

High Court restricts grounds to void a transaction under Section 60 of the Companies Act 1963

In the matter of Cognotec Ltd (in receivership)

Section 60(14) provides that a transaction in breach of section 60 is voidable against any person who had notice of the facts which constitute the breach.

The company sought to void the debenture which secured the loan on the basis that section 60 had not been complied with and the receiver appointed on foot of the debenture brought a motion for directions.

The court held that:

1. the onus of establishing that a person had notice of a breach of section 60 lies on the person asserting it;
2. the notice required to be established is actual notice, not constructive notice
3. the party asserting that a person had such notice must show that they had notice of the relevant breach prior to or simultaneously with the transaction; and
4. the notice required is actual notice of the particular breach (here the failure to deliver the declaration to the CRO in time).

The court concluded that the bank did not have actual notice of the failure to deliver the declaration in time. Accordingly, the court granted a declaration that the debenture was valid.

Comment

This case clarifies the position of banks and receivers in seeking to rely on security and limits the potential for directors and shareholders to avoid such security where they can not show that the bank had prior or contemporaneous notice of a particular breach of section 60. Furthermore, absent a bank taking responsibility for the statutory filings, or being informed that the borrower intends not to make the required filings, it is difficult to see how any filing failures could taint a bank's security as by their nature such filings are made after completion of the transaction.

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