THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 145

Appeal No. 2017/368

Whelan J
Baker J.
Costello J.

IN THE MATTER OF THE COMPANIES ACT 1963-2009

AND IN THE MATTER OF ETEAMS (INTERNATIONAL) LIMITED (IN VOLUNTARY LIQUIDATION)

AND IN THE MATTER OF SECTION 280 OF THE COMPANIES ACT, 1963

BETWEEN

BY ORDER THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

APPLICANT/

RESPONDENT

-AND-

BY ORDER ETEAMS (INTERNATIONAL) LIMITED (IN VOLUNTARY LIQUIDATION)

RESPONDENT/

APPELLANT

JUDGMENT delivered on the 14th day of May 2019 by Ms. Justice Baker

1. This is an appeal of the order and judgment of Keane J. made on 15 June 2017, *Bank of Ireland v. Eteams International Ltd* [2017] IEHC 393, in which he determined the proper characterisation of a written agreement ("the Agreement") made on 5 July 2007 between Eteams (International) Ltd ("the Company") and Bank of Ireland ("the Bank"). The question for consideration by the High Court and by this Court on appeal is whether the Agreement constitutes a sale by the Company of its debts to the Bank or whether the Agreement is properly to be characterised as a charge over the Company's book debts which would require to be registered under s. 99 of the Companies Act 1963, as amended ("the 1963 Act").

2. Anthony Fitzpatrick was appointed liquidator of the Company at a creditors' meeting on 27 March 2013, and as the Agreement was not registered as a charge under s. 99 of the 1963 Act, it is void against the liquidator if registration was required.

3. The question, as Keane J. indicated, raised issues of fact and law and no Irish authority directly on point was identified. The question is of some importance for creditors generally as a true debt factoring agreement does not carry a requirement of registration, but is not one the existence of which is readily ascertainable by other creditors of a company, and an agreement for the assignment of debt, or a factoring agreement, may, in its effect, obscure the true worth of a limited liability company.

4. There has been some discussion in recent academic commentary regarding the correct approach to the characterisation of a debt purchase agreement, and whether policy reasons might suggest that a degree of scrutiny by the courts as to the characterisation of such an agreement is warranted.

5. Gough, in his leading text *Company Charges* (2nd ed., Butterworths, 1996) para. 21.28, explains the matter as follows:

> "It must be counter-productive as a policy matter to continue to encourage artificial forms of finance and security to the prejudice of both secured and unsecured creditors by conferring on title security techniques the privilege of immunity from public disclosure through registration in the charges register. Stimulation of finance and security techniques involving the transfer of a company's trading stock and its normal trading function to some off balance sheet method of operation must be prejudicial to a fair, open and efficient system of secured financing."

Background facts

6. The Agreement was executed by the Company and the Bank and bears the date 5 July 2007. It is expressly described on the cover page as a "debt purchase agreement". The Agreement was for the sale by the Company of its debts in Ireland and otherwise to a maximum sum of €200,000, expressly for the initial period of twelve months. The Agreement incorporated by reference the general or

standard terms and conditions (Edition A/2005) (the "General Conditions") and the cover page whereof was signed for identification by an authorised signatory on behalf of the Company. The Agreement provided, in broad terms, for the advance by the Bank of 60% of relevant sales invoices issued by the Company and monies due on foot of invoices raised by the Company were lodged directly to a nominated bank account in the Bank.

7. While the amount owed by the Company to the Bank is not a matter material to this judgment, for completeness, I note that the claim of the Bank is that it is entitled to retain the sum of €82,339.50 which the Bank says represents debts already collected and lodged in the nominated account.

8. The application before Keane J. commenced by notice of motion grounded on the affidavit of Mr. Fitzpatrick sworn on 18 February 2015. The application was formulated, to use Keane J.'s words, in the guise of an application for directions that the monies were either lent to the Company or constituted a security. A replying affidavit of Michael Martin on behalf of the Bank, sworn on 12 March 2015 contested that claim and argued that the Agreement was in substance and form a debt purchase. Costello J. made an order on 8 June 2015 permitting the Bank to take over carriage of the proceedings and to be named as applicant and that the Company, therefore, be named as respondent to the motion.

9. The essential difference between the parties is that the Company argues that, as a matter of the true construction of the Agreement and in the light of the authorities on which counsel relies, the ownership of the debts did not transfer to the Bank. Counsel for the Bank argues that the language of the Agreement is clear and that the correct conclusion from the express language of the Agreement is that the debts did pass to the Bank and that, in form and substance, the Agreement is not to be characterised as a loan or security.

The High Court judgment

10. Keane J. delivered a considered judgment in which he expressed himself satisfied in the light of the authorities that the Agreement did effect a valid purchase of the debts of the Company by the Bank and did not constitute a registrable charge under s. 99 of the 1963 Act. He made an ancillary order that the liquidator pay to the Bank the proceeds of all the debts which he or the Company had collected and received and furnish such information that the Bank required in connection with the collection of the debts.

11. In his judgment, Keane J. analysed the historical jurisprudence and the parties to the appeal accept that his analysis is correct, and that no other authorities require to be considered. Counsel for the Company argues that the trial judge fell into error in the application to the facts of the test he identified, and in particular that he failed to have proper regard to the argument advanced by the Company that the risks associated with the book debts did not pass, or did not pass absolutely, to the Bank with the arguable consequence that, as a matter of substance, the Agreement created no more than a security interest under which title did not rest in the Bank. Some reliance is placed on the jurisprudence concerning retention of title clauses in commercial contracts for sale.

12. In a separate ground of appeal, the Company argues that the repeal of the 1963 Act by the Companies Act 2014 means that, as a matter of law, the proceedings were not properly constituted.

The grounds of appeal

13. The grounds of appeal, in summary, are:

> (a) that Keane J. failed adequately or properly to consider whether "on its own terms" the Agreement was in fact and in law a charge upon the book debts of the Company, and to consider whether the indicia of a registerable charge were contained therein;
>
> (b) that Keane J. erred in law and in fact in coming to the conclusion that the Agreement did not create a registerable charge over the book debts of the Company; and
>
> (c) that Keane J. erred in his construction, interpretation, and application of the case law on which he relied.

14. The respondent denies that there is any error whether in law or fact and that the judgment of Keane J. is to be upheld.

Express terms of the Agreement

15. It is convenient to first set out the express terms and special conditions (the "Special Conditions") of the Agreement, which bears in capital letters the title: "Debt Purchase Agreement".

16. A number of provisions of the Special Conditions identify the purpose and effect of the Agreement. Clause 1.1 of the Special Conditions recites an agreement on the part of the Bank to purchase the debts, but more importantly goes on to provide that from the date of the Agreement the Bank is the owner of all the debts. Under the heading "Summary" there is an express recital of the intention of the parties as follows:

> "On the terms and conditions of this Agreement we will purchase your Debts which exist on the Commencement Date or, which, after such date, become owing to you by your Debtors."

17. The words which bear capital letters are defined in the General Conditions.

18. Clause 1.1 of the Special Conditions then goes on to make an express declaration of the effect and intention of the Agreement as follows:

> "[…] we are the owner of all Debts to which this Agreement applies. Accordingly all Remittances received by you in payment of Debts must promptly be delivered to us in accordance with condition 5.5."

19. Clause 1.2 of the Special Conditions then goes on to provide that the Agreement is comprised, *inter alia*, of the "standard terms and conditions for the purchase of debt (Edition A/2005)", the General Conditions, and of other identified documents not relevant to the matters at issue in the present appeal. Clause 1.2 of the Special Conditions also contains a provision that, in the case of conflict or inconsistency, the Special Conditions of the Agreement would prevail over the General Conditions.

20. Other Special Conditions also express the purpose and intent of the Agreement. Clause 4.1 provides that:

> "Each such Debt in existence on the Commencement Date shall vest in us [the Bank] on that date. Each Debt coming into existence after the Commencement Date shall vest in us [the Bank] at the moment that such Debt is created […]".

21. Clause 5.1 refers to the Bank's "title to" the debts.

22. The General Conditions also refer in a number of places to the Bank's "title": Clause 1.2 of the General Conditions refers to "our ownership of the Debt" by reference to the Bank; Clause 1.3 of the General Conditions refers to "a debt vested in us", and that expression is repeated in Clause 2.1 of the General Conditions; Clause 5.4 of the General Conditions refers to "our [the Bank's] ownership of Debts".

23. Clause 11.5.3 of the General Conditions provides that the Bank will continue to own the debts notwithstanding termination.

24. The Agreement provides not merely that the parties agree that vesting is to occur on the signing of the Agreement but also that the Bank had thereafter pursuant to Clause 5.1 of the General Conditions:

> "[…] the sole right to enforce payment of and collect any Debts which vest in us [the Bank] under this Agreement."

25. Clause 5.1 of the General Conditions also confers upon the Bank "the sole right to institute, defend or compromise legal proceedings" in respect of the debts either in the Bank's name or in the name of the Company.

26. Clause 5.5 of the General Conditions is also consistent with a sale agreement and by this clause all remittances received by the Company are to be "promptly" delivered to the Bank or to an account specified by it. This clause enables the judgment of the Court of Appeal in *Unitherm Heating Systems Ltd v. Wallace* [2015] IECA 191 to be readily distinguished as there, the agreement provided for a sixty-day credit period during which the company could use the proceeds of sale on its own account.

27. Clause 7.1.4 of the General Conditions contains warranties by the Company to the Bank and is consistent with the transfer of ownership of the debts. By these the Company warranted that it has:

> "the absolute right to transfer the Debt to us [the Bank]" and that "our [the Bank's] ownership of the Debt will not violate any laws or agreement affecting you [the Company]".

The argument of the Bank
28. The Bank argues that Clause 1.1 of the Special Conditions of the Agreement by which the parties identified their purpose and intent is clear in its term and that ownership of the relevant debt did transfer by the Agreement and that the express terms admit of no other construction. Counsel for the Company accepts that Clause 1.1 of the Special Conditions of the Agreement does, in its terms, point to a conclusion that the Agreement contemplated a sale of the debts and effected such sale and transfer of title. It is argued, however, that other provisions of the Agreement are so contingent, so conditional, and so "random", that, on a correct construction, the Agreement is not in substance a sale, but rather a security interest or charge.

29. I will now examine the provisions on which the Company relies in support of that argument.

Fail safe clause
30. Counsel for the Company relies on Clause 1.4 of the General Conditions, described as a "fail safe clause":

> "You agree to hold in trust for us and separately from your own property any Debt or its Related Rights where ownership thereof fails to pass to us under this Agreement."

31. It is argued that the inclusion of such a provision amounts to an implied acknowledgment on the part of the Bank that the Agreement may not be effective to transfer the debts. That argument, in my view, is not in accordance with reason or logic, and the inclusion of a condition to deal with a possible defect in title is a standard and prudent clause commonly found in agreements for sale and does not either in its express terms or by implication amount to an acknowledgment that title has not transferred. Indeed, it seems to me that the agreement on the part of the Company to hold the relevant book debts on trust for the Bank strengthens the argument that the Agreement was intended to effect a transfer of the relevant book debts to the Bank, and the declaration of trust has the effect of constituting the Bank the beneficial owner of the debts and has the consequence that the Company thenceforth holds only a bare legal title.

32. Keane J. held at para. 57 of his judgment that Clause 1.4 of the General Conditions is a contingent clause and that "it only becomes operative where ownership of the debts somehow fails to pass to the bank under the principle terms of the agreement" and he was correct in this for the reasons I have stated.

Recourse/passing of risk
33. The second argument upon which counsel for the Company relies relates to the provisions of Clause 9 of the General Conditions entitled "Recourse" by which the Bank is agreed to have recourse:

> "[…] in respect of every Disapproved Debt and every Debt which remains Outstanding at the end of the maximum credit period referred to in the Particulars."

34. The balance of Clause 9 of the General Conditions provides the means by which the right of recourse is to be exercised. The "Disapproved Debt" to which this General Condition applies is defined as meaning "a Debt, which at our sole discretion we so designate" and "Recourse" is separately defined as meaning:

> "[…] our [the Bank's] right at our discretion to require you [the Company] to repurchase an Outstanding Debt and its Related Rights from us at its Recourse Price".

35. The definition of "Recourse Price" is not contentious and is defined as being "the price specified by us [the Bank] at which you [the Company] must repurchase a Debt from us".

36. Counsel for the Company argues that because an "Outstanding Debt" is one that may without reason and in its absolute discretion be so designated or nominated by the Bank, the discretion, contingency, and conditionality in the recourse provisions have the effect that the Bank, in substance, has no more than a security interest.

Mitigation or security against risk
37. The primary argument advanced by counsel for the Company is that the recourse and termination provisions of the Agreement

have the practical effect that the Bank has provided such a degree of security or mitigation against the risk of default that the Bank cannot be said in any real or meaningful way to own the assets. It is argued that risk is inherent in ownership and, for example, that an asset will be less valuable than the owner hopes or indeed that on the purchase of an asset an owner may pay far more than the true value of the asset. It is argued, in those circumstances, that because ownership in its true sense imports the entitlement to both the advantages and disadvantages of title, a mitigation or security against risk imports the absence of title.

38. In that context, therefore, it is necessary to examine the definition of "Outstanding Debt" in the General Conditions:

> "[A] Notified Debt which is owned by us and in respect of which the Notified Amount has not been paid to us in full (and for the purposes of this definition a debt shall be treated as being undischarged until its Collection Date, and the words "outstanding" is to be construed accordingly)."
>
> "Notified Debt" is defined as "the amount of a Debt as set out in its Notification". "Notification" means "your [the Company] advising us [the Bank] of the existence of a Debt in accordance with the terms of this Agreement".

39. Counsel for the Company argues that the power vested in the Bank in its discretion without reference to the quality, size, or terms of a particular debt to designate a debt as "outstanding", with no restraining or confining feature, whether qualitative or quantitative, means that the Bank is so fully shielded from any risk of default associated with the debts in the lifetime of the Agreement that it cannot be said to be in truth or in substance the owner of those debts.

40. Keane J. dealt with that argument at paras. 45 *et seq*. of his judgment and came to the conclusion at para. 49, having reviewed the judgment of Charleton J. in *Hagemeyer Ireland Plc v. The Revenue Commissioners* [2007] IEHC 49, [2007] 1 ILRM 521, that:

> "I can find no suggestion in those paragraphs, or anywhere else in the judgment, that the presence or absence of the passing of risk serves to distinguish sale and purchase agreements from loan and charge agreements."

41. He then usefully went on to express the view that the argument regarding risk would be "entirely inconsistent" with the jurisprudence, in particular the judgment of the Court of Appeal for England and Wales in *In re George Inglefield Ltd* [1933] Ch 1, the first in a long and authoritative line of judgments of the courts of England and Wales dealing with the question.

42. At para. 21, Keane J. quoted from the concurring judgment of Romer L.J. in *In re George Inglefield* as follows:

> "In a transaction of sale the vendor is not entitled to get back the subject-matter of the sale by returning to the purchaser the money that has passed between them. In the case of a mortgage or charge, the mortgagor is entitled, until he has been foreclosed, to get back the subject-matter of the mortgage or charge by returning to the mortgagee the money that has passed between them. The second essential difference is that if the mortgagee realizes the subject-matter of the mortgage for a sum more than sufficient to repay him, with interest and the costs, the money that has passed between him and the mortgagor he has to account to the mortgagor for the surplus. If the purchaser sells the subject-matter of the purchase, and realizes a profit, of course he has not got to account to the vendor for the profit. Thirdly, if the mortgagee realizes the mortgage property for a sum that is insufficient to repay him the money that he has paid to the mortgagor, together with interest and costs, then the mortgagee is entitled to recover from the mortgagor the balance of the money, either because there is a covenant by the mortgagor to repay the money advanced by the mortgagee, or because of the existence of the simple contract debt which is created by the mere fact of the advance having been made. If the purchaser were to resell the purchased property at a price which was insufficient to recoup him the money that he paid to the vendor, of course he would not be entitled to recover the balance from the vendor."

43. As Keane J. pointed out at para. 51 of his judgment, the contention that a failure to assume risk in itself transforms an agreement for sale into one of loan and security was rejected by Wilberforce L.J. in *Lloyds & Scottish Finance v. Cyril Lord Carpet Sa*les [1992] BCLC 609, at p 616:

> "One further point. In block discounting 'transactions', the purchaser is acquiring an asset (viz a book debt) which he did not create, as to the validity of which he has no knowledge, which he is not going to collect, and of any default in whose realisation he may be ignorant. He naturally requires a certain margin, or reserve, or as is sometimes said, security to ensure, so far as possible, that he will get what he has bargained for. But it is a fallacy (into which the appellants' argument falls) to argue from this towards a conclusion that the transaction as a whole is one of security or charge. There are many contracts, of sale, or for building work, or otherwise, where some security is required by one party that the other will fulfil his promise. But this does not alter the nature of the contract itself or turn it into a contract by way of charge. In the present case, the fact that the purchasers wanted guarantees, or security, or reserves to ensure that they received the whole of what they had bought, cannot convert a transaction of purchase into one of charge."

44. Keane J. then went on, at para. 54 of his judgment, to analyse the more recent decision of the Court of Appeal for England and Wales in *Welsh Development Agency v. Export Finance Co Ltd* [1992] BCLC 148 and he quoted from p. 161 of the judgment of Dillon L.J.:

> "[I]t is clear from *Re George Inglefield Ltd*, and the *Lloyds & Scottish* case, (a) that there may be a sale of book debts, and not a charge, even though the purchaser has recourse against the vendor to recover the shortfall if the debtor fails to pay the debt in full and (b) that there may be a sale of book debts, even though the purchaser may have to make adjustments and payments to the vendor after the full amounts of the debts have been got in from the debtors. As to the latter see especially the judgment of Lord Hanworth MR in *Re George Inglefield Ltd* [1933] Ch 1 at 20."

45. Keane J. described the argument that the ability of the Bank to designate a "Disapproved Debt" and "the absence of any meaningful transfer of risk to the bank" as "highly artificial" and held, correctly in my view, that such characterisation could not be reconciled with the authority of *Welsh Development Agency v. Export Finance Co Ltd*.

46. The argument of the Company both here and in the High Court relied on the judgment in the first instance of Browne-Wilkinson V.C. in *Welsh Development Agency v. Export Finance Co Ltd* [1991] BCLC 936, which was firmly rejected on appeal, as noted by Keane J. at para. 53 of his judgment. Dillon L.J., in his judgment on the appeal was clear that the fact that a purchaser of book debts may have recourse or, as he put it, "may have to make adjustments in payment to the vendor after the full amounts of the debts have been got in from the debtors", does not make the sale of a book debts, in substance, a charge.

47. I agree with the observations of Keane J. and I would make the additional point that Clause 9.3 of the General Conditions in its

express terms provides for the transfer *back* to the Company of the ownership of any debt following the exercise of the right of recourse. That provision too is inconsistent with the argument now made by the Company that title to the debt did not pass.

Recourse not a defining element
48. In the light of the authorities and the undoubtedly correct proposition that no one defining element favours a particular construction of a contract, counsel for the Company relies primarily on the argument that the recourse provisions of the Agreement are critical and favour the characterisation for which he contends.

49. The authorities do not bear out the proposition that a recourse provision in itself is a defining or particularly weighty element. This is clear from the *dicta* of Dillon L.J. in the *Welsh Development Agency v. Export Finance Co Ltd*, at p. 154:

> "It is now well-established that factoring or block discounting amounts to a sale of book debts, rather than a charge on book debts, even though under the relevant agreement the purchaser of the debts is given recourse against the vendor in the event of default in payment of the debt by the debtor."

50. In coming to that conclusion, Dillon L.J. was supported by the authorities all of which were considered in some detail by Keane J., starting with *In re George Inglefield* and, as he noted, those earlier authorities have an established and authoritative pedigree.

51. Keane J. was correct in his approach and his conclusions.

Termination
52. The third argument on which counsel for the Company relies are the express terms of Clause 11 of the General Conditions and Clause 2.2 of the Special Conditions relating to termination, which provided for the right on the part of the Bank to terminate the Agreement on the occurrence of an event of default.

53. Special Condition 2.2 of the Special Conditions makes the following provisions:

> "Either you or we may terminate this Agreement by giving written notice to the other of not less than six (6) months."

54. Express provision is also made in Clause 11.1 of the General Conditions for the cancellation of the agency created by Clause 5.2 of the General Conditions by which the Company is appointed as an "undisclosed agent for the purpose of administering the accounts of the Debtors and procuring payment of Debts." The balance of Clause 11 of the General Conditions makes provision for the respective obligations and rights of the parties on the cancellation of the agency or the termination of the Agreement.

55. Counsel relies in particular on clause 11.5.3 of the General Conditions, in the context of the argument as follows:

> "Upon the ending of this Agreement, for whatever reason: […] we shall continue to own all Debts until the Recourse Price of all Debts has been paid".

56. The first point to make in regard to this clause is that, in its express terms, it provides for the continuation of ownership, and is consistent only with the proposition that ownership or title has already passed. I do not agree with the argument of counsel for the Company that the provision for termination is inconsistent with the argument that the powers and obligations created on termination are consistent only with the creation of a charge. Indeed, it seems to me the opposite is the case, in that these clauses of the Agreement import an acknowledgment that title has vested.

Equity of redemption?
57. The Company makes no argument that the express terms of the Agreement confer upon the Company any right to redeem or, a right to require that the Bank would resell the debts to it on the happening of a specified event. It could be said, at a level of high principle, that the right to redeem is an element that, in many cases, can distinguish a charge or other security interest from an outright sale. Whilst the Company does not argue that the express terms of the Agreement do confer such an equity of redemption, it is useful to note the approach in the authorities which points to a view that the existence of an equity of redemption or other right to compel a resell is inconsistent with the existence of a charge.

58. In a passage applied by Murphy J. in *Carroll Group Distributors Ltd v. G. and J.F. Bourke Ltd (in Voluntary Liquidation*) [1990] 1 IR 481, at p. 485, Romer L.J. in *In re George Inglefield*, at p. 27, noted the following in his discussion of the essential differences between a mortgage or charge on the one hand and a transaction of sale on the other:

> "In the case of a mortgage or charge, the mortgagor is entitled, until he has been foreclosed, to get back the subject-matter of the mortgage or charge by returning to the mortgagee the money that has passed between them."

59. I would note that the argument from the equity of redemption is in no way supported by the express terms of the Agreement and the termination provision. They contain an entitlement to cancel the express agency created by the condition at Clause 5.2 of the General Conditions, and other rights of the Bank, expressly do not provide for an automatic vesting of the debts after an event of default and expressly provide the contrary proposition, at Clause 11.5.3 of the General Conditions, that all debts continue to be in the ownership of the Bank until the recourse price of all debts has been paid. The ending of the Agreement does not, therefore, contain any self-executing provisions, but rather provisions which enable the Bank to treat outstanding debts in a particular way and to seek recourse at its discretion.

60. Such clauses, in my view, do not disclose any feature akin to an equity of redemption, but rather are inconsistent with such.

Not a sham
61. Keane J. at para. 60 of his judgment, noted that counsel for the Company made "no suggestion whatsoever that the agreement at issue is a sham". He said that there might be circumstances where the parties might have reason to disguise the nature of an agreement between them, but that such was not the contention in the present case. At para. 34, Keane J. quoted from the concurring judgment of Staughton L.J. in *Welsh Development Agency v. Export Finance Co Ltd*, at p. 187:

> "There was here no sham, no collateral agreement or common intention to be bound by different terms, and no subsequent variation to that effect. So I can leave the external route, and turn to an internal consideration of the master agreement itself. This must be carried out on the basis that the parties intended to be bound by its terms, and by nothing else."

62. In the light of the concession made by counsel for the Company also made in this Court that the Agreement is not a sham, the approach to the transaction must be to analyse its express terms and its true substance by an analysis of the whole of the Agreement and the provisions expressly contained therein. The test must be to ascertain the substance of the Agreement as recorded and expressed.

No one touchstone

63. In *Welsh Development Agency v. Export Finance Co Ltd*, Dillon L.J. identified what, in my view, is the correct interpretative approach in the present case:

> "In my judgment there is no one clear touchstone by which it can necessarily and inevitably be said that a document which is not a sham and which is expressed as an agreement for sale must necessarily, as a matter of law, amount to no more than the creation of a mortgage or charge on the property expressed to be sold. It is necessary therefore to look at the provisions in the master agreement as a whole to decide whether in substance it amounts to an agreement for the sale of goods or only to a mortgage or charge on goods and their proceeds."

64. I note too the *dicta* of Romer L.J. in *In re George Inglefield,* at p. 27:

> "The only question that we have to determine is whether, looking at the matter as one of substance, and not of form, the discount company has financed the dealers in this case by means of a transaction of mortgage and charge, or by means of a transaction of sale".

65. This approach is consistent with the general approach of the Irish Courts to the construction of contractual terms, and I have no hesitation in accepting the general proposition that, in construing an agreement such as the present, a court will seek to construe the agreement with the intent of ascertaining its substance and intent, and that that court will not be bound by the characterisation that the parties, or one of them, identifies, even if such identification of the agreement is express. The starting point for the analysis must be the general proposition, as stated by Barron J. giving the judgment of the Supreme Court in *Kearns v. Dilleen* [1997] 3 IR 287, at 297, that:

> "The general principle is that parties are entitled to carry out their legal transactions in whatever form they wish. In construing the substance of those transactions the courts look not to the intention behind the transaction but to the form in which the transaction takes place and to the rights and duties imposed by the transaction itself."

66. Barron J. referred expressly to the concurring judgment of Hanworth M.R. in *In re George Inglefield* as to whether the documents "really masked the true transaction" and that the court in those circumstances must "have regard to the true position, in substance and in fact, and for this purpose tear away the mask or cloak that has been put upon the real transaction." Hanworth M.R. went on saying that, however:

> "the substance must, of course, be ascertained by a consideration of the rights and obligations of the parties, to be derived from a consideration of the whole of the agreement".

67. The starting point for the analysis is the proposition as stated by Staughton L.J. in *Welsh Development Agency v. Export Finance Co Ltd* that in general, the court will not look at the economic effects of an agreement but to the legal nature of a transaction, and Keane J. quoted a passage from that judgment at paras. 33 and 34 of his judgment, and correctly relied on the reasoning therefrom.

Retention of title clauses: A useful analogy?

68. Reliance is placed on the judgments concerning so-called "retention of title clauses". In particular, the judgment of the High Court in *Unitherm Heating Systems Ltd v. Wallace* [2014] IEHC 177, [2014] 2 ILRM 272, *Carroll Group Distributors Ltd v. G. and J.F. Bourke Ltd*, and *In re W.J. Hickey Ltd (in Receivership*) [1988] IR 126.

69. In *Unitherm Heating Systems Ltd v. Wallace*, Peart J. stressed the requirement that a court would analyse on a case-by-case basis the true nature of an agreement, and I agree with that approach. It is the segregation of the proceeds of the identified goods from other monies belonging to the purchaser that was the key to the conclusion of the Court in *Carroll Group Distributors Ltd v. G. and J.F. Bourke Ltd* and *In re W.J. Hickey Ltd* that the title had passed.

70. In *Carroll Group Distributors Ltd v. G. and J.F. Bourke Ltd* Murphy J. identified the correct interpretative approach to the characterisation of a reservation or retention of title clause. His comments at p. 486 are particularly helpful:

> "It would be wrong to infer that a particular transaction constituted a mortgage merely because the vendor structured it in such a way as to protect his commercial interests. On the other hand parties cannot escape the inference that a transaction constitutes a mortgage registrable under s. 99 of the aforesaid Act by applying particular labels to the transaction. The rights of the parties and the nature of the transaction in which they are engaged must be determined from a consideration of the document as a whole and the obligations and rights which it imposes on both parties. This is a principle of general application."

71. For the purposes of the consideration of the nature of the transaction in the present case there may be derived from that *dictum* the general proposition that the rights of the parties and the nature of the transaction are to be interpreted in the light of the agreement as a whole and that the label or characterisation of the parties, while it might be a factor, would not be determinative.

72. An observation of Murphy J. made earlier in his judgment is also useful where he pointed to the fact that a provision by a vendor inserted to protect his commercial interest by retaining title to the property he has agreed to sell does not of itself convert the contract for sale into a mortgage or charge which might require registration under s. 99 of the 1963 Act. That observation is useful, in particular in the light of the argument made by counsel for the Company that the element of risk mitigation in the present case tipped the balance. In my view, the trial judge was perfectly correct to reject this submission and in his reliance on the dicta of Lord Wilberforce in *Lloyds & Scottish Finance v. Cyril Lord Carpet* at para. 51 of his judgment.

73. I consider that the right to collect the debts and to enforce payment of the debts, whether by action or otherwise, or to compromise any claim in regard to any of the debts, to be incompatible with the existence of a charge. Further, as a matter of practice and by virtue of Clauses 3 and 5 of the General Conditions, a separate current account was maintained in the name of the Company into which payments of the assigned debts were to be made. Funds segregation of this type is consistent with the ownership by the Bank of those debts and the absence of such segregation was a critical factor in *Carroll Group Distributors Ltd v. G. and J.F. Bourke Ltd* and the ultimate determination by the Court that the asset had not been assigned.

74. A consideration of the express terms of the Agreement shows that the document bears the attributes of a sale and purchase and not the attributes of a mortgage or charge. In a similar vein, Charleton J., in *Hagemeyer Ireland Plc v. The Revenue Commissioners*, at para. 16, identified the approach and quoted from Branson J. in *Olds Discount Company Limited v. John Playfair Ltd* [1938] 3 All ER 275, at p. 277, as follows:

> "[I]t is the nature of the agreement entered into, and not its object, at which the court has to look in order to decide whether in any particular case the agreement is a money lending agreement or otherwise."

75. There is no authority to support the argument of the Company that the interpretation of the Agreement could have regard to the asserted subjective belief of the directors of the Company that the Agreement was, in truth, a charge. This assertion is to be rejected on a number of fronts:

> • the subjective intention of the parties is not a factor to which regard is had in the construction of the contract (see, for example: *Upm Kymmene Corp v. Bwg Ltd* (Unreported, High Court, Laffoy J., 11 June 1999); and
>
> • the third principle of construction identified by Hoffman L.J. in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 WLR 896, expressly approved by the Supreme Court in *Analog Devices Bv v. Zurich Insurance Company* [2002] 1 IR 272, rejects this approach as an admissible aid to construction.

The judgment in Hagemeyer Ireland Plc v. The Revenue Commissioners

76. Counsel for the appellant relies to a considerable extent on the judgment of Charleton J. in *Hagemeyer Ireland Plc v. The Revenue Commissioners*, albeit the judgment involved the question of whether a debt factoring agreement fell outside the scope of the relevant European VAT Directive. The judgment was considered at some length by Keane J. in paras. 45 *et seq*. of his judgment. In particular, he quoted as I will, paras. 18 and 19 of the judgment of Charleton J., as they formed the basis for much of the argument of the Company:

> "18. Crucial to the definition of factoring is that the risk of the payment not being made should be passed from the seller to the factor. If there is recourse to the seller in the event of default, the arrangement cannot be described as factoring. Salinger [Factoring: The Law and Practice of Invoice Finance, (3rd ed., Sweet & Maxwell, 1999)] treats this at para. 1-44 by stating:
>
> 'For those clients who need finance for the trade credit requirements of their debtors but no administrative service or protection, another service is provided extensively by factors. By the [simple] expedient of releasing the client from the need to notify the debtors to pay direct to the factor and by providing that all debts sold to the factor should be subject to full recourse, factoring is changed to a purely financial service sometimes referred to as "confidential factoring" or, more commonly, "invoice discounting".'

19. In this case it is claimed by the applicant that they have no recourse to the seller of the debt. Those debts, however, continue to be collected by the seller. Salinger at p. 16 gives a useful description of what he calls "factoring in its full form". This he describes as:

> '[…] a continuing relationship between a factor and supplier (the client) of goods to trade customers in which the factor purchases substantially all the trade debts of his client arising from such sales of goods or the provision of such services as they arise in the normal course of business. The client in turn for agreed fees and finance charges is thereby relieved:
>
> (a) from the need to administer and control a sales ledger and collect amounts payable from the debtors; and
>
> (b) from losses arising from the inability of the debtor to pay; and
>
> (c) from the provision of trade credit to debtors, to a substantial degree.'"

77. The *dictum* of Charleton J. that a provision for recourse is supportive of an argument that an agreement cannot be a factoring or debt sale was a comment on the quote from Salinger's text and, as Keane J. said, Charleton J. was distinguishing between "factoring in its full form" and invoice discounting factoring.

78. I agree with Keane J. that such a broad proposition would be inconsistent not just with the jurisprudence of the courts of England and Wales which have been quoted with approval and relied on in subsequent Irish judgments (see for example: *Carroll Group Distributors Ltd v. G. and J.F. Bourke Ltd; Kearns v. Dilleen; Hagemeyer Ireland Plc v. The Revenue Commissioners*), but also because that approach is not consistent with the correct approach to interpretation, namely that the court construe the entire document with a view to asserting its meaning and substance. The presence or absence of the passing of risk or the existence of recourse do not constitute sufficient defining elements to enable the essential nature of an agreement to be ascertained. I am persuaded by the *dicta* of Lord Wilberforce in *Lloyds & Scottish Finance v. Cyril Lord Carpet* quoted at para. 51 of the judgment of Keane J., that the passing of risk or the putting in place of security against risk is not determinative.

79. A central feature of the judgment of Charleton J. in *Hagemeyer Ireland Plc v. The Revenue Commissioners* was that it involved the interpretation of European law and was given in judicial review proceedings concerning the interpretation of a specific clause in art. 13B(d)(3) of the Sixth VAT Directive. The decision did not depend on any consideration of whether risk of payment had passed to the factor as the agreement in issue there was a "true factoring" agreement and did not involve recourse. As Keane J. correctly noted at para 55 of his judgment, in *Finanzamt Groß-Gerau v. MKG-Kraftfahrzeuge-Factory GmbH (Case C-305/01*), ECLI:EU:C:2003:377 ("the *MKG* case"), the Court of Justice of the European Union ("CJEU") did not draw a distinction between a full factoring or quasi-factoring agreement but, as noted by Charleton J. in *Hagemeyer Ireland Plc v. The Revenue Commissioners*, the question before the CJEU was whether the business was pursuing an economic activity for the purposes of the Sixth VAT Directive.

80. I conclude that Keane J. was correct that the judgment of Charleton J. in *Hagemeyer Ireland Plc v. The Revenue Commissioners* does not offer support for the proposition that the true nature of the transaction in the present case was a charge. What is useful, however, is the analysis by Charleton J. of the jurisprudence of the Courts of England and Wales starting with *In re George Inglefield*, which formed the backdrop to the judgment of Keane J. and against which the appeal is to be assessed.

Section 28(6) of the Judicature (Ireland) Act 1877

81. By way of a separate ground of appeal, the Company argues that the Bank did not formally notify debtors of the assignment after it cancelled the agency of the Company on 21 March 2015 in pursuance of the express provision in that regard in the General Conditions. The evidence contained at Exhibit AJ8 of the affidavit of Mr. Martin shows a "Notice of Assignment" dated 21 March 2013 was sent to the secretary of the Company that statement of debt would, from that date, be sent directly to the relevant customer.

82. However, even absent such notification, the assignment will take effect in equity (see: *Law Society of Ireland v. O'Malley* [1998] 1 IR 162), and I accept the argument of the respondent on that ground, one I note was not pursued with any great vigour in the oral submissions of the appellant.

Jurisdiction to make orders sought

83. The Company makes an argument on appeal not made before the High Court that the High Court lacked jurisdiction to make the orders sought having regard to the repeal of the 1963 Act by the Companies Act 2014. Whilst it is settled law that an appellate court is slow to consider a point on appeal that was not raised in the court below, it is appropriate that I deal briefly with that argument.

84. Section 27 of the Interpretation Act 2005 provides as follows:

> "(1) Where an enactment is repealed, the repeal does not—
>
> (a) revive anything not in force or not existing immediately before the repeal,
>
> (b) affect the previous operation of the enactment or anything duly done or suffered under the enactment,
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment,
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence against or contravention of the enactment which was committed before the repeal, or
>
> (e) prejudice or affect any legal proceedings (civil or criminal) pending at the time of the repeal in respect of any such right, privilege, obligation, liability, offence or contravention.
>
> (2) Where an enactment is repealed, any legal proceedings (civil or criminal) in respect of a right, privilege, obligation or liability acquired, accrued or incurred under, or an offence against or contravention of, the enactment may be instituted, continued or enforced, and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out, as if the enactment had not been repealed."

85. The matter is fully dealt with by the Sixth Schedule to the Companies Act 2014, which contains general saving and transitional provisions the broad remit of s. 1 thereof is dispositive of this point of appeal:

> "the continuity of the operation of the law relating to companies shall not be affected by the substitution of this Act for the prior Companies Act."

86. I am satisfied that this procedural point is without substance and the High Court did have jurisdiction to entertain the application commenced, as it was, pursuant to the now repealed legislation, and that that jurisdiction is vested in it by the clear terms of the Sixth Schedule to the Companies Act 2014, and the Interpretation Act 2005.

Conclusion

87. In conclusion, I consider that the Agreement as a whole bears the attributes of a debt sale in substance and in form and that many of the general and special conditions are inconsistent with the characterisation of the Agreement as a loan and charge as contended by the Company. It is not merely, as is contended by the Bank, that so many of the clauses bear the attributes of the Agreement, as the matter is not to be determined by an assessment of the number of clauses supportive of one view or the other. But the Agreement taken as whole bears, in my view, attributes which are consistent with a debt sale and not with a loan and security agreement. Further, I accept the arguments made by counsel for the Bank that the only express clause on which the Company relies, namely Clause 1.4 of the General Conditions by which a trust is declared, does not support the assertion that the title did not pass.

88. I propose that the appeal be dismissed. The arguments on which the Company relies do not support the appeal and the Agreement bears all the attributes of a debt sale. I can find no error in the analysis or conclusion of Keane J.