Chapter XX

IRELAND

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I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Insolvency and restructuring proceedings in Ireland are primarily governed by the Companies Act 2014 (as amended),[2] the Bankruptcy Act 1988 (as amended) and the Personal Insolvency Act 2012 (as amended). These are supplemented by principles of common law.

The Irish legal framework is embedded in the EU framework[3] under the Recast Insolvency Regulation, augmented by the provisions of the Rome Regulation and the Recast Brussels Regulation. The overall Irish framework is both creditor-friendly and flexible, featuring processes that facilitate rescue and restructuring of corporate groups with complex structures.

In terms of substantive provisions applicable to insolvency proceedings, a liquidator and any creditor may seek to set aside eligible transactions. Such powers arise when (1) the transaction occurred within specified periods before the company entered into liquidation and (2) the company was insolvent at the time it entered into the transaction.

Three types of transactions are particularly vulnerable in this regard:

a unfair preference: a transaction in favour of a creditor taking place within six months of the commencement of a winding up (or within two years if in favour of a connected person) and made with the dominant intention of putting the other party in a better position than they would be in if the company enters liquidation;

b avoidance of a floating charge: if a floating charge has been created within 12 months of the commencement of a winding up, it will be invalid unless it can be shown that immediately after the creation of the charge the company was solvent. However, it will not be invalid to the extent of money or goods or services actually provided as consideration for the charge; and

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2 The Companies Act 2014, which came into operation on 1 June 2015, is primarily a consolidation of existing laws; however, certain provisions have been modernised and updated. As regards insolvency and restructuring, it has brought increased clarity of process and reduced court supervision of insolvency processes.

3 The EU framework is as follows: Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings for proceedings opened before 26 June 2017 (the original Insolvency Regulation); Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings (the Recast Insolvency Regulation); Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial (the Recast Brussels Regulation); and Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) (the Rome Regulation).

c fraudulent transfers: a liquidator or creditor of a company can apply to the High Court for the return of assets or for compensation where they can establish that the transfer of the assets had the effect of the perpetration of a fraud on the company, its creditors or its members. However, transactions that are unfair preferences are excluded.

The underlying principle concerning distribution in a liquidation is that the property of a company should be applied *pari passu* in satisfaction of its liabilities. This allows for all creditors, particularly those within the same class, to be treated equally. If the realised assets of a company are insufficient to pay any class of creditors in full, they are paid in equal proportion to their debts.

A combination of legislation, contract law and common law establishes a 'waterfall' of claims in insolvency proceedings. The following order of priority is therefore a general guide only:

a super-preferential claims (e.g., certain employees' social insurance contributions);
b remuneration, costs and expenses of an examiner that have been sanctioned by the court;
c fixed charge holders (a fixed charge holder is entitled to realise its security outside a winding up of the company);
d expenses certified by an examiner;
e liquidation costs and expenses;
f preferential debts (e.g., certain rates and taxes, wages and salaries);
g holders of any charge created as a floating charge;
h unsecured debts; and
i deferred debts of members.

When proceeds are insufficient to meet the claims of one category in full, payments for that category are pro-rated.

ii Policy

The Irish restructuring regime lends itself towards rescue where appropriate. The threshold for each restructuring process is designed to ensure that only companies with a genuine prospect of survival can engage in a restructuring process.

'Examinership' is a court-supervised process whereby a court-enforced moratorium is in place on creditor action to facilitate the restructuring and survival of a company.[4] However, although the Irish framework provides for and encourages restructuring regimes, and the vast majority of examinerships have a successful outcome, the level of examinerships remains relatively low. This is largely because of the fact that it can be a costly process and, therefore, is not suited to every company.

Like the United Kingdom, it is also possible for companies in Ireland to avail themselves of a statutory scheme of arrangement, which can be used to implement a variety of arrangements between a company and its creditors or its members. While schemes of arrangement can be used to implement even the most complex of debt restructurings, they are not used as often as the examinership process in Ireland, not least because in an examinership, there is a lower voting threshold.

4 Companies Act 2014, Section 509.

iii Insolvency procedures

Liquidation

An insolvent company can be wound up by the High Court (compulsory liquidation) or by way of a shareholders' resolution followed by a creditors' meeting (creditors' voluntary liquidation). The main criterion required to liquidate an insolvent company is that the company is unable to pay its debts. This usually entails an assessment of whether (1) the company is unable to pay its debts as they fall due (the cash flow test) or (2) the value of the company's assets is less than its liabilities, taking into account its contingent and prospective liabilities (the balance sheet test).

The time frame for the completion of a winding up is dependent upon the size of the company and its trading patterns. A relatively straightforward liquidation can complete within a year; however, it is common for larger and more complex liquidation procedures to take significantly longer.

Examinership

Examinership is the main rescue process for companies in Ireland. Although there are a number of differences, international corporates will recognise examinership as being similar in many respects to the Chapter 11 procedures in the United States and, to a lesser extent, administration in the United Kingdom.

In an examinership, the maximum period in which a company may be under the protection of the court is 100 days. An examiner (a court-appointed insolvency practitioner) has to have formulated a scheme, convened creditors' meetings and reported back to the court by day 100 and the approval of the scheme is typically heard by the High Court shortly thereafter. The scheme must be approved by more than 50 per cent (in value and number) of any one impaired class in order for it to be put before the court for approval.

Statutory schemes of arrangement

Although the statutory scheme of arrangement[5] is not necessarily an insolvency process, its flexibility allows it to be used to restructure debt. However, the scheme is more commonly used in Ireland to give effect to a reorganisation of shareholdings of large corporates and has tended to be the tool of choice for effecting the large-scale corporate inversion transactions that have been in vogue in recent times with US and Irish pharmaceutical companies.

In a statutory scheme of arrangement, once a scheme proposal document has been finalised and circulated, it would not be unrealistic for the court process to be completed within eight to 10 weeks. The scheme must be approved by more than 75 per cent of value and a majority in number of each class of creditors or members.

Receivership

While a receivership is a method of enforcing security, it is in practice treated as a form of insolvency procedure. It is possible to restructure companies by way of a pre-pack receivership, in which case the sale of a distressed company's business can be negotiated before it enters into receivership and executed shortly after the receiver is appointed. The aim is to minimise disruption and cost, and an advantage is that out-of-the-money junior creditors can be left behind in the insolvent company.

5 ibid., Section 449.

Ancillary insolvency proceedings

The Recast Insolvency Regulation applies to all collective insolvency proceedings relating to a company with its centre of main interests (COMI) in an EU Member State. The regime under the Recast Insolvency Regulation allows for the opening of secondary proceedings in another Member State in which the company has an establishment where main proceedings have been opened and are pending in another Member State.

It is possible for the insolvency office holder in the main proceedings to give a unilateral undertaking to creditors in the secondary proceedings that local distribution and priority rules will be respected as though secondary proceedings were opened there, which generally negates the requirement for secondary proceedings.

It is possible for liquidators of companies in non-EU countries to apply to the court in Ireland under common law for an order in aid of the foreign proceedings. The court has discretion to grant such an order in appropriate cases.

iv Starting proceedings

The question of who may commence such proceedings depends on which procedure is used.

Compulsory liquidation

In a compulsory liquidation, the court has jurisdiction to appoint a liquidator if it is satisfied that the company is unable to pay its debts or that it is just and equitable to do so.[6] Those entitled to petition the court to liquidate a company include the company itself, a creditor of the company, a contributory of the company[7] and the country's Director of Corporate Enforcement. A compulsory liquidation is deemed to commence at the time of filing the petition.

Notice of the petition must be advertised, which allows parties (including the company itself and its creditors) to object to the appointment of a liquidator at the hearing of the petition.

Creditors' voluntary liquidation

A creditors' voluntary liquidation is usually initiated by the directors of a company. A shareholders' meeting and a creditors' meeting are called. The shareholders resolve that the company is insolvent and a liquidator is appointed. A statement of affairs is compiled and presented by the directors at the creditors' meeting, including a list of creditors and amounts owed.

6 ibid., Section 564.

7 Section 571(5) of the Companies Act 2014 places a restriction on the right of a contributory to apply to have the company wound up. A contributory is not entitled to present a winding-up petition unless the shares of which the person is a contributory, or some of them, either (1) were originally allotted to the person or have been held by the person, and registered in the person's name for at least six months during the 18 months before the commencement of the winding up, or (2) have devolved on the person through the death of a former holder.

Examinership

When a company is, or is unlikely to be, unable to pay its debts, the shareholders,[8] directors or creditors[9] may petition the court to appoint an examiner. It is generally the company itself that petitions the court for the appointment of an examiner. Notice of the petition must be advertised, and it is possible for interested parties to object at the hearing of the petition to the appointment of an examiner. If an examiner has formulated proposals for a scheme of arrangement for consideration by the creditors, it is possible to challenge the proposals on the basis that one class of impaired creditors has not voted in favour of the scheme (which could be based on arguments in relation to the composition of classes). Challenges are also possible on the basis that the proposals are unfairly prejudicial to a particular creditor or are not fair and equitable in relation to any class of creditors.

Statutory scheme of arrangement

It is generally the directors of a company who apply to the court to summons a meeting between the members and creditors to formulate a scheme of arrangement. However, the company itself, any creditor or member of the company, or in the case of a company being wound up, the liquidator, may also apply to the court to initiate the process.[10]

v Control of insolvency proceedings

Liquidation

Once an insolvent company is in liquidation, the directors' powers cease and the liquidator assumes the management of the company.

The Companies Act 2014 places a compulsory liquidation on the same footing as a creditors' voluntary winding up once the order for winding up is made, thereby reducing the supervisory role of the court in favour of greater creditor involvement and liquidator autonomy.

Examinership

In an examinership, the company will continue to trade and the directors usually remain in control of a company during the protection period. This is subject to the court's discretion to direct, upon application, that the examiner assumes some or all of the director's functions only for the period of examinership. In practice this is rarely done, and usually when there has been a suggestion of some sort of wrongdoing on the part of the directors. The examiner's scheme of arrangement requires court approval before it becomes binding.

Statutory scheme of arrangement

The directors and shareholders are usually instrumental in putting together the scheme and running the process. As with an examinership, the company can continue trading and the directors can stay in control of the company.

8 Section 510 of the Companies Act 2014 provides that shareholders are those holding not less than 10 per cent of shares carrying the power to vote at general meetings at the time of presentation of the petition.

9 Section 510 of the Companies Act 2014 provides that a creditor includes a contingent or prospective creditor of the company.

10 Companies Act 2014, Section 451(3).

vi Special regimes

Modified insolvency regimes apply in certain sectors and special situations. Examples include the following.

The Insurance (No. 2) Act 1983 provides for the appointment of an administrator to non-life insurance insolvent companies at the request of the Central Bank in certain circumstances with a view to ensuring the survival of the company.

Ireland took a series of exceptional steps to contain the crisis in the banking sector that emerged in 2008. Its strategy included transferring non-performing eligible assets to a government-backed entity, the National Asset Management Agency, and to provide capital and liquidity to weakened and distressed banks and building societies.

The European Communities (Reorganisation and Winding up of Credit Institutions) Regulations 2011 (SI 48 of 2011) and the Central Bank and Credit Institutions (Resolution) Act 2011 apply to the winding up of credit institutions and banks and aim to provide an effective and expeditious regime for dealing with failing credit institutions.

The Irish Bank Resolution Corporation Act 2013 was enacted in February 2013 and provided for the immediate liquidation of Irish Bank Corporation Limited (formerly Anglo Irish Bank Corporation Limited) by way of 'special liquidation'. As the special liquidators were appointed by the Minister for Finance, they are obliged to comply with instructions given to them by the Minister and are under an obligation to act in the interests of the Irish taxpayer, putting them in a somewhat different position than other liquidators, who are answerable primarily to the creditors of the company.

Ireland is an internationally recognised centre of excellence in aviation finance and recently gave effect to the 'Alternative A' insolvency remedy of the Aircraft Protocol to the Cape Town Convention on International Interests in Mobile Equipment, the primary purpose of which is to provide a protective regime for aircraft financiers and creditors in insolvency proceedings similar to the US Chapter 11 procedure.

vii Cross-border issues

The Recast Insolvency Regulation applies to all collective insolvency proceedings and some restructuring proceedings relating to a company with its COMI in the European Union. The Recast Insolvency Regulation provides for automatic recognition in Ireland of proceedings to which the Regulation applies.

Ireland has not adopted the UNCITRAL Model Law on Cross-Border Insolvency Proceedings (the Model Law). In November 2018, the Irish Company Law Review Group reported to the Minister for Business, Enterprise and Innovation on the Model Law and recommended that be adopted in Ireland. The report is currently under consideration by the minister's department. For a company that does not have its COMI in the European Union, the foreign insolvency officeholder can apply to the High Court pursuant to common law for recognition and an order in aid of the foreign proceedings. In the exercise of that jurisdiction, the Court has given consideration to the following factors:

a whether recognition is being sought for a legitimate purpose;

b that there is no prejudice to any creditor in Ireland in affording recognition;

c that there is no infringement of any local law in affording recognition;

d where the insolvency procedure in the other state is sufficiently similar to that in Ireland; and

e that to afford recognition would not infringe public policy in Ireland.

II INSOLVENCY METRICS

The Irish economy has emerged from the aftermath of the financial crisis and is currently experiencing a period of growth. Ireland's gross domestic product grew by 6.7 per cent in 2018, which is well above the EU area average.[11] The banking system continues to show positive signs of recovery, and the unemployment rate has been declining rapidly. Economic activity is expected to remain robust, driven by investment in construction and positive labour market developments, and the activity of multinational companies remains an important factor in Ireland's growth.

Corporate insolvency activity decreased by 12 per cent in 2018 as compared with 2017, and the 2018 figures reflect the lowest level of formal insolvency appointments since 2012. As discussed above, the dominant reason for this is the fact that the Irish economy has been in a growth phase for the past few years. While the total number of insolvencies in the first quarter of 2019 shows a marginal increase as compared with the first quarter of 2018, it is anticipated that the 2019 figures will demonstrate that the steady decrease in corporate insolvencies is now levelling off.[12]

The services sector and the construction sector again accounted for the highest number of insolvencies. Nevertheless, the number of insolvencies of construction companies has decreased, which is likely to be a reflection of the increased economic activity in this sector in recent years. The motor retail sector recorded an increase relative to quarter one of 2018, at a time when this sector is facing significant change. Analysis by Deloitte of the insolvencies in the first quarter of the year reveal that 'start-ups' account for a notable percentage of insolvencies, with 21 per cent of insolvencies being companies less than five years old.

Overall there has been a slight decrease in personal insolvency applications during the past 12 months. However, the percentage of debtors securing arrangements continued to rise. Successful insolvency arrangements are designed to return debtors to solvency. In comparison with the first quarter of 2018, both the number of applications for arrangements and the number of bankruptcies decreased in the first quarter of 2019.[13]

III PLENARY INSOLVENCY PROCEEDINGS

i Re: M.D.Y. Construction Ltd (in examination)[14]

An interim examiner circulated proposals for a scheme of arrangement to the members and creditors of the company, unusually, before his appointment had been confirmed by the court.

The examiner was appointed as interim examiner on 20 September 2018 and the hearing of the petition to confirm his appointment was listed for 22 October 2018. Prior to the hearing of the petition, the interim examiner had formulated proposals for a scheme of arrangement with the meetings of the members and creditors to consider the scheme of arrangement scheduled for the day after the hearing of the petition. While Mr Justice Quinn noted that it was unusual, if not unprecedented, for an interim examiner to activate

11 Figures from the EU Commission, available at https://ec.europa.eu/ireland/news/spring-2019-economic-forecast-ireland-s-economic-growth-to-moderate-on-the-back-of-a-less-benign-external-environment_en.

12 See https://www2.deloitte.com/ie/en/pages/about-deloitte/articles/insolvency-stats-year-in-review-2018.html.

13 Insolvency Service of Ireland, 'ISI Statistics Quarter 1 2019', available online at https://www.isi.gov.ie/en/isi/pages/media_&_statistics.

14 [2018] IEHC 676.

Section 534(2) of the Companies Act 2014[15] prior to the hearing of the petition, there was no suggestion that the interim examiner had acted beyond the powers conferred upon him by the Rules of the Superior Courts, or indeed the Companies Act 2014 in doing so.

Quinn J noted the importance for creditors and other interested parties to have an opportunity to be heard at the hearing to confirm the appointment of an examiner. However, the court was satisfied that there were compelling reasons in this case that justified the actions taken as being within the proper exercise by the examiner of his commercial judgement. Submissions were made on behalf of the company that time was of the essence, and that two significant clients were threatening to terminate their relationship with the company because of the uncertainty arising from the examinership. If this materialised, the survival of the company as a going concern would be gravely affected.

Interestingly, this case demonstrated that while it should be the exception and not the norm, it is not beyond the powers of an interim examiner to compile and circulate proposals for a scheme of arrangement and to call members' and creditors' meetings before his or her appointment has been confirmed, when there are compelling reasons to do so.

ii Re: Custom House Capital Ltd (in liquidation)[16]

This case concerned an application by the Official Liquidator of Custom House Capital Ltd to determine his interim remuneration, fees and expenses, as well as his solicitor's legal costs. Ms Justice Finlay Geoghegan determined that the Official Liquidator was not required to produce contemporaneous timesheets and that an increase in the hourly charge-out rate of the solicitor involved was objectively justified.

Finlay Geoghegan J acknowledged that the onus is on the liquidator to satisfy the court, on evidence put before it, that the amount of remuneration sought is reasonable for the work done. The court accepted as a matter of principle that the liquidator is under an obligation to keep 'proper contemporaneous records' but held that it did not follow that all such records needed to be produced on an application for measurement of remuneration. On the facts, it was held that the production of such timesheets would not assist in assessing the value of the work done, nor whether the time spent was necessary to achieve the work actually done, nor whether that work was necessary for the particular aspect of the liquidation to which it related.

In relation to legal fees, there was a dispute in relation to an increase in the solicitor's hourly charge-out rate from €285 to €300. In a previous decision, Finlay Geoghegan J held that an increase in a solicitor's hourly charge out rate in the context of a liquidation, which arose as a result of a promotion, was not objectively justified.[17] However in the present case, Finlay Geoghegan J was satisfied that there was objective justification for the increase. The solicitor had increased in seniority over the relevant period and was able to relieve a senior partner from certain work in relation to the liquidation.

15 This section provides that the examiner shall (1) convene and preside at such meetings of members and creditors as he or she thinks proper to consider proposals for a scheme or arrangement, and (2) report on those proposals to the court, within 35 days of the date of his or her appointment or such longer period as the court may allow.

16 [2018] IEHC 652.

17 *In the matter of Mouldpro International Ltd (in liquidation)* [2018] UECA 88.

iii Re: Ballantyne Re plc & Companies Act 2014[18]

In this case, Ballantyne Re plc sought an order sanctioning a proposed scheme of arrangement that provided for a compromise of the company's obligations to certain noteholders under the relevant notes and the commutation of certain guarantees provided by guarantors under those notes.

One creditor, ESM Fund I LP (ESM) opposed the scheme on the grounds that, *inter alia*, the court had no jurisdiction to sanction any scheme of arrangement that makes provision for the release of third-party obligations. It was alleged that on the proper interpretation of Part 9 of the Companies Act 2014, with the property rights protected under Articles 40.3 and 43 of the Constitution of Ireland, it was not open to the court to sanction a scheme that made such a provision. The effect of the proposed scheme would be to release ESM's (and other creditors') recourse to the guarantor.

In assessing ESM's objection, Mr Justice Barnville referred with approval to a number of decisions in other common law jurisdictions that were 'pro-release', such as Australia. Taking into account the legislation, Barnville J did not view Part 9 of the Companies Act 2014 as an attempt by the Irish parliament to exclude third-party releases from schemes of arrangement. Further, it was held that the proper balance had been struck between competing interests by virtue of the fact that a proposed scheme would not be sanctioned if it was unfair, inequitable, improperly coercive or unreasonable in the circumstances, together with the fact that this applied in tandem with a requirement to obtain the approval of the creditors. In this case, the overwhelming majority of the company's creditors voted in favour of the scheme.

Ultimately, Barnville J held that the release of Ballantyne's creditors' recourse under the guarantees was necessary, having regard to the need to ensure finality in relation to the affairs of the company so that it may be wound up in due course, as was the intention in the event the scheme was sanctioned. The court held that it would make no legal or commercial sense to leave such claims outstanding.

iv Re Denis Moriarty the Kerries Limited (in examination)

Denis Moriarty the Kerries Limited, which provides civil engineering works, was placed under the protection of the High Court in January 2018 with significant debts to its creditors. The company, during the examinership period, remained involved in more than 30 construction projects around the country. A successful scheme of arrangement was proposed and implemented by the examiner, which required detailed negotiations with the company's secured creditor and other contracting parties to get the scheme of arrangement approved by the court.

The company had approximately 900 creditors, which had to be dealt with during the examinership period, and the company had debts of approximately €20 million, which increased the challenge for the examiner in getting the scheme approved. To restructure the company, the examiner obtained approval from the High Court for a dividend to the trade creditors of 1.75 per cent, which was the lowest dividend ever approved by the High Court for an unsecured creditor class.

18 [2019] IEHC 407.

v In the matter of Sean Dunne (a bankrupt)[19]

Ulster Bank, as one of the largest creditors of Sean Dunne, had applied to the Irish High Court to have Mr Dunne adjudicated bankrupt in Ireland in 2013, despite him having previously been made bankrupt in the United States of America. The Supreme Court confirmed that it is possible for a debtor to be adjudicated bankrupt under the laws of Ireland notwithstanding the fact that the debtor has already been adjudicated bankrupt in another jurisdiction that is not subject to the EU Insolvency Regulation.

The result has been a unique interplay between the US courts, the Chapter 7 Trustee (the bankruptcy official appointed in the United States), the Official Assignee (the Irish court-appointed officer to the estate of Sean Dunne) and the Irish courts, to ensure that the bankruptcy is handled in the most efficient way.

The case is of ongoing significance as proceedings were recently instituted in the United States by the Chapter 7 Trustee against Gayle Killilea, Mr Dunne's spouse, seeking, *inter alia*, orders reversing certain asset transfers effected by Mr Dunne prior to his adjudication. In June 2019, a jury in the US proceedings instituted by the Chapter 7 Trustee returned a verdict awarding the Chapter 7 Trustee €18 million in damages against Gayle Killilea in respect of cash and assets that had been transferred to her by Mr Dunne. The international aspect of this bankruptcy was further demonstrated when the Official Assignee in Ireland was successful in obtaining an order in aid from the South African courts restraining the sale of a hotel in South Africa, which had been transferred by the bankrupt for the benefit of his wife.

Irish bankruptcy laws have become far more 'debtor friendly' latterly, with the normal duration for bankruptcy being reduced from 12 years to three years (in 2013) and to one year (in 2016). However, in the case of Sean Dunne, the High Court in 2018 extended the bankruptcy for 12 years as a result of the bankrupt's 'wilful and deliberate' failure to cooperate with the court official administering his bankruptcy.

vi The Bank of Ireland v. Eteams (in liquidation)[20]

In May 2019, Mr Justice Baker in the Court of Appeal upheld the judgment of Keane J in the High Court (and refused the reliefs sought by the liquidator of the company), in which he found that a debt purchase agreement entered into by Eteams (International) Ltd (in liquidation) and Bank of Ireland constituted a true sale of the company's debts, and not a charge over the company's book debts (as alleged by the liquidator), which would have required registration under Section 99 of the Companies Act 1963 (and which would have been void against the liquidator in light of non-registration).

Baker J acknowledged the attractiveness of construing debt factoring agreements as charges, in that such agreements are not readily ascertainable by other creditors and could be counterproductive to the transparent system of secured financing. However, following the logic set out by Keane J, Baker J dismissed the appeal by focusing on the substance and form of the agreement as a whole.

In arguing that Keane J had erred in law and in fact, the liquidator relied on (1) a fail-safe clause in the agreement whereby the company was deemed to be property held on trust for the bank where ownership had failed to transfer, (2) a clause enabling the bank to

19 [2015] IESC 42.

20 *The Governor and Company of The Bank of Ireland (the 'Bank') v. Eteams (International) Ltd ('Eteams') (in liquidation)* [2019] IECA 145.

require the company to repurchase any outstanding debt at the end of the credit period, and (3) the termination provisions whereby the bank was stated to own all debts until the recourse price has been paid.

On each point, Baker J agreed with Keane J that the effect was to reinforce an intention of the parties to transfer ownership of the debts and did not, therefore, have the effect of creating a charge that would have been void against the liquidator.

IV ANCILLARY INSOLVENCY PROCEEDINGS

The Recast Insolvency Regulation has not frequently been invoked in the Irish courts.

The High Court recently considered the scope of the Recast Insolvency Regulation in the case of *Healy v. Irish Life Staff Benefits Scheme & Anor,*[21] in which the plaintiff had been adjudicated bankrupt in 2013 by the High Court of Manchester in the United Kingdom. The relevant court order stated that the proceedings are main proceedings for the purposes of the original Insolvency Regulation, which was applicable at that time. The defendant was an employee of the second named defendant and was party to a pension scheme (the Scheme).

The trustee in bankruptcy claimed an entitlement to the plaintiff's rights and benefits under the Scheme. The plaintiff was discharged from bankruptcy in 2014 and was unsuccessful in his application to the High Court of Justice in England to have his pension under the Scheme excluded from his estate in bankruptcy. The plaintiff then sought injunctive relief from the Irish High Court in the form of an order preventing the defendants from liaising with the trustee in bankruptcy and from making any payments to the trustee. The defendants contested the jurisdiction of the Irish High Court on the basis of the plaintiff's COMI.

In relation to whether a pension should form part of a plaintiff's estate in bankruptcy, the Court confirmed that is a matter for determination in the UK proceedings and that, for the Court to make the reference to the Court of Justice of the European Union, as requested by the plaintiff, would in effect be precisely the type of interference with the UK bankruptcy proceedings that the EU regulations are designed to prohibit.

In the recent examinership case of the Vision Built Group, one of the companies had been incorporated in the United Kingdom. At the petition hearing to appoint an examiner to the three companies in the group, it was successfully argued that the UK company's COMI was in Ireland, notwithstanding that a petition to wind up the UK company had been filed in the United Kingdom.

V TRENDS

It is not entirely clear what effect the continuing Brexit negotiations will have on the Irish economy as a whole. However, Ireland is an English-speaking jurisdiction, with a strong and long-standing common law jurisprudence. This provides familiarity of process and procedure regarding substantive legal principles to those accustomed to dealing with UK law. It is anticipated that these factors will enhance Ireland's attractiveness as a location for a corporate to base its COMI.

It is anticipated that there will be a further divestment of non-performing loan (NPL) portfolios by Irish banks in the coming year, which is likely to result in further enforcement

21 *Healy v. Irish Life Staff Benefits Scheme & Anor* [2018] IEHC 28.

proceedings, although not on the scale seen in the past, in circumstances where it appears that private equity acquirers of NPLs have worked through a significant number of the loan books acquired in recent years.

The Land and Conveyancing Law Reform (Amendment) Bill 2019 was passed by the Irish parliament on 2 July 2019. The original bill was put forward as a private member's bill that was published in 2017, but was not substantially progressed (the Keeping People in their Homes Bill). The new bill was government-sponsored with a number of drafting changes and will result in a broadening of matters that a court must take into account when a lender applies for a possession order in respect of a borrower's primary residence. It is expected to be signed into law by the President before the beginning of the next court term in October.

Pre-pack receiverships have been used very effectively in Ireland in recent years. They have also been successfully used in conducting loan-to-own schemes. There are no formal guidelines that govern pre-packs in Ireland and there has been little judicial consideration of the procedure.[22]

There has been an increased interest in the potential use of Irish schemes of arrangement to effect corporate restructurings, particularly with regard to large corporate groups with entities registered in foreign jurisdictions. The recent approval by the Irish High Court of a scheme of arrangement that restructured US$1.65 billion of liabilities of Ballantyne Re plc confirms Dublin as one of the most effective restructuring venues in the European Union, and is a clear endorsement that Irish schemes can be used to implement complex cross-border restructurings. Further evidence of this trend is the fact that Weatherford plc, a global company with more than 100 subsidiaries operating in 80 countries has recently entered into Chapter 11 proceedings in New York, the success of which will be conditional on the approval of the proposed scheme in Ireland through an examinership process. Weatherford plc is an Irish-registered company listed on the New York Stock Exchange. The process is intended to achieve a significant deleveraging of the company's capital structure, reducing its balance sheet liabilities from approximately US$8.35 billion to US$2.75 billion.

While economic activity in Ireland remains positive, the continuing uncertainty around the United Kingdom's future relationship with the European Union makes it difficult to determine the potential impact of Brexit. Evidence does show that Ireland could be relatively more negatively affected than other EU countries, which could potentially have a significant effect on Ireland's economic growth.[23]

22 The sale of the Thomas Crosbie media group is an example of a high-profile pre-pack in which a firm acted for the secured lender. Although one creditor commenced proceedings challenging the process, the case did not proceed to trial, as the creditor was subject to an order to pay security for costs on the grounds that, among other things, the creditor plaintiff had failed to show that the secured creditor did not have at least a *prima facie* defence to the claims, on the grounds that the secured creditor was entitled to take steps to enforce its security in a manner that protected its legitimate interests. *Webprint Concepts Ltd v. Thomas Crosbie Printers Ltd* [2013] IEHC 359.

23 The Economic and Social Research Institute, QEC Special Article – 'Ireland and Brexit: modelling the impact of deal and no-deal scenarios' < https://www.esri.ie/publications/ireland-and-brexit-modelling-the-impact-of-deal-and-no-deal-scenarios>.

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Julie Murphy-O'Connor is a partner at Matheson. She has more than 20 years' experience in contentious corporate restructuring and insolvency and financial services litigation, non-contentious restructurings and liquidations, as well as high-stake complex commercial court corporate disputes. Her clients include financial institutions, insolvency practitioners and investment funds.

Julie has held a ministerial appointment on the board of semi-state company, Coillte, since 2013, and has recently been reappointed upon the expiry of her initial five-year term (the company having undergone an extensive and successful restructuring during this period). She was on the council of the Irish Society of Insolvency Practitioners from 2011 to 2014, acting as secretary and as chair of its educational subcommittee during that period. Julie is also a member of INSOL Europe and the American Bankruptcy Institute. She is co-author of the Commercial Litigation Association of Ireland's *Practitioner's Handbook for the Commercial Court in Ireland* and of the Incorporated Law Society of Ireland's *Insolvency Law Manual*.

KEVIN GAHAN

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Kevin Gahan is a senior associate in Matheson. He has been working in the corporate restructuring and insolvency group since 2009 and he regularly advises receivers, examiners, liquidators, directors, companies, financial institutions and creditor groups in connection with all contentious and non-contentious restructuring and insolvency matters, banking disputes, security, debt collection and other enforcement issues.

Kevin lectures on insolvency matters to trainee solicitors at the Law Society of Ireland and to professional directors for the Institute of Directors in Ireland. He is a member of the Irish Society of Insolvency Practitioners and sits on its law reform subcommittee and a member of INSOL Europe. He is a co-author of the Incorporated Law Society of Ireland's *Insolvency Law Manual*.

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