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Litigation & Dispute Resolution Update

Recovering debts: bankruptcy

In the current economic climate, where individuals have invested in property and other markets and are now feeling the pinch, bankruptcy proceedings as a means of asset recovery have become a more prevalent and effective method of enforcing judgments. Creditors should however be aware that the cost associated with bankruptcy proceedings tend to be higher than other enforcement measures. Also the procedure needs updating to be faster and simpler. It is not often useful where there is security for the debt.

Bankruptcy law governs the recovery of debts where the debtor is an individual rather than a company. It is governed by the Bankruptcy Act 1988 (as amended) and complimented by the Rules of the Superior Courts SI 79/89.

A unique feature of bankruptcy law is that it seeks to provide a means whereby creditors can recover rateably or equally among themselves from the individual debtor. It also grants a measure of protection to the bankrupt and ensures that the bankrupt cannot be proceeded against to the benefit of one creditor and to the detriment of another.

Bankruptcy proceedings may only be brought in the High Court. The practical result of successful bankruptcy proceedings is that the debtor's property is transferred to a trustee which in the vast majority of cases is the "Official Assignee", which is an office created by statute. The bankrupt loses his capacity to deal with that property and the creditors lose their right of independent remedy to recover their debts. The trustee or the Office of the Official Assignee then distributes the property among the creditors.

An inability to pay ones debts as they fall due is not a sufficient test for an adjudication of bankruptcy. In order to be declared bankrupt, an individual must commit what is known as an act of bankruptcy. This is defined as "an act or default, voluntary or involuntary, committed by a debtor which is either evidence of an intent to deprive creditors of their rights through fraudulent assignment or as an implication of insolvencies".

The 1988 Act sets out eight acts of bankruptcy. The most common instance that arises in practice is where the debtor fails to pay his creditors after receiving a bankruptcy summons. This is a notice in a prescribed form served on the debtor calling on the individual to pay the sum due within 14 days. As with all debt recovery, the sum due should be a liquidated sum and the creditor should be entirely satisfied that the debtor cannot dispute the sum claimed. The best way of avoiding any dispute in relation to the sum due is for the creditor to have already obtained a court judgment and the failure of the debtor to satisfy the judgment is then used by the creditor as the basis for the bankruptcy proceedings.

As with all debt recovery proceedings, the creditor should endeavour to ascertain whether or not the debtor has the resources from which the debt can be discharged. In other words a declaration of bankruptcy in itself means nothing if there are no funds or assets available. However often the threat of bankruptcy will be sufficient to prompt the debtor to discharge the debt if they can.

As with most problems it is better to take some advice sooner than later if a difficulty is perceived. This can very often lead to an effective commercial solution. At Beauchamps many of our litigators are trained in mediation and this can sometimes contribute to early resolution.



Arrangements under control of court

Against a backdrop of decreasing growth in our economy and increased mortgage repossessions it is an appropriate time to consider what steps a debtor can take to regulate his dealings with creditors.

One of the least known remedies available to a debtor is contained in Part IV of the Bankruptcy Act 1988 (1998 Act) (*section 87*). This allows the debtor to make a compromise of his debts, under the control of the court, so that his personal property may be protected until further order from "any action or other process". Under this procedure the debtor must bring a petition for protection to the High Court setting out the reasons for his inability to pay his debts and request that his property be protected until further order.

Once an order for protection has been granted, the court directs the debtor to call a preliminary meeting of his creditors and, at this meeting, the creditors are presented with a statement of the debtor's assets and liabilities. Following this meeting, the court directs a private sitting before the court for the purpose of considering the proposal. While an order for protection is in force a creditor is not entitled to register any affidavit for judgement.

If the debtor's proposal is approved by the court, it then becomes binding on all of the creditors and allows the debtor to compromise his debts and improve his financial position following court approval.

Few successful schemes of arrangement have been made under Part IV of the 1988 Act. However, the insolvency team in Beauchamps have engineered a scheme of arrangement through the courts involving the Kavanagh Group of companies, a family grain business based in Kildare. For further advice on this procedure, please contact Gabriel Daly at g.daly@beauchamps.ie

Structured Credit Holdings plc: corporate restructuring

The global financial problems created by difficulties encountered in the US sub-prime mortgage market have been well reported. One of the first victims of these difficulties in Ireland was Structured Credit Holdings Plc (SCH) the company and its subsidiaries which commenced trading on the 16 June 2006, after raising US\$207.8 million in equity capital and planned to become a specialist wholesale bank focussing on the credit risk transfer (CRT) market.

However, in September 2007, one of its creditors, Nomura Securities, appointed a provisional liquidator to wind up the company.

The company subsequently successfully applied to the High Court in Dublin to appoint an examiner. Examinership is a process which provides a mechanism for the rescue of potentially viable companies. Under legislation to date, a company has to have a reasonable prospect of survival in order for an examiner to be appointed. A company which is in examinership is under scrutiny by an examiner so that he/she can report back to the High Court with proposals for the company's survival.

In December 2007, Ms. Justice Finlay Geoghegan in the High Court approved a scheme of arrangement presented by the examiner, Billy O'Riordan, restructuring SCH and allowing the company to restart trading.

Members of the corporate restructuring group in Beauchamps, advised the investors in the restructuring of SCH. Subsequent to this, Beauchamps have also been involved in advising creditors in other insolvencies and examinerships, including International Securities Trading Corporation Limited (ISTC).

Restricting non-executive directors

Case: In the Matter of Tralee Beef and Lamb Ltd (In Liquidation) Kavanagh v Delaney & ors [2008] IESC 1

Facts. Coyle the fourth named respondent was a non-executive director of Tralee Beef and Lamb Limited (the Company) and represented the interest of certain investors. He was not involved in the day to day management of the Company. The Company subsequently went into liquidation. The liquidator found that it was insolvent on winding up but his affidavit stated that Coyle had acted honestly and responsibly in relation to the Company's affairs and whilst he commenced proceedings under section 150 of the Companies Act 1990 (as amended) to obtain restriction orders against each of the directors he requested the Director of Corporate Enforcement (DCE) to be relieved from the statutory obligation to bring restriction proceedings against Coyle. The DCE refused but gave no reasons.



The High Court imposed a restriction order on Coyle under section 150 preventing him from acting as a director of any company for five years on the basis that while he had acted honestly, he had not exercised the directors' fiduciary duties of skill and care in relation to the conduct of the company's affairs. Coyle appealed.

Decision. The Supreme Court in a ruling that was highly critical of the DCE, lifted the restriction order against Coyle noting in particular that the DCE had given no reason or indication to the court or to the liquidator as to why it was adopting such an attitude in spite of the liquidator's own conclusion that Coyle had acted honestly and responsibly. The court was not prepared to draw the same inference as the High Court that the DCE, in refusing the liquidator's request to dispense with the restriction application, disagreed with the liquidator's view. It went on to describe the restriction regime for directors as "draconian" because:

- Under section 56 of the Company Law Enforcement Act 2001 it is *mandatory* for a liquidator to bring an application to restrict a director in the case of an insolvent winding-up unless relieved of this obligation by the DCE. The liquidator could be guilty of a criminal offence if he does not bring the application.
- A restriction order must be made *unless* the High Court believes the director in question acted "honestly and responsibly in relation to the conduct of the affairs of the company" and that there is "no other reason why it would be just and equitable" to make such an order. As a result this puts the onus of proving these matters on the company director and this is not fundamentally fair.

Comment. The DCE's absence in this case was described by the court as "unfortunate". The court also stated that it was "gravely concerned about the justice of the procedures leading to the decision to restrict Coyle". The DCE issued a statement after the decision stating that he will "consider whether, and to what extent, he may need to modify the practices adopted by his Office when considering cases involving the types of circumstances involved in this particular case." The DCE subsequently agreed to make a contribution to the costs of the action and has stated that in future cases where the Office overrules liquidators and insists they take action to restrict directors, it will give a written explanation. This case has had definite ramifications for the manner in which the Office of the DCE operates in the future and the DCE has said that the Government will have to review the law in this area in light of this case.

Record award for libel

Case: McDonagh v The Sunday World 28 February 2008

Background. The Defamation Act 1961 currently governs the law of defamation in Ireland. An actionable statement must a) be published; b) refer to the complainant; and c) be false. The majority of defamation cases are heard in the High Court by a jury. The jury determines both liability and quantum (amount of damages) with only limited guidance from the trial judge. Neither the court, nor juries, can order a defendant to apologise or to admit that they defamed the plaintiff. It is also not possible to make a lodgement without an admission of liability, contrary to almost all other defences.

Facts. The plaintiff Martin McDonagh sued the Sunday World over an article describing him as a "Traveller drug king" and a "loan shark" while he was being held for seven days at a Garda station for questioning in connection with a major drugs seizure. He was subsequently released without charge. The defendant newspaper argued that the words complained of were true in substance and fact. The plaintiff gave evidence but produced no witnesses at all to support his case.

Decision. In the High Court the jury found the newspaper had proven McDonagh was a tax evader and a criminal but not a drug dealer and loan shark. They awarded him unprecedented damages of €900,000 plus costs. This is the biggest ever award of damages for libel in Ireland. McDonagh is to get €90,000 of the award pending the outcome of a Supreme Court appeal against the award.

Comment. It is generally thought that the award will be reduced on appeal. The Defamation Bill 2006 is currently going through the Dail and when enacted will revise and update the law of defamation. It aims to:

- Reduce the current limitation period for taking a case from six years to one from the date the cause of action accrues or such longer period "not exceeding two years" as the court may direct.
- Introduce a new defence of fair and reasonable publication on a matter of public interest.
- Provide that a plaintiff not seeking compensation can obtain a High Court order that the statement is defamatory.
- Make the defence of innocent publication available to distributors of defamatory material.
- Ensure juries receive directions from High Court judges in relation to damages.
- Create a new criminal offence of publication of gravely harmful statements.



Causation: a robust approach in the UK

Case: Drake v Harbour [2008] EWCA Civ 25

Background. A professional may act negligently, but if his actions cannot be shown to cause the loss, there is no claim.

Facts. The claimant engaged the defendant electrician to rewire her bungalow and vacated the property during the works. A fire started in the loft one night after the defendant had gone home. The English High Court had held that the fire had been caused initially by some festoon lights which had been left plugged in overnight. There was nothing inherently unsafe in so doing. However in not examining the cable insulation for damage before attaching the light sockets the judge held that because the festoon cable was not new that the defendant was negligent in failing to examine it. This was because it may have been damaged by a previous fitting of sockets.

The High Court decided that the maxim *res ipsa loquitur* ("the thing speaks for itself") applied in circumstances where the defendant was in sole control of the bungalow when the fire started. He therefore had an extra evidential burden to discharge which he failed to do. The court held that it was more likely than not that the fire had been caused by the defendant's negligence. The defendant appealed.

Decision. The English Court of Appeal dismissed the appeal and held that the High Court had correctly held that, on the evidence, the fire resulted from the defendant's negligence. It considered the correct approach to causation where negligence has been established but the claimant can not show which, of a number of possible factors, caused the loss. If the loss is of a type which one would expect to happen as a result of the proven negligence, then a court can infer that the proven negligence caused the claimant's loss. The onus is on the defendant to show that other possible causes were *at least as likely* as his negligence to have caused the loss.

Upcoming event

Beauchamps Solicitors are participating in the 2nd Annual European Data Protection Intensive conference (see <http://www.e-comlaw.com/europeanintensive2008/>). This is a two day pan-European event in Berlin on 15-16 May 2008. Claire Callanan and Madeleine Delaney of our Litigation and Dispute Resolution Department will be speaking on Day 2 of the conference.

Litigation and Dispute Resolution Department

If you have any queries on the contents of this update or if there are other topics you would like to see us address in future editions please contact any of the Litigation and Dispute Resolution solicitors below.

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