Bloomsbury Professional's Irish Company Law Update – March 2025

Introduction

Welcome to Bloomsbury Professional's Company Law Developments (2/25 March), a series where I summarise what I consider to be the most important recent case and statute law developments in company law. In this issue, the question of payment of an examiner's costs in circumstances where it had been represented that the directors were committed to investment in the company of €150,000 if an examiner were appointed, only to pay in only €35,000, which the examiner did not bring to the court's attention (*Re Tower Trade Finance (Ireland) Limited* [2025] IECA 37. The circumstances in which a company, which is only partly owned by a fiduciary who is in breach of his duty and is liable to account for profits, is also liable to account was considered by the High Court in a follow on decision to one reported here in BPCLD – January 2025) (*Victoria Hall Management Limited et al v Cox et al* [2025] IEHC 55. The test for a shareholder being given leave to bring a derivative action was considered also which addressed a number of interesting aspects to what should be required where the applicant is a lay litigant. (*Sutton v Salumi Grazing Limited et al* [2025] IEHC 49). Three decisions in the context of liquidation of companies are also considered: adoption of a protocol to avoid conflicts of interest by members of a committee of inspection of a company in liquidation (*GTLK Europe DAC* [2025] IEHC 105); appropriate means to vest the legal title to property of which a company in liquidation was beneficial owner under the *Trustee Act 1893* (*Re Joe Miley and Partners (Dublin) Limited; Diaz v Brett et al* [2025] IECA 25); and circumstances when appropriate to lodge a rump of undistributed monies in accordance with *s 623* of the Companies Act 2014 (*Re Custom House Capital Limited* [2025] IEHC 103).

Dr Thomas B Courtney

Court Protection

[Courtney, *The Law of Companies* (4th ed) Ch 23]

Court protection – appointment of examiner – proposed schemes of arrangement not approved – examiner appointed liquidator – examiner applying for orders approving remuneration and costs of the examinership and approving payment out of the assets of the company – High Court refusing to sanction any examinership costs on the grounds that the directors had represented to the court on the hearing of the petition that funds would be provided to cover the cost of the examinership – dispute as to what had been said by the directors – whether High Court misled on the application to sanction the examiner's costs – whether directors had agreed to discharge examiner's costs or to provide working capital – appeal to Court of Appeal – *s 551* of the Companies Act 2014 – *Re Tower Trade Finance (Ireland) Limited and Deal Partner Logistics Limited* [2025] IECA 37. In this case, an examiner was appointed to two companies. At the time of the appointment, it was said in court that the directors had agreed to provide a sum of money which could be used to defray the costs of the examination. This was at odds with the independent expert's report which referred to the provision of €150,000 by the directors as working capital; only €35,000 was paid by the directors. Ultimately the scheme proposed was not approved and the examiner was appointed liquidator. The examiner applied to the High Court for his costs but the High Court judge declined on the basis that the examiner by his silence and the solicitor in an affidavit had misled the court as to the basis upon which the High Court had been induced to place the companies under the protection of the court. The High Court was of the view that the premise of the application to appoint the examiner was that the directors would lodge €150,000 to the company which would be available to pay the examiner's fees. The High Court also said that the examiner and his solicitor ought to have filed a corrective affidavit in the costs hearing. On appeal it was accepted that the examiner was required to show that the High Court order not to sanction the fees was outside the range of calls which were open to it (*Ryan v Dengrove* [2022] IECA 155). The examiner advanced eight grounds for saying that the High Court had erred. Costello J for the Court of appeal reviewed the power to award remuneration and costs in s 551(4) of the

Companies Act 2014 and noted that in *Re Sharmane* [2009] 4 IR 285 Finlay Geoghegan J had said that the normal rule was that the remuneration of an examiner is to be paid out of the revenue of the company unless the court orders otherwise and that an order not to pay the remuneration etc out of the company's assets would be exceptional and normally where there is wrongdoing by an examiner. The case of *Re Wogan's of Drogheda (No 3)* was also cited. Costello J also noted that commentators on s 554 (Courtney, The Law of Companies, 4th ed; 2016 at p 1736 and Conroy, Companies Act 2014 (2018 ed) at p 770) commented that an examiner is ordinarily entitled unless he acts in breach of his duties or statutory remit, or where an examiner acts improperly. Costello J said the decisions in Sharmane and Wogans correctly state the law. Turning to examine the conduct of the examiner, Costello J said that it was at least reasonable to have expected the examiner to have clarified the discrepancy between what was said in court and what was in the independent expert's report. It was said that it was not known what the effect of this was; the directors may have disavowed the representations of their counsel. However, he said it was known that the committee of inspection did not believe that the examiner should be denied his costs and remuneration and while this was not decisive it was an important consideration. The Court of Appeal held that the failure to address the discrepancy was unfortunate but was not deliberate and did not justify refusing to award any remuneration or costs. It was also said that if the High Court had intended to place weight on the fact that the solicitor and examiner had not sworn a corrective affidavit, it ought to have raised that issue during the hearing. It was also said that the failure to pursue the directors did not warrant the refusal to award any sum for costs and remuneration and that the conduct of the examiner fell considerable below the standard in Wogans of Drogheda. The Court of Appeal also said that the High Court's concern that to approve the fees would impose a financial burden on the company's creditors but said that this is what the legislature has provided for. For the foregoing and other reasons, the Court of Appeal set aside the High Court order and sanctioned the examiner's remuneration, costs and expenses out of the companies' assets.

Fiduciary duties

[Courtney, *The Law of Companies* (4th ed) Ch 16]

Fiduciary duties – individual retained by a company as an employee or a consultant found to be a fiduciary who owed duties to the company – fiduciary duty breached – remedies available against a person found to be a fiduciary – accounting for profits – liability to account of companies in which the fiduciary was only part owner – Victoria Hall Management Limited et al v Cox et al [2025] IEHC 55. In the principal judgment [2024] IEHC 674, it had been determined that the categories of fiduciary had not been closed and that an individual retained as a consultant or employee could owe fiduciary duties. It was also found that those duties had been breached see (see BPCLD – January 2025 for case summary). This judgment concerned two questions arising from the principal judgment: the position of the sixth named plaintiff and the meaning and substantive effect of an 'account' of the profits. Quinn J clarified that the sixth plaintiff was not owed fiduciary duties and his claim was dismissed.

With regard to accounting for profits, Quinn J began by distinguished between an order to account for profits (i.e. to furnish a narrative description of the profits earned) and an order for disgorgement (i.e. an account 'of' profits by which order a defendant gives up and pays over the profits). The plaintiffs submitted that the effect of the decision was that they would be required to elect between the remedy of disgorgement and damages for breach of duty but that they should first receive a narrative of the profits earned and held by the defendants. Quinn J noted that before electing a party should be able to make an informed choice: *Island Records Ltd v Tring International plc [*1996] 1 WLR 1256 and went on to order that the defendants provide an account of the profits made on affidavit and with appropriate verification.

Regarding the disgorgement of profits, there was a dispute between the parties as to the scope of the application of that order insofar as it applied to the sixth, seventh and eighth defendants, companies in one of which the first defendant held 80 per cent of the shares. These defendants, referred to as the Carrowmore defendants, claimed that the obligation of these companies should be limited to accounting only for the first defendant's proportion of any profits held by them. The plaintiffs claimed all profits held in the Carrowmore defendants were held on trust for the plaintiffs and did so on the basis of reference to the 'defendants' in the judgment. Quinn J confirmed that the plaintiffs were incorrect in this as he found there was no cause of action against any of the defendants except the first and second defendants.

The plaintiffs also asserted that there was a claim of constructive trust over the entire profits in the Carrowmore defendants. In support of this the plaintiffs cited *Green v Bertobell Industries Pty Limited* [1983] WASC 144 where the Supreme Court of Western Australia upheld a finding that where a persona acted in breach of fiduciary duty and was liable to account, the order extended to a company through which he pursued his new contacts in breach of duty. In the case of *Quarter Master UK Ltd v Pyke and others* [2004] EWHC 1815. Quinn J pointed out that in neither case was there a third party, not being one of the fiduciaries, holding an independent interest in the company. Neither was there evidence that the persons with an independent interest were nominees of the person who breached his fiduciary duty. Quinn J therefore made a declaration that the Carrowmore defendants hold the profits as trustees for the first to fifth plaintiffs, 'as to eighty percent in the case of the seventh defendant and as to one third each in the case of the sixth and eighth defendants' (at para 45).

Shareholders' remedies

[Courtney, *The Law of Companies* (4th ed) Ch 11]

Shareholders' remedies – derivative action – application brought for leave to bring a derivative action against the respondents on behalf of company – Order 15, r 39 RSC 1986 – *Sutton v Salumi Grazing Limited and others* [2025] IEHC 49. This judgment of the High Court concerned an application by the plaintiff who was a 50 per cent shareholder and one of two directors of a company, for leave to bring a derivative action on its behalf against the other director (a Mr Leavey). The applicant claimed, inter alia, that while he was in prison between 16 October 2020 and 23 April 2021 on foot of an increased sentence handed down by the Court of Appeal following a conviction for alleged assault by him of his former partner which had since been overturned (a re-trial has been directed) that Mr Leavey wrongly appropriated the business of Salumi and transferred it to another company Karmar Foods Limited controlled by him and his wife, the third respondent. It was also claimed that another respondent (the licensor of property to Salumi) had facilitated this by terminating a licence which the company had and granting a new licence to Karmar. It was also claimed that another respondent had facilitated a series of allegedly unlawful company registration office filings, when he was in prison, which amended the constitution of the company and removed him from various positions in the company. Finally, he also alleged that the respondent bank had unlawfully changed banking mandates when he was in prison.

Quinn J noted that there were three other related proceedings to the present application. First, the applicant has obtained injunctive relief similar to those claimed in the instant proceedings. The relief afforded included that the CRO filings be reversed to put the applicant back in as director and secretary and to correct the allocation of shares to revert to the previous 50:50 allocation and that he be reinstated as a bank signatory for the company. In the second related proceedings, one of the respondent which owned the premises from which the company had traded sought and obtained an injunction to restrain the applicant and the company from presenting a petition to wind it up on the basis that it was an abuse of process. In the third proceedings, the applicant had sought a Mareva type injunction to prevent the owner of the premises who had terminated the licence to the company, from selling the property

Quinn J also noted the criminal proceedings against the applicant. He had been convicted of assault and production of a knife in relation to his former partner. He was sentenced but the DPP appealed against the leniency of the sentence and the applicant was sentenced to a further 16 months imprisonment. Subsequently, the applicant's appeal was heard and it was determined that arising from a Supreme Court decision in *DPP v Almasi* [2020] IESC 35 the Court of Appeal decided there was a substantive error of law in his original trial and his conviction was quashed although a retrial was ordered.

Quinn J noted that despite the applicant's statements to the contrary, there was no evidence that the company had traded since the licence to use the premises he had occupied had been terminated. The applicant had emptied the company's bank account since the order was made restoring him as a signatory to its bank account. It was also noted that the company had no assets was carrying on no business and that there was deadlock between the two shareholder-directors.

Quinn J then considered the relevant legal principles to be applied in an application for leave to bring a derivative action. The Rule in Foss v Harbottle was noted as were relevant Irish decisions in *Glynn & McCabe v Owen & Ors* [2007] IEHC 328, Fanning v Murtagh [2009] 1 IR 551, *Connolly v Seskin Properties & Ors* [2012] IEHC 332, and *Kenny v Eden Music Ltd & Ors* [2013] IEHC 628. It was also noted that the applicant must show that there was 'a reasonable chance of success' and the terms of

Ord 15, r 39 considered. It was noted that while the rule required a counsel's opinion that an applicant had a realistic prospect of success in the intended derivative action, the applicant was not legally represented and so could not provide this but the other parties did not consider this an absolute bar to his proceeding. Quinn J noted that in case law before the rule was made, the courts had merely said it was preferable to have such an opinion. It was noted that case law indicated that in the context of a claim based on the fourth exception to Foss v Harbottle (fraud on a minority) the onus is on the applicant to establish that the wrong done to the company happened when the company was controlled by the alleged wrongdoers. It was also noted that the relief is discretionary even if an applicant establishes all of the criteria.

After considering the submissions of the applicant and the responses from the several respondents to the proceedings, Quinn J held that the applicant had established a reasonable prospect of success against Mr Leavy his fellow director and shareholder based on the basis of the licence and his taking a new one on the name of his own company but not in relation to the use of the company accounts and that no claim was established against Mrs Leavy who was only company secretary. He was also satisfied a claim had been made out against the owner of the premises who had terminated the licence on the grounds it seemed probable it had colluded with Mr Leavy regarding the termination. However, no claim was made out against its director. It was held no claim had been made out against the accounts for the CRO filings as they had only acted on the instructions of the sole director at that time, Mr Leavey; neither was any claim made out against the bank which again only acted on the instructions of the only director at the time, Mr Leavey.

Quinn J then went on to look at other factors. He held that he did not accept that the applicant was not a minority because he held 50 per cent of the shares in the company, finding that control must be determined in a common-sense way. He held that it was not necessary that the applicant had to persuade the company to bring the action in order to maintain a derivative action, finding such a requirement wholly-unrealistic and relying on *Fisher v St John Opera House Co* [1937] 4 DLR 337 at 342 which acknowledged that a wrongdoer being in control can make it idle to apply to the company. He also held that it was not necessary that the licensor was not an insider and that an outsider can be sued in a derivative action and not just insiders although it was also held that the licensor had benefited from terminating the licence. It was also held that while there had been some delay by the applicant in bringing proceedings, in all the circumstances it did not justify refusing the relief. Quinn J also held that he was not satisfied that the potential action was "imprudent" for the company; neither did he consider it appropriate to deny relief to the applicant because he might have been pursuing the action for his own ulterior purpose or benefit. It was also held that it was not appropriate to refuse relief simply because the action might be thwarted by a successful application for security for costs or because the applicant might seek to represent the company contrary to the rule in Battle. It was also held that the court was not satisfied that relief should be refused by virtue of the manner in which the litigation had been conducted. And it was held that relief should not be refused because the applicant did not produce a counsel's opinion or because he had sought to rely draft accounts prepared by him without the benefit of an expert report contrary to the Ord 15, rule 39(5)(ii). In all the circumstances, the applicant was given leave to bring a derivative action on behalf of the company claiming damages against his co-shareholder and co-director, Mr Leavey and against the licensor company, but limits were placed on the actions which the applicant was permitted to take against both respondents.

Liquidators

[Courtney, *The Law of Companies* (4th ed), Ch 25]

Winding up – appointment of committee of inspection – application by two of the four creditors appointed to the committee of inspection for directions concerning potential conflicts of interest relating to the continued trading by the company in liquidation of notes – proposed information control protocol – s 629(6), 666, 668(9) of the Companies Act 2014 – GTLK Europe DAC [2025] IEHC 105 (Mulcahy J). In this case the company (and a related company) were Irish companies that were part of a group owned and controlled by the Russian Federation which operated an international transport leasing business consisting of ships and aircraft. The companies had issued loan notes with a value of $3.35bn which were traded. When sanctions were imposed against Russia following its invasion of Ukraine, the companies' assets were frozen and trading in the notes ceased. This resulted in the companies being put into liquidation on the petition of a group of creditors and four of them were appointed to a committee of inspection pursuant to s 666 of the Act. Two of the members of the

committee of inspection applied to the High Court for directions concerning potential conflicts of interest relating to the continued trading by the company in liquidation of notes. The circumstances in which the conflict was apprehended were that the liquidators of the companies had applied for the companies to be de-listed from the scope of those sanctions and, if that happened, the liquidators could obtain a general licence from the relevant US authorities following which it was anticipated that trading in the notes would resume. The applicants held c$378m in notes and wished to trade them but apprehended they may have a conflict of interest arising from their duties as members of the committee of inspection. In particular, s 668(9) of the Act provides that a member of the committee shall not make a profit from the winding up except with the leave of the court.

Looking at UK authorities, Mulcahy J noted that in *Re Gallard* [1896] 1 QB 68 it was held prior sanction should be obtained from the court to avoid breaching the rule. The learned judge also noted that there were equitable restrictions too which were relevant: *Re Bulmer* [1937] Ch 499 as well as market abuse rules.

Mulcahy J noted that while it was arguable that s 688(9) did not apply because the creditors would be trading their own property, not the company's, a more expansive interpretation suggested that the restriction on making a profit was intended in a fiduciary sense which meant it could apply to the committee members. The creditors also prepared a proposed protocol to establish and regulate controls and barriers on the flow of information from the committee to persons in their own organisations who would be involved in trading the notes. As there were no Irish or UK authorities dealing with an application by a committee member to trade in the debt of the company in liquidation, they opened a number of US authorities to the court: *Re Federated Department Stores Inc* (1991) WL 79143, *Re Adelphia Communications Corp 368 BR 140* (2007) and *In Re Spiegel*, 292 BR 748 (2003).

Mulcahy J held that trading in the debt obligations of the companies could not engage the prohibition in s 629(6) of the 2014 Act as the notes, are liabilities the companies' property, and therefore, are not affected by the restriction in that statutory provision. However, he considered that trading in the notes does have the potential to involve the Applicants, or any committee members, 'making a profit from the winding up' within the meaning of s 668(9). He also held that he was satisfied that the court had jurisdiction, whether pursuant to s 631 or to its inherent jurisdiction, to sanction a transaction which might contravene the equitable profits rule. Following a review of the protocol and the US authorities it was held that orders would be made to facilitate trading in the notes in the event that the companies are delisted but on condition that the parties complied with the protocol subject to certain amendments to the protocol suggested by Mulcahy J.

Realisation of assets

[Courtney, *The Law of Companies* (4th ed), Ch 26]

Realisation of assets – liquidator claiming company was beneficially entitled to a property and seeking orders to that effect and requiring a partnership to transfer the legal title to the company – Jurisdiction to make orders – appropriate statutory provision – ss 596, 608 and 627 of the Companies Act 2014 – ss 25 and 26 of the Trustee Act 1893 – *Re Joe Miley and Partners (Dublin) Limited; Diaz v Brett et al* [2025] IECA 25. In this case, the High Court had determined that a company which was in liquidation was the beneficial owner of a property consisting of a lock up shop with residential accommodation in Ballina, Co Mayo, the title deeds to which recorded that it was in the legal ownership of a partnership. The trial judge made a declaration under s 596 of the Companies Act 2014 that the liquidator was entitled to the property in question; the trial judge also ordered under s 25 of the Trustee Act 1893 that a new 'trustee' be appointed displacing the three persons in the partnership who were the legal owners with a view to the new trustee executing a transfer of the legal title to the company. The trial judge noted there was power to make a vesting order of the property under s 26 of the Trustee Act 1893 but refrained from making such an order as it had not been fully argued before the court whether there was jurisdiction to make such an order. On appeal it was held by Pilkington J for the Court of Appeal that the High Court was correct in determining that the evidence showed that the company was the beneficial owner of the property. As to the question as to whether an order could be made vesting the property in the company under s 26 of the 1893 Act, as opposed to appointing a new transferee who could transfer the legal title to the

company, Pilkington J held that there was jurisdiction to make an order under s 26(c)(vi) of the 1893 Act vesting the property in the company without the necessity to first appoint a new trustee. In so deciding, it was found that the apparently cumulative conditions in s 26 are not in fact cumulative because the Court of Appeal said that it '*cannot envisage any trust of land that would easily satisfy all criteria*' (at para 101).

Distribution of Assets

[Courtney, *The Law of Companies* (4th ed), Ch 26]

Winding up of company – realisation and distribution of assets of Custom House Capital Limited taking 14 years – despite significant progress in distributing money to rightful owners, the liquidator was left with a 'rump' of recovered misappropriated monies and pooled client assets which remained undistributed and undistributable for a variety of reasons including that the liquidator had no details of the clients – application by liquidator for directions – *s 623* of the Companies Act 2014 – *Re Custom House Capital Limited* [2025] IEHC 103 (O'Moore J) . This case concerned an application by the liquidator of Custom House Capital Limited for directions as to how to treat a 'rump' of recovered misappropriated monies and pooled client assets which remained undistributed and undistributable for a variety of reasons including that the liquidator had no details of the clients. It has previously been emphasised to the liquidator that he was obliged to distribute the funds realised to the persons entitled to them. The liquidator set out four possibilities open to dealing with the rump: continue the liquidation; establish a trust to hold the rump; distribute the rump to clients identified pro rata to what their claim was; apply the statutory process for dealing with undistributable balances after the dissolution of a company. The first three options were discounted for reasons of cost and fairness.

Both the liquidator and the court favoured the fourth option – reliance on s 623 if the Act, subs (1) of which provides that 'Where a company has been wound up, and is about to be dissolved, the liquidator shall, in such manner as may be prescribed, lodge to such account as is prescribed by the Minister the whole unclaimed dividends admissible to proof and unapplied or undistributable balances.'. O'Moore J stated that the question to be decided was whether the rump monies and assets constitute 'unapplied or undistributable balances' within the meaning of s 623(1). O'Moore J held that confining himself to the words of the section, he would hold that the rump came within the terms of s 623 but that 'the general sense and purpose of the legislation is also conducive to the interpretation for which the official liquidator contends' (at para 17). O'Moore J also referred to the Cox Report of 1958 which, he observed, with 'extraordinary prescience' set out the very difficulty faced by the liquidator in the case before the court. In all the circumstances, it was held that all monies on hand or under the control of the Official Liquidator representing unapplied or undistributable balances of monies beneficially owned by and payable to or for the benefit of former clients of CHC should be lodged in accordance with s 623 of the Companies Act 2014 to the account prescribed by s 623(1) of the 2014 Act.