[2018] IEHC 444

THE HIGH COURT

[2010 No. 196 COS]

IN THE MATTER OF THE COMPANIES ACT, 2014

AND

IN THE MATTER OF LANCE INVESTMENTS LIMITED (IN LIQUIDATION) AND LANCE HOMES LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF AN APPLICATION OF CARL DILLON (LIQUIDATOR)

THE HIGH COURT ON CIRCUIT

[2017 No. 245 CA]

IN THE MATTER OF THE MULTI UNIT DEVELOPMENT ACT, 2011

AND

IN THE MATTER OF THE COMPANIES ACT, 2014

BETWEEN/

LEE TOWERS MANAGEMENT COMPANY LIMITED

PLAINTIFF

AND

LANCE INVESTMENTS LIMITED (IN LIQUIDATION), LANCE HOMES LIMITED (IN LIQUIDATION), AND IRISH IMMIGRATION FUND LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 19th day of July, 2018

1. This application comes before me on the motion of Carl Dillon, the official liquidator of Lance Investments Ltd. and Lance Holmes Ltd. ("the Companies") pursuant to s. 631 of the Companies Act 2014 ("the Companies Act"), and by way of an appeal from an *interim* Mareva injunction made by the Circuit Court against the Companies and the liquidator given on 26 July 2017.

2. The Companies were property developers and were responsible for the development of a residential apartment complex called "Lee Towers", part of the River Towers complex on the grounds of the former Our Lady's Psychiatric Hospital, situated on the northern side of Lee Road, in the City of Cork. The development scheme agreements were executed on or about 1 January 2001.

3. The Companies were wound up by order of the High Court on 17 May 2010 on foot of a petition of the Revenue Commissioners presented on 29 March 2010 at the date of which Revenue claimed to be owed approximately €1.8 million.

4. The Companies are grossly insolvent and the liquidator estimates liabilities of approximately €5.8 million, of which approximately €1.8 million are to be treated as preferential.

5. It is anticipated that realisations already made, or assets not yet sold, may cover the costs and expenses of the liquidation and provide a small dividend to some preferential creditors. Very valuable assets of the Companies were subject to debentures, and the debenture holder having appointed a receiver has realised these assets. Unsecured creditors are not likely to receive any dividend.

6. The questions for determination arise out of Circuit Court proceedings authorised by Barrett J. on 17 November 2014 and brought pursuant to, *inter alia*, the provisions of the Multi-Unit Development Act 2011 ("the MUD Act") by Lee Towers Management Company Ltd. ("Lee Towers"), the owners' management company of the relevant parts of the development.

The Circuit Court orders

7. The Circuit Court proceedings were commenced by civil bill bearing record No. 2015/806 in the Cork Circuit Court against the Companies and another company, Irish Immigration Fund Ltd. ("IIF"), which was represented as notice party to the within application, and which had purchased phases 1 and 2 of the development from the liquidator.

8. The Circuit Court proceedings sought mandatory orders directing the Companies and IIF to transfer to Lee Towers the common areas and the reversions on the purchase leases in the relevant part of the development and an order that the Companies complete the development in accordance with the development agreement of 1 January 2001.

9. Orders were made by Judge O'Brien against all of the defendants on 5 July 2017 and the nature of the orders and the extent and enforceability of those against the Companies are the primary issues for determination in this judgment.

10. In summary, Judge O'Brien directed the transfer of the common areas and reversions to Lee Towers and made what was described as orders of "*mandamus*", but more properly described as mandatory orders, directing that the Companies and would complete the development in accordance with the development agreement of 1 January 2001, and comply with their respective obligations pursuant to the Planning and Development Act 2000, as amended ("the PDA") and/or the Building Control Act 1990, as amended ("the Building Control Act") to the satisfaction of the consulting engineer of the plaintiff. For convenience, I will refer to these orders as "remedial orders".

11. The works that were directed to be carried out to the common areas broadly speaking included works to the internal and external walls to deal with Fire Officer requirements, fire separation generally, and works to remediate defects in the roof, escape stairwell, lobbies, and other internal common areas.

12. Judge O'Brien also made an order directing the Companies (but not IIF) to reimburse to the plaintiff the costs already incurred in carrying out repairs and maintenance to the common areas.

13. Finally, the costs of the proceedings were granted to Lee Towers against the Companies and IIF, to be taxed in default of agreement. It is accepted for the purposes of present hearing that the costs order is joint and several.

14. Following on the order made by Judge O'Brien on 5 July 2017, Lee Towers obtained a Mareva injunction from the Circuit Court and later sought to attach and commit the Companies and Mr. Dillon personally and to sequester the assets of the Companies on the asserted ground that the Companies had wilfully disobeyed the order of Judge O'Brien.

15. When the application for committal and sequestration came before Judge O'Brien in the Circuit Court, he considered that the issues relating to the enforcement of his primary order ought to await consideration by the High Court of the questions raised in the application before me.

The directions sought

16. The reformulated questions in respect of which the determination of the High Court is sought are as follows:

    1) does the MUD Act have retrospective effect and, if so, does it operate to impose an obligation on a liquidator to ensure completion of a development partially completed by the Companies prior to their liquidation?

    2) are the obligations of the Companies to complete the development under the MUD Act otherwise specifically enforceable or do they sound only in damages?

    3) do the mandatory orders granted by the Cork Circuit Court operate to displace the statutory scheme of priority of payments set out in s. 621 of the Companies Act?

    4) does the order for costs granted by the Circuit Court fall to be treated as a "cost, charge and expense" in the liquidation of the Companies within the meaning of s. 617 of the Companies Act, notwithstanding that the liquidator did not defend or otherwise cause the Companies to participate in the said proceedings?

    5) were the application for a Mareva injunction and for attachment and committal permissible or appropriate in the light of the High Court order of 17 November 2014?

General propositions to be addressed

17. In very broad terms, counsel for the liquidator argues that the effect of the order by which the Companies were wound up was to fix the assets of the Companies with a special and unique "trust" under which the distribution of the assets was to be made in accordance with the statutory scheme. Counsel for Lee Towers, on the other hand, argues that the order made by Judge O'Brien must take priority over the other creditors of the Companies, and that the assets of the Companies are fixed with another form of "trust" by which they must be applied towards the performance of the order, and that the MUD Act altered the general statutory scheme relating to insolvent companies by interposing a requirement that a company comply with the provisions of the MUD Act, including, where necessary, by the expenditure of monies in the completion of certain works of maintenance or construction to which the MUD Act applies.

18. The question is not one which engages the simple matter of the sequence of the dates, and the fact that the MUD Act commenced on 24 January 2011, approximately 12 months after the Companies were wound up and ten years after the development agreement, is not argued to be dispositive. The judgment, therefore, engages the interplay between the provisions of the MUD Act, on the one hand, and the statutory rules governing the application of the assets of a company in liquidation on the other, which was raised, but

not determined, in the judgment of White J. in *Bohergar Developments Limited v. Cuirt Monard Management Company* [2014] IEHC 136.

19. Before dealing with the questions raised by the liquidator it is useful to examine the effect of winding up on the title to company property.

The position of a company after a winding up: The statutory "trust"

20. In *Ayerst (Inspector of Taxes) v. C&K Construction Ltd.* [1976] AC 167, the House of Lords described the effect of a winding-up as divesting a company of the "beneficial ownership" of its assets, since it could not thereafter use them for its own benefit.

21. It is often said that a "trust" comes into existence on a winding-up, such that while the company is not divested of its assets and continues to be alive, the assets are fixed with a trust so that the company is no longer entitled to the benefit of the assets or the proceeds of sale. In *Ayerst v. C&K*, Diplock L.J. described the functions of a liquidator as "similar to those of a trustee" or a personal representative in the estate of a deceased person, subject only to the proviso that, unlike in those examples, the legal title does not vest in the liquidator as it would in a trustee, personal representative, *etc*. Diplock L.J. was describing the effect of the UK legislation which directed the priority of payments by a liquidator.

22. The "trust" to which Diplock L.J. referred was the focus of much of the argument of counsel for the liquidator in the present case. The principle has a statutory origin and derives from the fact that, on a winding-up, the beneficial interest in the assets of a company no longer belongs to the company, and a "trust" is created by the statutory scheme that directs the manner in which the assets of the company are to be distributed by the liquidator. In *Ayerst v. C&K*, Diplock L.J. quoted with approval the dicta of Mellish L.J., with whom James L.J. agreed, in *In re Oriental Inland Steam Company* (1874) Ch App 557:

> "The English Act of Parliament has enacted that in the case of a winding-up the assets of the company so wound up are to be collected and applied in discharge of its liabilities. That makes the property of the company clearly trust property. It is property affected by the Act of Parliament with an obligation to be dealt with by the proper officer in a particular way. Then it has ceased to be beneficially the property of the company", at p. 559.

23. The position is no different in Irish law. In *In re Frederick Inns Limited* [1994] 1 ILRM 387, the question addressed was whether payments could be made by a company after a winding-up in discharge of its liabilities, and the Supreme Court held that once a winding-up order had been made, the distribution of the assets was to be done in the interests of the creditors, and the directors "had a duty to the creditors to preserve the assets" and distribute them in accordance to the relevant priorities expressed by statute.

24. Blayney J. quoted the passage from the judgment of James L.J., and stated in clear and unequivocal terms that, at the moment of winding-up of a company:

> "[…] it is clear that the relevant payments could not have been made as the company would have ceased to be the beneficial owner of its assets", at p. 395.

The analysis of the law by Blayney J. in *In re Frederick Inns* is authoritative and often quoted.

25. In *In re Worldport Ireland Ltd. (In Liquidation)* [2005] IEHC 189, Clarke J. held that payments made by a company after winding-up were a void distribution by virtue of s. 218 of the Companies Act 1963. His analysis eloquently describes the impact of winding-up as that the assets of the company are "frozen". He went on to say as follows:

> "The Companies Acts provide an elaborate code for determining where the burden of not being paid should lie. The primary purpose of the section, it seems to me, is to ensure that the court has ample power to prevent any adjustment occurring subsequent to the presentation of the petition, which would disturb that elaborate balance. In seeking to achieve that end there can, of course, be a series of subsidiary rights and obligations which necessarily arise."

26. This freezing effect is apparent in the fact that no proceedings may be commenced against a company save by leave of the court pursuant to s. 678(1) of the Companies Act, and sequestration or a Mareva-type relief is not permitted insofar as it might create an adjustment which might disturb the statutory scheme, as held by Clarke J. in *Hughes v. Hitachi Koki Imaging Solutions Europe* [2006] IEHC 233, at para. 3.10.

27. Therefore, the claims of creditors on this analysis are to be dealt with in the "sectional interest" of each creditor and the legal entitlement to property is fixed by statute. This has the effect that the company in liquidation may not deal with its assets other than in a manner that respects these statutory entitlements.

28. The matters may also usefully be considered in the context of the statutory duties of a liquidator to which I now turn.

Duties and powers of a liquidator

29. Section 677(1) of the Companies Act provides that from the commencement of a winding-up, the company shall cease to carry on its business "except so far as may be required for the beneficial winding up of it." The principle is well established. Laffoy J., in *In re Greendale Developments Ltd. (In Liquidation) (No. 1)* [1997] 3 IR 540, expressed the effect as follows:

> "Once a winding up order is made, the company is doomed to extinction. The winding up process is the process of the administration of the assets of the company: their collection, realisation and distribution in discharge of the liabilities of the company to the creditors and of the entitlement of its contributories in accordance with the scheme of priorities prescribed in the Companies Acts. Insofar as the Companies Acts give an entitlement to a creditor or a contributory to be heard by the court in relation to a matter arising in the winding up, in my view, the court is required to have regard to the sectional interest of that creditor or

contributory and, in particular, to the protection of his legal entitlement to a distribution from the assets of the company as defined by the Companies Acts", at p. 547.

30. The duties and powers of a liquidator are limited to the realisation of assets and the distribution to those entitled at law to share in the proceeds *pro tanto, per* Clarke J. in *Hughes v. Hitachi Koki*, at para. 3.7.

31. The powers of a liquidator may be carried out only to the extent necessary not for the business of the company but for the benefit of the winding-up, what was described by Thesiger L.J. in *In re Wreck Recovery and Salvage Company* (1880) 15 Ch D 353 as "a mercantile necessity […] highly expedient under all the circumstances of the case", at p. 362.

Application of principles to the present issue

32. What is critical for the purposes of the present case is that a liquidator's functions and powers are constrained by statute. The liquidator has powers of collection, realisation, and distribution of the assets of the Companies in accordance with the law as provided in s. 624 of the Companies Act, and the administrative functions of the liquidator must be understood in the context of the ultimate legislative mandate to distribute the assets of the company once ascertained "in accordance with law".

33. For the purposes of the present argument, this statutory limitation constrains the activity of the liquidator so that, for most purposes, he does not continue the business of the Companies, but more critically, the purpose of the process is to ascertain the assets so that they may be distributed in accordance with law, and the scheme of priorities contained in s. 621 of the Companies Act.

34. In that context, counsel for the Companies argues that the effect of the winding-up is that the Companies may continue their normal activity only in limited circumstances linked to the benefit of the winding-up, and that there is no evidence that the assets of the Companies might be improved in value by the carrying out of works of repair and maintenance of the common areas of the development when these works would benefit Lee Towers only.

35. I consider that proposition to be correct, but not to offer a full answer to the question raised.

Exception where remedy is *in rem*

36. An exception to the general proposition that the distribution and realisation of the assets of a company in liquidation must be dealt with in accordance with the statutory scheme is one that accords with fundamental principles, and is where a person is, to use the words of James L.J. in *In re David Lloyd & Co.* (1877) 6 Ch D 339, "merely seeking to enforce a claim, not against the company, but to his own property", at p. 344. That proposition must be correct insofar as assets held by a company prior to winding-up on trust for another continue to be held under such trust.

37. This proposition was considered by Vinelott J. in *In re Curegrange* [1984] BCLC 453, where the question was whether leave would be granted to commence an action for specific performance to a person regarded in equity as the owner of the property, and Vinelott J. considered that the grant of leave was a remedy "too obvious to need support", at p. 457.

38. Bearing these general propositions in mind, I now turn to the questions for determination in the present case.

The first question: retrospective effect of MUD Act

39. Counsel for the Companies seeks clarification or directions regarding the operation of the MUD Act and whether that Act may have retrospectively altered the obligations of the Companies as they existed at the effective date of their winding-up.

40. Counsel for Lee Towers argues that the MUD Act intended to allow for the enforcement of obligations which were in being at the date of its enactment, as a prospective interpretation would mean that only developments commenced after 2011 would be captured by the legislative scheme.

41. The liquidator did not defend the Circuit Court proceedings but did enter an appearance. The effect and reasons for this approach by the liquidator will be dealt with later in this judgment. The primary focus of the objections by the liquidator to the approach for which Lee Towers contends relates to the orders by which it was required to expend monies on works of construction and repair.

42. The question of retrospectivity has been considered in a number of cases. The leading judgment is that of O'Higgins C.J. in *Hamilton v. Hamilton* [1982] IR 466, where he explained that to interpret a statute as having retrospective effect would not generally be regarded as just and:

> "The result is a rule of construction which leans against such retrospectivity and which, according to Maxwell, is based upon the presumption 'that the legislature does not intend what is unjust'", at p. 474.

43. The Supreme Court returned to the question in *Minister for Social, Community and Family Affairs v. Scanlon* [2001] 1 IR 64, and considered that the presumption against retrospective effect is not absolute and may be displaced by clear words of the statute. As stated by Fennelly J. at p. 88:

> "The two essential elements of the rule [of construction], as it emerges from these passages, are: - firstly, it is designed to guard against injustice, in the sense that new burdens should not be unfairly imposed in respect of past actions; secondly, the rule is one of construction, not of law. It amounts to a presumption against retrospective effect which may be displaced by the clear words of the statute."

44. I do not find it necessary or useful for the proposes of the present case to engage any detailed analysis of the question of retrospective effect as it seems to me that the

question is a more narrow one, namely whether the argument for which Lee Towers contends might impair or otherwise alter existing rights of other creditors. In that regard, O'Higgins C.J. approved a passage in the judgment of Wright J. in *In re Athlumney* [1898] 2 QB 547, at pp. 551 to 552:

> "Perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

45. Fennelly J. identified one element of the rule or principle as amounting to a proposition that a new burden should not be unfairly imposed in respect of past actions.

46. There is nothing in the MUD Act that expressly displaces the existing statutory scheme of distribution in liquidations and, therefore, the principle against an unfair retrospective effect would appear to offer some support for the proposition for which the liquidator contends, that the MUD Act is not retrospective in this sense.

47. But as the Circuit Court order may conveniently be divided into two different classes of order, viz the order for the assurance of the common areas and the reversions, and the remedial orders, I consider that a different approach is warranted in regard to each, for the reason I now discuss.

The order to complete the conveyancing

48. In regard to the order that the Companies should complete the Management Company Agreement and effect an assurance of the common areas and reversions, the question of retrospectivity is not wholly engaged as the MUD Act did no more than create a statutory means of enforcing the pre-existing obligations and rights created by the Management Company Agreement and under which, as a matter of contract, the owner was obliged in due course to effect the necessary assurances.

49. The MUD Act created a statutory means to compel performance of a contractual obligation and created a statutory mechanism by which an order for the completion of the conveyancing could be made in the Circuit Court. I accept that the MUD Act is capable in its import of altering the contractual obligations contained in a management company agreement in that, in certain cases, it can accelerate the obligation to transfer which in most management company agreements is contractually mandated only when the last unit in a development is sold. No consideration of that factor arises in the present case, and the liquidator does not argue that the order to assure the construction areas and reversions was not properly made.

50. Accordingly, I consider that the obligation to transfer the common areas and the reversions, being one which is specifically enforceable as a matter of law, is an obligation which attaches to the title of the Companies in the relevant lands. At the date the

Companies were wound up, their interests in the common areas and the reversions were burdened with the obligations contained in the Management Company Agreement and the interest was nominal. This approach to the question is consistent with the general approach of Laffoy J. in *In re Heidelstone Company Ltd*. [2006] IEHC 408, [2007] 4 IR 175.

51. An order that the Companies execute an assurance of the common areas and the reversions is an action capable of being maintained against the Companies, and the order was capable of being made by the Circuit Court under the MUD Act even if the last unit was not sold. The MUD Act has, to that extent, a "retrospective effect" in regard to this class of order.

52. The liquidator, however, has argued that certain practical difficulties arose in regard to the transfer of the common areas, as the identity of the lands to the common areas was not readily ascertainable.

53. In order to compel the execution of the assurances, the Companies must make title to the relevant interest, and that includes an obligation to establish to the satisfaction of the purchaser the identity of the interests and parcels assured, and to provide a map of the assured land satisfactory for purposes of registration in the PRA. While the question of the costs of the preparation of the deed and the engineering costs of what was undoubtedly a difficult mapping exercise was raised in the course of argument, I was not referred to any relevant case law or arguments regarding such costs and expenses and I propose hearing counsel further before making a final determination on this point.

The remedial orders

54. This analysis is not readily applicable to the obligations imposed upon the Companies by the remedial orders of Judge O'Brien which required the expenditure of monies on works of refurbishment and repair, and the reimbursement of monies already expended by Lee Towers. One approach to these orders is to ask whether they operated *in rem*, or whether they are to be treated as equivalent to orders requiring the payment of monies. If the orders operate *in rem*, they may be specifically enforceable, or if the orders are to be treated as equivalent to an award of damages, the recovery of which will have the practical effect of displacing the statutorily imposed rights to priority of payment. It is to that reasoning that I now direct my analysis.

55. In essence, counsel for the owners' management company argues that the orders of the Circuit Court and the provisions of the MUD Act must be complied with prior to the distribution of the assets of the Companies and that the rights accruing to the owners' management company under the MUD Act and by virtue of the Circuit Court order do displace the statutory scheme of distribution on liquidation.

56. The order of the Circuit Court was made after a hearing in which the Court was satisfied that the works were required to be done, and that the obligation fell on the owner of the common areas and reversions. The obligations to perform the remedial works did not, in my view, crystallise until the Circuit Court made that determination, but even if I am

wrong in this, it seems to me that an obligation of this nature to expend money is not amenable an action *in rem*, or the classic remedy of specific performance, save perhaps where the claim is founded in breach of covenant. I do not propose in the present case, to consider that complex question as the case was not argued on that basis and the civil bill did not plead breach of covenant, and the development agreements were not in evidence before me.

57. No argument was made before the Circuit Court, nor before me, that a mercantile imperative such as the desirability to carry out works of repair might improve the marketability of the property.

58. The civil bill contained pleas regarding the defects in the premises, some of which were of design, construction, or installation, or arising from a failure to deal with obligations under the PDA or the Building Control Act and there is a plea that the premises had "fallen into disrepair".

59. It is useful here to analyse the relevant provisions of the MUD Act with a view to understanding their meaning or intent.

Relevant provisions of the MUD Act

60. The claim was made under s. 24 of the MUD Act. In particular, sub-s. 5)(l) empowers the court to direct the developer of a multi-used development to complete the development in accordance with:

> "(i) the terms of any contract,
>
> (ii) the conditions of a relevant planning permission under the Planning and Development Acts 2000 to 2009, or
>
> (iii) the Building Control Acts 1990 and 2007."

61. Section 7 of the MUD Act has the effect that the obligations to ensure completion of the development continue to subsist notwithstanding the transfer of ownership of the common areas and reversions. That section provides as follows:

> "The transfer of the ownership of an interest in the relevant parts of the common areas of a multi-unit development shall not relieve the person who would otherwise have been responsible from the duty, obligation or responsibility to ensure completion of the development, including—
>
> (a) compliance with the requirements or conditions of a planning permission under the Planning and Development Acts 2000 to 2009 which relates to the development concerned, and
> (b) compliance with the Building Control Acts 1990 and 2007."

62. The section, in its plain language, suggests that a transfer of the common areas and reversions does not relieve a person from any existing obligations, but does not create new obligations.

63. Section 7 could be contrasted with s. 9 of the MUD Act, by which certain easements and rights are preserved insofar as they are reasonably necessary to enable the multi-unit development to be completed by the developer even after the transfer has been completed. This suggests that the transfer may be made, and indeed is often directed to be made, before the works are finished.

64. Other sections of the MUD Act are also relevant. Section 13 permits an owners' management company to effect essential repairs to the common areas of a multi-unit development notwithstanding that the common areas remain in the legal title of the developer, and the necessary easements and rights for such purpose are granted by s. 13(1).

65. Under s. 13(2) of the MUD Act, the owners' management company shall not carry out such repairs unless it has notified the person with responsibility to do the works in advance and afforded a reasonable opportunity to that person to carry out the works. This restriction is necessary if the owners' management company is later to seek to recover such expenditure, pursuant to s. 13(4), from the person with responsibility to do the works.

66. Remedial orders, including a mandatory form of order for the carrying out of works, may be made under s. 24(3) of the MUD Act *inter alia* where a court is satisfied that an obligation in a development agreement has not been discharged, and orders may be made under that section that a developer complete the multi-unit development in accordance with PDA or the Building Control Act. It was that section that was invoked by the owners' management company in the present case.

67. The provisions of s. 24 of the MUD Act permit the making of an order of a mandatory nature, and not one that sounds in damages only. Counsel for Lee Towers argues that the statutory power has the effect of fixing the Companies with the obligation to carry out the works as a priority over other creditors.

Discussion of nature of MUD Act remedial orders

68. Section 24 of the MUD Act permits the making of an order by the court for the enforcement of an obligation with a view to ensuring the effective enforcement of a right or the effective discharge of an obligation relating to a multi-unit development. I accept that, *prima facie* at least, the Companies did have an obligation to complete the works to the common areas in accordance with the development agreement, and that the application before the Circuit Court was for the purposes of enforcing pre-existing rights. Counsel for Lee Towers makes the argument that the liquidator must comply with these secretary obligations and it is argued, therefore, that the liquidator can be compelled to perform a remedial order under the MUD Act as part of the function of calling in and realising the assets of the Companies in the liquidation.

69. Counsel for Lee Towers relies on the judgment of White J. in *In re Bohergar Developments Ltd*. [2014] IEHC 136. That case concerned an application by a liquidator to disclaim the obligations of operating and maintaining a sewage treatment plant and

pumping station imposed by the planning permission under which the company in liquidation had developed a residential housing development. The liquidator sought to disclaim those onerous obligations and to transfer them to the owners' management company, but in the circumstances of the case White J. refused the liquidator liberty to disclaim as a bond, which could have been sufficient to complete the necessary works, existed, and the liquidator and the County Council, which was a notice party to the application, were directed to cooperate to activate the bond.

70. At para. 18, White J. noted the fact that s. 7 of the MUD Act demonstrated that a developer and his successors are not exempted from compliance with planning conditions by reason of the transfer of the common areas, and noted the obligation of the company "was a statutory requirement". It seems also from his judgment that the liquidator had opened a number of authorities regarding the running of burdens and covenants, although White J. was able to decide the matter on the practical basis that the bond put in place as a result of a planning condition might have been sufficient to carry out the works to comply with the conditions in the planning permission.

71. I consider that the judgment of White J. does not answer the question raised in the present case and I note that, at para. 21 of his judgment, he observed that there might be "serious practical problems" where a company in liquidation is insolvent. Practical problems of that nature arise in the present case but the liquidator has not sought to disclaim the obligations and the question posed in the present case is quite different.

72. The MUD Act creates a form of statutory injunction by which a developer can be compelled to carry out works of repair to comply with planning and building Regulations requirements. That is, in effect, a statutory form of specific performance. But the availability of the remedy does not mean that a person seeking an order under s. 24 of the MUD Act has, on account of the statutory entitlement to seek a remedy, an entitlement which is akin to a trust or which creates a proprietary interest which might give rise to an argument that the remedy lies *in rem*.

73. Further, even in the case of a claim for specific performance of a contract for the sale of lands, the court may decline to make an order for specific performance on account of the impecuniosity of a purchaser, as is clear from *Aranbel Ltd. v. Darcy* [2010] IEHC 272, [2010] 3 IR 769, or where another impossibility of performance renders the making of such an order inappropriate. The remedy of specific performance may in a suitable case be refused and damages granted *in lieu*.

74. The Companies are insolvent, and on that basis alone, the orders made by the Circuit Court are incapable of performance unless the argument advanced by counsel for Lee Towers is correct, namely that the making of an order under s. 24(5) of the MUD Act displaces the statutory scheme of payments on liquidation, and creates in the owners' management company a right to enforce the obligations in priority to other creditors because, as he argues, the mandatory order must be performed, and also because the legislative scheme of the MUD Act makes it clear that the transfer of the common areas

and the reversions do not in itself relieve a developer from obligations in a development agreement.

75. I agree with the submission of counsel for Lee Towers that the obligation to transfer the common areas and the reversions is one which must be performed by the liquidator, being it an obligation which derived from the disposal scheme. This means, in practice, that the liquidator must realise and distribute the assets of the Companies in a manner that respects those rights. However, I do not agree that the Companies must complete the common areas to the appropriate statutory standard prior to the transfer to Lee Towers, if by doing so, they must expend monies over which they no longer have control as a result of the liquidation, and where the assets are fixed with the statutory trust.

76. Counsel for Lee Towers makes the obviously correct argument that the MUD Act does not *require* an owners' management company to accept without demur an assurance of the common areas and reversions when these are inherently defective and where, as in the present case, the defects are said to render the premises dangerous and in breach of other statutory codes. The management company does not "accept" the assurance in that sense, and is entitled under the scheme of the Act notwithstanding that the reversions and common areas have been assured to nonetheless seek and obtain a remedial works order under the MUD Act.

77. The Act provides a remedy and it has been invoked. The owners' management company is precisely in the position that the MUD Act intended and has available to it statutory remedies, as well as remedies in contract. But the effect of the order of the Circuit Court is that the owners' management company is an unsecured creditor. No provision exists to elevate a remedial order under s. 24(5) to preferential status or to displace the scheme of distributions on an insolvent liquidator. The making of a court order does not in itself give such a priority.

78. The remedial order is not one to which an owners' management company is entitled as of right, and the court must be satisfied that the making of the order is warranted on the facts. A remedial order is of a character wholly different from an order to complete the conveyancing for this reason, and cannot be said to bind a company in liquidation in the sense to which James L.J. referred in *In re David Lloyd*. The order to complete the conveyancing is one made to the person entitled as of right. A remedial order, on the other hand, is made only when the court is satisfied the contractual obligations have not been met, and the right crystallises only when the court so determines.

No express displacement of priorities

79. Further, I accept the argument of counsel for the liquidator that the MUD Act does not give any express priority to remedial orders made by the Circuit Court, which has exclusive jurisdiction under the Act.

80. While it may have been socially desirable to offer comfort to an owners' management company or to purchasers of residential units within a multi-unit development by offering some means by which the obligation to complete a development could be enforced, the

MUD Act does not offer in any of its express terms an entitlement by which a person or body who has obtained a remedial order thereby gains priority against creditors of a company in liquidation. It would seem, from the absence of any indication in the MUD Act from which such priority or preference could be derived, that the intention of the Oireachtas is that an order made under the MUD Act is, in suitable cases, to be treated as an unsecured debt on the liquidation and one that would rank *pari passu* with other unsecured creditors.

81. This is apparent too from the fact that as under the statutory scheme a person or body may not commence proceedings against a company without leave of the court.

Leave of the court to commence proceedings

82. The power of the High Court to give directions in the course of a liquidation and the obligation of a party to seek the sanction of the High Court before commencing proceedings mean that the final legal and practical effects of the making of an order in proceedings against a company in liquidation are subject to the supervisory and directory powers of the High Court. The order of Barrett J. made this clear.

83. The rational for requiring leave might usefully be examined. James L.J., in *In re David Lloyd*, at p. 344, explained the rational as follows:

> "These sections in the Companies Act, and the corresponding legislation with regard to bankrupts, enabling the Court to interfere with actions, were intended, not for the purpose of harassing, or impeding, or injuring third persons, but for the purpose of preserving the limited assets of the company or bankrupt in the best way for distribution among all the persons who have claims upon them. There being only a small fund or a limited fund to be divided among a great number of persons, it would be monstrous that one or more of them should be harassing the company with actions and incurring costs which would increase the claims against the company and diminish the assets which ought to be divided among all the creditors."

84. The preservation of the assets by the interposition of a requirement for court sanction before proceedings are commenced is intended to further and protect the distribution of the assets of a company in accordance with law. It means that the High Court has ultimate supervisory power over the enforcement of the judgment of a court in an action which has been sanctioned. The High Court must respect the established statutory scheme of priorities.

Liquidator powers limited

85. Furthermore, and if another argument is required to deal with the issue, it seems to me that, having regard to the established proposition of law that a liquidator may not continue the business of the company other than when this is "necessary" for the beneficial winding-up of a company in liquidation, the liquidator's powers to engage contracts for these works of construction must be limited.

The statutory "trust" is relevant

86. Further, the effect of a liquidation on the title of a company to its assets has been considered above, and as a matter of law the Companies do not have control over their assets and bank accounts, and accordingly, may not direct the expenditure required to perform the remedial orders.

Not retrospective regarding orders that direct expenditure of monies

87. Finally, the MUD Act creates a machinery by which certain existing laws may be enforced. Section 24 creates a form of statutory injunction which may or may not enlarge the current common law powers or the powers of the courts of chancery, but an argument that an order under the MUD Act could give a form of a preferential treatment in respect of those obligations, or permit the enforcement of the existing rights of an owners' management company of a wholly different nature than that which existed before the coming into operation of the MUD Act would offend the principle against retrospectivity.

The first three questions

88. Therefore, I consider that the first three questions raised in the present case must be answered as follows:

    (1) the MUD Act has retrospective effect to some extent, in that it creates a statutory means of enforcing existing obligations and rights. It does not of itself impose an obligation on the liquidator to take positive steps to carry out works of construction and development;

    (2) the obligations to complete a development in accordance with planning permission and under the Building Regulations is enforceable as a matter of statute by virtue of s. 24 of the MUD Act, but like any action in specific performance it may be one which is enforceable only as a claim in damages;

    (3) the mandatory orders granted by the Circuit Court do not displace the statutory scheme of priority set out in s. 621 of the Companies Act.

89. I turn now to consider the argument by Lee Towers that the costs award obtained against the Companies in the Circuit Court is to be treated as a cost and expense in the liquidation and therefore must be given priority.

The costs order

90. The owners' management company was awarded the costs of the Circuit Court proceedings against the Companies. The costs were taxed in the sum of €132,423.96 on 29 November 2017. Counsel for the owners' management company argues that those costs are to be treated as costs and expenses properly incurred in the liquidation of the Companies.

91. The liquidator took no active part in the Circuit Court after entering an appearance and the affidavit evidence of the liquidator is that he did not take any active step thereafter having taken legal advice, having consulted with the main creditor of the Companies, the Revenue Commissioners, and because the liquidator took the view that the proceedings

"were neither required for the orderly winding-up of the Companies" nor of benefit to the Companies.

92. The Revenue Commissioners were opposed to any participation in the proceedings, presumably because Revenue took the view that the costs of defending the proceedings could not be justified.

93. In those circumstances, therefore, a judgment in default of defence was granted against the Companies on 20 October 2016, and the assessment of damages was adjourned to the trial of the action before Judge O'Brien who determined the matter on 5 July 2017.

94. In *In re C.H.A. Ltd*. [1999] 1 IR 473, Laffoy J. held that a costs award against a company in liquidation is payable in full from the assets of the company in priority to the costs of winding-up. Those proceedings were for the recovery of rent of premises and the occupation of the company as tenant to the applicant and which the liquidator continued to occupy after the commencement of the winding-up.

95. Counsel for Lee Towers relies on the judgment of Buckley J. in *In re Wenborn & Co.* [1905] 1 Ch 413, which is in my view somewhat less absolute than the proposition for which the owners' management company contends. At p. 416, Buckley J. stated the rationale behind the rule as follows:

> "The cases cited to me are not perhaps easily reconcilable, but the principle which seems to underlie all of them is that when there is a winding-up of a company—whether the liquidation be compulsory or voluntary—all claims of creditors ought *prima facie* to be dealt with in the winding-up in accordance with the rules applicable to the distribution of the assets, and that costs ought also to be dealt with in like manner; but that if an action is pending to which the company is a party, then, if the company which is in liquidation acting by its liquidator determines to prosecute or defend the proceedings for the estate, the estate must be treated as the party litigant, and must in case of failure pay the costs in full. In other words, the other creditors, for whose benefit the action is defended, must in such case bear the costs."

96. In her judgment in *In re C.H.A.*, Laffoy J. noted that McCarthy J., giving the judgment of the Supreme Court in *Comhlucht Páipéar Ríomhaireachta Teo. v. Údarás na Gaeltacha* [1990] 1 IR 320, had quoted with approval a passage from *Halsbury's Laws of England* (Vol. 7(2), 4th ed.), at para. 1803, that costs of the successful defence of an action brought by a company in liquidation or by its liquidator are payable in priority to the costs of the winding-up. McCarthy J. had explained the rational as follows:

> "As a simple proposition, it would seem supported in principle. It would be a great injustice if a company were free, after liquidation, to maintain an action for the benefit of the general body of creditors and, if unsuccessful, successfully contend that the costs of the successful litigant against the company should only rank pari passu with the claims of the creditors", at p. 331.

97. In *In re C.H.A*., Laffoy J. considered that no distinction could be drawn between the costs of a successful plaintiff who, with leave of the court, commenced an action against a company in liquidation, and the costs of a successful defendant sued by a company in liquidation and noted that the quotation from *Halsbury's Laws of England* referred to in the judgment of McCarthy J. in *Comhlucht Paipear Riomhaireachta v. Udaras na Gaeltachta* made this clear.

98. In the light of those authorities, Laffoy J. was satisfied that the claimant was entitled to be paid in full the taxed costs of the Circuit Court proceedings in priority to all other claims in the liquidation.

99. The question I must determine is whether the principle applies also where a liquidator makes a determination not to defend proceedings brought against a company in liquidation, having regard to the assertion of the liquidator that he did not consider it prudent to defend the action on behalf of the body of creditors and the costs, therefore, are argued not to be treated as having been incurred for the benefit of the winding-up.

100. Counsel for Lee Towers argues that the judgment of Laffoy J. in *In re C.H.A*. is not to be distinguished on the grounds argued by the liquidator. He argues that the liquidator did "participate" in the Circuit Court proceedings by entering an appearance and by not defending a motion for judgment but not consenting to judgment.

101. The liquidator argues that the judgment of Laffoy J. can be distinguished in that the company chose not to defend the proceedings for the benefit of the creditors, and that the liquidator advisedly took no step in the proceedings, and that the judgment of Laffoy J. is not a finding that a company becomes liable to pay the costs of a plaintiff who obtains judgment in default of defence.

102. The point appears to be free of authority, but counsel for the liquidator relies on the practice explained by Finlay Geoghegan J. in *In re MJBCJ Ltd. (In Liquidation)* [2013] IEHC 256, [2013] 1 IR 407, where the liquidator did not appear on an application for sanction to commence proceedings seeking damages for personal injuries. The liquidator had informed the solicitors for the intended plaintiff that it was taking a neutral stance and did not propose incurring the expense of appearing at the application for sanction to commence the proceedings or indeed the litigation itself.

103. The rational which underlies the judgment of the Supreme Court in *Comhlucht Paipear Riomhaireachta v. Udaras na Gaeltachta* and the judgment of Buckley J. in *In re Wenborn* is that it would be unfair if a liquidator adopted proceedings in anticipation of achieving a benefit for the estate of the company in liquidation if a company who fails is not liable for the costs.

104. That rationale cannot have application in a case where a liquidator determines not to take part in the litigation at all and, as here, where the liquidator was clear that the litigation did not or could not benefit the Companies, as the opposite purpose or benefit was sought

to be achieved, *i.e*. the preservation of the assets and the avoidance of unnecessary expenditure on litigation which could not be beneficial to the estate.

105. Accordingly, I consider that the authority of *Comhlucht Paipear Riomhaireachta v. Udaras na Gaeltachta* does not support the contention that the granting of sanction to commence proceedings against a company will always result in priority being given to an award of costs against the company to a successful plaintiff. Whether those costs have priority must depend on whether the litigation could have benefited the company and was therefore embarked upon, or defended as the case may be, with that in mind.

106. But counsel for Lee Towers contends also that the liquidator did in fact participate in the Circuit Court proceedings.

The conduct of the Circuit court litigation

107. It is argued by Lee Towers that, by virtue of the provisions of O. 15, r. 1 of the Circuit Court Rules, the entry of an appearance indicated an intention to defend. Order 15, r. 1 provides as follows:

> "If a defendant intends to defend a Civil Bill or other proceeding, he shall enter an appearance in the Office in the prescribed form […]."

108. I do not consider that the entering of an appearance of itself indicates an obligation to defend. It is a necessary perquisite to defending an action, the other step being the service of the defence, but a party who enters an appearance is not thereby obliged to continue the action.

109. The plaintiff argues that, by entering an appearance but not thereafter conceding the entitlement of the plaintiff to the reliefs sought, the Companies placed an unnecessary burden on the plaintiff which had then to establish its claim and met the necessary proofs, including instructing a consulting engineer and fire safety consultant to prepare reports, and an engineer to map the relevant areas to be assured. It is argued, therefore, that the Companies, having failed to perform the obligations in the development scheme agreements or under the MUD Act, left the owners' management company in a position of having to fully establish its claim in the Circuit Court.

110. Notwithstanding my general view explained above that the costs of a successful plaintiff are not always to be treated as priority costs in the liquidation, it seems to me, that the failure of the liquidator to identify at an earlier stage that the Companies did not resist the application for specific performance of the Management Company Agreement is a cost to which the principles apply. It was for the benefit of the Companies to conclude the Management Company Agreement and to divest itself of the legal title to the ultimate beneficial owner thereof. That obligation pre-existed the liquidation and the assets of the Companies were fixed with that obligation which required at some point in time to be performed.

111. While the correspondence does suggest that the solicitors for the liquidator were prepared to give the assurance of the common areas and of the reversions, it appears that the title

deeds had been mislaid or could not be located by the financial institutions with which the Companies had conducted business before the liquidation. |The last letter in the chain of correspondence of 20 May 2014 threatened that proceedings would issue arising from the failure to complete the assurances and because of a fear that the action might become statute barred.

112. The solicitors for the owners' management company cannot be faulted for bringing the proceedings in these circumstances, and whilst the liquidator and his legal advisors bear no personal blame for the delay and the loss or misplacement of the title deeds, it was in my view necessary to commence the action.

113. Therefore, I consider that part of the costs of the prosecution of the Circuit Court proceedings are to be treated as being entitled to priority, as must portion of the costs of the application for leave to bring the proceedings.

The Mareva and attachment applications

114. The owners' management company brought an application for a Mareva injunction on 26 July 2017 and Judge O'Brien granted a Mareva injunction restraining the Companies and Mr. Dillon from in any way disposing of, distributing, reducing, transferring, charging, diminishing the value thereof, or otherwise dealing with all or any asset or monies concerning the liquidation of the Companies to a sum of €120,000, the monies representing the proceeds of sale of real property sold to the notice party.

115. Counsel for the liquidator argues that the Mareva injunction was wrongly sought and that the sanction of the High Court was required as the order of Barrett J. of 17 November 2014 provided that execution of any judgment that might be obtained by the owners' management company in the proceedings which were sanctioned was to be stayed pending further order of the Court.

116. Whether an application for a Mareva injunction is "execution" for that purpose is answered by the dicta of Denning L.J. in *In re Overseas Aviation Engineering (GB) Ltd.* [1963] Ch 24, at p. 39, where he stated that execution means "the process for enforcing or giving effect to the judgment of the court", and I consider that the order of Barrett J., in its simple terms, required that any enforcement action against the Companies would not be commenced without further order.

117. The motion for attachment and committal must similarly be characterised. The attachment of the liquidator does not seem to me to be correct having regard to the fact that s. 53 of the Companies Act, which allows *inter alia* the attachment of directors or other officers of the company, does not permit the attachment of a liquidator who is not "an officer of the company", and s. 2 of the Companies Act does not include the liquidator in the list of persons who may be so characterised.

118. Further, having regard to the approach I have taken in the present judgment to the nature and effect of the order made under s. 24 of the MUD Act, sequestration or attachment would not be appropriate.

The last two questions

119. I therefore answer the last two questions raised as follows:

(4) the order for costs made by the Circuit Court is not to be treated as a cost, charge, and expense in the liquidation within the meaning of s. 617 of the Companies Act, save with respect to that part of the costs as may reasonably be ascertained to be attributable to the costs of prosecuting the claim for specific performance of the Management Company Agreement for the transfer of the common areas and the reversions;

(5) the application for a Mareva injunction and the application for attachment and committal were not an appropriate means by which the Circuit Court order was to be enforced.

120. The Mareva injunction is to be vacated.