the survival of the company as a going concern. The profitable side of the company is to be sold off. Of course in a scheme it might well be advisable to sell a loss making asset, or even a profitable aspect of an undertaking, if it is to be ploughed back to ensure the survival of the company as a going concern. This is not the situation here.

51. An examinership is not a process for sale. Costello J. explained the role of the examiner in **In Re Clare Textiles Ltd** [1993] 2 I.R. 213, at p.220:-

"In my opinion, it is quite clear that the only proposals he is permitted to formulate are those which make it likely that (a) the company and (b) the whole or part of its undertaking will survive as a going concern. The examiner has no authority to prepare proposals involving the sale of the company's assets and its business or its liquidation and in my opinion the court has no power to confirm proposals under s. 24 which do not provide for the survival of the company and at least

part of its undertaking as a going concern. It was submitted on behalf of the examiner at the hearing under s. 24 and again on this motion that s. 18 implies that the examiner may formulate proposals for the sale of the company's business and assets when in his opinion the whole or any part of the undertaking of the company would be capable of surviving as a going concern. I do not think that this is a correct construction of the section. The section must be construed in the light of the earlier sections of the Act and the formulation of proposals for a scheme of arrangement under s. 18 can only arise after the examiner has reached the conclusion referred to in s. 16, namely that (a) the company and (b) the whole or any part of its undertaking are capable of survival. I should add that the fact that the court, when making a s. 2 order, empowered the examiner to negotiate the sale of the company's assets did not authorise the formulation of proposals involving the liquidation of the company - the examiner was required to exercise the powers he obtained so that he could fulfill his statutory functions."

This judgment was delivered before the amendment in 1999 further clarified the law.

52. A sale of part of Construction would leave it with what was described as "a legacy property development business". This is the aspect of the company most affected by the property downturn. The banks, except ACC, are said to be prepared to fund the building out of the legacy development property folio over an extended time. It is an extensive portfolio. The examiner envisages a decade to allow for the build out. If the developed assets are not then enough to repay their borrowings the financial institutions (except ACC) have agreed a marginal dividend from a Residual Debt Fund leaving the companies with solvent balance sheets.

53. I am not satisfied that there is a reasonable prospect of the survival of the company, Construction, after the sale envisaged, or any part of it, as a going concern. While the nature of a company is relevant to an analysis of whether the company will survive as a going concern, a fundamental requirement is that there is a reasonable prospect of the survival of the company, or any part of its undertaking, as a going concern. In this case the active part of the company is to be sold. It will no longer be within the company. The remaining undertaking is moribund – as a consequence of the property crash. While there may be circumstances where a sale assists the survival of a company as a going concern, this is not one such. In the circumstances of this case there is not an investment in the company to assist it proceed as a going concern, but rather a sale of its third party contracting business to another company, Donban Limited. Donban will then have the business, and the nature of its survival will be up to that purchaser and not part of the examinership. The remaining undertaking in Construction would be held for ten years, in the hope that the property market will have improved by then, and because the banks (other than ACC) support the plan it is hoped that they will financially support a build out programme in the future at some appropriate time. This is an aspiration, based on a hope. I am not satisfied that the requirements of s.2(2) of the Act of 1990 have been met. I am not satisfied that there is a reasonable prospect of the survival of Construction as a going concern.

54. Tivway is a property company which owns the Sentinel building in Sandyford and two thirds of the Aldi site in Sandyford. These properties are part of a mosaic of properties owned by related companies in Sandyford. Development of the properties will depend upon other plans being built out also in the area. ACC lent Tivway €21.5m. Tivway has contracted with Construction to develop the Sentinel building. Both Holdings and Construction provided a guarantee.

When Tivway applied originally for an examiner to be appointed there were discussions of an investor with €10,000,000 who would invest this money in the Sentinel building, which would thus involve employing people, and that the building could then be sold or rented. But that investor disappeared from the scene before Construction and Holdings were admitted to examinership.

55. Tivway is insolvent. It has not been trading since February 2009. There are no build out plans at this time. Originally when the application was made it was hoped that the investor with €10,000,000 would enable it to survive as a going concern. That is no longer the case. There is provision for a small sum of money - but that is not part of a projected build out.

56. The business of Tivway and related companies is intermingled, they were described by the examiner in his affidavit of the 4th September, 2009, as inextricably entwined. This intermingling extends beyond the three companies in examinership. As the examiner described in his affidavit of the 4th September, 2009, at paragraph 31:-

"By way of practical example of situation which I have described; the Sentinel Building – which is the property that is secured to ACC – is owned by the Company in the form of a "flying freehold". That "flying freehold" is located above car parking space – over some of which ACC has a licence – which is divided between the Company, Picerno Ltd. and Sipter Ltd.. In order to

enter the car park a motorist would have to pass over land belonging to various companies while to simply traverse the car park to the spaces allocated to the Sentinel Building requires a journey across land belonging to various companies. The services to the Sentinel Building are accessed through property belonging to various companies, while the building itself is effectively “landlocked” being hemmed in by property belonging to Sipter Ltd.. In addition to the foregoing, the planning permissions do not in fact vest in the Company but are held by Construction. The complications which are inherent in these arrangements would not in fact create any difficulty “on the ground” in circumstances where the Group continues to function and carry on its various undertakings, but they are indicative of the manner in which different companies within the Group – and the Company, Construction and Holdings in particular – are entirely inter-dependent on each other.”

57. The examiner has proposed Schemes in relation to three of these companies, and he has submitted that the Schemes provide for an orderly development of the secured assets over ten years. All banks, except ACC, support the Schemes, as they view that approach as preferable to a free for all if the banks were left to realise their own secured assets. The unsecured creditors also support the Schemes as they would get nothing if the companies go into liquidation.

58. However, while it is entirely understandable that the companies and the banks would prefer to hold a land bank with the hope of some return over the next ten years, and that the unsecured creditors would prefer the hope of some return rather than none, that is not the test to be applied by a court in permitting an examinership.

59. Holdings is described by the examiner as a holding company and finance company responsible for a degree of inter-company borrowings on which Tivway and Construction have depended. It is insolvent and dormant at the moment. The examiner submitted that if Tivway and Construction cannot survive then Holdings has no future.

Holding Company

60. It has been held by the courts that a holding company may have an examiner appointed. It may be highly desirable where there is a group of companies trading that a holding company in that group be part of an examinership: see McCracken J. in **In Re Tuskar Plc** [2001] 1 I.R. 668 at p.679.

61. The Court was provided with a diagram of the Fleming Group, which showed the position of the three companies within the group. In this case and similar situations it is necessary to consider the three companies and not a holding company in isolation. I am satisfied that the Court has jurisdiction to admit a holding company, a related company, to examinership, to enable companies in a group obtain the protection of the court – if they comply with the Act of 1990. However, the position of a holding company is dependent upon whether the Court is satisfied that there is a reasonable prospect of survival of the related companies as a going concern. Thus in this case the issue is whether the Court is satisfied that under the proposed Schemes of Arrangement that there is a reasonable prospect of the survival of Construction and/or Tivway as a going concern. If there is, then Holdings may also proceed in examinership.

62. The position in which Construction would be left has been described earlier in this judgment. The engine of the company is to be sold. The dormant property aspect of the company is to remain.

63. Tivway owns the shell Sentinel Building and two thirds of the Aldi site. The Court was referred to a letter of the 16th December, 2009, issued while this appeal was at hearing. Reference was made to the letter earlier in this judgment. Stress was laid on the fact that it showed the support of Anglo Irish Bank for the scheme. However, when one considers what the letter proposes, it may be seen that capital of €361,943 was approved by the bank. But what for? It was to fund site security, insurances and overheads. These are clearly costs relating to the maintaining of a site. They do not relate to any build out – or any operational work – or any evidence of the company operating as a going concern. The sum sought in relation to planning consultant fees, while approved in principle, requires detailed submissions (when the need for funds arises) in respect of each planning permission intended to be sought. This letter illustrates a holding situation – maintaining a site - with an aspiration or dream of future business – not a company operating as a going concern.

64. It was contended on behalf of the examiner that under examinership, and the protection from its creditors which that would provide, the companies in question would survive as a going concern insofar as they would over a period of two years or so benefit from the sale of completed units, continue to receive rental income and be engaged in the maintenance and care of existing properties. Such business activity, it was submitted, was sufficient to constitute ‘a going concern’

within the meaning of the Act of 1990. However, sales over a limited period would be of minimal value in relation to the liabilities and activities of the companies and any rental income must be applied towards outstanding interest. Thus the so called business activity of the companies would be essentially passive; they would remain insolvent but protected by the examinership. The low level business activity referred to would not alter the fundamental character of the proposed schemes of arrangement as providing no more than a holding position over a long period pending the resurgence of the property market when and if that occurs. Accordingly the very limited and passive business activity in which it is claimed that the companies could engage during an examinership would not alter its fundamental characteristics which I have described so as to mean that it was surviving as a going concern.

65. The Schemes of Arrangement in this case envisage a holding plan, the continued survival of the companies, who would continue insolvent. As ACC submitted, correctly in my view, the companies would be effectively dormant. Also, any future business in Tivway and Construction would be entirely dependent on future decisions of the banks.

66. A feature of this case is that Holdings and Construction are unlimited companies. The shareholders John and Noreen Fleming transferred €3,000,000 of their assets to trust funds in May, 2009. A total of €m personal assets of Mr. and Mrs. Fleming are pledged in the proposed schemes. The examiner states that the pledge should justify the fact that Mr. and Mrs. Fleming are relieved of their liability of being shareholders in an unlimited company. ACC has however stressed the fact that the guarantees of Mr. and Mrs. Fleming in the two unlimited companies, Construction and Holdings, were significant to them and they would be prejudiced by the loss of that route to Mr. and Mrs. Fleming. A consequence of the schemes if approved is that they will terminate the liability of shareholders. The Act of 1990 is not designed to immunise principals or shareholders of a company from the consequences of financial difficulties. However, as Mr. and Mrs. Fleming are not represented in these hearings my determination is not based on this aspect of the case.

Employees

67. While the issue of employees may be a significant factor in a case it is not so here. As counsel for the examiner explained, there are 137 employees in Construction. If the scheme is approved 15 will remain, 85 will go to Donban, 37 are employees of Construction on secondment to Vision and Fusion which are being bought by Donban Limited. Therefore, the total number of surviving employees would be 15. Thus the issue of employment in all the circumstances of this case is not a significant factor. As to work to be done on part builds, the work will be done and so employment will be given if and when these proceed.

68. The situation is that these three insolvent companies would remain insolvent under the proposed schemes and I am not satisfied that there is a reasonable prospect of the survival of the companies as a going concern. In such a situation, where the statute does not enable the court to make an order, the issue of employees is not a factor which can cure the want of jurisdiction.

Conclusion

69. The facts of this case are bleak. They epitomise the consequences of the recent property boom and bust. In the wake of these events many people have been left in dismal situations.

70. However, this is an appeal on an issue of law, as to whether the Court has jurisdiction to make orders in examinerships. At the core of this appeal is the purpose of the Act of 1990. The kernel of the statutory scheme is described in s.2(2), where the objective is expressly stated by the Oireachtas, and the test clearly provided, to ground the jurisdiction of the court. Thus a court shall not make an order appointing an examiner unless it is satisfied that there is reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern. It is not just a question of a reasonable prospect of the survival of the company – it is the survival of the company as a going concern. In this case the Schemes provide essentially for the survival of the companies – selling off the productive part of Construction – and keeping in a land bank the sites for ten years in the hope that the property market will recover and, that the banks will support a build out within that time.

71. It is not a question of this Court preferring its own commercial assessment. It is question of construing the legislation to determine whether the Court has jurisdiction to make orders in an examinership in all the circumstances of the case. Thereafter it is a matter of applying the law to the facts of the case.

72. Accepting that a holding company may be part of an examinership of a group, this means that each of the Schemes of Arrangement require to be considered.

73. While sale of part of a company's assets may be appropriate in a Scheme of Arrangement, the

sale in this case of the profitable undertaking in Construction illustrates perfectly what the Scheme is about, which is a plan to put the company into a holding pattern for ten years. However, a holding plan is not the vehicle of examinership established by the legislature.

74. It is entirely understandable that the companies would wish to hold on until there is an upturn in the property market. It is understandable that this would be a reasonable aspiration, subjectively, for the companies. But that is not the test which is required of the Court in assessing whether it has jurisdiction under section 2(2), and in an examinership, to make orders. As was stated in **In the Matter of Vantive Holdings and Ors** [2009] IESC 68, the court must have sufficient evidence before it, which will permit an objective appraisal so that it may arrive at a conclusion that the company has a reasonable prospect of survival as a going concern.

75. It is entirely understandable that the companies, and indeed the banks, would wish to retain control over the companies, and the property, in the hope that a rising market will enable a build out in the future. However, that is neither the test laid down by the Oireachtas nor the objective of the legislation.

76. The Schemes of Arrangement are analogous to a planned holding pattern for three airplanes ordered by the control tower of an airport, where it is ordered that three planes maintain a holding pattern over a specified area, at a specific height, until, say, the weather improves, at which time they will be permitted to land. By analogy, the three Schemes of Arrangement envisage a holding situation hovering over the property market, then if the property market improves, and if they have the support of the banks, they will be permitted to continue business. Failing an improved property market, or support of the banks, they will land in 10 years and the scrappage will be divided. This is not a plan for survival of the three companies as a going concern.

77. The Schemes of Arrangement do not provide for the survival of each of the companies as a going concern, as required by s.2(2). As the Schemes of Arrangement do not comply with the legislation, the Court had no jurisdiction to appoint an examiner. Thus the question arising under s.24(4) does not arise, nor is it necessary to consider the issue of unfair prejudice.

78. For the reasons given I would allow the appeal. I would propose an order reversing the order of the High Court and in its place an order pursuant to s.24(3) of the Act of 1990, refusing to confirm the proposals for Schemes of Arrangement.