THE HIGH COURT

[2021] IEHC 123

[2020 No. 277 COS.]

IN THE MATTER OF CARA PHARMACY UNLIMITED COMPANY

AND

IN THE MATTER OF PART 10 OF THE COMPANIES ACT, 2014

AND

IN THE MATTER OF CARA PHARMACY GROUP UNLIMITED COMPANY, CARA PHARMACIES (LONGFORD) UNLIMITED COMPANY, CARA PHARMACIES (KILLYBEGS) UNLIMITED COMPANY, CARA PHARMACIES (CAVAN) UNLIMITED COMPANY, CARA PHARMACIES (SLIGO) UNLIMITED COMPANY, CARA PHARMACIES (BALLINAMORE) UNLIMITED COMPANY, CARA PHARMACIES (BALLYCONNELL) UNLIMITED COMPANY, CARA PHARMACIES (BAILIEBOROUGH) UNLIMITED COMPANY, CARA PHARMACIES (DRUMSHANBO) UNLIMITED COMPANY, ABBEY HEALTHCARE UNLIMITED COMPANY, CARA PHARMACIES (CORK) UNLIMITED COMPANY AS RELATED COMPANIES WITHIN THE MEANING OF SECTION 517 AND SECTION 2 OF THE COMPANIES ACT, 2014

JUDGMENT of Mr. Justice Denis McDonald delivered on 25th February, 2021.

1. On 18th December, 2020, a hearing took place before me of the Examiner's application for an order under s. 541(3) of the Companies Act, 2014 ("*the 2014 Act*"), confirming proposals for a scheme of arrangement in relation to each of the above companies other than their ultimate holding company, namely Cara Pharmacy Group ULC. The Examiner was appointed on an interim basis on 4th September, 2020 to Cara Pharmacy ULC and to each of the related companies named above including Cara Pharmacy Group ULC. His appointment was subsequently confirmed by further order made by the court on 17th September, 2020. The appointment of the Examiner to Cara Pharmacy Group ULC was subsequently terminated on 11th December, 2020 (as described further below).

2. Cara Pharmacy ULC is the original trading entity of the group which operates thirteen retail pharmacy outlets in the State (most of which are operated by individual companies within the group) with approximately 141 staff employed in total by the group. Unusually, the Examiner was appointed to the group on the application of a secured creditor, namely Elm Corporate Credit DAC. The application for the appointment of an Examiner was initially opposed by the companies but, ultimately, by the time the petition came on for hearing before the court on 17th September, 2020, the companies did not resist the appointment of the Examiner.

3. During the course of the examinership, the Examiner sought proposals for investment. A number of parties made proposals. The party prepared to make the most significant investment was a company called Renrew Ltd which has agreed to invest a total of €14,150,000. This will be funded by the secured creditor and made by way of an equity subscription in Cara Pharmacy ULC of €13,650,000 with the balance of €500,000 made available by way of a capital expenditure facility in the sum of €500,000. The proposed investment is the subject of an investment agreement entered into between the investor and the company. Based on this investment, the Examiner formulated proposals for a scheme of arrangement under which preferential creditors will receive 100% of their agreed debt, key supplier creditors will be paid in full (albeit that full payment will not be made for up to four years from 1st April, 2021) and the remaining unsecured creditors

will receive a dividend of 5 cent in the euro. The secured creditor will receive the equivalent of a dividend of 80% of the debt owed to it.

4. The proposals were considered by the members and creditors of the companies at meetings which took place on 10th December, 2020. Of the classes of creditors of the companies who voted, only one class voted against the proposals, namely, the preferential creditors of Cara Pharmacy ULC. It should be noted, however, that, in the case of Cara Pharmacy ULC, four classes voted in favour of the proposals. In the case of each of the other companies in the group, all of the classes of creditors (comprising 44 classes in total) who voted were in favour of the proposals.

5. Subject to an issue of concern that I will describe presently, having heard the very helpful submissions of counsel for the Examiner and having considered the papers and having heard from each of the notice parties, I formed the view on 18th December, 2020, that the application was in order and I so indicated in the course of that hearing. I was nonetheless asked to postpone making any order in the matter in order to allow time for the proposed investor to negotiate new Community Pharmacy contracts with the Health Service Executive ("HSE") and to list the matter for further consideration by the court on 13th January, 2021. The investment agreement entered into between the investor and the companies (which is the foundation of the proposed schemes of arrangement) is stated to be conditional upon new Contractor Pharmacy agreements having been put in place with the HSE. As I understand it, some of the pharmacies would not be commercially viable in the absence of such contracts. Thanks to the very extensive work undertaken by the HSE in the intervening period, those contracts were finally agreed on 27th January, 2021 and the s. 541 application was thereafter listed on 28th January, 2021 when I made an order confirming the proposals but indicated that I would subsequently deliver a written judgment setting out the reasons for my decision and addressing in more detail the issue which was of particular concern to me (as described below). This judgment is now given for that purpose.

6. In the course of the hearing on 18th December, 2020, I expressed concern about an issue that emerged from my consideration of the Examiner's report under s. 534 of the 2014 Act, viewed against the backdrop of evidence that had previously been placed before the court on affidavit in the context of an application brought by the Examiner in November, 2020 against two parties who are directors of the companies and who are also the ultimate beneficial owners of the group through the shares held by them in Cara Pharmacy Group ULC, namely, Ms. Ramona Nicholas and Mr. Canice Nicholas. The Examiner's application concerned transfers of company monies which had taken place at the direction of those parties. The Examiner sought an order under ss. 528(1) and (2) of the 2014 Act that certain functions of the directors should be performable by him and he also sought directions in relation to an intended application under s. 524(6) seeking the return of the monies which had been transferred.

7. For completeness, it should be noted that, as described in more detail in para. 12 below, the Examiner's application was contested insofar as the return of the monies was

concerned. Ms. Nicholas and Mr. Nicholas maintained that the transfer was effected for the benefit of the companies with a view to discharging professional fees incurred by the companies and also for the purpose of obtaining additional legal and other professional advice. It was also intimated that the directors proposed to oppose the application to confirm the proposals for the schemes of arrangement and that they were taking advice (a) in relation to the conduct of the examinership and (b) as to whether the petition to appoint an Examiner constituted an abuse of process on the part of the secured creditor. Ultimately, the Examiner's application under ss. 528 and 524 did not proceed to a full hearing, although an order was made by consent that certain of the directors' functions should be performed by the Examiner.

8. I was subsequently informed by the Examiner in his s. 534 report delivered on 11th December, 2020 that an agreement had recently been reached between the secured creditor (which is funding the investment in the companies) and the directors with the result that the companies (through their directors) had withdrawn their opposition to the application to sanction the proposals for the schemes of arrangement in respect of each of the companies. In para. 11.5 of his report, the Examiner continued in the following terms:-

> *"The terms of this agreement are confidential. I can, however, confirm that consequent upon the agreement being concluded, I no longer intend to pursue any application for the return of such payments… The Secured Creditor has confirmed to me that it is happy for me to adopt such a position. In circumstances where I am satisfied that the Creditors of the Companies will do better under the Proposals in respect of the Companies (as voted upon at the various meetings) compared to how they would otherwise fare in a liquidation, any contested application for the return of any such payments would only serve to increase the costs of the examinership, which I am eager to avoid at this very late stage in the process."*

9. At this point, it should be noted that the Examiner's report was due to be delivered on 11th December, 2020. In accordance with the usual practice that has developed since the COVID-19 restrictions were first introduced in March, 2020, the papers grounding any such application would ordinarily be furnished by email in advance of the application to deliver the report. On this occasion, the application was listed for hearing at 10.30am on 11th December, 2020. However, it was not until 10.24am on that day that the papers were received electronically by the Registrar who immediately forwarded the papers by email to me. In view of the late delivery of the papers and my own commitments on the same morning, I did not have an opportunity to consider the text of the report itself. Regrettably, I was unable to defer the hearing of the s. 534 application until later in the day in circumstances where I was committed to Day 4 of a hearing which was due to resume at 11.00am on the same day. The most I could do in the very short time available was to consider the affidavit of the Examiner sworn on the same day. In the course of the relatively short hearing which took place, I made it clear to those involved that I had not had an opportunity to read the report and that I was proceeding solely on the basis of the affidavit sworn by the Examiner. On the basis of that affidavit, I was in a position to fix a

hearing date for the consideration of the s. 534 report and the application under s. 541 to confirm the proposals for a compromise or scheme of arrangement in respect of each of the companies in the Cara pharmacy group other than the holding company, Cara Pharmacy Group ULC. In his affidavit sworn on the 11th December, 2020, the Examiner explained that the investor did not wish to acquire the shareholding of the holding company or of the Isle of Man entities (namely Cara Pharmacy IOM Unlimited and Cara Group IOM Unlimited) which sat immediately below it in the group structure and which held the shares in Cara Pharmacy ULC. The Examiner explained that both the Isle of Man entities and the holding company were introduced into the group structure to facilitate the conversion of Cara Pharmacy ULC into an unlimited entity, thereby enabling it to avail of certain non-filing exemptions. The Examiner also explained that, in circumstances where the holding company did not have any business of its own or any employees, the survival of the trading entities within the group was not in any way contingent upon its survival. In those circumstances, the Examiner was satisfied to accede to the investor's request and to exclude the holding company from the proposed investment and not to formulate proposals for a compromise or a scheme of arrangement in respect of it.

10. On the basis of the Examiner's affidavit, I made an order on 11th December, 2020 lifting the protection afforded to Cara Pharmacy Group ULC. On the same day, I fixed Friday, 18th December, 2020 as the hearing date of the application to consider the s. 534 report and the Examiner's application under s. 541 of the 2014 Act to confirm the proposals for a compromise or scheme of arrangement in respect of each of the companies in the group other than Cara Pharmacy Group ULC.

The Issue of Concern

11. In the intervening period between 11th and 18th December 2020, I had an opportunity to consider the s. 534 report of the Examiner. On reading the report, and, in particular, on reading paras. 11.4 and 11.5, I was concerned that the report did not provide a complete picture to the court. I was particularly concerned by what was said in para. 11.5 of the report (quoted in para. 8 above) which referred to a "*confidential*" agreement but did not proffer that agreement to the court. In circumstances where an examinership is a court process overseen by the court, an agreement entered into in the context of an examinership should not be withheld from the court. It should also be noted that, on the face of what was said in para. 11.5 of the Examiner's report, the impression was created that the agreement was entered into solely between the directors and the secured creditor. I was concerned to see the agreement for a number of reasons. In the first place, I was concerned to see the agreement in circumstances where the agreement (as described in the Examiner's report) related to the application brought by the Examiner in November, 2020 which had not yet been disposed of. I was also concerned, in any event, that the agreement had not been proffered to the court by the Examiner. In this context, I fully appreciate that there may, on occasion, be documents generated in an examinership which are of a commercially sensitive nature and which have to be kept confidential, but that does not mean that they can be withheld from the court.

12. I was also very concerned that monies may have been paid to the directors and ultimate beneficial owners of the group which had not been disclosed either to the court or to creditors. On the basis of the description of the agreement given in the Examiner's report, I was puzzled that the entire of the payment previously made at the behest of the directors (which had been the subject of the proposed application by the Examiner under ss. 524 and 528, as described above) was to be retained by its recipient. As I understood it from the affidavit of Mr. Canice Nicholas sworn in response to the Examiner's application under ss. 524 and 528, the transfer had been effected with a view to funding a challenge to the examinership after it became known that the successful investor was funded by the secured creditor (who had brought these proceedings as petitioner) and also with a view to discharging professional fees which had already been incurred. In the affidavit sworn by Mr. Canice Nicholas on 27th November, 2020, it was stated that:-

> *"It was the Company's… professional advisors who advised making the payments and transfers in order to be able to take any necessary steps on foot of… investigations. The intention of the Company is to attempt to ensure its survival as a going concern and to protect the jobs and communities associated with it. The intention of the Company in making transfers and payments was to procure advice on whether the examinership was being run correctly and in accordance with the law… The Company was advised that the issues raised… would require a careful legal examination of the position, as well as an investigation and analysis of the conduct of the examinership to date and the actions and disposition of the petitioner, who the Company was informed played a pivotal role in the successful bid… On the basis described, the Company was advised to transfer the sum of €125,000 to the client account of Leman Solicitors and to discharge any outstanding professional fees…"*

13. My understanding of that averment was that some part of the sum of €125,000 was intended to discharge outstanding professional fees and the balance was to fund an investigation and possible challenge to the examinership. However, that challenge to the examinership never proceeded. In those circumstances, I was puzzled, on reading the Examiner's s. 534 report, that no part of the sum of €125,000 was being repaid to Cara Pharmacy ULC. I was concerned that some part of it might be earmarked for the beneficial owners of the group who, understandably having regard to their ultimate ownership of the group through Cara Pharmacy Group ULC, had been described as "*shareholders*" in a number of paragraphs in the affidavit of the Examiner grounding his application under ss. 524 and 528 of the 2014 Act.

14. In light of the concerns outlined above, in the course of the hearing on 18th December, 2020, I raised the issue as to why the "*confidential*" agreement had not been made available to the court and I also queried whether some part of the sum of €125,000 had been retained by the beneficial owners of the group.

15. There were, therefore, two principal areas of concern:-

(a) My first concern related to the withholding of an agreement from the court on the basis that it was stated to be "*confidential*". It is essential to bear in mind in this context that examinership is a court process and any report of an Examiner to the court should make full disclosure to the court of all relevant material. I can see no basis upon which an agreement which concerns the examinership could be withheld from the court on the basis of confidentiality. If there are genuine concerns that the provisions of an agreement should be kept confidential, there is no reason why that cannot be addressed in an appropriate way. There are many occasions where genuinely commercially sensitive material can be produced to the court on a basis that will not involve any public disclosure of that material. Similarly, if an Examiner has a concern about the release of information contained in his or her report to the court, that can also be addressed appropriately and the court has power to direct the redaction of any sections of the report that should not be made available to any party other than the court.

(b) The second area of concern related to the possibility that, in some way, financial provision had been made by the investor for the beneficial owners and directors of the companies which had not been disclosed either to the court or to creditors. As a general proposition, where creditors are presented with proposals for a compromise or a scheme of arrangement in an examinership, full information should be provided in relation to all recipients of any payments to be made by the relevant investor either to members or, where relevant, the beneficial owners of the company (through the vehicle of a corporate structure or otherwise). While I fully accept that, in some cases, there may be genuine reasons why it is not appropriate to make disclosure of some aspects of proposed arrangements, the starting proposition must be that, in the absence of some objective justification for not doing so, full information should be provided so that creditors are in a position to take a fully informed decision as to whether or not they wish to accept the proposals in question. It is important, in this context, to keep in mind that a court is enjoined by s. 541(4)(b)(ii) from confirming proposals for a compromise or an arrangement unless it is satisfied that the proposals are not unfairly prejudicial to the interests of any interested party. For reasons which are explained in more detail below, I take the view that a benefit to a director or a shareholder (or to someone who is the ultimate beneficial owner of the shares) is capable, depending upon the facts of an individual case, of constituting unfair prejudice in circumstances where creditors, under the proposals, are required to accept a write-down of their debts.

16. I now deal, in turn, with each of these concerns, in more detail.

The withholding of the "*Confidential*" Agreement

17. When I raised my concerns in the course of the hearing on 18th December, 2020, a copy of the agreement was made available to me on a confidential basis by the solicitors acting on behalf of the secured creditor. The first point to note is that, contrary to the impression created by para. 11.5 of the Examiner's report (which described it as an agreement between the secured creditor and the directors), the Examiner is himself a

party to the agreement. That made it all the more surprising that the agreement was not produced to the court as part of the Examiner's s. 534 application. Secondly, having considered the terms of the confidentiality clause contained in the agreement, I do not believe that there is any basis upon which the agreement could be said to be confidential in all circumstances. The confidentiality clause is in somewhat unusual terms. Subject to the issue of an agreed press release, it prohibits the ultimate beneficial owners of the group (who are described in the agreement as "*the Shareholders*") from disclosing the terms of the agreement to any third party (other than their professional advisors on a confidential basis) without first obtaining the written consent of the petitioner. It also prevents any party from issuing any "*formal public announcement or press release in connection with the signature or subject matter of this Agreement*" without the prior written approval of the other parties (such approval not to be unreasonably withheld or delayed). That is quite a limited prohibition on disclosure and does not prevent any party other than "*the Shareholders*" from disclosing the subject matter of the agreement by any means other than a formal public announcement or a press release. It plainly did not prohibit the Examiner from disclosing its terms. In addition, it provides that the obligations of the "*Shareholders*" as to confidentiality are to continue in force notwithstanding any termination or expiration of the agreement. Thus, by its own terms, the obligation of confidentiality operated primarily to prevent the "*Shareholders*" from making any disclosure of the terms of the agreement. It did not prevent the Examiner from disclosing the agreement to the court. Clearly, it would have been wrong for the agreement to go that far. As noted above, in the context of a court process such as an examinership, there could be no basis upon which an agreement entered into by the Examiner could properly be withheld from the court. Moreover, Cara Pharmacy ULC and the other companies in examination are all parties to the agreement. Cara Pharmacy ULC is to be distinguished from the ultimate holding company in the group, namely, Cara Pharmacy Group ULC which, as described in para. 1 above, is not the subject of the s. 541 application.

18. It is clear from the agreement that I was correct in apprehending (on reading the Examiner's report) that provision is to be made for the beneficial owners of the group. I can see from the terms of the agreement that there may well be commercial reasons why such provision was made. However, as a matter of principle, it seems to me that, for the reasons discussed below, any provision to be made to directors or to members of a company to which an Examiner has been appointed or to those who can be characterised as the ultimate beneficial owners of such a company should be disclosed not only to the court but also to the creditors of the company.

19. In light of the concerns outlined in para. 15 above, I directed the Examiner to prepare a supplemental report addressing my concerns. Thereafter, on 7th January, 2021, a detailed report was provided to the court by the Examiner in which he explained the circumstances in which his s. 534 report came to be delivered immediately prior to the scheduled hearing of the s. 534 application. The Examiner explained that discussions had been on-going with the Revenue Commissioners up to the evening of the preceding day in the hope of addressing residual concerns of the Revenue Commissioners regarding their

treatment under the proposals relating to the group. He also explained that, because of the on-going negotiations with the Revenue Commissioners, the confidential agreement was not at the forefront of his mind or the minds of his legal advisors at the time his s. 534 application was finalised. He further explained that the agreement was prepared by the solicitors acting for the investor following negotiations which took place directly between the legal advisors of the ultimate beneficial owners and the investor. The Examiner said that he was not a party to those discussions although, as noted above, he is named as a party to the agreement. The Examiner said that he was named for the purpose of confirming that no action would be taken to pursue the beneficial owners in respect of the money transfer described above. The Examiner also stated that the provision which is made for the beneficial owners is not in respect of their shareholding in any of the companies but relates to other rights claimed by them including statutory rights to redundancy payments and other employment rights.

20. The Examiner's supplemental report did not, however, explain why the terms of the agreement with the beneficial owners were subject to confidentiality on the terms described above. Accordingly, when the matter was next listed before the court on 13th January, 2021, I asked the Examiner to explain, in a further supplemental report, why the agreement was subject to a confidentiality clause which effectively only prohibited the ultimate beneficial owners (and no one else) from disclosing its terms (other than by way of a formal public announcement or press release). The Examiner prepared a second supplemental report. In that report, the Examiner stated that the investor's legal advisors had confirmed to him that the:-

> *"relevant clause in the Agreement is a standard boilerplate provision intended to protect the commercial interests of the proposed investor. They have also confirmed that the Directors did not resist or seek to negotiate the confidentiality clause."*

To my mind, that does not, in any way, explain why the confidentiality clause was drafted in the manner outlined in para. 17 above. From my previous experience in private practice, I have rarely seen a confidentiality clause drafted in that way which imposes a blanket obligation of confidentiality on one party to the agreement with no corresponding obligation imposed on the other parties.

21. In the same report, the Examiner provided further detail in relation to the relevant timeline. In particular, he explained that the investment agreement between Cara Pharmacy ULC and the investor was concluded on 4th December, 2020, after the Examiner had posted the notices convening the members and creditors' meetings at which the proposals for a compromise or scheme of arrangement were to be considered. The Examiner explained that he had to serve the notices in question on 4th December, 2020 in circumstances where, if he was to meet the timescale for delivery of a s. 534 report on Friday, 11th December, 2020, any meetings of creditors and members would need to take place on Thursday, 10th December, 2020. He also said that the meetings could not be postponed pending the finalisation of any agreement between the investor

and the directors/ultimate beneficial owners. At the time the relevant notices were posted, the Examiner confirmed that there was no agreement in place with the directors/ultimate beneficial owners although his understanding was that discussions were on-going. Thereafter, the various members and creditors' meetings took place on the morning of Thursday, 10th December, 2020. At that point, the Examiner confirmed that, although discussions between the investor and the directors/ultimate beneficial owners were at an advanced stage, no agreement had been reached at the time of the meeting. The agreement was concluded later on the same day.

22. The additional material contained in the supplemental reports prepared by the Examiner contains all of the information which I believe ought to have been included in the s. 534 report. It is unfortunate and regrettable that the information was not contained in the s. 534 report. Nonetheless, I accept that the s. 534 report was prepared under significant time pressure and at a time when the Examiner was focused on securing an agreement with the Revenue Commissioners in negotiations that continued late into the afternoon of 10th December, 2020. That said, in terms of the practice to be adopted in examinerships, there are lessons to be learned from what has happened and this is an issue that I address further in paras. 50 to 51 below.

23. Furthermore, for the reasons explained in paras. 24 to 29 below, an important issue of principle arises in relation to payments to directors or members (or persons who, although not strictly members are the ultimate beneficial owners of the company concerned). It is appropriate, in those circumstance, to highlight the potential significance of the issue and to provide some guidance as to how an issue of this kind should be addressed in the future.

The potential significance of provision being made for a shareholder or director of a company to which an Examiner has been appointed

24. As noted in para. 15(b) above, a court is enjoined by s. 541(4)(b)(ii) from confirming proposals for a compromise or an arrangement unless it is satisfied that the proposals are not unfairly prejudicial to the interests of any interested parties. In *Re SIAC Construction Ltd* [2014] IESC 25, Fennelly J., at para. 66, explained that:-

> *"The notion of "unfair prejudice" in the Act requires to be considered from at least two points of view. Firstly, there is the question of whether the objector is unfairly treated by comparison with how he would be likely to fare in a liquidation. Secondly, a court will have regard to his treatment vis-à-vis other creditors."*

25. Unfairness can, therefore arise in at least two ways. First, if the creditors will fare worse under a proposed scheme, that may give rise to unfairness. Second, unfairness may also arise on a comparative basis when the outcome, under the scheme, for one creditor or class of creditors is different to the outcome for others in a similar position. It is the latter aspect of unfairness which is relevant for present purposes. While Fennelly J., in *SIAC*, was concerned with the comparative treatment of creditors *inter se*, the same principle also applies as between shareholders, on the one hand, and creditors, on the other. In this context, creditors are frequently asked to accept significant write-down of their debts

under proposals for a compromise or scheme of arrangement. If, on the other hand, directors or shareholders are to receive a benefit arising out of or incidental to the arrangements which are proposed to be put in place, that is an issue which is potentially very relevant to the issue of unfair prejudice. For this purpose, it seems to me that the court must be mindful not only of the terms of the relevant proposals but also of any agreement which is separately entered into between the investor and shareholders or directors of a company under which the latter are to receive any payments.

26. The relevant principle was explained (in the context of s. 24(4)(c) of the Companies (Amendment) Act, 1990 which was the predecessor provision to s. 541(4)(b)(ii) of the 2014 Act) by Clarke J. (as he then was) in *Re Tony Gray & Sons Ltd* [2009] IEHC 557 at paras. 21-22:-

> *"21. It is important… to refer to the provisions of the Act and, in particular, s. 24(4)(c) which requires that a scheme of arrangement be fair and equitable to any class voting against approval of the scheme and, with particular relevance to the issue which I have to decide, provides, in subs. (ii), that the scheme be "not unfairly prejudicial to the interests of any interested party". In that context it is important to note that s. 24 precludes the approval of a scheme where those terms are breached. Therefore, it is a mandatory requirement of the Act that the court be satisfied that a scheme is not unfairly prejudicial to the interests of any interested party.*
>
> *22. In that context it seems to me that it is necessary to assess whether, as and between the shareholders on the one hand, and the unsecured creditors on the other hand, the scheme could be said to be unfairly prejudicial. It should first be noted that the unsecured creditors are moving from a position on liquidation of receiving nothing, to a position under the scheme, if approved, where such creditors will receive 5%. It should also be noted that the shareholders are moving from a situation where they would also receive nothing on liquidation (either in their capacity as shareholders or, to the extent that it might be relevant, otherwise), but will have the benefit of the full value of the company if the scheme is approved. I will return to this issue in due course, because any comparison will obviously depend to some extent on how the company is likely to be valued should the scheme be approved, because this, in turn, would be likely to determine the extent of the value which the shareholders might be said to be obtaining by the approval of the scheme…"*

27. In that case, the scheme which was put forward for confirmation by the court envisaged that the existing shareholders would remain in place notwithstanding that the scheme did not involve any investment of new capital by them. Clarke J. carefully reviewed the evidence before the court and ultimately came to the conclusion that the shareholder value to be obtained, by virtue of the scheme, was very modest. At para. 31 of his judgment, he concluded that the level of benefit to the shareholder was not disproportionate in the circumstances. He said:-

"31. That seems to me to lead to the view that the shareholder value to be obtained by the current shareholders if the scheme is approved is limited, on the particular facts of this case, and is not such as would render it unfairly prejudicial to allow those shareholders to continue to have the benefit of that shareholding without any injection of new capital. I would comment that it is only in those unusual circumstances, however, that I am satisfied that what must be an untypical arrangement, whereby shareholders are permitted to retain their shareholding in full without the introduction of any new capital, meets the test of lack of unfair prejudice as specified in the Act…"

28. On the facts, the scheme proposed in *Tony Gray & Sons Ltd* is quite different to the proposals under consideration in respect of the Cara pharmacy group. Under the scheme proposed here, the ultimate beneficial owners of the group (who are also the directors of each of the companies in the group) will have no further involvement in the companies which are the subject of the proposals. In addition, the beneficial owners are not members of any of the companies which are the subject of the proposals. Their beneficial ownership is derived through the corporate structure and is, therefore, indirect. That said, it is important to bear in mind that the court, in considering unfair prejudice to the interests of any interested party, is not confined under s. 542(4)(b)(ii) of the 2014 Act to weighing the outcome of the process for creditors as against the outcome of the process for members. Nor is it confined to considering the position of creditors inter se. This is an issue that was addressed (albeit in the context of an application to appoint an Examiner) by Clarke J. In *Re McSweeney Dispensers 1 Ltd* [2011] IEHC 494. Coincidentally, that case also related to the examinership of a pharmacy group. In the course of his judgment in that case, Clarke J. made the following very relevant observation:-

"6.1. …I have… in a number of recent examinerships emphasised the importance of scrutinising schemes of arrangement where the only additional capital being introduced comes from the existing shareholders or persons or entities connected with them. In such cases it is important for the court to analyse with some care the extent to which the scheme as a whole is fair not only as and between the various categories of creditors but also between the creditors on the one hand and shareholders on the other. Such a scheme may well be unfair if the shareholders get to keep their company (and frequently retain additional financial benefits such as contracts of employment or director's fees which go with it) for the introduction of very limited additional capital in circumstances where the creditors are expected to take huge write downs. If the examiner in this case was to ultimately come up with a scheme of arrangement which was unfair on that basis then there can be little doubt but the scheme would not be confirmed."

29. That observation appears to have been made with the earlier decision in the *Tony Gray* case in mind. It is clear that Clarke J. was of the view that, on an application to confirm proposals for a scheme, it is necessary to consider any additional financial benefits which shareholders or directors may obtain over and above any provision that may be made for them under the proposals. There is again an obvious difference between the

circumstances described by Clarke J. there and the present case where a significant investment is being made by the investor. However, the underlying principle is nonetheless relevant. Thus, for example, if an investor chose to make an overly generous payment to directors of a company in order to secure their exit when compared with the amount made available by the investor to fund a dividend payment to the creditors of the company, that could well give rise to unfair prejudice to the creditors and is a matter that would require careful scrutiny and consideration by the court. In this context, it is important to emphasise that the question of unfair prejudice to any interested party is an issue which the court is required to consider whether or not any creditor or other interested party opposes the order sought under s. 541. As noted in para. 24 above, this is an obligation which is placed on the court itself by s. 541(4)(b)(ii) of the 2014 Act. As Clarke J. made clear in *McSweeney Dispensers*, the financial benefits derived from contracts of employment or directors' fees are very relevant in circumstances where creditors are expected, under a proposed scheme, to accept a substantial write-down of debt. Logically, the same concern arises where payments are made to directors or shareholders by way of exit fees.

30. It is against this backdrop that my concern in relation to the withholding of the agreement with the beneficial owners arises. If the court is to be in a position to properly undertake its role under s. 541 of the 2014 Act, it is crucially important that all relevant material should be placed before the court so that the court can properly assess whether the proposals placed before it under s. 541 satisfy each of the statutory criteria including the requirement that the proposals are not unfairly prejudicial to the interests of any interested party.

31. On an application under s. 541, the court will require to be satisfied that all of the requirements of s. 540 (in relation to consideration by members and creditors of the companies concerned of the relevant proposals) have been complied with. The court will also be concerned to establish whether the proposals will, if implemented, have a reasonable prospect of securing the future of the company concerned and of maintaining employment. While this is not a factor which is specifically identified in s. 541, it is, as Clarke J. observed in *Tony Gray & Sons Ltd* the "*whole point of the Examinership process… that… the enterprise and jobs associated with the company can be saved for the benefit of the community and those who are in the relevant employment".* Obviously, if any member or creditor objects to the confirmation of the proposals under s. 543, the court will also be required to consider that objection. However, even in the absence of such an objection, the court is expressly prohibited from making an order confirming any proposals unless at least one class of creditors whose interests or claims would be impaired by implementation of the proposals has accepted the proposals and the court is satisfied that the proposals are fair and equitable in respect of any class of either members or creditors that does not accept the proposals (where the interests or claims of that class will be impaired by the proposals) and the court must also be satisfied that the proposals are not unfairly prejudicial to the interests of any interested party.

32. In addition, the court will wish to hear the views of any of the parties specifically identified in s. 541(2), namely, the company, the Examiner, any creditor or member whose claims or interest would be impaired if the proposals are implemented, and the directors of the company. The weight to be given to the views of each of those parties will obviously depend on the circumstances of any particular case. However, as a general rule, in the context of an insolvent company, the court will always have to keep in mind the impact of the proposed scheme on the creditors of the company and, in particular, the extent of the write-down of their debts. Given the fact that, in almost every case, there will be a substantial write-down of debt, the court will have to consider whether that write-down is unfairly prejudicial. While the task of the court, in assessing unfair prejudice under s. 541(4), extends to satisfying itself in relation to the position of all interested parties including members, the write-down of debt requires the court to be particularly mindful of the impact of the proposals or any related arrangements on creditors who, almost invariably, bear the brunt of the insolvency.

The payments to be made in this case under the "confidential" agreement

33. Having regard to the considerations discussed in paras. 26 to 32 above, I believe it is essential to consider the payments which are to be made to Ms. Ramona Nicholas and Mr. Canice Nicholas under the terms of the "*confidential*" agreement. While I was asked by counsel for Ms. Nicholas and Mr. Nicholas not to reveal the terms of the agreement in this judgment, no sufficient reason has been advanced as to why the terms of the agreement should not be revealed. As noted earlier, it seems to me that the starting position must be that, in the absence of some objective justification for not doing so, full information should be available to the creditors so that they are in a position to take a fully informed decision as to whether or not they wish to accept proposals put before them in respect of the payments to be made to them in satisfaction of the debts owed to them. Furthermore, full disclosure must likewise be made to the court so that the court is in a position to determine whether persons in the position of Ms. Nicholas and Mr. Nicholas are obtaining a benefit which gives rise to an unfair prejudice to the creditors or other interested parties. While I do not exclude the possibility that, in an individual case, payments to directors or shareholders by an investor in companies to which an Examiner has been appointed might quite properly be kept confidential, no plausible case has been made here that the terms of the agreement of 10th December, 2020 should not be disclosed. In any event, if I am to reach a conclusion in relation to whether s. 541(4)(b)(ii) of the 2014 Act has been satisfied in this case, I must examine the agreement and, more particularly, the payments to be made under it.

34. There are a number of parties to the agreement of 10th December, 2020. These include the secured creditor, the investor, Cara Pharmacy ULC, the other companies the subject of the proposals formulated by the Examiner, Ms. Nicholas and Mr. Nicholas and the Examiner himself. Ms. Nicholas and Mr. Nicholas are referred to in the agreement as the "*Shareholders*". The agreement recites that both Ms. and Mr. Nicholas are employees of Cara Pharmacy ULC and directors of that company and the related companies. The recitals also refer to the application brought by the Examiner under s. 528 of the 2014 Act and to the selection by the Examiner of Renrew Ltd as the preferred investor. The recitals

also confirm that the parties have agreed to enter into the agreement "*for the purposes of documenting the exit of the Shareholders from the Company and settle any claims between the Parties in the event that Proposals are approved by the Court".*

35. Under clause 2.1 of the agreement, the shareholders acknowledge and confirm that the Examiner has been validly appointed; that Renrew Ltd has been validly selected as the preferred investor and that they do not have a claim of any nature against Renrew, the secured creditor and/or the Examiner or any of their agents. Under clause 5.1, Ms. Nicholas and Mr. Nicholas are each to be paid a total of €200,000 comprising €29,000 as a statutory redundancy payment and €171,000 as "*an ex gratia payment on the termination of their employment*". That money is to be paid by Cara Pharmacy ULC. Given that Renrew Ltd will become the beneficial owner of the group under the Examiner's proposals, it will ultimately bear the burden of having to make this payment.

36. The making of the payment is subject to a number of conditions. Under clause 3.1, Ms. Nicholas and Mr. Nicholas agreed to cooperate with the Examiner and to sign any documents necessary to facilitate the change of ownership of the group. Under clause 4.1, it is agreed that their employment with Cara Pharmacy ULC will end on the "*Effective Date*" which is defined by clause 1.1 as the date upon which the proposals are confirmed by the court under s. 541 of the 2014 Act and become effective. That date has now passed. Furthermore, the payment is subject to the agreement and acknowledgment by Ms. Nicholas and Mr. Nicholas that the payments are without any admission of liability and are accepted in full settlement, satisfaction and discharge of all claims against the company. Ms. Nicholas and Mr. Nicholas also agreed and acknowledged that they have no claim against the company or any Cara group company in respect of any employment matters. They also agreed to return to the company all papers and any property belonging to Cara Pharmacy ULC or any group company.

37. In addition, under clause 7, Ms. Nicholas and Mr. Nicholas undertook not to do any of the following:-

    (a) Carry on any retail pharmacy business within a five kilometre radius of any of the pharmacies operated by any of the companies in the group which are the subject of the proposals made by the Examiner. This restriction is to continue for a period of twelve months from the date of the agreement;

    (b) For a period of twelve months from the date of the agreement, to cause, induce or seek to induce any employee or officer of any of the companies in the group to take up employment with them;

    (c) For twelve months from the date of the agreement, to solicit or entice away any supplier to any of the group companies which supplied goods and/or services within the twelve-month period immediately preceding the agreement;

    (d) To carry on any business directly or indirectly under any of the names or any name that includes "*Cara*" or "*Abbey Healthcare*"; or

(e) Otherwise compete with the "*Cara Home*" business for a period of twelve months.

(f) Under clause 8 of the agreement, Ms. Nicholas and Mr. Nicholas also irrevocably assigned and/or transferred the full benefit of any present or future right, title and interest held by either of them in any intellectual property or domain names relevant to the Cara Pharmacy business, save that they are to retain the right to purchase, sell or otherwise trade in a very limited number of Cara own brand products under the "*Renew*" brand name.

38. Clause 9 of the agreement deals with waivers of claims and, in particular, records the agreement of the parties that they have no claim to the sum of €125,000 which was the subject of the intended application by the Examiner. This confirmation is given by all of the parties. The sum had previously been held in the client account of the solicitors who had acted on behalf of Ms. Nicholas and Mr. Nicholas in the application brought by the Examiner in November, 2020. The effect of this provision is that no part of the sum of €125,000 is being paid to Ms. Nicholas or Mr. Nicholas. Contrary to the impression which I had formed, it appears that the entire of that sum has been applied in discharging professional fees to those involved in the investigation described in the affidavit of Mr. Canice Nicholas sworn in November, 2020. It is clear from the terms of clause 9 of the agreement that Renrew Ltd (who will be the relevant party most affected by that transaction, once its acquisition of the group is complete) has agreed not to pursue repayment of any element of the sum of €125,000.

39. I am strongly of the view that, as a matter of principle, creditors should be informed, prior to any vote on proposals for a compromise or scheme of arrangement, of any payments to be made to directors or shareholders or those who, through a corporate structure, are the ultimate beneficial owners of the shares in the companies which are the subject of such proposals. While I do not believe that it would usually be necessary to provide creditors with all of the detailed terms of any agreements which have been entered into, it seems to me that, at minimum, creditors, in the absence of good reason to the contrary, should be informed of the amount of any payments to be made and, in broad terms, the reasons for the payments. Otherwise, creditors will be unable to form a view as to whether the proposals are in any way unfairly prejudicial to them. For example, if the payments to be made to directors are unjustified or are disproportionately high (when the amount of the dividend to the creditors is taken into account), creditors must be in a position to determine whether they should, in the first instance, vote for the proposals and, furthermore, to consider whether they should object to the confirmation of the proposals by the court on the grounds of unfair prejudice or any other ground. I appreciate that, in particular circumstances, payments to be made to directors or shareholders may well be commercially justified where, for example, intellectual property necessary to the successful conduct of the business of a company is personally owned by the directors or shareholders themselves and that, in such cases, it might be argued that the payments are, therefore, both necessary and appropriate and that they are not relevant to the issue as to whether or not the payments to be made to creditors under the proposals are fair or unfair. However, in the context of a court process such as

examinership, which should be seen to be both transparent and fair, it is nonetheless necessary, in my view, that the creditors should be informed of the fact of the payments and the broad reasons for them so that they can form their own view as to whether or not the making of such payments is or is not relevant to the fairness of the proposals put forward to settle the creditors' claims. Again, it is important to keep in mind the observations of Clarke J. in *McSweeney Dispensers* that the financial benefits to directors and shareholders are relevant when it comes to scrutinising proposals for a scheme of arrangement. While those observations were made by Clarke J. in the context of the court's scrutiny of the arrangements, the creditors are also entitled to be provided with sufficient information to enable them to assess what stance they should take in relation to the proposed arrangements prior to voting upon them. The creditors have a statutory right to be heard on an application under s. 541 and if that right is to be appropriately vindicated, it is essential that they should have sufficient information available to them for the purpose of addressing whether the requirements of s. 541 have been satisfied (including the requirement that the proposals are not unfairly prejudicial to the interests of any interested party).

40. In this case, however, the agreement with Ms. Nicholas and Mr. Nicholas was not in place at the time the meetings of creditors and members were convened for the purposes of considering the proposals formulated by the Examiner. As outlined by the Examiner in his supplemental reports to the court, with a view to meeting the deadline for submitting his s. 534 report on 11th December, 2020, he had, on 4th December, 2020, convened the meetings for 10th December, 2020. He also confirms that the agreement with Ms. Nicholas and Mr. Nicholas was not completed until later on the same day as the meeting. In those circumstances, the creditors could not have been informed of the payments to be made in advance of the holding of the meetings to consider the proposals. While it is highly undesirable that negotiations with directors or members should be allowed to continue until after the creditors' meetings have concluded, there is no evidence to suggest that the agreement with Ms. Nicholas and Mr. Nicholas was deliberately held back until the meetings of creditors had taken place. Furthermore, although I had raised, at the first hearing of the s. 541 application on 18th December, 2020, my concerns about provision being made for the directors, none of the creditors who were acting as notice parties in relation to the s. 541 application expressed any concern that information in relation to such provision had not been made available to them. The matter was subsequently before the court again on 13th January, 2021 and again on 28th January, 2021 and, on neither occasion was any issue raised by any creditor in relation to the non-disclosure of information to them. The impression I formed from the submissions made by creditors at those hearings was that the creditors were very much in favour of the proposals albeit that, in the case of the Revenue Commissioners, the proposals were modified to address a particular concern of the Revenue Commissioners. That modification did not affect the position of any other creditors.

41. As previously noted, whether or not any party objects to proposals, the court is required to be satisfied of each of the statutory requirements set out in s. 541. In the present case, on the basis of the evidence before the court, the only issue which arose under s.

541 was as to whether the court could be satisfied, for the purposes of s. 541(4), that the proposals were not unfairly prejudicial to the interests of any interested party. It is in that context that the making of payments to Ms. Nicholas and Mr. Nicholas arose for consideration. It is true that the payments to be made to them are the subject of a separate agreement and are not part of the proposals before the court. It is also true that the only company in which they hold shares – namely, Cara Pharmacy Group ULC – is no longer part of the court process, the court protection for that company having been terminated by the order made on 11th December, 2020. These issues were addressed in the following way in para. 3.3 of the first supplemental report provided by the Examiner where he said:-

> *"3.3. Although the Agreement defines Mr. and Mrs. Nicholas as the "Shareholders", this was done for ease of drafting only. Despite Mr. and Mrs. Nicholas having been identified as "Shareholders" for the purpose of the Agreement, the proposed payments to Mr. and Mrs. Nicholas in the amounts of €200,000 relate to the consensual termination of their respective contracts of employment with the Company. Their employment spans a period of approximately twenty years. As detailed in the Agreement, the individual payments of €200,000 which are to be made to each of Mr. and Mrs. Nicholas comprise of a net statutory redundancy payment in the amount of €29,000 and a net ex gratia payment on the termination of their employment in the amount of €171,000. The said payments do not therefore relate to their shareholding in the ultimate parent company of the Group (i.e. Cara Pharmacy Group Unlimited Company) which company… had the protection afforded to it lifted by order dated 11 December 2020. The various proposals for a compromise or scheme of arrangement formulated and voted upon at the various meetings, did not include proposals in respect of Cara Pharmacy Group Unlimited Company (being the only company in which Mr. and Mrs. Nicholas hold shares)."*

42. I am not sure how the Examiner is in a position to explain why the term "*Shareholders*" was used in the agreement for the purposes of designating Ms. Nicholas and Mr. Nicholas. The Examiner explained elsewhere in his report that he was not involved in the drafting of the agreement. In any event, the subjective view of a party to an agreement of this kind is not admissible as an aid to its interpretation. It seems to me to be inherently more likely that the term "*Shareholders*" was adopted because it reflected the reality that, although Ms. Nicholas and Mr. Nicholas do not hold any shares directly in any of the companies, the subject of the present proposals, they were, at all times, regarded as being in the position of shareholders having regard to their indirect holding of the shares through Cara Pharmacy Group ULC. Through that holding, they were able to maintain ultimate control over each of the companies in the group. For that reason, I have referred to them in this judgment as the ultimate beneficial owners.

43. Moreover, even if the payments do not relate to their position as shareholders, that does not mean that the payments are not relevant in the context of s. 541 of the 2014 Act and, in particular, to the issue as to whether the making of such payments gives rise to

unfair prejudice to any interested party. The decisions of Clarke J. in *Tony Gray* and *McSweeney Dispensers* show very clearly that financial benefits to directors are also relevant in the context of any consideration of unfair prejudice. The court is not confined, in its consideration of fairness, to scrutinising benefits paid to members in respect of their shareholding. For the same reason, the fact that the payments are made under an agreement which is separate to the proposals addressing the position of members and creditors does not make the payments irrelevant to the task of the court under s. 541. On the contrary, in light of the significant value of these payments, the fact that they are being made under a separate agreement increases the need for the court to carefully scrutinise the payments in the context of the necessary determination that requires to be made under s. 541 as to whether any interested party has been unfairly prejudiced. Likewise, the fact that the payments are characterised as redundancy payments or as payments for long service or as otherwise connected with their employment does not mean that the payments to Ms. Nicholas and Mr. Nicholas do not require to be carefully scrutinised by the court.

44. Payments in a total amount of €200,000 to each of Ms. Nicholas and Mr. Nicholas cannot be characterised as inconsequential. Even in the context of an overall investment of €14,150,000, a payment of €400,000 (in the aggregate) to the ultimate beneficial owners of the group is significant, particularly in circumstances where many of the creditors are getting no more than 5 cent in the euro in respect of the debts owed to them. If the payments were confined to the statutory redundancy payments of €29,000 each, it might be possible to reach a view that payments of that scale could not be considered to give rise to any unfair prejudice to the creditors. However, the payment of an additional €342,000 by way of an "*ex gratia payment on the termination of their employment*" is, by any standard, a very substantial payment in the context of an insolvency where creditors are suffering a very substantial write-down of their debts. The making of such a payment begs the question as to why this payment is made to the directors/beneficial owners rather than to the creditors.

45. The scale of the payment is all the more relevant when one considers that the agreement under which it is proposed to be paid was not produced to the court until requested by the court. The form of the confidentiality clause is also of concern. In the absence of a plausible explanation to the contrary, it raises a question as to whether the one-sided nature of the confidentiality obligation imposed on Ms. Nicholas and Mr. Nicholas was designed to ensure that the scale of the payments made to Ms. Nicholas and Mr. Nicholas was not disclosed to creditors. These are issues to which I have given very serious consideration. However, while I am troubled (a) by the form of the confidentiality clause (which cannot plausibly be regarded simply as a boiler plate provision to which no great thought was given), (b) by the way in which the agreement was withheld from the court (until requested) and (c) by the scale of the payments, I have nonetheless concluded that the payments to be made to Ms. Nicholas and Mr. Nicholas do not, in the very particular circumstances of this case, make the proposals unfairly prejudicial to any interested parties and, in particular, to the creditors.

46. I have reached that conclusion in circumstances where the amount of the investment to be made by Renrew Ltd in the sum of €14,150,000 is significantly in excess of the value of the group and exceeds any of the other proposals for investment that were made (including the proposal made by Ms. Nicholas and Mr. Nicholas themselves). This became clear in the course of the Examiner's application under ss. 524 and 528 of the 2014 Act described above. In para. 5 of the affidavit of Mr. Canice Nicholas sworn in opposition to the Examiner's application, he drew attention to the fact that the proposal made by Renrew Ltd is "*very greatly in excess*" of the value of the assets of the group which have been independently verified at €8,060,000. While Mr. Nicholas, in that affidavit, sought to suggest that the size of the proposal made by Renrew Ltd indicated some sinister or improper intention on the part of the secured creditor to use the examinership process as a basis for a hostile takeover of the group, the making of an investment so far in excess of the underlying value of the group will be of very considerable benefit to creditors, not only in relation to historical debts but also in relation to debts that will accrue in the future. An investment of this scale has the best chance to secure the future viability of the business of the group and the continued employment of the highly skilled workforce. That seems to me to be a powerful countervailing factor that requires to be borne in mind.

47. In addition, a further and very important factor to be borne in mind is that the agreement entered into with Ms. Nicholas and Mr. Nicholas has brought to an end the threat of proceedings to challenge the validity of the examinership process. Such proceedings, by their very nature, would have required a very significant and costly hearing. Even if the challenge failed, the very fact of the challenge could have derailed the examinership process, particularly having regard to the very constrained time limits within which such a process is required to be concluded. Had that happened, it could have had disastrous consequences for the creditors and employees of the group. It is clear from the Examiner's s. 534 report that in a liquidation, the unsecured creditors, save in the case of Cara Pharmacies (Cork) ULC, would receive no dividend at all. Even in the case of Cara Pharmacies (Cork) ULC, the prospect of a dividend might well have disappeared if the additional costs involved in such a significant hearing were taken into account. In these very particular circumstances, it seems to me that there was a commercial rationale for making some level of payment to Ms. Nicholas and Mr. Nicholas. The making of the payments allowed the examinership to be brought to an orderly conclusion and ensured that proposals could be put in place under which the creditors would receive some benefit.

Conclusion

48. Thus, while the benefits payable to Ms. Nicholas and Mr. Nicholas are significant, I have formed the view that, in the very particular circumstances of this case, the payments do not give rise to unfair prejudice to the creditors or to any other interested party.

49. Insofar as the Examiner is concerned, I am satisfied that he has achieved a very satisfactory outcome of the examinership which is to the benefit both of creditors and employees and which will secure the future viability of the trading entities within the Cara

Pharmacy Group. While it is regrettable that the agreement of 10th December, 2020 was not proffered by the Examiner to the court in the first instance, I accept the explanation of the Examiner as to how this occurred and there is no reason to believe that the agreement was deliberately withheld by the Examiner from the court. Furthermore, while the information in relation to payments to the directors and ultimate beneficial ownership was information that should properly have been made available to the creditors, it is clear from the sequence of events as described by the Examiner (as summarised above) that the information in relation to the payments was not available at the time of the creditors' meetings to consider the Examiner's proposal. Moreover, for the reasons outlined in paras. 46 to 47 above, even if the creditors had been informed of the payments and had objected to the confirmation order sought by the Examiner on that basis, I believe that I would, in any event, have formed the view, in the very particular circumstances of this case, that the considerations outlined in those paragraphs displaced any suggestion of unfair prejudice to any of the creditors.

50. There are, nonetheless, lessons to be learned from this case. In the first place, parties, practitioners and investors need to be aware that, in a court process such as examinership, there should be transparency in relation to any payments to be made to shareholders, directors, key employees or persons with an indirect beneficial interest in the companies concerned. While there may be exceptional circumstances where the making of a payment may, for objectively justifiable reasons, be kept confidential, the general rule should be that the payments should be disclosed. Secondly, it is important that everyone should be aware that any benefits to persons in that position (whether paid pursuant to an investment agreement or otherwise) will, for the reasons identified by Clarke J. in *Tony Grey* and in *McSweeney Dispensers*, be subject to scrutiny by the court in accordance with its obligations under s. 541 of the 2014 Act. Equally, if creditors are to take an informed decision in relation to proposals for a compromise or scheme of arrangement, any benefits payable to shareholders, directors or persons in like position should be disclosed, in advance, so that creditors will be in a position to form a view as to whether or not any such payments give rise to unfair prejudice to them. In turn, this means that meetings of creditors should not, ordinarily, take place until all arrangements in relation to any payment of benefits to directors, shareholders or persons in like position have been finalised. In this context, I am very conscious of the tight timeframe within which an examinership must be concluded but all of those involved in the process should be aware that these steps have to be taken and that, accordingly, the timeframe for negotiations must be tailored accordingly. The present case illustrates the difficulty that arises where negotiations in relation to such matters are still ongoing at the time when meetings of members and creditors take place to vote on proposals.

51. Insofar as the court process is concerned, it is equally important that practitioners and those involved in the process should be conscious of the need to give the court sufficient time to consider papers in advance of an application being mentioned or heard. The events of 11th December, 2020 illustrate this very clearly. It is entirely unsatisfactory that papers should be delivered to the court for the purposes of an application in an examinership five minutes before the court is due to sit to hear the application in

question. While I appreciate that, in the present case, negotiations with the Revenue Commissioners were ongoing up to the previous evening, those involved in such negotiations should be conscious of the need to conclude them in sufficient time to allow the court to consider the papers fully in advance of the hearing of any application to which the negotiations may be germane. At the absolute minimum, papers for court should be delivered no later than 24 hours in advance so that the court has some opportunity to review them in advance of a matter being mentioned or heard. I stress that this is the very minimum time that should be factored into any timetable. Given the requirement to give at least 48 hours' notice to any notice parties, the material for court should normally be furnished at least three days prior to an application being heard. However, I appreciate that, in some cases, there may be genuine reasons why it is not possible to do this and that there are, very occasionally, circumstances where that timeframe cannot be met. There is, nonetheless, a limit to which the timeframe can be reduced and, in my view, that limit is 24 hours at minimum. Anything less than 24 hours is, in my view, unsatisfactory and, save in the most extraordinary circumstances, completely unacceptable. Anyone involved in negotiations such as those which occurred prior to 11th December, 2020 needs to be aware of the practical requirement that the court will need time to consider the relevant papers and that negotiations will have to be concluded in sufficient time to allow this to occur.