

## **High Court clarifies rights of secured creditors to object to schemes of arrangement in examinerships.**

In Re McInerney Homes Limited

In the McInerney case, the company and the examiner sought to have schemes confirmed which would result in an immediate payment to a banking syndicate of €25 million. The banking syndicate contended that the discounted current value which they expected to recover from their security outside any schemes was €50 million.

The banking syndicate's first line of argument was that the court could not confirm a scheme which imposed a reduction on the debt due to a secured creditor. This rather ambitious argument was dismissed by the court. The court found that the debt due to a secured creditor could be reduced under a scheme provided that the scheme was not unfairly prejudicial to the secured creditor. The court drew a distinction between the debt due to a secured creditor and the security held for that debt noting that in a scheme the debt could be reduced but the security could be left in place to secure the reduced debt.

However, the court also held that it would require exceptional circumstances before a court could approve a scheme of arrangement where secured creditors could be shown to be worse off under the scheme than under other methods by which the secured creditors could realise their security.

The balance of the case related to resolving the competing assessments of how the banking syndicate would in fact fare if the schemes were not confirmed. The banking syndicate estimated that it would recoup a current day value of approximately €50 million and therefore the offer under the schemes of €25 million was unfairly prejudicial whereas the company and the examiner contended that the bank would recoup only €11.9 million at present day value and therefore the €25 million offer was significantly better than the likely outturn on a receivership.

Much of the judgment was given over to the difficulties in assessing the competing evidence put forward as there was no cross-examination of the expert evidence which was presented on affidavit. Moreover, there are inherent difficulties in considering evidence of likely outturns which would be dependent on a wide variety of factors.

The court concluded that the evidence given by the banking syndicate established that it had a realistic prospect of doing better under the proposed receivership model than under the proposed schemes and accordingly the court refused to confirm the schemes.

### **Comment**

This decision should dispel a number of persistent myths about the examinership process.

First, it removes any doubt regarding the ability of a scheme to write-down the debt due to a secured creditor (as distinct from interfering with its security).

Secondly, and most critically, it confirms that unless there are exceptional circumstances, the court will not approve a scheme where secured creditors will do worse than if they were permitted to realise their security in the ordinary way.

Thirdly, it shows that if the secured creditor can adduce evidence which allows the court to conclude that there is a credible basis for its position that it will do better outside a scheme, that should be sufficient to persuade the court not to confirm a scheme, even when faced with evidence to the contrary presented by the company and/or the examiner.

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