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Interplay between the MUD Act and insolvent development companies

[Lee Towers Management Company Limited v Lance Investments Limited \(In Liquidation\) & Ors \[2018\] IEHC 444](#)

A recent High Court case, **Lee Towers Management Company Limited v Lance Investments Limited (In Liquidation) & Ors** serves as a helpful reminder of the extensive statutory rights now available to both unit owners and owners' management companies under the [Multi-Unit Developments Act 2011](#) (the "MUD Act") to help with the running of multi-unit developments. It also highlights limitations in enforcing such rights against insolvent companies. In this case, the High Court rejected an argument by an owners' management company that the liquidator of an insolvent development company could be compelled to carry out remedial works to the common areas of a multi-unit development ahead of paying the preferential and other creditors of the company.

Background

Lance Investments Limited and Lance Holmes Limited (the "**Companies**") developed the apartment complex known as Lee Towers in Cork in and around 2001 and established Lee Towers Management Company Limited (the "**OMC**") to take title to (and responsibility for) the common areas of the apartment complex. The title to the common areas was never transferred to the OMC and the Companies were wound up by order of the High Court in May 2010 on foot of a petition of the Revenue Commissioners.

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Various defects subsequently came to light in the apartment complex and the OMC obtained leave of the High Court in 2014 to issue Circuit Court proceedings against the Companies (In Liquidation) under s. 24 of the MUD Act to, amongst other things, seek to compel the Companies to remedy the defects.

Circuit Court decision

In July 2017, the Circuit Court made the remedial orders requested under s.24(5) of the MUD Act and ordered the Companies to:

1. carry out various remedial works to the common areas of the apartment complex to comply with planning permission and building control; and
2. reimburse monies already spent by the OMC on repair of the common areas.

The Circuit Court also ordered the Companies to transfer the common areas of the apartment complex to the OMC.

As the Companies were grossly insolvent, the liquidator of the Companies did not comply with the Circuit Court's orders.

High Court decision

In seeking to enforce the remedial orders of the Circuit Court, the OMC argued that the making of an order under s. 24 of the MUD Act displaces the statutory scheme of payments on liquidation and provides the OMC with a right to enforce the obligations in priority to other creditors because the remedial orders were mandatory and must be performed.

The High Court did not accept this argument. It examined general legal principles applicable to the status of a company's assets after a winding up order has been made, a liquidator's obligations at law and the provisions of the MUD Act and ultimately determined that:

“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.”

The High Court was also asked to consider if the MUD Act had retrospective effect given that the Lee Towers development was completed long before the MUD Act came into force in 2011. The OMC argued that any other interpretation was inappropriate as it would mean that the MUD Act would only apply to developments commenced after 2011. The High Court determined that the

MUD Act has retrospective effect to some extent in that it creates a statutory means of enforcing existing obligations and rights.

With regard to the obligation to transfer the common areas of the apartment complex to the OMC, the High Court held that this obligation was specifically enforceable against the OMC notwithstanding the insolvency of the Companies. It noted that the OMC's right to take the title was a proprietary right and attached to the title of the Companies in the relevant lands prior to such insolvency.

The High Court did not determine who would bear the costs of transferring the title to the common areas, particularly in relation to mapping. Ms Justice Baker parked this pending hearing further arguments on the matter.

General comment

Although the OMC was ultimately unsuccessful in seeking to have the liquidator carry out the remedial works, this case still highlights the value of s.24 of the MUD Act generally. As the High Court noted:

“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.”

In addition to issues of disrepair and non-compliance with planning and building control legislation, S.24 of the MUD Act also provides a statutory remedy (via the Circuit Court) for all manner of disputes which might affect multi-unit developments including in relation to service charges, the management of an owners' management company, voting rights, enforcement of lease covenants and the form of the legal documentation for a scheme.

As Circuit Court judgments are not recorded, it is not possible to establish the extent to which the provisions of s.24 of the MUD Act have been invoked since 2011 to help resolve disputes arising in relation to multi-unit developments. It is possible that these powers are being underused at present, however a key takeaway is that there is a lot that can be done under the MUD Act when disputes in relation to multi – unit developments arise.

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