

Clarity for Creditors When Settling with Multiple Debtors

Settling with one or some of a number of potential wrongdoers can be fraught with difficulty, particularly due to concerns regarding the application of the provisions of the Civil Liability Act 1961 (the "Act") on contribution between 'concurrent wrongdoers', i.e. two or more persons who are responsible for the same damage. Until now, the lack of clarity regarding the applicability of the Act to claims for the recovery of a debt often preoccupied banks and their advisors when considering debt arrangements with certain co-borrowers and / or guarantors and the form of such arrangements.

In a significant judgment delivered earlier this year¹, the Court of Appeal held that those provisions of the Act do not apply to claims for the recovery of debts. The Court also held that a claim to recover a debt against a borrower and a related negligence claim against a valuer were not claims for the 'same damage' under the Act – thus, those parties could not be considered concurrent wrongdoers.

Consequently, the Court dismissed arguments by the defendant borrowers that a settlement of a claim against a valuer by the bank precluded the bank from pursuing those borrowers for the balance of the debt.

This is a welcome clarification, especially for creditors, although caution should still be exercised when entering into settlements in such circumstances.

Background

Ulster Bank (the "Bank") sought to recover a judgment debt against the defendants in the sum of €22 million arising from a loan advanced by the Bank in 2007 which funded the acquisition of land. In satisfaction of a condition precedent for the loan, the Bank received an independent valuation which valued the land at €57 million.

In March 2013, the Bank and the defendants entered into a compromise agreement pursuant to which the debt, then standing at approximately €25 million, was to be written off in return for a payment of approximately €5 million. The defendants later allegedly breached the terms of the agreement and the Bank then sought judgment for the full amount of the debt.

In June 2013, however, the Bank instituted proceedings against the valuer for the alleged negligent valuation of the land. The Bank settled that action in 2016 in the amount of €5 million which sum was credited to the defendants' loan account.

Defendants: Bank Precluded from Recovery Due to Settlement with Valuer

The defendants argued that, as a consequence of the settlement between the Bank and the valuer, the provisions of the Act precluded the Bank from recovering from them because the valuer caused all of the Bank's loss.

¹ Ulster Bank, Paul McGann and Patrick Dillon v Brian McDonagh, Kenneth McDonagh and Maurice McDonagh [2022] IECA 87.

This argument was rooted in section 17(2) of the Act which in effect provides that, where there is no intention in a settlement with one wrongdoer to discharge the others, the plaintiff shall be "identified" with the released wrongdoer such that any action by the plaintiff against the other wrongdoers is reduced by the greater of the following three amounts:

1. the sum paid for the settlement – in this case, the sum of €5 million paid by the valuer to the Bank;
2. the amount by which the settlement provided that the total claim shall be reduced – no such reduced amount was stipulated in the settlement;
3. the extent by which the released wrongdoer would have been liable for the entire claim – the defendants argued that the Bank's claim against them should be extinguished to reflect the fault of the valuer.

Non-Application of the Act to Debt Recovery Cases

The Court of Appeal, however, concluded that the provisions of the Act are concerned exclusively with actions for the recovery of damages and that a claim for the recovery of a debt, which is in essence a claim to enforce a legal obligation, is not an action for the recovery of damages. Consequently, the defendants could not rely on the provisions of the Act to escape liability.

Claims Against Borrowers and Valuer Were Not for the Same Damage

The Court of Appeal further concluded that, in any event, the liability of the valuer and the borrowers were not concurrent for the purposes of the Act – the borrowers' liability was for the whole of the debt while the valuer's liability was only for the amount that the lender was unable to recover from the borrowers. Therefore, even if the Act applied, a claim for a debt and a claim for negligent valuation alleged to have resulted

in the granting of the loan are not actions to recover the same damage.

Implications for Debtors and Guarantors

The Court of Appeal also clarified that its decision did not mean that a settlement with one debtor has no implications for another party liable for that debt. Instead, the relevant common law rules and equitable principles would continue to operate.

The Court of Appeal observed that, in the case of joint debtors, this means that the release of one co-debtor which did not expressly or impliedly reserve the creditor's rights against the others will "wholly extinguish the creditor's rights". It follows that, in practice, banks and their advisors ought to clearly and expressly reserve all such rights.

In the case of a debtor and guarantor relationship, the extent to which a guarantor has a right to an indemnity and contribution from a principal debtor and its rights as against other guarantors will be governed by equitable principles. Those principles require careful analysis on a case-by-case basis but they are intended to ensure that the person primarily liable should bear the whole burden.

Conclusion

The determination that the Act does not apply to debt recovery cases removes some of the complexity involved in such settlements but that is not to say that creditors should not continue to exercise caution.

The case also underlines the importance of establishing the same damage in concurrent wrongdoer claims.

At the time of writing, a separate Court of Appeal judgment concerning the application of the Act to actions for the recovery of a debt is expected shortly.

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