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THE INSOLVENCY REVIEW

FIFTH EDITION

Editor
Donald S Bernstein

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Chapter 11

IRELAND

Robin McDonnell, Saranna Enraght-Moony and Karole Cuddihy

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Ireland is a sovereign state in Europe and a member of the European Union since 1973. The legal system in Ireland is a combination of statute and common law in which a large emphasis is placed on precedent.

The principal statutes governing insolvency law in Ireland are as follows:

a the Companies Acts 2014, which came into operation on 1 June 2015, consolidating and replacing the Companies Acts 1963 to 2013;

b Regulation (EU) 2015/848 of the European Parliament and of the Council (applicable when a debtor has its centre of main interests (COMI) in an EU Member State) (the Recast Regulation);²

c the National Asset Management Agency Act 2009 (relevant from the perspective of statutory receivers appointed by the National Asset Management Agency); and

d the Irish Bank Resolution Corporation Act 2013 (which introduced the concept of Special Liquidation) (the IBRC Act).

ii Policy

Remedies in the area of insolvency and bankruptcy involved enforcement of security, realisation of a debtor’s assets and the penalisation of resisting debtors. In recent years, however, there has been a subtle shift towards a ‘rescue culture’ in respect of certain companies. This has been motivated by a desire to achieve value for all stakeholders.

For those businesses that are in difficulty but can demonstrate that they have a reasonable prospect of survival³ examinership remains an attractive model for formal corporate restructuring and recovery. Examinership is a rehabilitative procedure that, broadly speaking, is a hybrid of Chapter 11 in the United States and administration in England and Wales. It can be thought as a debtor-in-possession model.

Many businesses in Ireland borrowed significantly from 2000 to 2008, and much of that borrowing was used to fund property acquisitions. From 2008 onwards, there was a

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1 Robin McDonnell is a partner and Saranna Enraght-Moony and Karole Cuddihy are associates at Maples and Calder.
2 Regulation 2015/848 (the Recast Regulation) was adopted by the European Parliament on 20 May 2015. The Recast Regulation repeals and replaces EU Insolvency Regulation 1346/2000 (the Insolvency Regulation) and applies to insolvency proceedings commenced after 26 June 2017. The Insolvency Regulation continues to apply to proceedings commenced before that time.
3 This is a threshold enshrined in Section 509(2) of the Companies Act 2014.
prevailing policy of enforcement by the lending institutions in respect of businesses and individuals who have breached covenants in their agreements. The lending institutions enforced in two ways: by the appointment of receivers to secured property or by issuing proceedings in the Irish courts to obtain judgments against defaulting debtors (or both). Over the past few years, large tranches of distressed loans and associated security have been purchased by venture capital and private equity funds. Even as the Irish economy has recovered, a significant amount of this distressed debt remains.

iii Insolvency procedures

The formal insolvency and rescue procedures available in Ireland to wind up or rescue companies are:

- creditors’ voluntary liquidation;
- compulsory or court liquidation;
- examinership; and
- statutory scheme of arrangement.

Receivership is a distinct enforcement remedy available to secured creditors only and does not involve the commencement of insolvency proceedings. The Companies Acts recognise and protect the rights of secured creditors to enforce their security in accordance with its terms, and secured creditors can, as a general rule, enforce or realise their security outside an Irish winding-up process.4

Creditors’ voluntary liquidation

To commence a creditors’ voluntary liquidation (CVL), the company, acting through its members (in general meeting), resolves that it cannot, because of its liabilities, continue in business and that it should be wound up voluntarily.5

The members’ meeting at which the winding-up resolution is passed must be held on the same day or the day before a meeting of the company’s creditors.6 The winding up commences once the members’ resolution has been passed and, thereafter, the company must cease to carry on its business except insofar as is necessary to facilitate the liquidation.

The creditors almost entirely control the CVL process, although any interested party can apply to the Irish High Court (the High Court) for directions to determine any question arising during the course of the winding up.7

Once appointed, the function of the liquidator is to realise all of the assets of the company and to distribute the proceeds of sale of those assets to creditors in accordance with the priorities prescribed by the Companies Acts and the Rules of the Superior Courts.

The liquidator conducts the liquidation independently and reports on the conduct of the liquidation to meetings of the members and creditors at the end of each year. The liquidator is also obliged to submit a report to the Office of the Director of Corporate Enforcement following his investigation into the affairs of the company.8

4 Section 440 of the Companies Act 2014 provides that holders of floating charges are subordinate to the claims of preferential creditors set out in Section 621 of the same Act.
5 Section 590 of the Companies Act 2014.
6 Section 587 of the Companies Act 2014.
7 Section 631 of the Companies Act 2014.
8 Section 682 of the Companies Act 2014.
Compulsory liquidation

A High Court or compulsory liquidation is commenced by the presentation of a petition for the winding up of a company, which can be presented by:

- the company itself;\(^9\)
- a creditor of the company;\(^10\)
- a member or contributory of the company;\(^11\)
- the Director of Corporate Enforcement;\(^12\) or
- the Registrar of Companies.\(^13\)

A court-appointed liquidator is subject to the supervision of the High Court. The liquidator is an officer of the court and must conduct the liquidation in accordance with the provisions of the Rules of the Superior Courts and, in particular, the Companies Act 2014. Formerly, many of a court-appointed liquidator’s powers were exercisable only with the sanction of the High Court. The Companies Act 2014 has changed the position in this regard to one where the requirement is to notify creditors of the exercise of certain powers. There will also be a greater role for committees of inspection in court liquidations. In addition, it remains open to the liquidator to seek directions from the court in an appropriate manner as to the carrying out of his or her functions.

Where the company in question is insolvent, it is typically a creditor who applies to have it wound up compulsorily on the grounds that the company is unable to pay its debts as they fall due for payment. It may, however, also be the company’s members or the company itself that presents a petition before the court.

The powers of the directors will cease once an order has been made to wind up the company, but the liquidator may request their assistance and any necessary information from them. The shareholders retain their residual powers and have a proprietary interest in the liquidation of the company.

When the liquidator has carried out all of his functions, he or she is required to apply to the High Court for final orders that will include an order discharging him or her as liquidator. Discharge occurs only once the liquidator has made all required payments pursuant to the final orders.

The High Court may, if satisfied that the urgency of the situation warrants it, appoint a provisional liquidator pending the hearing of the winding-up petition, for the purpose of continuing the company’s business or preserving its assets or where an immediate investigation into the affairs of the company is necessary.\(^14\)

Transaction avoidance in creditors’ voluntary liquidations and compulsory liquidations

A transfer of property by an insolvent company to a creditor within six months of the commencement of the winding up of that company, if made with a view to giving such creditor a preference over other creditors, may be deemed an ‘unfair preference’ and, therefore,

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\(^9\) Section 569 of the Companies Act 2014.
\(^10\) Ibid.
\(^11\) Section 599 of the Companies Act 2014 and Section 569 of the Companies Act 2014.
\(^12\) Section 761 of the Companies Act 2014.
\(^13\) Section 569 of the Companies Act 2014.
\(^14\) Section 573 of the Companies Act 2014.
invalid.\textsuperscript{15} The relevant provision is only applicable if, at the time of the transfer, the company was unable to pay its debts as they fell due. Essentially, for the transaction to amount to an unfair preference, the company must positively intend to improve the position of the beneficiary creditor in the event of the company’s liquidation. Case law in this area indicates that it must have been the ‘dominant intention’ of the company to prefer the creditor in question.

Where the preferential transaction is made in favour of a ‘connected person’,\textsuperscript{16} the transaction will be invalidated where made within two years of the commencement of the winding up; a ‘connected person’ includes a related company. In addition, unless the contrary is shown, the preferential transaction in favour of a connected person is deemed to have been made with a view to giving such person a preference over other creditors, and to be an unfair preference. Consequently, the burden of proof is on the connected person to show that the transaction was not fraudulent.

Further, where property of a company has been improperly transferred, the High Court may order the return of the property to the company on the application of a liquidator, creditor or contributory of the company.\textsuperscript{17} To apply for such an order, it must be shown to the satisfaction of the court that the effect of such disposal was to perpetrate a fraud on the company, its creditors or members. Unlike the unfair preference provision, there is no operative time limit for the making of the fraudulent disposition. There is also no requirement that, at the time of the disposition, the company was unable to pay its debts as they fell due – all that is required is a disposal of property where the effect of such disposal is to perpetrate a fraud on the company, its creditors or members.

A floating charge on the undertaking or property of a company created in the 12 months before the commencement of its winding up may be rendered invalid (except to the extent of monies actually advanced or paid, or the actual price or value of the goods or services sold or supplied to the company at the time of or subsequent to the creation of, and in consideration for, the charge) unless it is proved that the company was solvent immediately after the creation of the charge.\textsuperscript{18} Where the floating charge is created in favour of a ‘connected person’, the period of 12 months is extended to two years.

Where a company is being wound up by the High Court, any disposition of the property of the company (including things in action) and any transfer of shares or alteration in the status of the members of the company, made after the commencement of the winding up, shall, unless the court otherwise orders, be void.

In certain circumstances, a liquidator may be entitled to disclaim onerous covenants, unprofitable contracts or any other property that is unsaleable or not readily saleable.\textsuperscript{19} The liquidator must apply to the High Court within 12 months of the commencement of the winding up, seeking the court’s leave to disclaim. Any person suffering loss or damage as a result of a disclaimer will be deemed a creditor of the company in the amount of such loss or damage and may prove for that amount as a debt in the winding up.

\textsuperscript{15} Section 604 of the Companies Act 2014.
\textsuperscript{16} Section 220 of the Companies Act 2014.
\textsuperscript{17} Section 443 of the Companies Act 2014.
\textsuperscript{18} Section 597 of the Companies Act 2014.
\textsuperscript{19} Section 615 of the Companies Act 2014.
Examinership

The examinership procedure is the most common form of formal corporate reorganisation under Irish law. Examinership is a remedial process whereby an insolvent company is placed under the protection of the High Court (or, in certain limited circumstances) to enable a court-appointed examiner to investigate the company’s affairs and report to the court on the prospects of the company’s survival. If the company is deemed capable of being rescued, the court may sanction proposals for a scheme of arrangement formulated by the examiner. A scheme usually involves the part-payment of the company’s creditors. The overall aim is the survival of the business of the company and the preservation of employment.

A petition for the appointment of an examiner may be presented to the court by:

\begin{enumerate}
\item the company;
\item the directors of the company;
\item a creditor (including a contingent or prospective creditor) of the company; or
\item shareholders holding at least one-tenth of the shares carrying the power to vote at general meetings at the time of presentation of the petition.
\end{enumerate}

The effect of presenting a petition for the appointment of an examiner is that for 70 days from the date of presentation of the petition (which may be extended by a further 30 days) the company shall be deemed to be under the protection of the High Court. This means that creditors are prevented from taking the type of action that they would normally be entitled to take (e.g., enforcing security or issuing proceedings against the company).

The court shall not confirm the examiner’s proposals:

\begin{enumerate}
\item unless they have been approved by at least one class of creditors whose interests would be impaired by the implementation of the proposals;
\item if the sole or primary purpose of the proposals is the avoidance of tax; and
\item unless the court is satisfied that the proposals are fair and equitable and not unfairly prejudicial to any interested party.
\end{enumerate}

An examiner does not have an executive role in the company to which he or she is appointed and does not enjoy the same powers as a liquidator (unless he or she applies to court for one or more of such powers). The powers of the directors survive both the presentation of a petition and the appointment of an examiner. As such, the directors remain responsible for the day-to-day management of the company.

If the examiner’s proposals are confirmed by the High Court, they become binding on all members and creditors with effect from such date as the Court may fix. If, during the course of the examinership, the examiner comes to the view that he or she cannot formulate proposals for a scheme of arrangement, he or she will immediately inform the Court, which will invariably end the examinership and place the company into compulsory liquidation.

Statutory scheme of arrangement

A scheme of arrangement is a statutory procedure provided for under Irish law whereby a company puts forward compromise proposals to its members and creditors. The members
and creditors then meet and vote on the scheme. At each class meeting, the scheme must be approved by a majority in number representing 75 per cent in value of the creditors voting whether in person or by proxy at the meeting. Provided the statutory voting majorities are obtained, the company can seek the sanction of the High Court to make the scheme binding on all parties.

The High Court will only confirm a scheme if it is satisfied that:

a. sufficient steps have been taken to identify and notify all interested parties;
b. the statutory provisions and procedures and all directions of the court have been complied with;
c. the classes of members and creditors were properly constituted;
d. the prescribed majorities at each meeting acted *bona fide* and no issue of coercion arises; and
e. the compromise or arrangement is ‘fair and equitable’ such that an intelligent and honest person, a member of the class concerned, acting in respect of his or her interest, might reasonably approve.

The scheme becomes effective once the High Court order sanctioning the scheme is filed in the Irish Companies Registration Office. The scheme of arrangement process is seldom used in Ireland. Perhaps the principal reason for companies favouring the examinership process is the immediate and extensive protection that is afforded once an examinership petition is presented. In addition, examinership has a lower voting threshold for creditor class approval (i.e., a simple majority in number and value). It should also be noted that in an examinership, it is sufficient (in order for proposals for a scheme of arrangement to put before the court for approval) that the proposals have been approved by one class of creditors.

A statutory scheme of arrangement has the advantage that the directors can control the process to a greater extent than in an examinership. The Companies Act 2014 streamlined the scheme of arrangement process, such that the number of court appearances has been reduced from as many as three under the old regime to now possibly only one. The intention behind this streamlining was to reduce the cost and to increase the attractiveness of the scheme of arrangement procedure.

iv Special regimes

*Special liquidation of Irish Bank Resolution Corporation*

The Irish government enacted the IBRC Act, in February 2013, to secure and stabilise the assets of one of the most distressed Irish banks, Irish Bank Resolution Corporation (IBRC) (formerly known as Anglo Irish Bank Corporation Limited). The IBRC Act provides for the winding up of IBRC within a novel regime known as a ‘special liquidation’.

Joint special liquidators were appointed to liquidate IBRC. Portfolios of assets including the mortgage book of IBRC have been identified by the special liquidators who will oversee a process of independent valuation and the sale of such assets to third parties. The proceeds of these sales will be used to repay creditors in accordance with the priorities prescribed by the Companies Acts.

The Special Liquidation Order (the Order) made by the Minister for Finance to commence the special liquidation provides:

a. for an immediate stay on all proceedings against IBRC;
b. that no further actions or proceedings can be issued against IBRC without the consent of the High Court;
that no action or proceedings for the winding up of IBRC or the appointment of a liquidator or an examiner can be taken, issued, continued or commenced;

for the removal of any liquidator or examiner appointed prior to the Order; and

that it constitutes notice of termination of employment for each employee with immediate effect.

The appointment of a receiver pursuant to a debenture or charge created by IBRC does not constitute proceedings for the purposes of the Order.

The special liquidators have the same duties and powers as a liquidator in a compulsory liquidation, except that they are appointed by the Minister for Finance and are obliged to comply with the instructions given to them by the Minister and act in the interests of the Irish taxpayer.

Administration of insurance companies

The Insurance (No. 2) Act 1983, as amended, introduced a procedure designed to manage insurance companies that are insolvent, and only applies to non-life insurance companies. This Act provides for the appointment of an administrator to take over the management of an insurer with a view to re-establishing the business on a sound financial footing where it can also comply with the regulatory requirements. The procedure is not restricted by any timescale and is supported by funding from the Insurance Compensation Fund, which ensures that all creditors are paid in full.

Cross-border issues

Both the original Insolvency Regulation, and its successor the Recast Regulation, apply to a company that has its COMI in an EU Member State. Under these Regulations, 'main' insolvency proceedings may only be opened in Ireland in respect of a company (including a foreign-registered company) having its COMI in Ireland.

In Ireland, the insolvency proceedings that could have been opened for the purposes of the Insolvency Regulation included compulsory liquidations, creditors’ voluntary liquidations (with confirmation of the High Court) and examinerships. The Recast Regulation extends the scope of the regime to include pre-insolvency rescue proceedings and certain interim and debtor-in-possession proceedings.

A foreign company incorporated and having its COMI in a country, which is not subject to the provisions of the Recast Regulation, may be wound up by the High Court even if it has not carried on business in Ireland and has no assets in the jurisdiction, provided that:

a a sufficiently close connection can be established between the company’s business and Ireland;

b there is a reasonable possibility that a winding-up order will benefit those applying for it; and

c the High Court can exercise jurisdiction over one or more persons interested in the distribution of the company’s assets.

No such foreign company may be wound up voluntarily in Ireland.

24 PMPA Insurance plc and Quinn Insurance are two insurance companies that have gone into administration under the Insurance (No. 2) Act 1983.
The Insolvency Regulation was introduced to improve the efficiency and effectiveness of insolvency proceedings that have cross EU-border effects by harmonising the provisions in each Member State concerning jurisdiction, recognition and applicable law. This approach has largely been repeated in the new Recast Regulation. However, a number of important new provisions have also been advanced.

The Recast Regulation, like the Insolvency Regulation, provides for the automatic recognition of judgments of other Member States opening insolvency proceedings unless it would be manifestly contrary to public policy, as a matter of Irish law, to give recognition to such a judgment. Where main proceedings have been initiated in one Member State, they shall produce the same effects in any other Member State. Furthermore, the effects of these proceedings may not be challenged by any other Member State.

The Recast Regulation also provides for the recognition and enforceability of insolvency judgments across Member States. A liquidator in main proceedings and a liquidator in secondary proceedings are bound to cooperate with each other and to share information with each other.

However, the Recast Regulation goes significantly further than its predecessor in a number of important respects. The Recast Regulation has now introduced greater safeguards to prevent abusive forum shopping. It provides for a formal group coordination procedure where insolvency officers have been appointed in different Member States to companies in a group, and it also improves transparency by requiring Member States to provide databases of insolvency and restructuring proceedings that have been opened pursuant to the Regulation.

II INSOLVENCY METRICS

After experiencing unprecedented levels of growth since the mid-1990s, Ireland entered a recession in 2008 amid the global economic downturn. Ireland began to emerge from the downturn in 2013, and overall economic indicators show that the modest recovery which was observed during 2014 continued, at a markedly increase pace during 2015. This strong performance has continued throughout 2016 and into 2017.

Unsurprisingly, during the recession the level of activity in the insolvency sector grew significantly. This can be seen in the fact that corporate insolvencies for 2012 totalled 1,684, a 117 per cent increase on the 2008 total.

In 2013, the total number of corporate insolvencies fell to 1,365, which represented a 19 per cent drop from the total number in the previous year. The reduction was largely attributable to a significant reduction in the number of creditors’ voluntary liquidations. The downward trend continued during 2014–2016. The figures to hand for the first six months of 2017 show continued reductions in the total number of corporate insolvencies.

25 Article 19 of the Recast Regulation.
26 Article 20 of the Recast Regulation.
27 Article 32 of the Recast Regulation.
28 Article 43 of the Recast Regulation.
29 Article 4 of the Recast Regulation.
30 Chapter V of the Recast Regulation.
31 Article 24 of the Recast Regulation.
32 All insolvency statistics have been sourced from www.insolvencyjournal.ie.
The decline in the number of creditors’ voluntary liquidations looks set to continue, but the number of receiverships remains steady, which may be attributable to an increase in enforcement of security by loan purchasers.

<table>
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<th>Year</th>
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<th>Examinerships</th>
<th>Creditors’ voluntary liquidations</th>
<th>Compulsory liquidations</th>
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<td>57</td>
<td>62</td>
<td>568</td>
<td>86</td>
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<td>124</td>
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<td>1,191</td>
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<td>2011</td>
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<td>16</td>
<td>1,252</td>
<td>86</td>
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<td>2012</td>
<td>399</td>
<td>27</td>
<td>1,187</td>
<td>71</td>
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<td>729</td>
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<td>346</td>
<td>15</td>
<td>626</td>
<td>45</td>
<td>1,032</td>
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<td>2017 (January to June inclusive)</td>
<td>148</td>
<td>14</td>
<td>268</td>
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### III PLENARY INSOLVENCY PROCEEDINGS

The following is a brief summary of some of the most legally significant decisions in insolvency cases in the past 12 months.

i **English v. Promontoria (Aran) Limited**

This case concerned a challenge by a borrower who sought to undermine the position of a loan purchaser.

The High Court (Murphy J) initially placed a stay on the appointment of a receiver, on the basis that the secured creditor (who had purchased the distressed debt from the original lender) had not put forward sufficient evidence to establish its legal entitlement to effect the appointment.

It was not in dispute that the bank was entitled to assign the debt; the issue was whether Promontoria had proved that it was the assignee of the debt.

Promontoria exhibited the relevant portions of each deed and the entirety of the deed of conveyance and assignment. It also revealed the identities of those who executed and affixed the company seal to the deeds as well as the relevant powers of attorney. The High Court (Murphy J) found that Promontoria had provided *prima facie* proof of the transfer. It then fell to the plaintiff to seek to rebut this.

The plaintiff, Mr English, did not put forward affidavit evidence. Rather, he advanced a number of legal arguments to the effect that: (1) the evidence given as to the assignment was insufficient; and (2) the intended assignment was flawed.

It was argued that Promontoria had not proved that proper notice of assignment had been given to the debtor, as required by Section 28(6) of the Supreme Court of Judicature (Ireland) Act 1887. The Court rejected this argument and held that proper notice had been given.

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It was also argued that a director who executed the instrument of appointment of the receiver was in breach of Section 142 of the Companies Act 2014, which limits the number of directorships that a person may hold to 25. No evidence was produced as to any breach of this rule. Evidence was produced that the director in question enjoyed an exemption in this regard.

Murphy J stated that the plaintiff could only validly raise such issues if he had an entitlement to challenge the efficacy of the deeds by virtue of being a party to them. Murphy J held that the plaintiff was merely entitled to be shown that Promontoria had validly acquired the interests of Ulster Bank Ireland Limited. Murphy J found that the plaintiff had failed to validly challenge the deeds and this amounted to an acceptance of their validity, if only by inference.

Notably, Murphy J also held that the deeds were not hearsay, but rather constituted real evidence of transactions between parties.

As a result, Promontoria succeeded in having the stay on the receiver’s appointment lifted.

ii Independent Trustee Company Limited v. Registrar of Companies

In this case, the appellant (ITC) challenged a practice whereby the Irish Registrar of Companies (or Companies Registration Office (CRO)) gave the status of ‘Receivership’ on the register of companies to a company that has had a receiver appointed over some but not all of its assets. ITC argued that the relevant provisions of the Companies Act 1963 (the 1963 Act), did not apply where a company had no beneficial interest in the property and sought declarations to that effect.

The High Court (Hunt J) held that any interest in the property is susceptible to the provisions of Section 99(1) of the 1963 Act (the requirement to register a charge over property of a company with the CRO) and further held that Section 107(1) (the requirement to notify the CRO of the receiver’s appointment) applied to the appointment of the receivers over the property in question. The High Court also held that Section 317(1) (the requirement that upon the appointment of a receiver, that fact is to be expressly stated on all company documentation) applied, notwithstanding that the appellant was only the legal owner of the property and held the property on trust for the unit-holders of the sub-fund.

Hunt J held that the CRO’s use of a single ‘Receivership’ label was justified, because the CRO had on its website an explanatory note alerting persons inspecting the Register of the various possibilities regarding ownership of assets, together with an invitation to review the Form E8, which clearly noted that the receiver had been appointed over some only of ITC’s assets. Hunt J accepted that the criticisms made by ITC of the application of a single ‘Receivership’ label were well-founded, but he considered that the refinement introduced by the explanatory note amounted to a sufficient explanation to meet the criticism.

On appeal, the Court of Appeal (in a judgment given by Finlay Geoghegan J) accepted that the CRO has a statutory power and duty to organise the information on the electronic register in a clear, organised and accessible manner. This includes a power to create a summary of statutorily mandated notifications, including the appointment of a receiver. Finlay Geoghegan J held that this power cannot be exercised in a manner that implies that the appointment of a receiver to property of a company causes a change or a pending inevitable change in the status of the company.

The Court of Appeal held that changing of the ‘status’ of a company on the CRO’s register to a ‘Receivership’ label is potentially misleading, is ultra vires the powers of the...
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registrar under the Companies Act and is ‘unclear and apt to mislead’. The ‘Receivership’
label gave the misleading impression ‘that there has been or will inevitably shortly be a change
in the corporate status of the appellant’. Finlay Geoghegan J disagreed with the High Court’s
view that the explanatory note on the CRO’s website was sufficient to correct the otherwise
misleading impression.

In respect of the construction of Sections 99, 107(1) and 317(1) of the 1963 Act,
Finlay Geoghegan J found that firstly, the ordinary meaning of the phrase ‘receiver of the
property of the company’ included (as set out in Section 323(a) of the 1963 Act) a receiver
‘of part only of that property’. It follows that even if the deed of charge was confined to a legal
interest in property (in fact it was not so confined), then Section 99 of the 1963 act would
have applied to the charge.

Finlay Geoghegan J rejected the argument that the phrase ‘the property of a company’
in Section 107 of the 1963 Act) should be construed as applying only to assets that would
be available for distribution to creditors on insolvency, namely assets beneficially owned by
the chargor.

In passing, Finlay Geoghegan J stated that Section 317 of the 1963 Act did not
necessarily require a company to adopt the common practice of including the phrase ‘In
Receivership’ on the company’s letter head. The obligation is only to include a statement that
a ‘receiver has been appointed’. Finlay Geoghegan J said that a statement could be included
specifying the property over which the receiver has been appointed.

The Court of Appeal held therefore held that the CRO was not permitted to change the
status of the applicant from ‘Normal’ to ‘Receivership’.

iii In re Regan Development Limited\(^\text{34}\)

Regan Development Limited (RDL) operated the Regency Hotel, which incorporated
a convenience store and a restaurant in Swords, County Dublin. McGettigan Limited
(McGettigan) owned and operated a licensed premises in Dublin 7, together with four retail
units in Bray, County Wicklow. McGettigan was a guarantor of the liabilities of RDL, and
would otherwise have been solvent.

Neil Hughes was appointed as interim examiner of RDL and McGettigan as a related
company. The petition was opposed by OCM EmRu Debcro DAC (OCM), which was owed
approximately €25 million by the companies and was the largest secured creditor.

OCM had appointed Anne O’Dwyer of Duff and Phelps as receiver of RDL. At
the hearing of the examinership petition, it was ordered, pursuant to Section 522 of the
Companies Act 2014 that the receiver would cease to act pending further order.

OCM opposed the petition on two grounds. First, it argued that there was a material
omission from the petition and the verifying affidavit. Second, it was argued that the petition
had been presented for an improper purpose.

OCM alleged that full disclosure was not made in relation to meetings and
conversations had between Mr McGettigan and the receiver. On 20 January 2017, three
days prior to the presentation of the petition, Mr McGettigan and the receiver met, and
he was described as being hostile and aggressive towards the receiver. It was alleged that Mr
McGettigan threatened to remove the IT facilities that operated the hotel booking system.
Mr McGettigan did not deny the making of this threat. However, he stated that he did not

\(^\text{34}\) In re Regan Development Limited ([2017] IEHC 156.)
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deed it necessary to mention it in the verifying affidavit or at the hearing, because he did not carry out the threat. Baker J rejected the suggestion that the threat was not material and held that it should have been disclosed.

Section 518 of the Companies Act 2014 provides that the court may decline to hear a petition where the petitioner has failed to disclose any material information or has in any way failed to exercise utmost good faith. In *Re Wogans Drogheda Ltd (No. 3)* (unreported, High Court, Costello J, 9 February, 1993), Costello J said ‘this is because (a) of necessity the Court must depend to a considerable extent on the truth of what it is told by the company and (b) because of the potential injustice involved in the making of a protection order when the proper course is to wind up the company’. Baker J noted that not all non-disclosure is fatal, and in that regard she followed the decision of Costello J in *Re Bookfinders Limited (In Interim Examinership)* [2015] IEHC 769, where it was held that dismissing the petition would ‘be disproportionate to the gravity of the offence. It would have the result of imperilling the employment of 49 people who were in no way responsible for the offending behaviour’. Baker J held that the non-disclosure was not of an extent or nature that would warrant the petition to be dismissed.

The alleged improper purpose was that the petition had been presented in order for the McGettigan family to maintain control of the companies via a ‘statutory standstill’, which would enable the company to negotiate a debt swap. The receiver, on affidavit, swore that the intention was for the company to trade while in receivership. As such, job losses were not an immediate factor for the Court’s consideration. In his verifying affidavit, Mr McGettigan said that any examiner might have to invite proposals from other unconnected parties, which OCM argued amounted to the McGettigan family attempting to maintain control of the company. OCM relied on the dicta of Clarke J in *Re Traffic Group Limited* [2008] 3 IR 253, in which it was noted that the principal purpose of the legislation is to enable the continuation of enterprise for the benefit of the economy and to allow as many jobs as possible to be maintained. OCM further cited the dicta of Clarke J in *Re McSweeney Developments Limited* [2011] IEHC 494, who observed that ‘the examinership regime does not have the purpose the saving of shareholders from their unsuccessful investments’.

In considering the application, Baker J looked at the practical and legal differences between a trading receivership and an examinership. Baker J noted that in a trading receivership ‘the bank concerned will remain able to make decisions based only on its own interests and to the exclusion of the interests of other creditors’. Baker J noted that ‘the preservation of jobs is not the only function of the examinership process’ and ‘equally legitimate is a concern to improve and strengthen the enterprise of a company with a view to improving its standing and business for the benefit of the economy’. Baker J went on to state that there is nothing wrong, in principle, with a scheme of arrangement that has the effect of debt being refinanced, so long as this does not unfairly prejudice a creditor or a class of creditors.

In light of the foregoing, Baker J found that the petitioners should succeed and have the companies placed into examinership.
iv  Larianov Foundation v. Leo Prendergast and Sons (Engineering) Limited

This judgment addressed two key issues: first, whether a charge over certain lands executed in favour of the notice party (Cascade) in 2004 was valid; and secondly, whether that charge, if valid, enjoyed priority even though it was registered in the Land Registry later in time than a judgment mortgage registered against those lands in favour of Larianov as of 9 January 2012.

The background to this case was that, in 2002, Larianov had entered into a loan agreement with the defendant, Leo Prendergast and Sons (Engineering) Limited (Prendergast). The directors of Prendergast indicated to Larianov that Prendergast was holding the title deeds of the land in trust to enable Larianov to have the proposed mortgage secured as a first legal charge over the lands. However, no such mortgage was ever executed. Larianov argued that this letter amounted to an agreement sufficient to create an equitable charge over the lands.

In April 2011, Larianov obtained judgment against Prendergast in the sum of €438,876, plus costs. On 9 January 2012, the Property Registration Authority (which controls the Land Registry) registered a judgment mortgage as a burden on the lands. On 11 January 2012, the Registrar of Companies issued a certificate of registration of the judgment mortgage as a charge on the lands.

Between 2004 and 2006, Cascade provided Prendergast with three loans amounting to an aggregate of €1.3 million. On 24 March 2004, Prendergast executed a deed of mortgage and charge. The mortgage deed was registered as a charge over the lands in the CRO on 1 April 2004 although it was not registered in the Land Registry as a burden on the lands until 30 August 2012.

In respect of the first issue for decision, Larianov pointed to three features of the notice party’s mortgage deed, which it said rendered it invalid and hence ineligible for priority over Larianov’s judgment mortgage. First, the mortgage deed incorrectly described Cascade’s registered office as being in Jersey. Second, the mortgage deed contained a recital stating that Cascade was ‘a bank named in the third schedule to the Central Bank Act 1942’, whereas Cascade was not a bank. Third, the deed was not executed by or on behalf of Cascade.

Keane J found that no company with the same name as Cascade had ever been registered in Jersey and that Cascade was not a licensed bank. Keane J took the view that accordingly there can have been no intention on the part of Prendergast to enter into a mortgage deed with another company. Therefore, the court was satisfied that these were clear errors and it was clear in each case what the correction should be.

Keane J went on to state that, even if he were not satisfied that it was appropriate to construe the mortgage deed subject to the necessary corrections, Larianov could not succeed in its argument, as the errors identified were immaterial to the validity of the deed. There was no suggestion that the errors created any doubt or confusion as to the identity of Cascade.

In relation to the argument that the deed was not executed by or on behalf of Cascade, Keane J cited the English case of Eagle Star Insurance Ltd v. Green [2001] EWCA Civ 1389, in which the Court of Appeal of England and Wales found that a mortgage deed is not a contract and by implication there is no infirmity in a mortgage deed if it has not been signed by the mortgagee.

In addressing the second key issue Keane J was faced with an apparent contradiction in the legislation as between the Land and Conveyance Law Reform Act 2009 (the 2009 Act) and the Registration of Title Act 1964 (the 1964 Act). Section 117, subsection 3 of the 2009 Act contained a provision which stated:

Act provides ‘[t]he judgment mortgage is subject to any right or incumbrance affecting the judgment debtors land, whether registered or not, at the time of registration’. Section 74 of the 1964 Act provides that burdens that are registered as affecting the same land, and which if unregistered would rank in priority according to the date of creation shall rank according to the order in which they are entered on the register and rank in priority to any other burden affecting the land, not being a burden to which, though not registered, the land is subject under Section 74 of the 1964 Act.

Keane J held that any possible tension between those provisions is resolved by applying the maxim of interpretation ‘generalia specialibus non derogant’, namely that the general does not derogate from the specific, or that provisions of more universal application do not prevail over, or detract from, those of specific application to the same subject matter. Applying this maxim of interpretation, Keane J found that the general rules relating to priority under Section 74 of the 1964 Act do not apply to judgment mortgages as judgment mortgages are specifically dealt with separately under Section 117 of the 2009 Act. As Section 117 of the 2009 Act provides that a judgment mortgage is subject to rights and incumbrances even those which are not registered, the charge held by Casade was held to have priority. This was dependent on Keane J’s finding that Cascade’s legal mortgage deed was an existing right or incumbrance affecting the lands.

IV ANCILLARY INSOLVENCY PROCEEDINGS

The Recast Regulation provides that the courts of a Member State other than that in which the debtor’s COMI is located may only open insolvency proceedings where the debtor has an ‘establishment’ in that Member State.\textsuperscript{36} While the definition of establishment has been slightly altered by the Recast Regulation, this will still require a business with substance and ‘boots on the ground’. Such proceedings are known as ‘territorial’ proceedings (or, if opened following the opening of main proceedings, ‘secondary’ proceedings). Territorial proceedings may be opened prior to the opening of main proceedings, in which case they are not restricted to winding-up proceedings, but only if:

\begin{enumerate}
  \item main proceedings cannot be opened because of conditions laid down by the law of the Member State where the debtor’s COMI is situated; or
  \item where the opening of territorial proceedings is requested by a creditor whose domicile, habitual residence or registered office is in the Member State within the territory of which the debtor’s establishment is situated.\textsuperscript{37}
\end{enumerate}

The Insolvency Regulation has not, to date, been invoked often in the Irish courts. A significant decision of the Irish courts concerning the Insolvency Regulation took place in 2014, with the notable appointment of a provisional liquidator (subsequently confirmed as official liquidator) to McArthur Group Limited in secondary proceedings.

V TRENDS

It is clear that the overall number of corporate insolvencies in the first half of 2017 represents a reduction on the position in 2016, and a continuation of the drop from the peak of 2012.

\textsuperscript{36} Article 3(2) of the Recast Regulation.
\textsuperscript{37} Article 3(4) of the Recast Regulation.
There does not appear to be any fall-off in the number of examinerships or court liquidations. In 2016, the number of receiverships increased as compared to 2015, and it appears likely that 2017 will see the 2015 figure surpassed again. This indicates that enforcement of distressed secured debt continues to be a significant feature, at least as regards the number of insolvent entities, as opposed to the quantum of debt involved. As we approach and pass a decade from the severe recession that began in 2007 or 2008 – analysts differ as to the precise start date – it is apparent that the working out of the economic consequences is not over.

In last year’s chapter, we noted that Ireland was responsible for €24 billion in loan sales in 2015 out of a total of €108 billion.\(^{38}\) Figures for 2016 indicate\(^ {39}\) there were loan sales worth €149 billion in the European countries analysed (broadly speaking, the EU, Russia and Turkey), of which €12 billion related to Ireland. There were 275 deals, of which 17 related to Ireland. To have 6 per cent of the deals and 8 per cent of the quantum of debt traded in Ireland, which account 2 per cent of EU GDP, indicates that Ireland is contributing to the debt sale market at an elevated level, but the decline from 2015 is evident. The figures for the first half of 2017 indicate that 72 deals took place worth a total of €69 billion, but that only one of these deals took place in Ireland (with a value of €250 million). It is beyond the scope of this chapter to speculate on the reasons for this downward trend, but it has been argued that the effects of the UK’s Brexit referendum and the 2016 Finance Bill’s ending of tax deductibility for investors in loans secured on Irish property were contributing factors.\(^ {40}\)

Based on the foregoing, our view is that while loan purchasers will remain active players in the Irish insolvency and restructuring market into 2018, the cycle of deleveraging appears to be, if not drawing to a close, then tapering off.

As regards other aspects of the restructuring market, while we have seen several ‘loan-to-own’ transactions and ‘pre-pack’ receiverships, both types of deal have been relatively uncommon in Ireland to date.

The Brexit referendum has caused speculation as to the effect on Ireland as an alternative EU location for investment and indeed also for restructurings. More broadly, while Irish 10-year bonds dropped to record lows of less than 0.4 per cent in the autumn of 2016, by early 2017 the rate was over 1.2 per cent, and at the time of writing this chapter (early August 2017), the bonds have returned to where they stood immediately prior to the UK referendum (i.e., approximately 0.8 per cent). Much will depend on the final outcome of the UK’s exit negotiations with the EU, which will likely not be known until 2019 at the earliest.

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\(^{38}\) The updated figure for 2015 reported in the source used in this paragraph is €104 billion. The Irish figure remains at €24 billion.


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