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End of Court Year Case Digest: Irish Insolvency & Restructuring Judgments

September 2022

As another Irish Court year will soon commence, now is an opportune time to look back at some of the more interesting insolvency and restructuring judgments to have been delivered in the Superior Courts during the last 12 months.

The judgments explored below will prove of relevance and importance to practitioners and clients navigating distressed corporates and assets over the coming weeks and years. Please do get in touch with your Walkers Ireland Insolvency and Dispute Resolution contact or any of the contacts listed below with any comments or queries.

1. Winding up petition - grounds for defence – Section 569 Companies Act 2014

The company asserted that a demanded amount used to ground a winding up petition was not intended as a loan to the company but instead as a personal liability accepted by the petitioner.

Butler J was satisfied that the petitioner's evidence indicated that the alleged debt constituted a loan by the petitioner to the company. The loan documentation exhibited showed that the loan was not made to the petitioner in a personal capacity but was a business loan to the company for the purposes of completing a development on company property.

Butler J did not consider the defences advanced by the company to be in good faith. The company did not dispute the debt until after the petition for winding up was presented; this was despite the fact that the petition was preceded by repeated correspondence. The company's filed accounts also expressly referenced that the debt was outstanding in favour of the petitioner.

In re Kilcurrane Business Centre Ltd, Judgment delivered on 10 November 2021 by Ms Justice Butler (Judgment here).

2. Application for restoration of dissolved company – Section 738 of the Companies Act 2014

This case concerned an application to have a dissolved company restored to the register of companies so that a receiver could be appointed to enforce security over a company property.

A former director of the company provided evidence to the court that the secured property was previously sold with the consent of the original loan provider.

During the court application, it was noted that the transfer of the secured property had through inadvertence not concluded but, despite this, the unconnected purchaser had entered into possession of the property.

The court therefore had to consider whether it would be just and equitable for the company to be restored to the register, allowing a receiver to be appointed and seek to enforce the security, in light of the revelation that the property was now the home of a third party.

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Butler J acknowledged that the purchaser was a de facto bona fide purchaser for value and it would not be equitable to make an order for restoration of the dissolved entity given the factual circumstances over what is de facto the third party's property without notice to the third party.

In re Allenton Properties Ltd, Judgment delivered on 16 November 2021 by Ms Justice Butler (Judgment here).

3. Bankruptcy – Extension of time for non-cooperation – Section 85A of the Bankruptcy Act 1988

The Court considered the appropriate length of time to extend a bankruptcy for. The usual term for a bankruptcy is one year, but in cases of non-disclosure or non-cooperation, the maximum term can be 15 years.

Humphries J highlighted three questions which arise in these situations:

(i) Whether there has been non-cooperation or failure to disclose assets;
(ii) If so, whether the matter should be adjourned to allow further cooperation or disclosure to take place; and
(iii) What extension of bankruptcy is appropriate within the maximum of fifteen years.

The only point arising for decision here was the appropriate extension period. Humphries J noted that due to the near total non-cooperation of the bankrupt, the imposition of the maximum period would not be unwarranted. However, having an "indulgent" regard to any elements of information which could arguably have been said to have been provided by the bankrupt, the bankruptcy was extended to its thirteenth anniversary.

In re Lalor, Judgment delivered on 26 November 2021 by Mr Justice Humphries (Judgment here).

4. Restriction and disqualification of directors of insolvent companies – Tests to be met – Sections 891 and 842 of the Companies Act 2014

Quinn J provided a clear commentary on the difference between an order for restriction and disqualification, offering guidance on the proofs required before an order for restriction or disqualification will be made together with the onus on the liquidator and the respondent company director.

In every application for restriction, the onus is on the respondent directors to satisfy the following requirements if an order is not to be made:

(a) the director has acted honestly and responsibly in relation to the conduct of the affairs of the company, whether before or after it became an insolvent company,

(b) the director has cooperated with the liquidator as far as could reasonably be expected, and

(c) there is no other just and equitable reason not to restrict the director.

By contrast with applications for restriction, an application for disqualification places the onus on the applicant liquidator to establish the grounds relied on.

Here, Quinn J declined to make an order for disqualification as allegations of fraud, though serious in nature, were presented to the court without adducing probative evidence.

In respect of restriction, Quinn J found that while the existence of a significant liability to Revenue did not automatically warrant restriction, the directors completely denied liability for VAT without pursuing appeals of the assessments and as such were restricted.

In re Meridian Motors Ltd (In Liquidation), Judgment delivered on 21 December 2021 by Mr Justice Quinn (Judgment here).

5. Insolvent liquidation – liquidator's application for directions – onus regarding proof of debt

This judgment dealt with an application by a liquidator of the company under s.631 of the Companies Act. Here the liquidator was seeking the direction of the High Court as to whether a debt claimed by the notice party should be admitted to proof in liquidation. In this instance, the liquidator had avoided expressing any view on the issue in his application for liquidation. The onus and standard of proof in relation to admitting a debt to proof in liquidation also arose in this case.

In this case, Butler J noted that the notice party accepted the onus of proving the debt should be admitted, and that the civil standard of proof applied. The notice party adduced sufficient evidence to establish, to the civil standard, that the sum claimed was payable and so the debt was ultimately admitted as proof.

In re Doonbeg Investment Holding Company Ltd (In Liquidation), Judgment delivered on 16 February 2022 by Ms Justice Butler (Judgment here).

6. Examinership – Extension of protection period - Companies (Miscellaneous Provisions) (Covid-19) Act, 2020

The business of the company in examinership was heavily dependent on gas as a raw material; in the previous twelve months the price of gas had risen some 400%. The independent expert report concluded that the company had a reasonable prospect of survival, despite the increase in gas prices. The report noted that this was, however, dependent on the stabilisation of the energy market in the medium to long term.

The examiner argued that if an extension of the protection period was not granted he could not conclude his report and therefore the examinership would fail, causing job losses and a complete failure of the business.

The judge noted that the title of the act suggests that it was enacted to address the adverse business effects of the pandemic but that it does not suggest it should be confined to addressing only these types of matters.

Taking into account the likelihood of lost jobs and the failure of a potentially profitable business, O'Moore J was satisfied that it was within his discretion to extend the period of protection for the company for a further 50 days.

In re Premier Periclase Ltd, Judgment delivered on 21 March 2022 by Mr Justice O'Moore (Judgment here).

7. Application of Civil Liaiblity Act to Debt Claims – Civil Liability Act 1961

Ulster Bank DAC had provided €21.85 million to the appellants to purchase property. A valuation of the land was provided to the bank by CBRE at the time of the loan. The appellants failed to repay the loan and Bank sought to enforce the debt. The Bank also sought a ruling of negligence against CBRE for their valuation.

The court made a number of findings in relation to concurrent wrongdoing and clarified the applicability of the Civil Liability Act, notably that it only covers the allocation of responsibility between wrongdoers who are facing legal action in instances where damages are sought. The law governing claims as against concurrent wrongdoers does not apply to actions for recovery of debts.

In re Ulster Bank Ireland DAC & Ors v McDonagh & Ors, Judgment delivered on 6 April 2022 by Mr Justice Murray and Mr Justice Collins (Judgment here).

8. Entity in receivership – Directions as to whether a related party to a borrower can compel a receiver to lease secured property to the borrower – Section 438 of the Companies Act 2014

This case examined the novel proposition that a borrower may compel a receiver to lease secured property to them, where the receiver was appointed to secured property. The applicant complained that the lands were being mismanaged and vital steps such as crop rotation were not being carried out.

The Court concluded that it did not have the jurisdiction to make the order sought. The proposition that a shareholder in a company is automatically considered the beneficial owner of property owned by the company was rejected and it was noted that this would contravene the notion of separate legal personality.

The judge clarified that even though a provision in legislation may grant the court a power to make orders as it sees fit, this does not give it unfettered power to make orders in contravention of other parties' rights.

In re Dan Morrissey (Ire) Ltd, Judgment delivered on 13 May 2022 by Mr Justice Twomey (Judgment here).

Contacts

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