[2020] IEHC 514

THE HIGH COURT

[2020 No. 272 COS]

IN THE MATTER OF NEW LOOK RETAILERS (IRELAND) LTD AND IN THE MATTER OF THE COMPANIES ACT, 2014

JUDGMENT of Mr. Justice Denis McDonald delivered on 14th October, 2020

Introduction

1. In these proceedings New Look Retailers (Ireland) Ltd ("*the Company*") has, by petition presented on 28th August, 2020, sought the protection of the court under Part 10 of the Companies Act, 2014 ("*the 2014 Act*"). On the day the petition was presented, an application was made on an ex parte basis to Barrett J. for the appointment of an Interim Examiner. By his order made on that date, Barrett J. acceded to the appointment of Mr. Ken Fennell of Deloitte as Interim Examiner of the Company and he fixed 16th September, 2020 as the hearing date for the petition. By the same order, Barrett J. directed that the Revenue Commissioners and a number of landlords of properties occupied by the Company should be served with the proceedings. Subsequently, on 16th September, 2020 the petition was listed for hearing before me. On that occasion, I was satisfied that all of the directions given by Barrett J. had been complied with. I was also informed that the following parties were opposing the petition:

   (a) BVK Elektra 2 Liffey Phase 1 ICAV, the landlord of the unit occupied by the Company at Liffey Valley Shopping Centre, Clondalkin, Dublin 22;

   (b) INT INV Limited Partnership I, the landlord of the unit occupied by the Company at Fairgreen Shopping Centre, Mullingar, County Westmeath and also landlord of the unit occupied by the Company at CastleWest Shopping Centre, Ballincollig, County Cork; and

   (c) Davy Target Investments, the landlord of the unit occupied by the Company at Navan Town Centre, County Meath.

2. On 16th September 2020, I was informed that the parties had agreed that the hearing of the petition should be adjourned to 29th September, 2020 in order to allow the exchange of further affidavits and written submissions to take place. In those circumstances, I made an order continuing the appointment of the Interim Examiner and the protection of the Court up to and including 29th September, 2020 and I gave directions for the delivery of affidavits and submissions.

3. The hearing of the petition subsequently took place over two days commencing on 29th September, 2020. There were a number of issues debated at that hearing. However, the principal focus of the debate was on two issues. In the first place, there was disagreement between the parties as to whether the Company could be said to satisfy the statutory test set out in s. 509 of the 2014 Act as to inability to pay debts. The second issue centred on the discretion of the court. Counsel for the opposing landlords argued, on a number of grounds, that, even if the court concluded that the statutory test for

inability to pay debts was satisfied, the petition should nonetheless be dismissed in the exercise of the court's discretion under s. 509.

4. In addition, for the reasons explained below, I asked the parties to address me on the evidence in relation to where the centre of main interests of the Company lies. Having regard to the obligations placed on the court by Article 4 of the EU Recast Insolvency Regulation (Regulation (EU) 2015/848) ("*the Regulation*") it is incumbent on me to address, as a preliminary issue, whether the court has jurisdiction pursuant to Article 3 of the Regulation and, if satisfied that the court has such jurisdiction, to specify the grounds on which the jurisdiction of the court is based. If satisfied that the court has jurisdiction under Article 3, I will then address whether this is a case in which, in accordance with the provisions of Part 10 of the 2014 Act, it would be appropriate for the court to appoint an examiner to the Company. In undertaking that inquiry, I must first of all address whether the statutory conditions for the appointment of an examiner are met. If I am satisfied that the statutory conditions are met in this case, I must then consider any discretionary factors that arise.

Background

5. Before attempting to address these issues, it may be helpful, at this point, to briefly describe the Company and the nature of its business.

6. According to the evidence before the court, the Company is part of a UK based group comprising New Look Retail Holdings Ltd ("*the parent*") and its subsidiaries of which the Company is one. The group first began trading in the United Kingdom in 1969. The group expanded into Ireland in 2003 when the Company was incorporated on 20th August, 2003. The first New Look store was opened in Dún Laoghaire, County Dublin. It currently operates 27 stores in Ireland all of which are held under long leases. There are stores in Counties Donegal, Galway, Mayo, Wicklow, Waterford, Wexford, Westmeath, Meath, Kerry, Kildare, Dublin, Carlow, Tipperary, Cork, and Limerick. All of the outlets trade under the brand name "*New Look*" which is owned by another group company namely New Look Ltd. Although the retail outlets once also stocked menswear, the Company now trades exclusively in women's fashion with part of its business made up of concessions operated in-store offering a range of products including women's fashions, homeware and accessories on the basis of a commission rate paid by the relevant concession to the Company.

7. The Company employs a total of 475 employees with 431 of these employed on a part time basis and 44 employed on a full-time basis. The board of the Company comprises four members, two of whom are based in England and two in Ireland. The Company's registered office is at 3 Burlington Road, Dublin 2.

8. The affidavit evidence before the court describes the business model of the Company. While the Company carries out all of the in-store retail operations in Ireland, it relies on the parent for the provision of significant services including property management, financial control, distribution and warehousing logistics, support and development of computer systems, marketing and brand support and customer relations. In addition, all

of its stock (other than concession stock) is supplied by the parent under the New Look brand. The Company does not benefit from any website sales as the website *newlook.com* is owned and managed by the parent.

9. The petition discloses that the parent has had its own financial difficulties. On 21st March, 2018, the creditors of the parent approved a creditor's voluntary arrangement ("*CVA*") under the Insolvency Act 1986 (U.K.) in the United Kingdom which was aimed at reducing the extent of its store portfolio and correcting what is described in the petition as *"the over-rented (i.e. being locked into rents that were higher than market rent) position in which many of the UK stores found themselves"*. Subsequently, in May 2019, the group underwent a restructuring in which the shares of New Look Ltd were sold to New Look Bonds Ltd, a wholly owned subsidiary of the parent. Ownership of the parent was acquired by certain of the group's bondholders. The petition states that the effect of the restructuring was to remove approximately £1 billion of liabilities from the group's balance sheet. Notwithstanding these restructurings, a further CVA was proposed in respect of the parent on 26th August, 2020 (which was two days prior to the presentation of the petition in these proceedings). As discussed further below, the CVA has subsequently been approved by the creditors of the parent.

The case made in the petition for the appointment of an Examiner

10. Insofar as the Company is concerned, the petition explained that, while the Company had made profits in the financial year ended 30th March, 2019 and had also made a profit in the financial year ended 28th March, 2020, significant losses have been incurred as a consequence of store closures during the Covid-19 pandemic. In circumstances where the Company has no online presence itself, it had no sales in the period from 20th March, 2020 (when the Company, four days prior to the government lockdown announcement, decided to close its stores) up to 8th June, 2020 (when the stores began reopening on a phased basis). As of the date of presentation of the petition, 25 of the 27 stores operated by the Company were open and trading. The petition explained that the Company's projections for the year ending March 2021 reveal a revenue decrease of approximately 57% and losses of approximately €9.7 million for the remainder of the year giving rise to a total loss (on an earnings before interest, taxes, depreciation and amortization ("*EBITDA*") basis) for the year of €13.4 million. The case made in the petition was that, while the Company's projected turnover was down by almost 60%, its property costs remained constant in that rent in each of its 27 stores continues to accrue. The petition also disclosed that the Company had stopped paying rent and service charges to its landlords while its stores were shut during the lockdown period and that, since reopening its stores, the Company had paid a contribution to rent on a turnover basis. The petition also stated that, if an examiner is appointed to the Company, landlords would be paid in full the contractual rent during the protection period. However, the petition also stated that the store rents are "*substantially above market rents in the retail sector and account for €10.7 million of the Company's costs in the financial year ended March 2020".*

11. In para. 25 of the petition, it was stated that, notwithstanding that rents in the retail sector had fallen over the last number of years, the fact that the majority of the leases

held by the Company contained "*upward only*" rent review clauses has prevented the Company from lowering its "*rent burden*". The petition stated that, given likely changes in consumer activity and the reduction in the income of the Company going forward, a reduction in the Company's rental costs is essential if the Company is to survive and maintain the employment of its workforce.

12. It is important to note that, in para. 26 of the petition, the case was made that, based on its experience during the lockdown and the consequential changes in consumer behaviour, the Company projected that it would become cash flow insolvent by October 2020. Paragraph 26 continued:

> *"In order to give the restructuring required by the Company the best chance of success the Company has resolved to act now and file the within Petition before it reaches the point of actual cash flow insolvency".*

The report of the independent expert

13. The petition was accompanied, in accordance with the requirements of Part 10 of the 2014 Act by a report of an independent expert namely Mr. Kieran Wallace, the well-known chartered accountant and insolvency expert. In his report, the independent expert identified that, as at 27th June, 2020, the total assets of the Company amounted to €41.1 million of which €12.05 million was held in cash. The balance of the assets was made up principally of intangible assets (including goodwill) valued at €15 million, stock, and debtors. The amount owed by debtors was €10.1 million which included an intercompany balance of €8.8 million owed by the parent. However, the report recorded that, under the proposed CVA, the net receipt which the Company could expect to be paid by the parent was no more than 2% of that figure.

14. The report also revealed that the total liabilities of the Company as at 27th June, 2020 amounted to €10 million of which €7.7 million related to current liabilities and €2.3 million to long term liabilities. Of the liabilities, only €431,000 was due to trade creditors. The independent expert explained that the relatively modest figure due to trade creditors was at that level in circumstances where the Company sources all of its stock from the parent.

15. On a balance sheet basis, the Company is plainly not insolvent. That said, the assets represented by goodwill would be unlikely to have any significant value in a liquidation. Furthermore, the amount due from the parent is illusory in circumstances where the parent has undergone a CVA which has dramatically reduced its liabilities. However, the sum held in cash as at 27th June, 2020 is striking. In fact, it appears that as at the date of presentation of the petition in August, 2020, the cash reserves of the Company had increased to €15.6 million. The existence of such a substantial cash balance is unusual in the context of an application for the appointment of an Examiner under the 2014 Act. Notwithstanding the extent of the cash balance held by the Company and the extent to which its assets exceed its liabilities, the independent expert, at para. 1.50 of his report, stated that the Company "*will be cash flow insolvent by October 2020 and will be unable to meet its payments as they fall due*". I have to say that there is very little in the report which explains the basis upon which cash flow insolvency would arise as early as October

2020. However, the report does explain that the management accounts show that, for the thirteen-week period from 28th March, 2020 to 27th June, 2020, there was a loss of €3,834,000. Furthermore, at para. 6.11 of the report, the independent expert stated that the trading projections showed an overall projected EBITDA loss of €13.4 million for its financial year ending in March 2021 and he expressed the view that this anticipated loss coupled with the outstanding liabilities of the Company meant that it would be cash flow insolvent by October 2020. Notwithstanding the projected loss to the end of March 2021, I can see no explanation in the report as to why the independent expert was of the view that the point of cash flow insolvency would occur in October 2020 as opposed to some later time. In a table attached to this paragraph of his report, the independent expert showed a deficit of €3,429,000 as at 31st March, 2021. Although the independent expert predicted that the Company would be cash flow insolvent as of October 2020, it should be noted that in his projected cash flow statement for the protection period (contained in Appendix D to his report) he predicted that the Company would have an opening cash flow balance of €10.3 million as of 29th August, 2020 and a closing cash balance as of 12th December, 2020 (in week 37 of its financial year) of €5.2 million. As I understand it, the opening balance of €10.3 million took account of a number of projected liabilities of the Company including debts due to the parent (which are described in more detail in para. 17 below).

16. The independent expert also provided an estimated statement of affairs in the event of a liquidation as at 27th June, 2020. On the basis of this estimated statement of affairs, the independent expert predicted that, after discharge of preferential creditors and the costs of liquidation, there would be assets available of the order of €8,962,000 which would generate a dividend for unsecured creditors of 27 cent in the euro. At paras. 8.20 to 8.21 of his report, the independent expert expressed the following opinion:

> *"8.20 Concerned with saving the business and protecting jobs, the Directors and Management of the Company are seeking to restructure the business and reduce costs, given the performance of the Company in Q1 2021 as a result of the COVID-19 pandemic and the uncertainties that lie ahead particularly where there may be a second wave of the virus. There are risks that stores may be closed for a period of time or footfall may continue to diminish. Unlike other Retailers, [the Company] does not benefit from website revenues.*
>
> *8.21 In my opinion the Directors and Management are taking a prudent and well measured approach in line with good management practices. Based on my analysis it would be more advantageous to the members, creditors and employees that an attempt is made to restructure the business through examinership rather than a winding up".*

17. The independent expert recommended that a number of pre-petition liabilities should be paid to ensure that the Company could continue to trade during any period of examinership. Among the pre-petition liabilities which he considered should be paid was a sum of €1.5 million payable to the parent in respect of the centralised services provided

by the parent and a sum of €3.1 million in respect of stock for the months of July and August 2020. The report stated that, insofar as services are concerned, the Company was highly dependent on the parent in order to continue to trade. In this context, it should be noted that the petition disclosed that the parent had, historically, charged the Company an annual charge of 2.9% to 4.4% of overall Group costs in respect of the Company's use of central services but that *"[in] light of the parent Company's difficulties it has informed the Company that it has increased this charge to 5% of its overall costs in respect of the provision to the Company of those services going forward"* and that this will result in a central costs charge of €4.4 million for the financial year ending March 2021. Insofar as stock is concerned, the independent expert recommended that the parent should be paid in order for the Company to continue to receive future stock for the purposes of its trade in Ireland.

The Grant Thornton report commissioned by the opposing landlords

18. The opposing landlords were unhappy with the level of information disclosed in the petition and the report of the independent expert and they engaged Grant Thornton to assist them. In turn, Grant Thornton were unhappy with the level of information provided but, nonetheless, they provided a report. In that report, Grant Thornton stressed that they had not been furnished with the detail behind the projected EBITDA loss for the nine-month period from 27th June, 2020 to 31st March, 2021 but, based on the limited information available to them, they could not see how the Company would become cash flow insolvent by October, 2020. Furthermore, contrary to the suggestion made in the table in the report of the independent expert (described in para. 15 above) that there would be a deficit of €3,429,000 as at 31st March, 2021, Grant Thornton estimated that the Company should still be in surplus at that date to the order of €10,899,000. In arriving at this figure, Grant Thornton took into account the following:

    (a) They called into question why the Company had agreed to the decision of its parent to increase the rate of payment for the provision of services to 5% of central costs. In circumstances where the Company is facing financial difficulties, they suggested that it was reasonable to assume that the Company could negotiate a reduction of 1% for the six-month period from 1st October, 2020 to 31st March, 2021 resulting in a saving of €440,000;

    (b) They had regard to a longer period of rates relief;

    (c) They assumed that the Company should be able to agree a 20% deferral in respect of rents payable to all of its landlords in respect of the period July 2020 to September 2020 until at least 2022;

    (d) They highlighted that the report of the independent expert did not take account of the Employment Wage Subsidy Scheme ("*EWSS*") which was announced by the Government in July 2020 and which would provide up to €203 per week per employee for affected businesses capable of being backdated to 1st July, 2020 and running until 31st March, 2021.

(e) In addition to taking account of the CVA dividend of 2%, Grant Thornton also suggested that an adjustment should be made for some percentage of the income stream earned on on-line sales currently retained by the parent and for additional cost saving programmes;

(f) Based on their market knowledge, Grant Thornton also suggested that a rent write-off could be negotiated in respect of the April to June 2020 period when the stores of the Company were closed;

(g) In addition, they suggested that it should be possible, in accordance with the EWSS, to "*warehouse*" at zero interest amounts due in respect of VAT and PAYE. It should be noted that it subsequently became clear in the course of the proceedings, that such warehousing is not possible in circumstances where, as here, the Company has embarked on a formal insolvency process such as examinership.

The affidavits sworn on behalf of the opposing landlords

19. In the affidavits which were delivered on behalf of the opposing landlords, the case made by each of the deponents was very similar. Each of the deponents drew attention to the dealings which had taken place between the landlords and the parent in relation to payment of rent. Each of the affidavits noted that the first letter from the parent (informing them that the Company would cease paying rent while the stores were closed) was sent on the day prior to the decision of the Company to close the stores. The correspondence in question will be considered in greater detail below. At this point, it is sufficient to note that, in each of the affidavits, a number of complaints were made as follows:

(a) Each of the landlords complained about the decision on the part of the Company or the parent to withhold payment of rent;

(b) Each of the deponents drew attention to the fact that all of the dealings which took place were with the parent and that nothing emanated from the Company until 28th August 2020 when the solicitors for the Company advised them of the making of the order of Barrett J. of that date;

(c) Concern was also expressed about the delay in obtaining information in relation to the financial position of the Company;

(d) Each of the deponents relied upon the Grant Thornton report to suggest that the Company was not unable to pay its debts;

(e) The deponents complained that there had been no engagement with the landlords and that, instead, the parent had simply sought to present the landlords with a *fait accompli*;

(f) Based on the Grant Thornton report, each deponent expressed the view that, in light of the manner in which the Company and the parent conducted themselves since March 2020, the court should exercise its discretion to refuse the petition;

(g) In addition, in the affidavit of Mr. Patrick Gorman sworn on behalf of the landlord of the Fairgreen and CastleWest units, it was disclosed that a notice had been issued by the landlord's solicitors pursuant to s.570 of the 2014 Act seeking payment of the outstanding rent for both units and warning that a failure to discharge the sum due within 21 days would result in a petition for the winding up of the Company under s. 569 (1) (d) of the 2014 Act.

(h) It was also suggested in Mr. Gorman's affidavit that footfall had improved in both the Fairgreen and CastleWest shopping centres and he called into question the pessimistic picture painted on behalf of the Company in the petition and in the report of the independent experts.

The replying affidavit of Mr. Jackman on behalf of the Company

20. These affidavits on behalf of the opposing landlords were sworn and filed on the day prior to the return date fixed for the hearing of the petition on 16th September, 2020. As noted above, the hearing of the petition was adjourned, by consent of all participating parties, to allow the filing of further affidavits. Thereafter a further affidavit was sworn by Robert Jackman, one of the directors of the Company and an affidavit was also sworn by the independent expert who exhibited a further report dated 22nd September, 2020. It is clear from that report that the independent expert is no longer suggesting that the Company would be cash flow insolvent by October 2020. For reasons which are explained in more detail below, the independent expert now takes the view that, by the end of March 2021, the Company will "*likely be both Balance Sheet and Cash insolvent*". Thus, the evidence before the court now in relation to the apprehended insolvency of the Company is strikingly different to the evidence that was presented to Barrett J. at the end of August when the *ex parte* application was made for the appointment of the Interim Examiner.

21. In his affidavit, Mr. Jackman stressed that, in addition to the opposing landlords, the Company has 22 remaining landlords and neither they nor the other creditors of the Company are opposing the petition. He also drew attention to s. 6.3 of the report of the independent expert who had indicated that one of the conditions for the survival of the Company was a reduction in store rents through negotiation or repudiation of property leases. He sought to justify the refusal of the Company to provide trading details to landlords in respect of each store on the basis that it will be necessary to engage with all of the landlords of the Company including the opposing landlords in order to address the "*above market*" rents. The subtext was that it would be commercially damaging to the Company to disclose these details to the landlords at this point.

22. With regard to the assumption made by Grant Thornton in their report of a 20% rent deferral across the Company's lease portfolio, Mr. Jackman responded to the effect that there had been "*limited constructive engagement from landlords*". He said that the Company had received an offer from one of the opposing landlords in relation to two of its stores. In the case of the Mullingar store, the offer was to waive rental arrears (in return for removal of a break clause) thereby committing the Company to a twelve-year term at above-market rent. In the case of Ballincollig, the offer was conditional on a lease

extension of five years at above-market rent or to defer three months' rent to be repaid in six monthly instalments from January 2021.

23. Mr. Jackman stressed that there had been no consistency in the responses from landlords. One landlord had offered to defer six months' rent to be paid over a 24 month period from January 2021 in return for adding rent at a rate of 5% of turnover on top of the existing rent and extending the lease by six years. Another landlord had offered to waive the outstanding portion of rent due on the 1st April, 2020. However, Mr. Jackman did not go into detail in relation to any other proposals that might have been made by landlords. Surprisingly, there is very little evidence before the court as to the steps taken on behalf of the Company to negotiate with landlords. Mr. Jackman simply stated that none of the offers of a short-term rental deferment that were made by landlords address what he described as "*the Company's mid to longer term issue of being bound to above-market rate rents with upward only rent reviews*". In addition, Mr. Jackman drew attention to the fact that proceedings for the recovery of rent had been instituted by one landlord and that the landlord of the Mullingar and Ballincollig stores had issued a s.570 notice.

24. In his affidavit, Mr. Jackman also addressed the complaint made on behalf of the opposing landlords that pre-petition payments in respect of stock and central costs were proposed for payment and recommended by the Independent Expert. Mr. Jackman said that this recommendation was made in light of the Company's economic dependence on the parent. Mr. Jackman explained that this recommendation by the independent expert resulted in the opening cash balance of €15.6 million being reduced by €5.3 million. It was on this basis that the examinership cash flow showed an opening balance of €10.3 million. However, Mr. Jackman further explained that these pre-petition liabilities were not in fact paid and this has had the effect of increasing the opening cash balance to €15.6 million. Mr. Jackman also said that "*This failure to make the recommended intercompany payments had the effect of deferring the point of cash flow insolvency, anticipated in the IER as at the end of October 2020*". I have to say that it is not clear to me that this is the basis on which the anticipated point of cash flow insolvency has been deferred. I do not believe that the second report of the independent expert (considered further below) provides confirmation for this explanation. On the contrary, the independent expert refers to a number of factors.

25. In para. 11.2 of his affidavit, Mr. Jackman confirmed that on 15th September, 2020, the CVA in respect of the parent was approved and, by operation of its terms and under the law of England & Wales, an automatic set-off occurred whereby sums due by the Company to the parent (representing central charge and stock cost) were set-off against the amount due to the Company by the parent. The effect of the set off was that the Company reduced its liability to its parent by setting off €3 million previously owed by it to its parent as against the €8.8 million due to it by the parent as at 30 June 2020.

26. In para. 12 of his affidavit, Mr. Jackman stated that warehousing of arrears of taxes would not be available to the Company. This was confirmed by counsel for the Revenue

Commissioners in the course of the proceedings. Although no reference was made to the EWSS either in the petition or in the first report of the Independent Expert, Mr. Jackman also said that the Company hoped to access the EWSS which he said would fund trading losses by up to €1.5 million up to March 2021. He explained that, in order to gain access to the EWSS, it appeared likely that the Company would have to pay all outstanding taxes in order to obtain the necessary tax clearance certificate which was a precondition to entry to the EWSS. As it transpired, an application was subsequently made to me on 25th September, 2020 for an order under s. 521 (2) of the 2014 Act giving leave to pay the pre-petition liabilities due to the Revenue Commissioners. On that occasion, I was not satisfied that the evidence justified the making of the application in advance of the hearing of the petition but I adjourned the matter to 28th September, 2020 in order to give the Company an opportunity to explain why the order was required urgently. Following a hearing on 28th September, 2020, I acceded to the application thereby making it possible for the Company to take advantage of the EWSS for the month of September 2020 and succeeding months subject to the conditions of that scheme.

27. In his affidavit, Mr. Jackman also addressed the suggestion made by Grant Thornton that the 5% central costs charge payable to the parent could be negotiated downwards. Mr. Jackman responded to the effect that the business model of the Company and its "*dependency*" on the parent for, *inter alia*, stock and services, means that the Company has little bargaining power in relation to the setting of the charge. Mr. Jackman also said that:

> *"Given the restructuring of [the parent] and the economic difficulties it has experienced, an increase in the central charge is (a) not unreasonable and (b) not something the Company is in a position to negotiate or influence. [The parent] has provided the central services to the Company for many years. If the Company was required to obtain such services on the open market, it is clear that the costs of procuring those services would be significantly in excess of those costs which are charged by [the parent] given the initial set up costs and time investment required to implement new terms and processes".*

28. With regard to the suggestions made by some of the deponents on behalf of the opposing landlords that footfall in shopping centres had increased, Mr. Jackman suggested that footfall is not an indication of sales and he also said that, since the introduction of the more severe Level 3 restrictions in Dublin in September 2020, footfall had reduced in a number of shopping centres. In the case of Liffey Valley, he suggested it had fallen by 80%. In the Jervis Centre, he said the drop was 65% and that in Tallaght it was 50%, all of these drops being measured on Monday 21st September, 2020 against 2019 (although Mr. Jackman did not identify the date or the day of the week in 2019 by reference to which this comparison was made). With regard to sales, Mr. Jackman said that, as a consequence of the application of Level 3 restrictions to Dublin, weekend sales in Dublin for the weekend 19-20 September, 2020 were 23% lower than the preceding weekend. He also said that, in the case of the Newbridge store, sales were down over 50% during the Kildare local lockdown as against the same trading period in the previous year. He

also stressed that no one can say whether further local or national lockdowns will occur "*nor how that uncertainty will further reduce sales between now and the resolution of the COVID-19 pandemic*". He said that, in light of the "*new and foreseeable strained trading environment*", the Company cannot "*sit on its hands and pay landlords above-market rents until it runs out of cash…*".

The further report of the independent expert

29. In his affidavit sworn on 22nd September, 2020, the independent expert explained why there were some logistical difficulties in terms of the timing of provision of information to Grant Thornton. Counsel for the opposing landlords did not suggest that the explanation was unsatisfactory. In the circumstances, I do not believe that it is necessary for me to make any ruling in relation to the adequacy of the information provided to Grant Thornton or as to the speed with which it was provided. As noted above, the independent expert also provided a second report in which he analysed the Grant Thornton report. In this second report, the independent expert suggested that there are a number of flaws in the Grant Thornton analysis. These are dealt with below. With regard to the view expressed in his first report that the Company would experience a cash flow deficit by October 2020, the independent expert stated as follows:

> "*The IER assumed the Company would face a cashflow deficit by October 2020 but we have prepared revised cashflow forecasts which illustrate that a cashflow deficit will occur but is now projected to occur in or around March 2021. This change in timing is due to the amendment of the Company's cash flow projections to incorporate a number of changes that have resulted from issues such as the UK parent entering a CVA insolvency process and the write-off of certain intercompany amounts that had been projected to be paid and the Company's now discharging historical revenue arrears in the coming weeks in order to participate in the Wage Subsidy Scheme".*

30. The independent expert noted that, in the three-week period during which the Company had been in Interim Examinership, the level of sales was 9.7% higher than that forecast by him in his first report. However, he emphasised that the trading was 33% behind the previous year's level and he also stressed that the Dublin stores account for 25% of overall revenue such that any local restrictions in Dublin will have a "*severe impact*" on sales. The independent expert stated that these restrictions are not currently reflected in the Company's trading projections.

31. In his second report, the independent expert analysed the individual savings which Grant Thornton had suggested could be achieved. In circumstances where the parent has just undergone a CVA process in the United Kingdom, the independent expert expressed the view, in the context of the 5% charge, that the parent would not be in a position to offer financial or other support to the Irish business unless they received an appropriate level of payment for the services provided. With regard to the EWSS and the fact that it had not been mentioned in his first report, the independent expert suggested that the reason why it was not included in the original forecast was that "*the Company was working through the process of understanding the scheme and no application had been made at*

that time". He estimated that the figure available would be €1.5 million rather than the figure of €3.761 million which Grant Thornton had suggested. Based on the Company projections, he estimated that the total projected cash deficit facing the Company by March 2021 was €3,107,800 of which €1.5 million would be funded by the EWSS. Based on the projections provided by the Company, this equated to a net deficit of €1,578,000 by March 2021. This compares to the figure of €10.9 million cash balance predicted by Grant Thornton in their report. The independent expert expressed the view that the Company projections "*are prudent and do not take into account what could be a worst case scenario*". He also explained that the cash flows as prepared assumes a decrease of trading revenues for the months of September and October 2020 of 40% as compared to the same period of 2019, and a decrease of trading revenue of 50% in November and December 2020 as compared to the same period in 2019. Insofar as January 2021 is concerned, the decrease in revenue is projected to be 60% lower than January 2020. In the case of February 2021, the projection is a decrease of 50% of the same month in 2020. In the case of March 2021, the assumption is that the Company will have the same level of revenue as in March 2020.

32. With regard to these projections, the independent expert states:

> *"I have considered the above forecast reductions in line with market norms, market publications from experts in the field and my knowledge and experience of the retail market in Ireland. I am comfortable with the assumptions made by Management. No one can have certainty as to what lies ahead for the retail sector and in particular ladies' fashion. I am seeing significant pressure on the sector through my work on Debenhams and my work with a number of other companies in the sector.*
>
> *Furthermore, there remains material uncertainty as to whether there will be a solution by way of vaccine or treatment for Covid-19 by March 2021 and in reality it is unlikely to be case (sic) and the negative impact on shopping behaviour and retail performance will continue to be adversely affected beyond March 2021. As a result, it is therefore likely that the Company's cash flow deficit will continue to increase from April 2021 with a backdrop of having utilised all cash reserves at that point. As a result, this illustrates the requirement for them to take action now to deal with their liabilities and place the business on a sound financial footing going forward."*

33. The independent expert added a new item of potential loss to the losses previously envisaged by him. He provided an estimate of additional logistics costs arising from Brexit of €500,000. In support of his views as to the difficulties facing the retail sector as a result of the Covid-19 pandemic, the independent expert also referred to the report authored by Grant Thornton on behalf of "*Retail Excellence*" (a retail industry trade body comprising more than 2,200 retail companies operating 13,000 stores in the Irish market). This report confirmed that ladies fashion sales reduced by 76.6% in the second quarter of 2020. This was during the lockdown period. The Retail Excellence report was

not appended to the second report of the independent expert. I asked that it be produced. From what I can see, the report does not address anything other than the second quarter of 2020. It therefore does not address the current period or provide any projections in respect of the future.

34. In the revised cash flow forecast for the examinership period contained in his second report, the independent expert shows an opening balance for cash at bank of €15.7 million and a total of €4.2 million being spent during the predicted fourteen-week period of the examinership, leaving a closing cash position of €11.2 million at the end of the examinership period. In terms of the estimated outcome in a liquidation, the second report suggested there would be a dividend for unsecured creditors of 28 cent in the euro which represents a marginally better picture than in his first report (when he predicted a 27 cent dividend for the unsecured creditors).

The Grant Thornton response

35. A number of further affidavits were delivered on behalf of the opposing landlords. These took issue with a number of the averments made by Mr. Jackman. An affidavit was also filed by an associate director of Grant Thornton in Northern Ireland in which he analysed the effect of the CVA process relating to the parent. For present purposes, it is unnecessary to consider those affidavits in detail. What is of more relevance is the response provided by Grant Thornton to the second report of the independent expert. In their response, Grant Thornton highlight the acknowledgment now made by the independent expert that the Company will not become cash flow insolvent until March 2021 and that, even on the Company's figures, the estimated cash deficit as of March 2021 at €1.6 million is significantly less than the previously predicted deficit of €3.4 million. Grant Thornton rejected the projections put forward by the Company and supported by the independent expert. Based on their analysis, the Company will remain cash flow solvent as at March 2021 and they estimated that the available cash at that point would be of the order of €6.5 million. As noted above, warehousing of taxes is not currently open to the Company in circumstances where it is in an insolvency process (i.e. examinership). This estimate is, however, based on the ability of the Company to warehouse tax liabilities of €2.6 million. In real terms, therefore the cash estimate is €3.9 million.

36. Grant Thornton continued to maintain that a 20% deferral of rent should be achievable and that it should be possible to agree a write-off of rent for the period from April 2020 to June 2020 which they say reflects "*the reality of what is being offered in the market*". Grant Thornton also continued to maintain that tax warehousing should be possible. While this is obviously not correct in the context of a company in examinership, counsel for the opposing landlords suggested that, had the present insolvency process not commenced, warehousing of tax liabilities could have been achieved. With regard to the estimate of costs in respect of Brexit, Grant Thornton suggested that these were purely speculative. Grant Thornton also highlighted the improved trading position of the Company above what had been projected in the first report of the independent expert. Insofar as the Company's projections are concerned, Grant Thornton say:

"These assumptions appear extraordinarily pessimistic and unrelated to what is happening presently. We have not focussed on the revenue assumptions and trading EBITDA to March 2021 in this report. However, any improvement in the position will have a material impact on the EBITDA loss projected of €9.03m".

The report of the Interim Examiner

37. The Interim Examiner provided a very helpful report to the court. Not all of that report is relevant in the context of the present dispute. However, in para. 3.4 the Interim Examiner confirmed that the trading performance of the Company has generally been in line with its forecasts for the protection period. The Interim Examiner also stated that, in the period since the presentation of the petition, weekly sales have been declining, resulting in turnover of €629,000 for the most recent week ending 26th September, 2020 compared to €849,000 for the week ending 29th August, 2020. The Interim Examiner also noted that the turnover of €629,000 for the week ending 26th September, 2020 represents a 49% drop in sales compared to the same period last year. In addition, the Interim Examiner stated that the Company has been trading at a loss since the onset of the Covid-19 pandemic and "*all indications are it will continue to do so for the foreseeable future".*

38. In the same paragraph of his report, the Interim Examiner noted that the opposing landlords have sought to challenge the assertion of the independent expert as to the impending insolvency of the company. Very properly, he conceded that it is not appropriate for him, as Interim Examiner, to enter into the respective merits of the positions adopted by the Company, on the one hand, and the landlords, on the other. He nonetheless added that, at a general level, his own experience as an insolvency practitioner "*would support the contention that retail tenants are operating under significant pressures (particular in the face of increased on-line shopping activity) with these challenges being exacerbated further by the impacts of the Covid-19 restrictions… which are likely to remain in situ over the coming months*".

39. In describing his actions to date in the Interim Examinership, the Interim Examiner stated, in para. 8.1 of his report, that, as part of the work undertaken by him, he has reviewed the position of the Company in respect of its individual stores and that he continues to liaise with the Company's property team and advisors regarding ongoing landlord discussions and proposals regarding current market rental terms. In the same paragraph, the Interim Examiner stated: *"I understand initial discussions to date have been largely positive with the majority of landlords*".

The further evidence in relation to the centre of main interests of the Company

40. The final affidavit placed in evidence before the court is a further affidavit of Mr. Jackman that was filed on the second day of the hearing in response to the questions raised by me on the first day of the hearing in relation to the location of the centre of main interests of the Company for the purposes of the application of the Regulation. The content of this affidavit is addressed below in the context of my consideration of that issue which, having regard to the obligations of the court under Article 4 of the Regulation, should be addressed first.

Is the centre of main interests of the Company located in Ireland?

41. Under Article 4 of the Regulation the court is under an obligation, of its own motion, to examine whether it has jurisdiction pursuant to Article 3. Insofar as relevant, Article 3 (1) provides as follows:

> *"1. The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.*
>
> *In the case of a company … the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary…."*

42. In the present case, there is no doubt but that the registered office of the Company is in Ireland. The registered office is at 3 Burlington Road, Dublin 4 (the offices of Eugene F. Collins Solicitors). Accordingly, the rebuttable presumption contained in Article 3 (1) applies subject to proof to the contrary. In the present case, however, I was concerned by some of the facts stated in the affidavits filed on behalf of the opposing landlords in which the deponents stressed the way in which many of the approaches received by landlords in respect of the store premises emanated from the parent in England. In light of that evidence, I was concerned to ensure that the court could properly conclude that the centre of main interest of the Company was in Ireland. Having regard to the affidavit of Mr. Jackman filed on the second day of the hearing, I am now satisfied that the centre of main interest of the Company is in Ireland. The Company secretary is Irish. The Company maintains on file separate accounts and returns in the Company's registration office. While that is not definitive, it is relevant that anyone looking for information on the Company will find those returns and accounts in the Companies Registration Office. The core trading activity of the Company is carried on in Ireland namely the sale of ladies' fashion from stores which are leased by the Company in its own name. All of the leases are governed by Irish law. The Company has never traded in any jurisdiction other than Ireland and its only place of business is in Ireland. The Company pays its employment and other taxes including corporation tax in Ireland and all 475 of its employees work and pay their taxes in Ireland. All of their employment contracts are subject to Irish law. All of these matters support the view that the centre of main interests of the Company is in Ireland.

43. It is true that, as the papers before the court disclose, the business model of the Company is such that it avails of centralised services provided by the parent but that arrangement does not, of itself, make the location of the parent the centre of main interests of the Company. Although some creditors of the Company deal with the parent (in circumstances where it is exercising a central purchasing power for the group as a whole) the evidence of Mr. Jackman is that the Company trades with a significant number of creditors directly in Ireland. These creditors invoice the Company in Ireland and are paid by the Company. In all of these circumstances, notwithstanding the role paid by the parent, it seems to me that there is no sufficient evidence before the court to displace the

presumption which applies under Article 3 (1) of the Regulation that the centre of main interests of the Company is in Ireland. On that basis, I am satisfied that the court has jurisdiction to open main insolvency proceedings in Ireland and that the proceedings before the court constitute main insolvency proceedings within the meaning of Article 3 (1) of the Regulation.

Is the Company unable to pay its debts?

44. The power of the court to appoint an examiner will only arise where the conditions set out in s. 509 (1) and s. 509 (2) of the 2014 Act are met. There is no dispute in the present case in relation to the potential application of s. 509 (2) at least in so far as the possibility of the Company's survival is concerned. Under that provision, the court is enjoined from making an order appointing an examiner unless it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern. In this case, both sides contend that there is a reasonable prospect of survival albeit that only one side (namely the Company itself) contends that the appointment of an examiner is necessary for this purpose. The dispute in the present case relates to the requirements of s. 509 (1) (a) which will only apply where it appears to the court that a company is or is likely to be unable to pay its debts. Section 509 (1) provides as follows:

> *"(1) Subject to subsection (2), where it appears to the court that—*
>
> *(a) a company is, or is likely to be, unable to pay its debts,*
>
> *(b) no resolution subsists for the winding up of the Company, and*
>
> *(c) no order has been made for the winding up of the Company,*
>
> *the court may, on application by petition presented, appoint an examiner to the Company for the purpose of examining the state of the Company's affairs and performing such functions in relation to the Company as may be conferred by or under this Part".*

45. There was significant debate in the present case between counsel for the Company and counsel for the opposing landlords as to whether there was sufficient evidence before the court to enable the court to conclude that the Company satisfied the requirements of s. 509 (1) (a) as quoted above. Counsel for the Company urged that the statutory language "*where it appears to the court*" indicates a low or modest threshold. She argued that, on the basis of the material before the court, that threshold was readily surmounted and that it was clear, so she submitted, that the Company was likely to be unable to pay its debts by March 2021. Counsel submitted that, notwithstanding the significant cash balance currently held by the Company, the evidence establishes that, within months, the Company would be unable to pay its debts. She stressed that s. 509 (1) (a) expressly envisages that it is not necessary to establish that the Company is, as of now, unable to pay its debts. The statutory provision clearly went further and included also

circumstances where there is a likelihood that inability to pay debts would arise in the future.

46. In contrast, counsel for the opposing landlords argued that, on the materials before the court, it could not be said that the Company is or is likely to be unable to pay its debts. He argued that the suggestion that the Company will be insolvent by March 2021 is based on an unduly pessimistic prognosis for the next six months which may or may not come to pass. He emphasised that, on the basis of the second report of the independent expert, there was now evidence from both experts that the Company would be cash flow solvent for the six-month period from October 2020 to March 2021. He submitted that, in these circumstances, there was no warrant to invoke s. 509 (1) (a) at this point. He stressed that the word "*likely*" in s. 509 (1) (a) must be given its ordinary meaning and that it is therefore necessary for the Company to show that the probability is that it will become insolvent within a short space of time. He argued that the evidence fell well short of satisfying any probability test and he characterised the evidence adduced on the part of the Company as "*future tense speculative evidence*". Counsel submitted that, if a petitioner such as the Company here (with a generous cash balance standing to its credit) is entitled to invoke s. 509 (1) (a), then almost every retailer in the country (many of whom are unlikely to have such extensive cash balances) would equally be able to invoke the jurisdiction of the court under s. 509.

47. With regard to the submission made by counsel for the Company that the word "*appears*" in s. 509 (1) (a) represents a low or modest threshold, counsel submitted that the use of that word, in substance, means no more than that the court must be satisfied that the Company is unable to pay its debts or is likely to be so within a very short period.

48. Counsel for the opposing landlords also made the case that, insofar as there is a conflict of evidence between the independent expert, on the one hand, and Grant Thornton, on the other, it is for the Company, as petitioner, and as the party on whom the onus of proof lies, to address how the court could safely resolve that conflict in the Company's favour. In the written submissions, counsel for the opposing landlords had gone further and suggested that the conflict of evidence, to the extent that it was necessary to resolve it, could only be resolved by cross examination and that it was a matter for the Company, as petitioner, to pursue cross examination, if it was to discharge the onus of proof which lies upon it. However, in her submissions to the court, counsel for the Company had strongly contended that cross-examination would not be an appropriate course to take on an application of this kind (which requires to be heard and determined urgently). In fairness to counsel for the opposing landlords, when it came to oral submissions, there was less emphasis placed upon the suggestion that cross examination might be necessary.

The approach to be taken under s. 509 (1) (a)

49. It is clear from the language of s. 509 (1) (a) that the court's power to appoint an examiner is triggered both where a company is currently unable to pay its debts and where it is likely to be unable to pay its debts at some point in the future. Section 509 (1) (a) provides no guidance as to how far into the future a court can reasonably look for

this purpose. Counsel were unable to point to any Irish authority which addressed the approach which a court should take in a case where a petitioner alleges a likelihood of a future insolvency. However, counsel helpfully drew attention to a number of English authorities which arose in the context of s. 8 (1) (a) and also s. 8 (1) (b) of the Insolvency Act, 1986 (United Kingdom) ("*the UK Insolvency Act*"). While those authorities were relied on principally to address the meaning of the word "*likely*" in s. 509 (1) (a) of the 2014 Act, they also provide some assistance in relation to the difference between the "*where the court is satisfied"* standard and "*where the court considers*" standard which is somewhat similar to the language used in s. 509 (1) (a) namely "*where it appears to the court*". Under s. 8 (1) (a) of the UK Insolvency Act, the UK courts are empowered to make an administration order in relation to a company where the court "… *is satisfied that a company is or is likely to become unable to pay its debts* …". While the UK statutory provision uses the words "*is satisfied*" rather than the words "*where it appears to the court",* the subsection is otherwise in very similar terms to s. 509 (1) (a) of the 2014 Act.

50. Counsel for the Company referred to the judgment of Hoffmann J. (as he then was) in *Re. Harris Simons Construction Ltd* [1989] 1 W.L.R. 368. That case was not concerned with s. 8 (1) (a). In that case, an issue arose as to the degree of probability that must be demonstrated in order to satisfy the test set out in s. 8 (1) (b) of the UK Insolvency Act. That provision requires that, before an administration order can be made, the relevant UK court must "*consider*" that the making of the order would be likely to achieve one of the purposes set out in s. 8 (3) of the UK Insolvency Act. These purposes include the survival of the Company (or the whole or any part of its undertaking) as a going concern. In that case, Hoffmann J. was satisfied that the Company was unable to pay its debts. The only issue before him was whether the s. 8 (1) (b) test had been satisfied. Hoffmann J. suggested that the test in s. 8 (1) (b) required a "*modest threshold of probability*" and he did not follow the view previously taken by Peter Gibson J. in *Re. Consumer and Industrial Press Ltd* [1988] B.C.L.C. 177 where Peter Gibson J. had said, at p. 178:

> *"As I read section 8 the court must be satisfied on the evidence … that at least one of the purposes in section 8 (3) is likely to be achieved if it is to make an administration order. That does not mean that it is merely possible that such purpose will be achieved, the evidence must go further than that to enable the court to hold that the purpose in question will more probably than not be achieved".*

51. In the *Consumer and Industrial Press* case, Peter Gibson J. therefore required that, on a scale of probability of 0 (meaning impossibility) to 1 (absolute certainty) the likelihood of success should be more than 0.5. This approach was not followed by Hoffmann J. in the *Harris Simons* case. At p. 370, he said:

> *"I naturally hesitate to disagree with Peter Gibson J., particularly since he had the benefit of adversarial argument. But this is a new statute on which the judges of the Companies Court are still feeling their way to a settled practice I therefore think I should say that in my view he set the standard of probability too high. My reasons*

are as follows. First, 'likely' connotes probability but the particular degree of probability intended must be gathered from qualifying words (very likely, quite likely, more likely than not) or context. It cannot be a misuse of language to say that something is likely without intending to suggest that the probability of its happening exceeds 0.5, as in 'I think that the favourite, Golden Spurs at 5–1, is likely to win the Derby'. Secondly, the section requires the court to be 'satisfied' of the Company's actual or likely insolvency but only to 'consider' that the order would be likely to achieve one of the stated purposes. There must have been a reason for this change of language and I think it was to indicate that a lower threshold of persuasion was needed in the latter case than the former. The … judgment of Peter Gibson J. suggests that he did not take this variation into account. Thirdly, some of the stated purposes are mutually exclusive and the probability of any one of them being achieved may be less than 0.5 but the probability of one or other of them being achieved may be more than 0.5. I doubt whether Parliament intended the courts to embark on such calculations of cumulative probabilities. Fourthly, as Peter Gibson J. said, section 8(1) only sets out the conditions to be satisfied before the court has jurisdiction. It still retains a discretion as to whether or not to make the order. It is therefore not unlikely that the legislature intended to set a modest threshold of probability to found jurisdiction and to rely on the court's discretion not to make orders in cases in which, weighing all the circumstances, it seemed inappropriate to do so. …".

52. Counsel for the Company relied on these observations both in relation to the meaning of the word "*likely*" and also in the context of the argument made by her that the words "*where it appears to the court*" in s. 509 (1) (a) should be read as indicating a lower threshold than would be the case if the statute had prescribed a "*where the court is satisfied*" standard. She drew a parallel between the use of the words "*the court…considers that the making of an order under the section would be likely…*" (emphasis added) in s.8 (1) (b) of the UK Insolvency Act (on which Hoffmann J. placed reliance in the *Harris Simons* case) and the use of the words "*where it appears to the court"* (emphasis added) in s. 509 (1) (a) of the 2014 Act. Separately, she also relied on the passage quoted above in support of her argument as to the meaning of the word "*likely*".

53. I accept that the judgment of Hoffmann J. is helpful in relation to the meaning of the word "*likely*" (if only for its rejection of the somewhat rigid approach taken by Peter Gibson J.) and that the decision provides some support for the argument of counsel for the Company that the words "*where it appears to the court*" in s. 509 (1) (a) of the 2014 Act should be read as prescribing a somewhat lower standard than the use of words such as "*where the court is satisfied*". As the passage from the judgment of Hoffmann J. (quoted above) illustrates, the language of any statutory provision must always be read in the context of other related provisions within the same statute and in the context of the statute as a whole. This is consistent with the approach taken in Ireland as evidenced, for example, in the judgment of McKechnie J. in the Supreme Court in *Dunnes Stores v. The Revenue Commissioners* [2019] IESC 50. The approach taken by Hoffmann J. was

influenced by the juxtaposition of the words "*the court … is satisfied …*" in the context of s. 8 (1) (a) of the UK Insolvency Act and the words "*if the court … considers*" in the very next paragraph (i.e. in s. 8 (1) (b) of the Act) and he came to the conclusion, having regard to the difference in language, that the legislature must have intended a different standard to be applied in respect of both of these provisions. A similar issue arises in the context of s. 509. In the case of the s. 509 (1) requirements, they are to be applied by reference to the words "*where it appears to the court*". In contrast, different language is used in the immediately succeeding subsection namely s. 509 (2) which addresses whether the company, the subject of the petition, has a reasonable prospect of survival. Under s. 509 (2) the court is required to be satisfied that there is such a reasonable prospect of survival. Section 509 (2) provides as follows:

> "*(2) The court shall not make an order under this section unless it is satisfied that there is a reasonable prospect of the survival of the Company … as a going concern".*

54. It is noteworthy that the language used in s. 509 (2) is different to the language used in the predecessor provision contained in s. 2 (2) of the Companies (Amendment) Act, 1990 (*the 1990 Act*") which provided that the court might make an order for the appointment of an examiner "*if it considers that such order would likely to facilitate the survival of the Company … as a going concern*". (Emphasis added). That language was changed in 1999 by s. 5 (b) of the Companies (Amendment) (No. 2) Act, 1999 ("*the 1999 Act*") which substituted the language now used in s. 509 (2). That suggests a deliberate decision on the part of the Oireachtas to impose a higher test. At the time of the introduction of the 1999 Act, both commentators and courts took the view that the new provision imposed a higher standard. Thus, for example, in MacCann on the Companies Acts 1963-2009 at p. 1070, the authors stated:

> "*In its original form …, s. 2 (2) allowed for the appointment of an examiner where the court 'considered' that such an order might facilitate the survival of the Company on the whole or part of its undertaking as a going concern. This was interpreted by the courts as imposing a very low standard of proof, namely that the petitioner establish 'some prospect of survival' or some 'identifiable possibility of survival'. However, the newly-worded subsection as substituted by [the 1999 Act] has introduced significant changes which involve the imposition of a more exacting evidential standard. It is negatively worded and this has been held to take away much of the court's discretion in the matter. It imposes a jurisdictional threshold which must be overcome before the court can have any entitlement to even consider appointing an examiner, since it stipulates that the court 'shall not' appoint an examiner unless it is 'satisfied' that there is a 'reasonable prospect' of survival. It should be noted though, that in order to establish a reasonable prospect of survival, the petitioner does not have to establish a probability of survival'.*

55. In support of these observations MacCann refers to the decisions of McCracken J. in Re. Circle Network (Europe) Ltd (High Court, unreported, 15th February, 2001) and Re. Tuskar Resources Plc [2001] 1 I.R. 668 at p.p. 674-676 and the judgment of Murray J.

(as he then was) in the Supreme Court in Re. Vantive Holdings (No. 1) [2009] IESC 69. The observations are also consistent with the views expressed (albeit in the specific context of the UK Insolvency Act) by Hoffmann J. in Harris Simons.

56. In these circumstances, I believe that there is considerable force to the argument made by counsel for the Company that the "*where it appears to the court*" test in s. 509 (1) lies somewhere lower on the scale to a "*where the court is satisfied*" test. However, neither side cited any authority to me as to the parameters of the "*where it appears to the court*" test. In the time available, my own researches have failed to identify any authority of significant assistance on the issue. I note that in *Robinson v. Sunderland Corporation* [1899] 1 Q.B. 751, an issue arose in relation to the meaning of s. 36 of the Public Health Act, 1875 which provided that: "*If a house within the district of a local authority appears to such authority … to be without a sufficient water-closet* …" the local authority could serve a notice on the owner to provide the necessary water-closet. Furthermore, there was also a statutory provision that the local authority could apply to a court of summary jurisdiction to authorise the local authority to enter the property concerned for the purposes of carrying out the necessary works itself. One of the issues which arose in the case was whether the court could embark upon a consideration as to whether the property in question was without a sufficient water-closet. Channell J. rejected that suggestion and said at p. 757 that:

> *"The words 'appear to such authority' are obviously put in for the purpose of making the local authority the judges on the question whether the house is without a sufficient water-closet…. It depends upon the opinion of the local authority ….. It cannot possibly be a matter for the justices to decide…".*

57. I also note that in *R. v. Dickens* [1990] 2 Q.B. 102, the Court of Appeal of England & Wales had to consider a provision of the Drug Trafficking Offences Act, 1986 (UK). Under the relevant statutory provision, the prosecution bore the burden of proving that any payments received by the accused were the proceeds of drug trafficking. However, that burden was ameliorated by s. 2 (2) of the Act which provided that, for the purposes of determining whether the accused had benefited from drug trafficking, the court was empowered to make a number of assumptions on the basis that "*any property appearing to the court*" to have been (inter alia) transferred to the accused could be assumed to have been so transferred as a payment or reward in connection with drug trafficking carried on by him. At p. 107, Lord Lane LCJ said that the words "*appearing to the court*" meant "*that if there is prima facie evidence that any property has been held by the defendant…since the beginning of the relevant period, the judge may make the assumption that it was a payment or reward in connection with his drug trafficking*".

58. I have to say that neither of these authorities is particularly helpful on the subject. Neither authority explains the basis upon which the court came to its view as to the meaning of the word "*appears*" or "*appearing*". I must therefore decide the issue by reference to principle. For the reasons discussed in paras. 53 to 55 above, it seems to me that s. 509 (1) does not go so far as to require the court to be "*satisfied*" that a

company is likely to be unable to pay its debts. I accept that the words "*where it appears to the court*" lay down a somewhat lower standard. Those words and the case-law cited by MacCann suggest a less rigorous standard than "where the court is satisfied". The words "*where it appears to the court*" in their natural and ordinary meaning seem to me to require that there should be adequate material before the court to allow the court to form the view that a company is likely to be unable to pay its debts. In my view, the word "*appear*" is a synonym for "*seem*". Both words are frequently used by courts in the course of reaching conclusions on issues in controversy before them. The words "*appear*" and "*seem*" are also frequently used by lawyers in expressing their views in written opinions provided to clients. Before something can "seem" to the court, there must be some basis either in law or on the evidence for the court to reach that view. It seems to me that, like any other case where a court is required to form an opinion, there must be a sufficiently sound basis for that purpose laid down in the evidence. What will be a sufficiently sound basis will depend on the evidence in any individual case. The court clearly could not act on incomplete or unconvincing evidence. It would need to have sufficient evidence placed before it by the petitioner to show that there was a proper basis to form the view as to the likelihood of inability to pay debts.

59. While, for the reasons outlined above, I believe there is force to the argument of counsel for the Company that the "*where it appears to the court*" test is not as rigorous as a test that requires the court to be satisfied that a company is likely to be unable to pay its debts, it is nonetheless the case that a petitioner must show that the company concerned is likely to be unable to pay its debts. The test of what is "*likely*" involves a consideration of what is probable. As Denham J. (as she then was) observed in *Fyffes plc v. DCC* [2009] 2 I.R. 417 at p. 707 (albeit in a different statutory context):

> *"The word 'likely' is defined in the Oxford Dictionary as 'probable', 'such as well might happen ...', 'to be reasonably expected'. It is a word in common usage and meaning and is not a term of art. It envisages a situation which would probably arise".*

60. Although that observation was made in the specific context of the use of the word "*likely*" in s. 108 (1) of the Companies Act, 1990, the observations of Denham J. appear to me to be equally applicable in the context of s. 509 (1) (a). For the purposes of the present case, I must therefore consider whether, on the evidence before the court, there is a proper basis to form the view that it is probable that the Company will, at some point in the future, be unable to pay its debts. For completeness, I was also referred to a number of English authorities on the meaning of the word "*likely*" in s. 8 (1) (a) of the UK Insolvency Act. As noted above, s. 8 (1) (a) uses the more stringent "*if the court … is satisfied …*" test. For example, in *Re. Colt Telecom Group plc* [2002] EWHC 2815 (Ch.) Jacob J. (as he then was) had to consider whether a petitioner had to prove the likelihood of inability to pay debts on the balance of probabilities or whether it was sufficient to prove that there was a real prospect of that being so. In addressing this issue, Jacob J. highlighted the significance of the step involved in placing a company in administration. While his observations in relation to the meaning of the word "*likely*" must be treated with

some caution (in circumstances where the UK Insolvency Act imposed a "*where the court is satisfied*" standard), his observations as to the significance of the step involved nonetheless have a resonance in the present case in the context of examinership. At pp. 25-26, Jacob J. said:

> "*To put a company into administration is a serious matter. Creditors, as well as the Company itself, can apply. To expose the Company to all the expense, danger, and problems associated with administration is a serious matter. It is most unlikely that Parliament intended this when there was only a real prospect of insolvency rather than where insolvency was more probable than not.*
>
> *I cannot think Parliament intended that companies should be exposed to this kind of hostile proceeding where it is more likely than not that the Company is not insolvent. Administration is a rescue procedure – it must be shown that rescue is probably needed before asking for a rescue team".*

61. Subsequently, at p. 87, Jacob J. continued:

> *"…a shaky, tentative, and speculative peering into the middle-distance is no basis for forcing a company into administration…. an allegation of insolvency is a serious matter. It needs a solid foundation".*

62. A "more probable than not" standard was applied by Lewison J. (as he then was) in Re. AA Mutual International Insurance Company Ltd [2004] EWHC 2430 (Ch.). I am not sure that I would go so far as to suggest that the evidence must establish that it is more probable than not that a company will be unable to pay its debts. Such an approach may well be appropriate in the context of a statutory provision which requires the court to be satisfied of a particular state of affairs before granting relief. The "*more probable than not*" approach is redolent of the rather rigid methodology adopted by Peter Gibson J. in *Re. Consumer and Industrial Press Ltd* (discussed in paras. 50-51 above). In my view, it sufficient to adopt a similar approach to that taken by Denham J. in the *Fyffes* case (quoted in para. 59 above) that the word "*likely*" means "*probable*" or "*such as well might happen*" or "*to be reasonably expected*". As Denham J. observes the word "*likely*" is a word in common usage and its meaning is not a term of art. The primary rule of construction of statutes is that words should be given their natural and ordinary meaning and that is precisely what Denham J. did in the *Fyffes* case.

63. In support of her arguments in relation to the breadth of s. 509 (1) (a) of the 2014 Act, counsel for the Company also referred to the decision of Briggs J. in *Re. Cheyne Finance plc (in receivership)* [2007] EWHC 2402 (Ch.) and the decision of the UK Supreme Court in *BNY Corporate Trustee Services Ltd v. Eurosail-UK* [2013] 1 W.L.R. 1408. However, I do not believe that these authorities are in point. They are concerned with s. 123 (1) (e) of the UK Insolvency Act which provides that a company will be unable to pay its debts if it is proved to the satisfaction of the court that the Company "*is unable to pay its debts as they fall due*". In both of those decisions, the courts took the view that, in determining whether a company is unable to pay its debts as they fall due, it can be appropriate to

take into account debts which fall due in the reasonably near future. As Lord Walker explained at p. 1424:

> *"… the 'cash-flow' test is concerned, not simply with the petitioners' own presently-due debt, nor only with other presently-due debt owed by the Company, but also with debts falling due from time to time in the reasonably near future. What is the reasonably near future, for this purpose, will depend on all the circumstances, but especially on the nature of the Company's business. …".*

64. In the present case, there is no need to consider those authorities. Section 509 (1) (a), by its own terms, expressly envisages debts that may fall due in the future. As noted in para. 49 above, s. 509 (1) (a) does not require that a company must be insolvent as of the date of the petition. It explicitly envisages that an application might be made in respect of a company which is likely to become unable to pay its debts. That necessarily involves an element of looking into the future. Having regard to the generally accepted meaning of the word "*likely*", it seems to me that, a petitioner seeking an order under s. 509 in respect of a company, on the basis that it is likely to be unable to pay its debts as they fall due, must show that the Company concerned will probably (within the meaning of that word as explained by Denham J.) be unable to pay its debts at some point in the future. In this context, it does not seem to me to be worthwhile trying to evaluate, on an ex ante basis how far into the future one can look for this purpose. In my view, everything will depend on the facts of an individual case. Until a body of experience builds up, it would be wrong to attempt to identify, in advance, the principles which should be applied.

65. Nonetheless, there are some observations which can be made. While s. 509 (1) (a) does not impose any temporal limit on the extent to which one can look into the future, I think it is unlikely that a court would be prepared to look too far into the future. In the first place, it is usually difficult to predict what is likely to happen in the future. That was a point that was forcefully expressed by Jacob J. in *Colt Telecom* quoted in para. 61 above. Secondly, for reasons which are explained at a later point in this judgment, a court, in the exercise of its discretion, is less likely to be prepared to appoint an examiner if the risk of insolvency is some significant distance away. The observations of Jacob J. in the *Colt Telecom* case (quoted in paras. 60 above) are worth bearing in mind. The appointment of an examiner is a very serious step with significant consequences and should not be taken lightly or precipitately. In my view, these considerations will, at a practical level, temper the extent to which the "*likely to be unable to pay its debts*" aspect of s. 509 (1) (a) will be utilised in practice.

Are the requirements of s. 509 (1) (a) satisfied in this case?

66. For the purposes of the present application, I must, therefore, first address whether there is a proper basis, on the evidence before the court, to form the view that the Company is likely to be unable to pay its debts as they fall due in the future. Before considering the evidence in relation to that issue, I should draw attention to the provisions of s. 509 (3) of the 2014 Act which I raised with counsel in the course of the hearing. Section 509 (3)

provides that, for the purposes of s. 509, a company will be unable to pay its debts where any of the following three circumstances apply:

"*(a) it is unable to pay its debts as they fall due,*

(b) the value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities, or

(c) the circumstances set out in section 570 (a), (b) or (c) are applicable to the Company".

67. The provisions of s. 509 (6) (a) are concerned with cash flow insolvency. Section 509 (3) (b) is concerned with what is generally known as balance sheet insolvency. However, s. 509 (3) (c) goes further and provides that, for the purposes of s. 509, a company will also be unable to pay its debts where any of the circumstances set out in s. 570 (a) (b) or (c) are applicable. Section 570 of the 2014 Act is concerned with the circumstances in which a company is deemed to be unable to pay its debts. The most common circumstance is that prescribed by s. 570 (a) under which, if a creditor serves a demand in writing on a company to pay a debt exceeding €10,000 then due, and the Company fails to pay that debt within 21 days from the date of service of the demand, the Company will be deemed to be unable to pay its debts. This is the mechanism on which creditors frequently rely in order to support a petition for the winding up of a company on the grounds that it is unable to pay its debts. In the present case, the s. 570 demand was served on the Company by the solicitors acting on behalf of the landlord of the Fairgreen and CastleWest stores. I should make clear that counsel for the petitioner, in her written submissions, had not sought to rely on s. 509 (3) (c). However, after I had raised the issue with counsel for the objecting landlords in the course of the hearing to approve the payment of outstanding VAT and PAYE/PRSI to the Revenue, counsel placed some reliance on it but, it has to be said, that it was not front and centre of her submissions.

68. Counsel for the objecting landlords took the view that it would be wrong to rely on s. 509 (3) (c) in the circumstances of the present case. He argued that, all that the subsection does (in conjunction with s. 570) is to create a presumption that a company is unable to pay its debts. Counsel argued that the subsection was "*clearly not intended to allow a company that has millions of euro of cash reserves which are more than adequate to discharge all of its current liabilities to wilfully elect not to discharge its liabilities in order to feign insolvency*". Counsel also submitted that the court should be "*very reluctant to create a rogue's charter of this type unless it was absolutely mandated to do so by statute*". In addition, counsel cited the observations of Megarry V.C. in *Polydor Ltd v. Harlequinn Record Shops Ltd* [1980] 1 CMLR 669 to the effect that "*the hypothetical must not be allowed to oust the real further than obedience to the statute compels"*. While counsel acknowledged that this decision was subsequently overturned by the Court of Appeal of England & Wales, this statement was subsequently cited with approval by Jacobs L.J. in *Shanks v. Unilever plc* [2010] EWCA Civ. 1283.

69. Counsel for the opposing landlords also sought to suggest that s. 509 (3) (c) was intended to assist creditors in presenting a petition for the opponent of an examiner to a company. He made the point that creditors would often not have access to any detailed information in relation to the financial position of companies and that accordingly, the Oireachtas made provision to allow them to readily establish insolvency on the part of a company, the subject of a creditor's petition under s. 509.

70. While I am not convinced that s. 509 (3) (c) is there purely to assist creditors, I propose, in circumstances where the Company did not place any reliance on s. 509 (3) (c) of its own motion, to defer reaching any conclusion on the arguments as to its potential application until after I have considered whether the Company has established, on the basis of the evidence, a sufficient case to enable the court to form the view that the Company is likely to be unable to pay its debts. If I come to the conclusion that the Company has satisfied that test, it will be unnecessary to consider the potential application of s. 509 (3) (c).

The conflict of evidence on the issue of insolvency

71. As noted above, there is a conflict on the evidence before the court. There is a dispute between the experts as to whether the Company will or will not be cash flow insolvent as of March 2021. In the written submissions delivered on behalf of the opposing landlords, reliance was placed on the judgment of the Supreme Court in *RAS Medical Ltd v. Royal College of Surgeons in Ireland* [2019] 1 I.R. 63 in which the court stressed that, in the event of a conflict of evidence in proceedings heard on affidavit, appropriate measures should be taken by the parties (such as seeking leave to cross-examine the deponents of the affidavit) such that questions concerning the credibility or reliability of the evidence tendered could be put to the deponents to enable the court to reach a sustainable conclusion as to the accuracy or otherwise of the evidence concerned. That decision was made in the particular context of judicial review proceedings where, on the hearing of such proceedings, the court will make definite findings as to whether or not the applicant is entitled to the relief claimed. In heavily contested judicial review proceedings, the court will normally assign a number of days to the hearing, following which judgment will usually be reserved and a detailed written judgment given thereafter. In such proceedings, there will also be statements of grounds and of opposition. There will also be a timetable for the delivery of affidavits and, in the event of a conflict of evidence on an issue of fact that requires to be determined by the court, there will be time for the parties to bring an application for leave to cross examine the relevant deponents.

72. I am not convinced that the same approach is appropriate in the specific context of a hearing under s. 509 of the 2014 Act. By its very nature, an application to appoint an examiner will ordinarily be a matter of considerable urgency. More often than not, the court will give an *ex tempore* ruling. There will be much less time for the delivery of affidavits than would ordinarily be permitted in the timetable approved by the court in judicial review proceedings. The closest analogous situation which was identified in the course of the argument arose in *McInerney Homes Ltd* [2011] IEHC 4. There, the conflict of evidence arose at the time an application was made to confirm a proposed scheme of

arrangement in an examinership. That application was opposed by a banking syndicate who claimed that the scheme was unfairly prejudicial to them such that the court should refuse to confirm it. There was a significant dispute on the evidence as to whether the syndicate was unfairly prejudiced. Clarke J. (as he then was) drew attention to the observation made by Hardiman J. in the Supreme Court in *Boliden Tara Mines v. Cosgrove* [2010] IESC 62 where he said:

> *"It cannot be too strongly emphasised that, where evidence is presented on affidavit, a party who wishes to contradict such evidence must serve a Notice of Intention to cross-examine. In a case tried on affidavit, it is not otherwise possible to choose between two conflicting versions of facts which may have been deposed to. …".*

73. At para. 5.9 of his judgment, Clarke J. indicated that he was faced with a similar difficulty. Each side presented evidence from experts to back up its contention as to the likely recovery by the syndicate in the event of a receivership. No cross examination of the competing experts was sought. Clarke J. was clearly troubled by the difficulty in which the court was placed as a consequence of the conflict on the evidence which had not been explored or tested in cross examination. Nonetheless, he acknowledged that:

> *"… within the time confines of the process contemplated under the … Act, it might be difficult to mount a significant hearing where many expert witnesses were subject to cross examination. It is true that the maximum 100 day period for the continuance of an examinership is specified by reference to the date on which the examiner presents his final report containing, if appropriate, a proposed scheme of arrangement. The court is entitled to extend the period to enable the court to consider whether the scheme of arrangement should be approved. … In cases where there is significant opposition a … delay is likely to occur to enable the parties to prepare for a contested hearing and, if necessary, to afford the court an opportunity to consider the evidence and arguments and rule on same. However, given the clear statutory intent that a company should not be in examinership (with all of the consequences which flow from that) for too long a period, a court could not lightly contemplate a prolonged gap between the presentation at the end of a 100 day period of a scheme of arrangement and the courts decision on whether to confirm that scheme. However, that logistical difficulty does not take away from the problem with which the court is faced in having to assess the potential prejudice to a creditor where there is starkly contrasting expert evidence material to an assessment of that prejudice and where no cross examination has taken place of the experts concerned".*

74. The observations made by Clarke J. in relation to the urgency of dealing with examinership matters apply with even greater force in the circumstances of the hearing of a petition under s. 509 where there will usually be a pressing need to hear and determine the application as a matter of urgency. In contrast, there will usually be somewhat more flexibility available to the court with regard to the hearing of an application to confirm

proposals for a scheme of arrangement which may allow greater scope for cross examination to occur. It is manifestly undesirable that the hearing of a petition should be protracted or delayed. As a matter of principle, cross examination at the stage of a hearing under s. 509 should only be undertaken as a last resort. In this context, I would not go so far as to exclude the possibility that, in an appropriate case, cross examination might be necessary. However, in the case of a hearing under s. 509, I believe that, in the vast majority of cases, the court should strive to deal with the matter, as best it can, on the basis of the affidavit evidence before the court. That is what Clarke J. ultimately did in the *McInerney Homes* case. Although he was clearly unhappy that he had to address the evidence without the benefit of cross examination, Clarke J. examined the evidence in relation to each of the items in dispute. For example, in the case of the dispute between the experts as to the value of work in progress, he came to the conclusion, in para. 5.19 that, in light of the uncertainty that was created by the conflict of evidence, he could do no more than conclude that there was a realistic and credible basis for the contention put forward on behalf of the syndicate that the sum of €22 million should be included in the cash flows. He came to a similar conclusion in relation to the dispute about the extent to which sales prices would be discounted in the event of a receivership. On a similar basis, he expressed the view that the syndicate had made a credible basis for its suggestion that the costs of construction contained within its predicted cash flows could be achieved. In making that finding, he said, at para. 5.23 of his judgment, that the syndicate might be wrong in this regard but that it was "*just not possible to reach a conclusion as to whether they are right or wrong*". He ultimately came to the following conclusion at para. 5.25 of his judgment:

> *"There is a credible basis for the Banking Syndicate's position, although it may turn out to be wrong. It may turn out to be wrong for any number of reasons. A court can, of course, analyse the competing opinions of experts given on affidavit for the purposes of assessing whether it is possible to reach conclusions on the basis of obvious flaws or gaps in the evidence tendered on one side or the other. Even taking evidence tendered at its height, same may disclose flaws or gaps which entitle the court to disregard it in part or to treat conclusions asserted as not necessarily following from the substance of the evidence. The difference, in this case, between a possible cash flow of €75,000,000.00 and a negative cash flow of €11,700,000.00 comes down to the four areas analysed earlier. The evidence of the … Syndicate on those issues did not seem to me to disclose obvious flaws or gaps of that type such as would allow the court to treat the conclusions reached … as unsafe in the absence of cross examination. In those circumstances the only possible conclusion is that there is a credible basis for the … Syndicate's position. First, any estimate of the likely performance of property over the next ten or so years is fraught with difficulty for reasons which hardly need to be stated here. Even if all the experts agreed on the best estimate, it could be no more than an estimate which everyone would have to accept might turn out, with the benefit of hindsight, to … have been quite wrong. Any assessment or evaluation in the current climate in respect of property is fraught with difficulty and the range of possible outcomes are many and widely disparate. That does not mean, of course,*

that a court should not do its best to form a credible estimate of the likely performance of the … assets under receivership based on the best expert evidence available. However, where, as here, that expert evidence significantly diverges … the court is, in the absence of cross examination, left in a position where it can do more than conclude that there is a credible basis for the Banking Syndicate's position, but that equally it might well be that there is some merit in some or all of the criticisms of that position put forward by the examiner or McInerney."

75. In circumstances where he came to the view that there was a credible basis for the position taken by the banking syndicate in relation to the outcome of a receivership, Clarke J. concluded that it had a realistic prospect of doing better under the receivership model such that the scheme proposed by the examiner in that case was unfairly prejudicial to the members of the syndicate.

76. In light of the approach taken by Clarke J. in *McInerney Homes*, I therefore propose to address the conflict of evidence in the present case in a similar way. Before turning to the individual items which have been the subject of debate between the experts, it is important to keep in mind that, following the provision of the second report of the independent expert, there is at least one point of agreement between the experts namely that the Company will not be cash flow insolvent in 2020. The dispute between the experts relates to the position in March 2021 with the independent expert taking the view that the Company will be cash flow (and balance sheet) insolvent by the end of that month while Grant Thornton take the view that the Company will continue to be solvent as of March 2021 with the benefit of a projected cash balance of €3.9 million. As noted in para. 35 above, Grant Thornton estimate that the available cash as of March 2021 would be of the order of €6.5 million but this is based on their view that the Company should be able to warehouse tax liabilities of €2.6 million. For the reasons explained elsewhere in this judgment, the Company, as a consequence of entering into an insolvency process (namely the presentation of a petition for the appointment of an examiner), will not be able to warehouse its tax liabilities. Even if it was able to warehouse those liabilities, the liabilities to the Revenue Commissioners would remain in place. They would simply be deferred. For that reason, it seems to me that the true figure of the cash estimate put forward by Grant Thornton should be taken to be €3.9 million rather than the figure of €6.5 million given in their second report.

77. The projected cash balance of €3.9 million predicted by Grant Thornton is based on a number of assumptions including their expectation that it should be possible for the Company to agree with its landlords a write-off of rent for the period from April 2020 to June 2020 and a 20% deferral of rent for the period between July 2020 and March 2021. While they maintain that this reflects the reality of what is being offered in the market, I have been provided with no detail of the basis for this assertion and I do not believe that it is possible, in the circumstances, to make any firm assumption that such a deferral or write-off of rent will necessarily be achieved. Everything will depend upon the nature of the negotiation that takes place between the individual landlords and the Company.

78. On the other hand, the view taken by the independent expert is informed by a number of assumptions (which have likewise not been explained in any detail) about predicted fall off in trade. As noted in para. 31 above, the independent expert has relied on the Company's assumption that there will be a decrease of trading revenue for the months of September and October 2020 of 40% as compared to the same period in 2019, a corresponding decrease in trading revenue of 50% in November and December 2020 and a decrease in revenue in January 2021 of 60% compared to the month of January 2020. There is a 50% reduction in sales revenue predicted for February 2021 while March 2021 is assumed to have the same level of revenue as March of this year (when the impact of the pandemic began to bite and when ultimately the stores were closed). According to Grant Thornton, these predictions are "*extraordinarily pessimistic*" and purely speculative.

79. In the absence of more detailed evidence explaining the basis of the predictions on both sides, it is impossible for me to determine who might be correct in terms of projections. The reality is that there is very significant uncertainty at present and I doubt whether anyone can accurately predict what may happen over the next number of months in terms of sales revenues. As an aside, it does seem odd that the Irish operation has not commenced some form of online sales with a view to trying to make up (at least to some extent) for the loss of "*in person*" sales. While the evidence before the court establishes that the parent currently undertakes all the online sales for the group, it is difficult to see how that will continue after Brexit insofar as sales in the State are concerned and one would have thought that, even if the Company was not facing the difficulties created by the pandemic, it would have made commercial sense for the company to have begun to operate its own online sales business for customers in the State. One of the difficulties I have is that there is very little evidence before the court as to what steps the Company has taken following the pandemic to try to ameliorate the difficulties facing it. This is an issue which is explored in more detail below with regard to the relationship between the Company and its landlords.

80. Notwithstanding the difficulty that arises in attempting to predict what may happen in the future, there is independent evidence before the court from the Interim Examiner which establishes that, in the period since the presentation of the petition, weekly sales have been declining. Thus, for the week ending 26th September, 2020 turnover was €629,000. This compares to €849,000 for the week ending 29th August, 2020. The Interim Examiner also confirms that the sales for the week ending 26th September, 2020 represents a 49% drop in sales compared to the same period last year. He also confirms that the Company has been trading at a loss since the onset of the pandemic. Against that backdrop and the continuing nature of the pandemic (with no end in sight), it is reasonable to assume that the loss in sales which has been experienced to date will continue for as long as the pandemic continues to have an impact on the way in which we all live our lives. Given the likely lead-in time that will be required before any vaccine (if developed successfully) will be available to the general public, I do not believe that it is unreasonable to assume that the current loss in sales will continue into the first quarter of next year. This also seems to be the working assumption subtending the EWSS as it is scheduled to run until the end of March 2021. While, as counsel for the opposing

landlords suggested, there may be an improvement in the pre-Christmas period, the pandemic creates obvious problems for "*in-person*" sales and I do not believe that it is reasonable in the circumstances to assume that there will be a return to pre-Covid sales levels in the pre-Christmas period.

81. As outlined above, I do not believe that it is possible to make the assumption made by Grant Thornton in relation to deferral of rent and write-off of rent. On the other side of the coin, I believe there is a reasonable basis on which to assume that the current dip in sales of the order of 49% (as compared to the same period last year) is likely to continue until, at least, March, 2021. In the absence of any detail supporting the Company's predictions, it seems to me to be more reasonable to assume that the current experience will continue. It also seems reasonable to conclude that the effects of the pandemic on the retail experience are unlikely to change dramatically for as long as the pandemic continues and for as long as there is no effective vaccine or treatment. Thus, on the basis of the information placed before the court by the Interim Examiner, there is a proper basis to conclude that the Company will therefore trade at a loss between now and March 2021. In these circumstances, I believe that the Grant Thornton prediction (summarised in para. 35 above) of cash reserves of €3.9 million as at 31 March, 2020, is unlikely to be achieved. It seems to me to follow that the likelihood must be that the Company will be unable to pay its debts at some stage in the first half of 2021. Given the dispute on the evidence, I believe it is impossible to form the view that the point of cash flow insolvency is likely to occur by the end of March 2021. It may be a little later – perhaps in April or May. But, either way, barring an unexpectedly early commercial launch of a vaccine or effective treatment for Covid-19, it is likely to occur at some stage in the first half of next year.

82. For the reasons outlined above, I believe that there is a sufficient basis before the court to form the view that the Company is likely to be unable to pay its debts at some stage in the first half of next year. I have therefore come to the view that the requirements of s. 509 (1) (a) have been met.

83. However, that is not the end of the inquiry. Although there is no dispute between the parties that the Company has a reasonable prospect of survival as a going concern (which is the next applicable statutory condition), the grant of relief under s. 509 is not automatic. The fulfilment of the statutory conditions for the grant of an order is not a box ticking exercise. The grant of relief is at the discretion of the court. Section 509 (1) provides that the court "*may … appoint an examiner*" (emphasis added). While I accept that s. 509 (1) (a) expressly envisages that the court's jurisdiction can be triggered not just by present insolvency but also future insolvency, the fact that insolvency is not imminent is a factor which seems to me to carry significant weight in the context of the discretion of the court in deciding whether or not to appoint an examiner.

The discretion of the court

84. The importance of the court's discretion under s. 509 has been noted in a number of decisions. For example, in *Re: Gallium Ltd*. [2009] IESC 8, Fennelly J in the Supreme Court, at para. 46 of his judgment, noted that a petitioner, by getting over the s. 509

statutory threshold, "*does not … acquire a right to have an order made. I still think it is fair to say that the section confers a 'wide discretion' on the court, or alternatively, the court should take account of all the circumstances*…".

85. In many cases, the discretion of the court may not loom large. Where the company concerned is plainly in imminent danger of financial collapse and has a significant enterprise capable of survival if given the benefit of the breathing space available under Part 10 of the 2014 Act, a court may be prepared to relatively readily grant the order sought. In such cases, unless there is some failure to act in good faith or some other troubling aspect of the company's conduct, the issue of discretion may not feature significantly in the decision of the court.

86. However, in the context of the court's discretion, it must be borne in mind that appointment of an examiner is a very serious step. In the circumstances described in para. 85 above, the need for the appointment may seem so obvious that the serious nature of the remedy may not be such a significant factor. Nonetheless, the appointment must be seen in the light of the substantial curtailment of creditors' rights which flows from s. 520 (4) of the 2014 Act for the duration of the protection period. Section 520 (4) prevents creditors from taking enforcement action against a company. No winding up proceedings can be taken. No receiver can be appointed. No process of execution can be put into force against the property of the company. Secured creditors are not entitled to exercise their rights to realise security. No steps may be taken to repossess goods in the company's possession under a hire purchase agreement. No proceedings of any sort may be commenced against a guarantor. Proceedings can only be commenced against the company itself with the leave of the court. Any existing proceedings can also be affected by the power given to an examiner under s. 520 (5) to apply to the court in relation to such proceedings.

87. These effects were described by Keane J. (as he then was) in *Re. Butlers Engineering L*td (High Court, unreported, 1st March, 1996) as a "*drastic abridgement*" of creditors' rights. At p. 10 of his judgment in that case, Keane J. observed (in terms very similar to the observation subsequently made by Jacob J. in England in the *Colt Telecom* case quoted in para. 60 above):

> *"It is almost superfluous to point out that while the purpose of the Act is the protection of the company and, as a result, its shareholders, employees and creditors, the court must never lose sight of the drastic abridgement that the giving of that protection effects to the rights of the last mentioned category and I do not think that the judgments to which I have referred would lend any support to the view that the court must disregard those consequences in deciding whether an Examiner should be appointed. In particular, it should be borne in mind that even the comparatively short breathing space … given by the appointment may have serious consequences for the creditors, given the fact that their normal remedies remain in abeyance, while the control of the company remains in the hands of those who, in some cases at least, have contributed significantly to its insolvency".*

88. Similar observations were subsequently made by Fennelly J. in the Supreme Court in *Re. Gallium Ltd* [2009] IESC 8 where, at para. 47, he drew attention to the impact of the appointment of an examiner on the creditors of a company. He said:

> *"The entire purpose of examinership is to make it possible to rescue companies in difficulty. The protection period is there to facilitate examination of the prospects of rescue. However, that protection may prejudice the interests of some creditors. The court will weigh the existence and degree of any such prejudice in the balance. It will have regard to the report of the independent accountant".*

89. In the *Butler Engineering* case, Keane J. was concerned with whether there was sufficient evidence before the court to establish an identifiable possibility that the company would survive as a going concern. He was not satisfied with the evidence available and he refused the relief sought. For the reasons outlined above, that is not an issue which arises here. However, the impact of the appointment of an examiner on the creditors of a company is a very real concern particularly in the present circumstances where there is now agreement between the experts that there is no imminent risk that the Company will not be able to trade and where the Company, at present, clearly has sufficient funds to pay its debts as they fall due over the next number of months. In this context, it is of some significance that the revised cash flow statement prepared by the independent expert for the duration of an examinership shows that at the end of fourteen weeks of an examinership, the company would have cash on hand of €11.2 million. This is on the basis that rents would be paid in full to landlords during the protection period. While it is important to keep in mind that this does not in any way suggest that the company will not face cash flow difficulties in 2021, it illustrates that there is no imminent risk that the Company will have to cease to trade even where it continues to discharge its rental obligations in full. Given these circumstances, it seems to me that, if the Company is to persuade the court to exercise its discretion in favour of the appointment of an examiner, it should be in a position to demonstrate that there is a real necessity to appoint an examiner at this point. Having regard to the impact of the appointment on creditors, this seems to me to be essential in the particular circumstances of this case.

90. In this case. counsel for the Company argued that the directors of the Company are required to act prudently. She highlighted that there was no denial in any of the affidavits sworn on behalf of the opposing landlords that the rents currently payable by the Company exceed market rents. She also emphasised that of the many landlords with whom the Company has a relationship, only three are opposing the petition. No other creditors have come forward to oppose the petition. I should also record, at this point, that the Revenue Commissioners take a neutral position in relation to the petition. However, as a consequence of the order made by me on 25th September, 2020, the Revenue Commissioners have been paid in full. Accordingly, their voice does not carry the same weight which it might otherwise do.

91. Counsel for the Company cited the observations of McCarthy J. in the Supreme Court in *Re. Atlantic Magnetic Ltd* [1993] 2 I.R. 561 at p.p. 578-579 where he said:

"It is, I believe, of great importance to bear in mind in the application of the Act that its purpose is protection - protection of the company and consequently of its shareholders, workforce and creditors. It is clear that parliament intended that the fate of the company and those who depend upon it should not lie solely in the hands of one or more large creditors who can, by appointing a receiver pursuant to a debenture, effectively terminate its operation and secure, as best they may, the discharge of the monies due to them, to the inevitable disadvantage of those less protected. The Act is to provide a breathing space, albeit at the expense of some creditor or creditors. The timescale is short; the role of the examiner is hedged around by duties and the restrictions of time. The court is not required to make up its mind about survival at the stage of the appointment …. It may well be that the result of appointing an examiner will be to lessen the eventual return to the secured creditor, in the event of the company not surviving. In such an event, the damage to others, perhaps less equipped to bear the loss, will be far greater; if one has to balance rights or obligations, the protection afforded by the Act should, if at all possible, be provided if only for a very short time. …".

92. Those are clearly very powerful observations by McCarthy J. However, they must be seen in the particular context of that case. There, a receiver had been appointed to a manufacturing company with a very large workforce. By definition, that appointment could not have been made if an act of default had not been made by the company concerned. That gave rise to an immediate financial crisis for the company and transferred control of the company into a receiver appointed by a secured creditor. There was an obvious and immediate need to seek the appointment of an examiner in that case. The circumstances of the present case are quite different. Although the case made initially here to Barrett J. was that the Company would be insolvent within two months from the date of presentation of the petition, that is no longer so. There is no longer any immediate danger of insolvency in this case. The company has a breathing space of 6 months (or possibly more) available to it without the intervention of the court – or 8 months if one takes the date of presentation of the petition as the starting point.

93. Counsel for the Company strongly argued that the Company had a clear need to address the issue in relation to its rent roll obligations and that it did not make sense for the directors to wait until they reach the edge of the precipice before seeking the appointment of an examiner. She also said that the Company is bound into long-term leases which are "*over-rented*" and that the "*over-rent*" is estimated at €4.5 million per annum. She said that, in any negotiation, the landlords have "*the stronger hand because of course we can't break those leases in the ordinary course*…". In those circumstances she asked, rhetorically, what is the Company going to do? She suggested that the point will come where, if the leases are "*not corrected to market rates*" there will be a winding up and the landlords will have to find new tenants for the stores. In contrast, she said that, if an examiner is appointed, a repudiation of a lease becomes possible subject to an application being made to the court under s. 537 of the 2014 Act. Thus, in the event that a landlord did not agree to a reduction in the rent payable under an individual lease, the lease could be repudiated (if so permitted by the court). Counsel stressed that, in an

examinership, any negotiation with landlords will take place against the backdrop of the power of the Examiner to apply to the court under s. 537. Counsel candidly said that this "essentially… evens up the bargaining position between the parties". Counsel submitted that there was nothing inherently wrong in taking this approach. She said that the Company was doing no more than recognising the root cause of its projected insolvency. This was, she added, was consistent with the case made by the Company in its petition.

94. Before going further, it should be noted that the opposing landlords do not accept that the rental obligations of the Company will render the Company insolvent in the future. They point to the fact that the Company made significant profits in the 2019 financial year notwithstanding its rental obligations. Counsel for the opposing landlords made a cogent argument that the current pandemic is the cause of any problems that the Company may have to face. The pandemic caused the loss in sales previously described in this judgment. Counsel for the opposing landlords argued that the pandemic was of a temporary nature and that there was no reason why rents could not return to their contractual rates once the pandemic was over.

95. I do not believe that it is necessary for me to determine whether the Company would or would not be insolvent as a consequence of its rental obligations independently of the effects of the pandemic. Nor do I think it is necessary to make any ruling as to whether or not it is legitimate for a company to seek to use the examinership process to achieve a compromise with its landlords. For the reasons outlined below, I believe that it is entirely premature to consider the appointment of an examiner and that, in those circumstances, I should exercise my discretion against the appointment of an examiner. It is accordingly unnecessary to decide any of the other issues that were raised by the opposing landlords as possible bases on which to dismiss the petition on discretionary grounds.

96. I have come to that conclusion in light of the evidence before the court as to the extent of the attempts made by the Company, prior to presenting the petition in August 2020, to address its concerns in relation to its rental obligations to its landlords. There is, in fact, a surprising dearth of evidence before the court in relation to that issue. In my view, if a petitioner wishes to pursue examinership on the basis put forward by the Company here, it is incumbent on the petitioner to establish that appropriate efforts were made prior to the presentation of the petition, to seek to resolve the issue in relation to "*over-rents*" with its landlords. That seems to me to be a basic step before invoking the more drastic remedy of examinership. That is not to say that there may not be a basis to seek the intervention of the court where insolvency may be more imminent and where the relevant parties do not have the luxury of time to enter into detailed negotiations prior to invoking the jurisdiction of the court under s. 509. However, that clearly cannot be said in the present case where, for the reasons previously outlined, it is apparent that the Company will not face insolvency for another six months.

The evidence before the court in relation to dealings between the Company and its landlords

97. The issue was addressed in very general terms in paras. 8 and 9 of Mr. Jackman's replying affidavit sworn on 22nd September, 2020. I have already summarised Mr.

Jackman's evidence on this issue in paras. 21 to 24 above. When I pointed this out to counsel for the Company, she responded that the nature of the negotiations is apparent from the exhibits to the affidavit of Mr. Frank Martin sworn on behalf the landlord of the Liffey Valley store. I confirm that I have re-read Mr. Martin's affidavit and the exhibits. Far from establishing that the Company engaged in any serious process of negotiation, the material before the court illustrates a lack of any real engagement on the part of the Company. Given that it is making the case that it needs landlords to take a more realistic view of their ability to retain tenants at current rents, it is extraordinary, that the Company and its parent did not initiate intensive negotiations with landlords with a view to persuading them to adopt a more commercial approach. In this context, I find it difficult to credit that an enterprise as large as the New Look group had concerns about its bargaining power in dealing with landlords.

98. As previously noted, on 17th March, 2020, a letter was sent to all landlords (in standard form) by the chief executive officer of the parent in which he drew attention to the impact of the Covid-19 pandemic. This letter was in a standard form and it appears to have been sent to the landlords of all UK and Irish stores. Its terms do not suggest any apprehension on the sender's part as to lack of bargaining power. The letter stated:

"… due to the significant footfall decline being experienced, a consequence of this unprecedented global pandemic, we are therefore looking to you, amongst others, for support.

With immediate effect, myself and the Board request the following from you:

- *A rent holiday effective immediate for 3 months with a further review at that point; and*
- *Service charges to be kept to a minimum with any major works delayed. Where payments are currently made quarterly, they will revert to monthly.*

This is a grave situation and we have therefore been forced to take grave action to seek to protect our employees, our customers and our business as much as we possibly can. Rest assured we have not taken this decision lightly and we ask for your support as we look to navigate through these enormous challenges together as partners…please respond with confirmation of your acceptance by close of business on Thursday 19th March, 2020…".

99. That letter was emailed by Mr. Richard Collyer, the chief financial officer of the parent and a director of the Company. In response, Mr. Martin emailed Mr. Collyer on 20th March, 2020 enquiring who he might "*talk with regarding Liffey Valley Dublin*". He received an email response on the same day from Mr. Euan McGonigle, the leasing manager of the parent who also provided a mobile telephone number. In response, Mr. Martin emailed Mr. McGonigle on 7th April, 2020 in which he confirmed that the landlord of Liffey Valley was not prepared to consent to any variation to the existing lease conditions. The email drew attention to the government schemes to assist employees. A response was received

from Mr. McGonigle on the same day and it also appears that there was a telephone conversation on that day. In his email, Mr. McGonigle thanked Mr. Martin for his response and asked him to keep in touch. In the meantime, on 1st April, 2020, a gale of rent became due which was not paid. However, nothing further occurred between the 7th April, 2020 and 18th June, 2020 when an email was received from Ms. Caren Leon of CBRE in London setting out a proposal on behalf of the Company under which rent would be paid as a percentage of turnover. Although described as a "*proposal*", the document attached to the email made clear that, once a store had re-opened, the Company's intention was to proceed on the basis described in the document. The email set out the determination which had been made as to the percentage of turnover that the Company would pay in respect of the Liffey Valley store. Notably, no explanation has been provided to the court as to why there was this very long gap between April and June or why no officer or agent of the Company sought to follow up, more immediately, on the exchange that took place in April, 2020.

100. Mr. Darragh Cronin of Savilles (the Liffey Valley landlord's agent) responded to CBRE on 19th June, 2020 seeking further information to enable the landlord to make an informed decision. The request for further information sought two years audited accounts, management accounts, a budget cash flow forecast for the next twelve months, a business plan for twelve months and any other information the tenant would like to put forward to support the request. It was stressed that it was important that consideration could only be given to the CBRE proposal once sufficient information had been provided.

101. In his affidavit, Mr. Martin explained that no response was received to the email of 19th June, 2020. However, on 23rd June, 2020, a further email was sent by the chief executive officer of the parent in terms which again did not reveal any inkling of lack of bargaining power. The letter stated:

> *"… following our plans to reopen our stores in phases over the next few weeks, we plan to recommence rent payments on the basis of our turnover performance. This is the only way to make payments, due to the uncertainty of income as the country eases out of lockdown. Payments are planned to be made on the normal due dates with rent initially based on projected turnover with a reconciliation over the following months. In addition, we intend to recommence service charge and insurance premium payments. All payments will be on a monthly basis.*
>
> *We fully appreciate that this proposal represents potentially significant reductions to our passing rents and that it is, therefore, a huge ask, but we believe that we have no other option given the current uncertainty of income, the significant reductions in footfall, and the precarious state of the economy. It may not be of comfort, but we do not think we will be alone among retailers in requesting turnover rents and that such terms are likely to become a common feature in the retail property market.*
>
> *We are also very conscious that we have not made any payments to you since the start of the lockdown and this has made it unbelievably challenging for you. We*

would therefore like to thank you for your patience during these unprecedented times, but we are currently unable to address the arrears at this time.

We very much look forward to hearing from you with any further queries you may have.

Your continued support and assistance is hugely appreciated".

102. Later the same day, the landlord was informed that the Liffey Valley store would reopen on 29th June, 2020. By email of 25th June, 2020, Mr. Martin wrote to the chief executive of the parent (which was also copied to Ms. Leon of CBRE) in which the following proposal was made:

"On behalf of the owners of Liffey Valley, we wish to advise that while our communication channels are as always open and we are as always willing to engage with you as to how we can work together to maximise the performance of your store at Liffey Valley. However, for the avoidance of doubt we are not willing to accept your proposal to vary the provisions of the lease regarding future rent payment.

In order to assist with the cashflow deficit arising from the fact that you have not traded during April, May and to date in June in these unprecedented and difficult times for all businesses, we are agreeable to deferral of payment of the rental amount of €234,100 that fell due on 1st April last and which remains outstanding, for payment in Q1 2021. This deferral is offered subject to and on the basis that all service charges are brought up to date as at 1st July, 2020 along with the payment of the rent amount of €234,100 due on 1st July.

We are of the view that this course of action will enable both parties to better understand the impact that the pandemic has had on our businesses and it will also allow us to engage with our various stakeholders".

103. Mr. Martin's email concluded by stating that he was available on his mobile telephone number (which was given in the email) to discuss the matter further. As Mr. Martin made clear in his affidavit, no response was received to that email. However, on 1st July (when a further rental payment of €234,100 became due together with €25,676.25 in respect of service charges), a payment of €17,986.15 was received. In his affidavit, Mr. Martin confirms that this was the first payment received by the landlord in respect of either rent or service charges since the 31st December, 2019 other than an amount of €8,617.18 discharged in respect of insurance in March 2020.

104. On 11th July, 2020, there was a conversation between the centre director for the Liffey Valley shopping centre and the store manager of the Company there. This conversation appears to have related to the extent of turnover in the store at this time and is not immediately relevant to the present issue.

105. In light of the lack of response to the email of 25th June, 2020, Mr. Martin sent a further email to the chief executive of the parent on 13th July, 2020. In that email, Mr. Martin stated that it was "*very unsatisfactory that we have still not had the courtesy of a response …*". The email also stated that the "*lack of communication*" made the situation unsatisfactory.

106. Again, there was no response to that email. In those circumstances, by email of 11th August, 2020, Mr. Martin wrote again to the chief executive indicating that, in light of the lack of any response, the landlord was left with "*little alternative but to pass this matter over to our debt collection lawyers*". Mr. Martin explained, in para. 41 of his first affidavit that this provoked an immediate response by telephone from Ms. Leon of CBRE. Mr. Martin says that, during their conversation, he emphasised that, unless there was immediate engagement, the landlord would be obliged to issue proceedings in respect of the arrears. In response, Ms. Leon asked for a statement of account which Mr. Martin confirms was duly furnished. However, notwithstanding this conversation, no further communication was received. In those circumstances, on 26th August, 2020, the solicitors for the landlord issued a formal demand letter in respect of the arrears. There was no response to that other than the presentation of the petition.

107. It is clear from this summary of the dealings that took place between the landlord of the Liffey Valley store and the Company (or more properly its parent on behalf of the company) that there was no substantial attempt made on the part of the Company to initiate any process of negotiation with landlords. It is particularly significant, in my view, that, although the Company (through its parent) made a proposal in June 2020 (after two months of no communications at all) the Company, thereafter, made no attempt to engage with the landlords. I find it impossible to understand how the Company was not prepared to respond to the request for information made by the landlords in the email of 25th June, 2020 (described above). That email was sent approximately two months prior to the presentation of the petition. There is no explanation as to why the Company allowed this second period of two months to elapse without seeking a meeting with the landlords or seeking to have discussions with the landlords with a view to renegotiating the terms of the leases or otherwise discussing proposals that would alleviate the problem which the Company perceives it has in relation to the extent of its rental commitments. Instead, the Company simply gave effect to the "*proposal*" made in the CBRE email of June. With some justification, this approach was characterised by counsel for the opposing landlords, as presenting the landlords with a *fait accompli*. In substance, no process of negotiation was initiated by the Company and yet, against that backdrop, the Company is now seeking the appointment of an examiner in order to bring about such a process. That seems to me to be a classic case of putting cart before horse.

Conclusion

108. In the circumstances outlined above, I believe that it is entirely premature to consider the appointment of an examiner to the Company. In my view, the Company has failed to demonstrate that the appointment of an examiner is necessary at this time. In expressing this view, I am not suggesting that the directors should necessarily have to wait until the

Company reaches the edge of the precipice (to borrow the metaphor used by counsel) before invoking the s. 509 jurisdiction. However, I am of the view that it is entirely inappropriate that the jurisdiction should be invoked when there is an alternative and obvious route available to the Company to seek to deal with its landlords - namely negotiation.

109. It seems to me that, before taking the very serious step of seeking the appointment of an examiner, a company which is not currently insolvent, should, in the first place, make serious efforts to explore less drastic options. In the present case, on the basis of the evidence before the court, it is inexplicable that the Company did not take more proactive steps in the period between March and August to resolve its differences with its landlords. As it happens, there is still time for serious negotiations to take place before insolvency looms more immediately in sight. I am of the view that this requires to be explored before seeking the intervention of the court.

110. Of course, I appreciate that any such negotiations may fail and that an application under s. 509 may have to be made in the future. However, in circumstances where no real attempt has been made to date to enter into negotiations, it would be wrong, as a matter of principle, to allow this factor to influence the outcome of the present application or to presuppose that the parties will not act commercially and sensibly. At a time when closure of retail stores is becoming an increasingly common feature of the retail market in Ireland, it is clearly in the interests of both landlords and the Company that an accommodation can be reached which will allow the Company to continue to operate its 27 stores.

111. For the reasons outlined above, I have come to the conclusion that, in the exercise of the court's discretion under s. 509, I should refuse to accede to the petition. I will hear the parties as to any other orders that may be necessary or appropriate.

112. In the circumstances, it is unnecessary to consider any of the other arguments advanced by counsel for the opposing landlords in support of his submission that the petition should be dismissed. While it is troubling that the petition was originally presented (and an interim examiner appointed) on the erroneous case put forward by the Company that it faced insolvency as early as October 2020, I do not believe that it is necessary to consider whether there is a basis to make an adverse finding against the Company on that ground. Nor is it necessary to address the potential application of s. 509 (3) (c) of the 2014 Act.