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ARTICLE

First Successful Creditor Application for Appointment of an Inspector to an Irish Corporate Sets Precedent for Future Appointments

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Synopsis

The recent success of a creditor to have an inspector appointed to an Irish company sets a precedent for possible future appointments. The two judgments delivered by the Irish High Court in this case review in detail both the appointment considerations and how to deal with the aftermath of the inspector's report. For creditors of insolvent Irish corporates, the inspector appointment route offers an alternative avenue to the appointment of a liquidator.

Within Part 13 of the Companies Act 2014 (the 'Act') are provisions for the appointment of an inspector to investigate into the affairs of a company.

The Act provides that such an appointment can be made on the application of the Corporate Enforcement Authority (the 'CEA') (Section 748 of the Act) and other parties, including the company, certain members, a director or a creditor (Section 747 of the Act). All applications to date have been made and inspectors appointed pursuant to Section 748 which provides for an application by the CEA.

However, the recent case of Re WFS Forestry Ireland Limited[1] (the 'Company') is the first recorded application by a creditor in the Irish High Court pursuant to Section 747 of the Act.

This may be a seminal moment in the jurisprudence on appointment of inspectors in Ireland and could become a more frequently adopted route for creditors to have an inspector appointed to go under the hood of a company. This may become of most relevance where a creditor does not have the financial means to petition to have a liquidator appointed to the company. As we will see in this article, it may also have consequences for the public purse strings as the State is liable for the fees of the inspector at the first instance.

WFS Forestry Ireland Limited

The Company was understood to be in the business of growing and supplying Christmas trees and sought retail investments to fund the business. The applicant was a creditor of the Company. The applicant had invested €157,360 with the Company. The applicant and at least seventeen others claimed that investments they made in the Company, structured variously as loans and other advances, were not repaid when due.

It was alleged that the Company was engaged in a fraudulent investment scheme in fictitious forestry projects with the purpose of defrauding creditors. The applicant alleged that the company claimed to fund its operations by raising funds from the public in the form of loans and through what were described as 'crop production agreements' while offering rates of return in excess of 10%.

The applicant stated that after the Company failed to repay the indebtedness, he became suspicious of the Company and took steps to enquire about the existence or otherwise of the trees which the Company had contracted to grow and manage on his behalf which led to conflicting evidence on affidavit.

The applicant also brought the court's attention to the last set of financial statements filed by the Company which were made up to 31 March 2019. The balance sheet showed current assets comprising debtors in the amount of €970,099, and cash at bank and in hand of €9,269, making a total of €979,268. Creditors were stated to amount in total to €2,081,631 resulting in a net deficit on the balance sheet of €1,102,263. That estimated deficit assumed full recovery of the debtors yet clearly showed that the Company was balance sheet insolvent.

There was further evidence of breaches of the following provisions of the Act:

(a) Section 137 regarding the requirement for a bond in the absence of a resident director;

(b) Section 239, prohibition on loans to connected parties; and

(c) Section 343, the obligation to file annual returns and financial statements at the Company Registration Office.

Notes

1 [2022] IEHC 512.

At the initial mention of the case, Quinn J. directed that notice of the application be given to the Minister for Justice and Equality (the 'Minister'). This was done to satisfy Section 762 of the Act which provides that expenses of an investigation by an inspector appointed under Section 747 of the Act must be defrayed in the first instance by the Minister (i.e. the State). Accordingly, the Minister has a direct, if involuntary, interest in the outcome of the application.

Quinn J. had no hesitation in finding that there was *prima facie* evidence of wrongdoing, unlawfulness or other irregularity. The allegations were vigorously denied by the Company. Nonetheless Quinn J. was satisfied that the threshold was met and that the appointment of an inspector would serve the purpose intended by Part 13 of the Act, namely that of uncovering facts not already known.

Quinn J. also took into account the additional factors when determining whether to appoint an inspector such as public interest, proportionality, other possible investigations, insolvency and the adequacy of the powers of an inspector versus a liquidator.

The CEA and the Minister's considerations

Neither the CEA nor the Minister opposed the application. However, the essence of the CEA's submissions were that the Company was insolvent and there was no prospect of survival and therefore an order for the winding up of the Company should be made. The CEA was also clear in noting that a winding up was inevitable and it would be inappropriate to waste resources on an investigation pursuant to Section 747. This point was made with understandable force as the costs of such an investigation must first be borne by the Minister by virtue of Section 762 and thus be taken from the public purse. The CEA also submitted that a liquidator would also have the power of investigation should they be appointed.

The Minister supported the CEA's submissions and added that the Section 747 application would be more suitable for solvent companies and should not be used as a substitute for inspections that should be carried out by a liquidator. The Minister noted that the complaints should be more appropriately made to law enforcement agencies such as an Garda Síochána. Interestingly, the Minister submitted that the appointment of an inspector in this case would open a potential floodgate, in that aggrieved creditors of companies such as the applicant may prefer to seek the appointment of an inspector, where the cost would fall in the first instance on the Minister, instead of petitioning for a winding up or pursuing other traditional routes.

Quinn J nonetheless found that the appointment of an inspector who will have the functions and powers conferred by Part 13, Chapter 2 of the Act will serve the purpose intended by the Act, namely to enable facts not already known to be found and proceeded to give the following reasons for his judgment.

Quinn J. did not find that the applicant was acting vexatiously or frivolously or, more importantly, for an improper motive, even where he has openly acknowledged that his decision not to petition for a winding up is informed by unwillingness or inability to bear the cost associated with liquidation. Further, no other creditor had presented a petition for liquidation and noted that the applicant was under no obligation to bring a petition for liquidation. This application was also not devoid of a public or multiparty dimension even if this application were motivated initially by a desire to secure the return of the applicant's money. At least 18 investors were affected and the evidence was that they have made investments exceeding €1.4 million, of which the applicant's investment is only a small portion.

Quinn J also noted that the Oireachtas chose to enact the legislation to include the provision at Section 762 to the effect that the Minister should, in the first instance, discharge the costs. The argument as to the potential floodgate which would open whereby such applications would become commonplace instead of petitions for a winding up was deemed speculative by Quinn J. If it is shown that an application is vexatious or frivolous or an abuse of the process then the court would exercise its discretion to refuse such an application. This provision is also not an *'open chequebook'* and an inspector once appointed should engage immediately with the Minister as to the expected quantum of expenses.

In light of the above, Quinn J. was happy to appoint the inspector pursuant to Section 747 of the Act and ordered that he enquire into and report on the affairs of the Company.

The Inspector subsequently reported to the court that he had ascertained that the Company's *raison d'etre* was to defraud investors. He found that the Company received at least €7.1 million from investors and was unable to repay these amounts. He found that crops of Christmas trees referred to in the Company's communications with investors either did not exist or existed on lands in which the Company had no interest.

Notwithstanding that the legislation provided for the appointment of a liquidator following the consideration of the inspector's report by a motion of the Court itself, any adversely affected person or the CEA, Quinn J. concluded that no order should be made for the winding up of the Company at this time as no person was willing to act as liquidator. He was of the view that while the Act provides for a company to be placed into liquidation without a liquidator appointed that was not appropriate in the present case. This does not preclude a future petition.

Conclusion

Given the ability of an inspector to review the affairs of a company and the obvious benefits that flow from such an inspection for a creditor, it will be interesting to see if similar appointments become more common place before the Irish High Court.[2]

Any creditor application to have an inspector appointed is likely to draw considerable scrutiny from the courts and the Minister given the fact that the State is responsible in the first instance for the expenses of the appointed inspector.

Notes

2 For recent consideration of the law of Cayman Islands on the appointment of inspectors, see B. Gowrie, L. Petith, S. Sheridan and C. Stanley, 'Taking a Closer Look at the Law Relating to the Appointment of Inspectors', (2023) *International Corporate Rescue* 20(1) 18-20.

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