O'FLYNN v CARBON FINANCE LTD: CONTEMPORARY DEVELOPMENTS FOR EXAMINERSHIP LAW IN IRELAND

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A INTRODUCTION

Although examinership is by its genesis an American, British and antipodean creature, it has evolved in Irish jurisprudence to be an Irish solution to an Irish problem. Despite bearing many similarities to administration in the United Kingdom,[1] quite a nuanced and distinct system of corporate rescue has been born of the modern legislation and its interpretation; an archetypal example of this being the decision in *O'Flynn & Anor v Carbon Finance Limited & Ors*.[2] Examinership remains a critically relied upon mechanism in the Irish sphere of corporate law, depended upon by employers, creditors and employees alike; its import is of such that its development in an Ireland still reeling from political, financial and legal remedial recessionary action could have far reaching implications for a variety of commercial enterprises, significantly expanded since the introduction of the Companies (Miscellaneous Provisions) Act 2013 and the related increase in access to justice and the courts.[3] Contemporaneously the evolution of the area is of great interest within the recessionary time period in light of the National Assets Management Agency, established under the auspices of the NAMA Act 2009, apropos of the implications for companies seeking the protections afforded by the scheme and all the benefits that come with it and, as the case may be, those seeking to avoid it in order to maintain a nexus of stability and independent governance.

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[1] See Thomas B Courtney, *The Law of Companies* (3rdedn, Bloomsbury Professional 2012) ch 22 for comparison.

[2] *O'Flynn & Anor v Carbon Finance Limited & Ors* [2014] IEHC 458 (*O'Flynn*).

[3] See below, 'Legislative Background'.

The aim of this case note is threefold – to succinctly delineate the facts and specifics of the case and the basis upon which the action is grounded both factually relating to the law and briefly the historic background of the legislation in the jurisdiction, to examine the decision and reasoning of Irvine J, and finally to explore the consequences of the judgment for Irish company law and for the area of examinership, as reflected in the growing body of modern cases in Irish corporate law expanding upon its application.

B ANALYSIS

1 Legislative Background

Generally examinership is a central tenet of corporate insolvency; its purpose is to extend, to a company with some reasonable prospect of survival, a ray of hope and the prospect that through the court's protection the company will survive and thrive. As noted by Courtney and O'Donnell, the origins of examinership in the Companies (Amendment) Act 1990 arose in rather unusual circumstances.[4] On 6 August 1990, four days after the Iraqi invasion of Kuwait, the UN trade embargo on Iraq triggered potentially disastrous consequences for the Irish economy due to the huge financial stakehold beef producer Goodman International, a company which accounted for 42% of national beef exports and potentially up to 6% of GNP,[5] had in exporting beef to Iraq. The passing of the 1990 Act, a fast-tracked portion of the Companies Bill 1987, allowed for a company to be placed under court protection, freezing its assets for up to 12 months. It is the foundation of modern Irish examinership, the Act having clear origins in the Cork Committee and the Harmer Report, and thus bearing many parallels with its British and Australian counterparts.[6] The McDowell Report was published in 1998 on company law

[4] Courtney (n 1), and John L O'Donnell, *Examinerships* (Oak Tree Press 1994).

[5] Dáil Deb 9 March 1989, vol 388, no 2 <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail1989030900006?opendocument> accessed 16 March 2015.

[6] *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) ch 9 (The Cork Committee); Australian Law Reform Commission, *General Insolvency Inquiry* (Report no 45, 1988); see Lynch Fannon and Murphy, *Corporate Insolvency and Rescue* (2nd edn, Bloomsbury Professional 2012) 490.

compliance and included recommendations regarding the examinership legislation.[7] Following the Gallagher Report in 1994 more far-reaching changes to the original legislation were recommended which came to fruition in the Companies (Amendment) (No 2) Act 1999.[8] This new Act sought to provide 'checks and balances … to give sufficient focus to viable companies' whilst giving 'sufficient protection to the interests of creditors'.[9] Most critically the Act dictated that an examiner shall not be appointed by the court unless it was satisfied that there is a 'reasonable prospect of survival of the company and the whole or any part of its undertaking as a going concern' whereas previously this had only been 'some prospect' under the 1990 Act,[10] which adds a heightened hurdle to obtaining examinership. Most recently the Companies (Miscellaneous Provisions) Act 2013, originally a part of the proposed Companies Bill 2012, has introduced what is colloquially known as 'Examinership-Lite' extending the jurisdictional remit of the Circuit Court to appoint examiners where companies are under a certain threshold, thus avoiding the necessity of High Court applications and procedures and reducing the cost of processing. In this way, the protections of examinership were extended to small and medium-sized enterprises at significantly reduced legal costs.[11] The legislation remains an integral and functioning part of the modern Irish corporate framework; from 2012 to 2014 alone 64 companies were granted examinership.[12] Broadly speaking, there exists the dichotomy of internal management-led or creditor-led examinerships. Relatively speaking creditor-led examinerships such as in the *O'Flynn* case are atypical; creditors generally, though

[7] *Report of the Working Group on Company Law Compliance and Enforcement* (1998).
[8] *Report of the Company Law Review Group* (December 1994) (The Gallagher Report); see Lynch, Marshall and O'Ferrall, *Corporate Insolvency and Rescue* (1st edn, Butterworths 1996).
[9] ibid, para 2.12.
[10] s 2(1) Companies (Amendment) Act 1990 (as amended s5(b) Companies (Amendment) (No 2) Act 1999).
[11] McDonald, 'Examinership Lite' (2014) 46(1) Accountancy Irl 37.
[12] Examinership Totals: Comparison from 2012 to 2014 (InsolvencyJournal.ie) <http://www.insolvencyjournal.ie/stats/examinership-totals-comparison-from-2012-to-2014> accessed 16 March 2015.

not always, prefer to pursue receivership.[13] It is precisely these specific facts of this case paired with the nature of the application that make for such a salient judgment.

2 Factual Background

The background of the case is relatively idiosyncratic. The O'Flynn group of companies, being as it was, and still is, heavily embroiled in the construction industry, originally fell into trouble upon the collapse of the property development and construction market Its debts then, under the purview of the NAMA Act 2009, fell under the control of National Asset Loan Management Limited (NALM), the wholly-owned subsidiary of NAMA and entered its restructuring process in the hope that the company could be rehabilitated. The restructured loans were then sold to Carbon Finance Limited, a member of the Blackstone Group, and it is from this that the current scenario arises.[14] Due to the restructured nature of the personal loans originally acquired by NALM and NAMA, and then purchased by Carbon, they were such as to allow the lender to call them in at any time. On 29 July 2014 at 10.30am Carbon Finance triggered this term, issuing demand letters for loans worth €16,764,351 in total, by 1.00pm on the same day. Failure to pay would form the basis of the alleged default on these monies. Accordingly Carbon Finance appointed receivers to Mr O'Flynn's shareholding in Colebridge International Limited, the British Virgin Island parent company of the group, which in turn broke the lending agreement between Carbon and O'Flynn and put the entire 80 plus companies in the O'Flynn Group into default. This is the basis upon which Carbon appointed four receivers, who proceeded to remove the existing directors from Colebridge International and applied to the

[13] For further information see *Cappoquin Poultry Limted* (HC, August 2012); *Golden Discs Limited* (HC, February 2009).
[14] *O'Flynn* (n 2) [10-20].

court to apply an interim examiner. At 4pm Carbon presented a s 3A(1) 1990 Act ex parte petition to the High Court seeking protection in the absence of an Independent Accountant's Report, external guidance for the court which typically is fundamental to the granting of examinership. McGovern J in appointing an interim examiner accepted the arguments of Carbon and set 27 August 2014 to hear the petition. In defence of the group's continued survival, O'Flynn sought the appointment to be dismissed as well as an interlocutory injunction restraining the calling in of, or enforcing of, the corporate O'Flynn Group loans. The domino effect set in motion by Carbon Finance deftly sprung control of the company from the O'Flynns in the space of a mere three hours and it was the minutiae of this process that the Court had to consider.

3 Judgment

In essence three issues lay before the court for decision; the s 3(A) 1990 order and the exceptional jurisdiction of the court, s 4(A) and the obligation to exercise utmost good faith, both issues regarding the granting of interim examinership, and finally the injunctive proceedings restraining Carbon Finance.

(a) Section 3A(1) Companies (Amendment) Act 1990

Section 3A(1) sets out the conditions under which the court is willing to dispense with the Independent Accountant's Report (IAR); that there be exceptional circumstances outside the petitioner's control that render it impossible to present the report alongside the petition, and that said circumstances could not have been reasonably anticipated by the petitioner. In their argument the plaintiffs relied on the judgment of Hogan J in *Re Belohn*[15] and argued that there are two matters the Court ought to contemplate when reconsidering ex parte orders on an *inter*

[15] *Re Belohn* [2013] ILRM 407 (HC).

partes basis; that the order be set aside due to a lack of candour on the part of the original applicants and on the basis of insufficient justification demonstrated on the facts before the court. With a pragmatism that exemplifies the entire judgment, Irvine J remained attuned to commercial realism. In interpreting section 3A, Irvine J highlights the importance of section 4A's stipulation of 'utmost good faith' and links it to *Re Belohn.*[16] Irvine J highlighted that both the volume of correspondence and the frankness thereof were such to undermine Carbon's assertions, regardless of the disputed interpretation of the Facilities Agreement.[17] Irvine J even goes as far as noting the 'remarkable' speed by which the Group facilitated Carbon. Furthermore Irvine J found any recalcitrance on the part of the Group to be not due to general uncooperativeness but due to the fact that the Group disputed Carbon's entitlement in the first place. In closing Irvine J highlighted that Carbon could not escape culpability for the lack of disclosure, rather that it was the Court's decision to decide what was relevant even if the information is not determinative of the matter,[18] and it was for these reasons that the interim examinership should be set aside:

> I should also state that I do not accept that Carbon can escape culpability for the failure to bring all of the aforementioned matters relevant to the cooperation of the Companies to the Court's attention by relying on the fact that the petition went no further than to state that there had been an absence of 'full' cooperation, leaving open the concession that they had provided some cooperation.[19]

Furthermore the Court noted that in applying the exceptional jurisdiction under the section, the standard of proof was to establish material nondisclosure and not, as was contended by Carbon,

[16] s 4A(b).
[17] *O'Flynn* (n 2) [50].
[18] ibid [56-58].
[19] ibid [56].

that the disclosure be of a probative value to sufficiently demonstrate the decision taken would have been different in that circumstance. The materiality of the nondisclosure should be that the court would have been unable to form an accurate view of the circumstances, and not to have drawn an erroneous one.[20]

(b) Section 4A Companies (Amendment) Act 1990

Having already used it to underpin the interpretation of section 3A, section 4A plays a pivotal role in the entire judgment. Section 4A provides the Court with the power to decline a petition on the basis of a failure of disclosure of information material to the granting of the court's protection, and if there is a failure to exercise utmost good faith. The interpretation of this section is what underpins much of the judgment. Irvine J very usefully breaks the application down to the six categories of document and the various aspects of the bases for the non-disclosure, which form the grounds of the petitioner's allegations. The disputes regarding each are somewhat contextual and relate to the technicalities of the facilities agreement originally between NAMA and the Group, and of cash flow and balance sheet insolvency, however the reasoning applied by the Court remains constant.

(i) Absence of any Default on Repayment

The first category relates to the actual absence of default on repayment by the Group, which was not set out by Carbon in the petition. The Group argued that the 'sense of urgency set out by the petition' was completely at odds with a failure to not mention this lack of default, it being so intrinsic and rare in the current climate in relation to loans taken over by NAMA.[21] Counsel for the Group noted that it was particularly rare that such a fact would be omitted on the petition of the Court for an examinership. Carbon countered by saying that, due to a dispute

[20] ibid [58].
[21] ibid [64].

with NAMA as to the date of default which was later conceded by NAMA on agreement, they had not acted in bad faith, as the absence of default was not the main concern of the petitioner, rather that the balance sheet insolvency was. Irvine J held that the non-disclosure of the absence of default was a material non-disclosure, discussed below in relation to the Proposals in Regard to the Facilities, whereby the Court held that Carbon were engaged in what could be termed intellectual honesty by labeling correspondence as 'restructuring' rather than 'refinancing' or 'repayment'.

(ii) Dispute on Construction of Finance Documents and Resultant Cash Flow Crisis

A dispute existed as to the construction of provisions of the finance documents and whether the Group could use the proceeds of asset disposal to pay down interest, with Carbon taking the position that its consent was required and the Group arguing this would result in a cash flow crisis. At one point the Group had threatened to seek declaratory relief in the Commercial Court but this was ultimately decided against. The Group argued that the omission of this dispute in the petition to the Court was particularly egregious as it directly affected cash flow solvency, which again Carbon argued was merely a subsidiary issue.[22] The Court came to the decision that this was also a material non-disclosure as there was a real possibility and danger that cash flow insolvency could occur, or that the companies were already cash flow insolvent due to this dispute and this was of significant importance and falling within the scope of section 4A.[23]

(iii) Failure to fairly Report on the Companies' Asset Strategy

[22] ibid [68-71].
[23] ibid [97].

Arguably quite a serious non-disclosure, which could be more accurately described as a distortion or purposefully misleading account, concerned the details of the companies' asset strategy. The Group argued that the petition purposefully represented the disposal of certain assets negatively, when they were in fact a contractual requirement between the parties. Counsel for Carbon countered that consent was again a necessity and its inclusion in the petition was subject to Carbon's interpretation of the heavily disputed facility agreement. Further, counsel submitted that as it was open to Carbon to reject this asset disposal plan, it was their prerogative whether or not to include it in the petition.[24] The Court came to the conclusion this too was a material non-disclosure as Carbon had failed to bring the contractual necessity to the Court's attention, and rejected counsel's argument that it was sufficient to suggest that the requirement for permission was enough to preclude disclosing that a contractual basis existed for the asset strategy, especially when advancing a critique of it in the petition.[25]

(iv) Financial Information available to produce an IAR

In relation to this category, the limited information available to Carbon in the production of the IAR, which the Court had already considered in relation to the section 3A order, there was competing affidavit evidence as to both the level of available information and the cooperation of the Group when requested. The arguments relating to the IAR, being of key importance in examinership proceedings, act as an instructive insight into both Carbon's interpretation as to their rights in petitioning examinership and the Group's role in this.[26] To this the Court took the view that the correspondence certainly undermined Carbon's contentions that the Group, as per section 3A, had been reticent as to cooperation. The Court further took the view that the

[24] ibid [73], [78].
[25] ibid [98].
[26] ibid [85-86].

petitioner had asserted an inaccurate impression of the circumstances,[27] on the basis of the correspondence between the parties.

(v) Proposals in regard to facilities

The fifth category of alleged non-disclosure was the portrayal in the petition that the O'Flynns did not have any proposals as to the refinance or repayment of the personal facilities, which was rejected by the O'Flynns having submitted without prejudice correspondence on this basis.[28] Irvine J held that it was insufficient for Carbon to classify the proposals made by the O'Flynns via correspondence as 'restructuring' rather than 'refinancing' or 'repayment' and had therefore improperly created an impression of 'disengaged' and 'disinterested' borrowers.[29]

(vi) Position on the 2013 Audited Accounts and Access to the Auditors

The final alleged non-disclosure relates to the petition's contention that the Group were of the position that NAMA had waived an entitlement to the 2013 audited accounts in preparation of the sale to Carbon, and that when Carbon sought the audited accounts the Group had attached conditions, such as that NAMA had originally waived the production of these accounts, and that a timeframe to produce them within was needed. The Group did not dispute this. Indeed, the Group had also put it to Carbon that the best route of getting an accurate position of the companies was via management rather than its auditors.[30]

In conclusion, of the six categories, Irvine J came to the conclusion that an inaccurate picture, or no picture at all as the case may be, was presented to the Court in all but the position of sixth

[27] ibid [99-100].
[28] ibid [89].
[29] ibid [101].
[30] ibid [92-93].

category, the 2013 audited accounts, where Carbon accurately portrayed the difference of position of the parties and also accurately noted the Group's belief that NAMA had granted a waiver. However the five other categories were such that they amounted to a breach of the petitioner's obligations under section 4A.

The Court underlined the centrality of the ex parte application and the burden this placed on the petitioner, as codified by section 4A(b), paired with RSC Order 75A, and that the standard was not just of good faith but rather of 'utmost good faith'[31] and the materiality of the non-disclosures. Quite importantly the Court also delineates the consequences of the non-disclosures, both specifically and generally, as being critical to the decision of McGovern J and to the case at hand, whilst the petitioners argued that in order for the petition to be dismissed the non-disclosures must be of sufficient import to indicate that the Court would have taken a different decision.[32] However despite this and counsel's novel argument that this would be the pragmatic interpretation of the section in that following the judgment in *Re Traffic Group Limited*,[33] the protection of jobs and a viable enterprise were key here and would ameliorate the lack of candour, Irvine J followed the reasoning of Hogan J in *Re Belohn* in holding that the necessity of candour was linked to constitutional fair procedures and that a high standard of disclosure was therefore necessary.[34] She further distinguished *Re Traffic Group* on the basis that the examinership at issue there had for all intents and purposes concluded, unlike here where it was in its infancy.[35] Critically the Court noted the atypicality of the situation – creditors rarely apply for the protection of the Court through examinership, rather it is usually the company itself. The Court then went as far to say that it was in fact the petitioner, as

[31] ibid [100].
[32] ibid [103].
[33] *Re Traffic Group Limited* [2007] IEHC 445, [2008] 3 IR 253 (*Re Traffic Group*).
[34] *Re Belohn* (n 11) 413.
[35] *O'Flynn* (n 2) [106-107].

creditor, who presented the main threat to the survival of the company.[36] The Court's bluntness certainly does not belie the gravity of the consequences to the Group:

> In the present circumstances the main threat to the survival of the companies comes from the petitioner itself; there was no evidence at the hearing of an impending threat from any other creditor. As such, the dismissal of the petition does not of itself pose a threat to the survival of the companies.[37]

In recognition of Carbon's aggressive strategy, Irvine J emphasized that the Court retains discretion to decline the appointment of an examiner even when the statutory requirements are fulfilled. Counsel for Carbon accepted that the use of the insolvency process was purely to transfer ownership of the Group's assets to Carbon. If this was found to be an improper purpose, the Court could use its discretion to decline the request for examinership, but Irvine J stated that the consideration of the matter would be inappropriate at this stage in the litigation and would have to await the full hearing. This emphasis of the Court's discretion suggests that meeting the formal statutory requirements alone will not be sufficient for a grant of examinership, where the examinership would be essentially a distortion of the objectives behind the legislative scheme.

(c) Injunctive Proceedings

Despite the dismissal of the petition, the injunctive proceedings still remained key to the case, were the O'Flynns to prospectively protect their involvement in the Group, so as to remain in control of the Group, and stave off their ousting by Carbon. Counsel for the O'Flynns contended that by triggering the personal loan demand letters the last thing in fact that Carbon

[36] *O'Flynn* (n 2) [115].
[37] ibid.

wanted was repayment, rather that this was part of an overall strategy to 'capriciously, arbitrarily and unreasonably' enforce the corporate loans.[38] In the application of the *Campus Oil* interlocutory test,[39] Carbon argued that there was no arguable case for the contentions of the plaintiffs on the basis that they had afforded them reasonable time and were not bound to act within the facilities agreement which they had not been a party to.[40] Initially in applying the 'mechanics of payment test', which allows the debtor only as much time to transfer the outstanding sum to the creditor as is reasonable in all circumstances, the Court concluded that the repayment demand was unreasonable and therefore so too were all subsequent acts of enforcement of this,[41] on the basis of the Australian precedent of its interpretation, grounded in the English case of *Sheppard & Cooper Ltd v TSB Bank Plc*.[42] Despite this the Court did conclude that even had a reasonable amount of time been given the plaintiff it would not have been in the position to pay, though this did not preclude the granting of an interlocutory injunction.[43] Having satisfied the first limb of the test, that there was a serious issue to be tried, the Court turned its attention to the key issues of whether damages would be adequate were the injunction to be refused and later be successful at trial, on the balance of convenience. It was accepted that the defendant was in a position to pay damages, but the Court concluded that in the circumstances they would be inadequate:

> [I]t will not be possible to parachute the plaintiffs back into the management roles in the companies … these plaintiffs, by reason of their seniority and expertise, operate at

[38] ibid 118.
[39] *Campus Oil v Minister for Industry and Energy (No 2*) [1983] IR 88 (HC) (*Campus Oil*), as delineated in the judgment through *B&S Ltd v Irish Auto Trader* [1995] 2 IR 142 (HC).
[40] *O'Flynn* (n 2) [121].
[41] *NALM v Barden* [2013] IEHC 32.
[42] *Sheppard & Cooper Ltd v TSB Bank Plc* [1996] 2 All ER 654 (HC). See also *Bunbury Foods PTY Ltd v National Bank of Australia Ltd* [1984] HCA 10.
[43] *O'Flynn* (n 2) [142-147].

> the most senior level … and accordingly may find it difficult to obtain positions even remotely resembling those they held before 19 July 2014 …[44]

The reasoning here is somewhat reflexive; job security at the highest level is hardly a factor which ranks amongst those to demonstrate inadequacy of damages given the existing narrow application of the inadequacy limb of the injunctive test and seems an inconsistent slip from the pragmatism which defines this judgment, especially in the granting of the examinership to a construction firm. Why the Court would extend the test to accept job protection of business people in specific industries due to seniority seems especially flippant given the existing jurisprudence in this area.[45] However this is tempered by the Court's examination of the potential effect on the O'Flynn's reputations when the Court says: 'It is not correct or fair for Carbon to suggest … [the O'Flynn's] are to be considered failed businessmen with no reputation to protect.'[46] Overall the Court emphasized that the injunction would, as per Clarke J in *AIB v Diamond*,[47] maintain the status quo pending full trial. This seems to depart perpendicularly from the very sound reasoning of the rest of the decision and is arguably the weakest strand of the Court's judgment. There is an amount of frivolity that is at odds with the earlier pronouncements that undermines the overall reliability of the case for the future. The case places into precedent that a party may rely both in general injunctive and equitable proceedings as well as those specifically addressing examinership, on future employment prospects in very specific circles as fulfilling the adequacy as to damages test. Of course, the Court's observations as to the prospective reputational damage is well within previous precedents,[48] but this does seem almost to be the Court expanding the test in order to facilitate

[44] ibid 164.
[45] *AIB v Diamond* [2011] IEHC 505, *Curust* v *Löwe-Lack-Werk* [1994] IR 450.
[46] *O'Flynn* (n 2) [166].
[47] *AIB* (n 44).
[48] ibid.

the answer it wants. Arguably even without this disparate niche of the judgment, the *Campus Oil* test is otherwise fulfilled.

Overall Irvine J's decision reflects the growing body of cases concerned with maintaining the 'community' benefits of employment and the supra economic effects of companies to the local and national economy. The *Tivway Ltd and Ors*[49] and *Re Eircom*[50] series of cases began a trend whereby the Court gave some amount of credence to the employment provided by companies and the role they played in the local community and saw it as a consideration worth bearing in mind in the granting or denial of examinership. There exists diverging jurisprudence on the weight that should be afforded these considerations, however the decision does broadly conform to the more conservative approach of the later of that series of cases,[51] whereby the Court stressed the need for restraint considering the failure of the examinership process of many of the earlier cases.[52] On the other hand, a corollary of this is that the Court has underlined that none of NAMA's obligations are passed to Carbon as they are purely public law duties, arising from NAMA's statutory duty to act within the public interest, which could arguably go some way as to undermine certain aspects of the decision vis-á-vis the effect on the community at large.[53] However, the decision is undoubtedly the correct one with regard to the implications of the imposition of public law duties on a body corporate. [54]

Undoubtedly the implications for the upheaval of the O'Flynns from the management of the Group would have had a discernible effect both for the Group's own employees and those of similar companies were a precedent set enforcing Carbon's aggressive manoeuvers though

[49] *Tivway Ltd and Ors* [2009] IEHC 494.
[50] *Re Eircom* [2012] IEHC 107.
[51] *Vantive Holdings and Others* [2009] IEHC 409, [2009] IESC 69.
[52] *Re Cork City Investments Ltd* (HC, 15 April 2005).
[53] *O'Flynn* (n 2) [155-159].
[54] See Keany, "Insolvency Law: A Matter of Public Interest?" (2000) 51 NILQ 509 which addresses issues of public interest law and their application to the body corporate in the case of liquidation.

whether these aspects should be considered worth applying remains debatable.[55] Irvine J in the application of section 3(A) and section 4(A) undoubtedly appreciated the consequences of allowing such blatant aggression for the Group specifically and for examinership as a whole and it is this strand which permeates the judgment as a whole and exemplifies the entire decision.

C CONCLUSION

On 6 October 2014 McGovern J of the Commercial Court upheld the order of O'Malley J granting provisional ex parte leave to extra jurisdictionally serve proceedings on the UK arm of The Blackstone Group LP, The Blackstone Group International Partners LLP, parent company of Carbon Finance Ltd.[56] This decision was appealed to the Court of Appeal, which was to deliver its judgment in January 2015 and so the full hearing had been provisionally listed to be heard thereafter during Hilary term 2015. However in late January the O'Flynns reached a consensual outline agreement, bringing proceedings to a close.[57] Had the hearing proceeded and the appeal failed the addition of the Blackstone Group would have meant that the full hearing could have been a very intriguing examination into the extra jurisdictional lifting of the corporate veil vis-à-vis deciding culpability and the factual unraveling of the sequence of events that lead to the current case, and had the appeal been refused, the judgment of the Court of Appeal would have been a salient insight into the Court's motivation in assigning accountability if any to Carbon Finance.

In summary the judgment acts as a sort of vindication for the procedural aspects and criteria of the examinership process and the safeguards inherent in the legislation if nothing else. It would perhaps too be glib to say that the O'Flynn group was in a rather precarious financial position

[55] See Kirwan, "Aspects of Examinership" (2009) 16(11) CLP 252 and Keany, (n 50) which although dealing with liquidation is somewhat analogous to the Court's reasoning in *Tivway* et al.
[56] *O'Flynn & Ors v Carbon Finance Ltd & Ors* [2014] IEHC 439.
[57] Barry O'Halloran, 'O'Flynn to Agree Deal with Blackstone' *Irish Times* (Dublin, 31 January 2015).

and that perhaps the loans were sold on too soon from NAMA, without going through the restructuring process, but regardless of this corollary issue the courts have remained extremely pragmatic. Irvine J's judgment remains a committed enforcement of the letter of the law, methodical in its purposive interpretation of the Act; examinership is and always was intended to be a remedial mechanism, not one by which aggressive financial services firms would tactically attempt coups. It also raises issues toward the ease by which interim examinership may be granted, though the particularly organized and committed defense and appeal by which this course of action was averted may in practice be atypical.

The implications for the area of law are promising; the judgment demonstrates that the court will not suffer a lack of candour gladly, nor will it allow a blatant abuse of process. The methodical approach taken by the Court both in the application of sections 3A and 4A and the investigation of the six alleged categories of non-disclosure demonstrates that the Court will also not shirk from the minutiae and specifics of each individual application and petition. Overall it bodes well for the post-recessionary body corporate, though it could be argued that it is a step in a generous direction. Had the circumstances been different another firm given the benefit of the doubt could well have fallen leaving its creditors to pick up the pieces; conversely a lesser firm may never have even survived to get to litigation. One thing is for certain, the Group's continued development will have companies who have left or are still in the NAMA process watching with interest.