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Bloomsbury Professional's Company Law Developments – 2/26 - April

Welcome to Bloomsbury Professional's Company Law Developments (2/26 April), a series where I summarise what I consider to be the most important recent case and statute law developments in company law in the preceding two months. In this issue, I summarise some of the key points in two recent Irish High Court decisions concerning the exercise of the court's discretion – one in the context of an examinership application (***Re KC Capital Property Group Limited*** [2026] IEHC 115 (Twomey J)) and the other in the context of a petition to wind up a company (***Re Charles Kelly Limited*** [2026] IEHC 140 (Charleton J). Also noted is the decision in ***Ryconlou Limited v Conlon*** [2026] IEHC 152 (O'Donnell J) where there is a very useful summary of the proper approach in an application for security for costs under *s 52* of the Companies Act 2014 as to whether a corporate plaintiff is likely to be unable to pay the defendant's costs if the defendant is successful. Also noted is the decision in ***San Leon Energy plc v Brightwaters Energy Limited*** [2026] IEHC 1 (Kennedy J) where it was decided that the existence of an arbitration clause in an agreement between a company and a petitioning creditor was not per se a reason to refuse to grant a petition to wind up a company. Two recent English decisions are also noted. In ***Noal SCSp and ors v Novalpina Capital LLP and ors*** [2025] EWHC 1392 (Ch) (ICC Judge Agnello KC) the UK's High Court considered the requirements which applied where an English company is placed into members' voluntary liquidation and the meaning of solvency in that context. In ***THG plc v Zedra Trust Company (Jersey) Limited*** [2026] UKSC 6 by a four to one majority, the UK's Supreme Court determined that an action for unfair prejudice was not subject to a limitation period under UK law.

Dr Thomas B Courtney

Corporate Civil Litigation

[Courtney, *The Law of Companies* (4th ed) **Ch 6**]

Corporate civil litigation – Security for costs – Appeal from an order made in the Circuit Court directing the plaintiff company to provide security for costs – Section 52 of the Companies Act 2014 – ***Ryconlou Limited v Conlon*** [2026] IEHC 152 (O'Donnell J). This decision concerned an appeal from an order made in the Circuit Court ordering that the plaintiff company provide security for costs pursuant to s 52 of the Companies Act 2014. The application was made in the context of landlord and tenant proceedings concerning a licensed premises in Athlone. The parties had entered into a lease on 2018 for an annual rent of €85,580 + VAT. The lease expired in March 2025 and the plaintiff tenant remained in occupation and issued proceedings seeking relief claiming a new tenancy or in the alternative compensation for improvements. Noting that the jurisdiction to award security for costs against a limited company arose under s 52 of the Act, O'Donnell J noted that the test to be applied was set out by the Supreme Court in *Usk District Residents Association v Environmental Protection Agency* [2006] IESC 1, at para 6.2 and that, in the application before the court, the plaintiff had accepted that the defendant did have a *prima facie* defence, such that the threshold question was whether the defendant had established that there was reason to believe that the plaintiff would be unable to pay the defendant's costs in the event that he was successful in defending the proceedings. O'Donnell J stated that he was satisfied that the proper approach to the issue was set out in the judgment of Barniville J in *Coolbrook Developments Ltd v Lington Development Ltd and Davy*

Target Investments plc [2018] IEHC 634 and he summarised the principles there as being: *'(a) The onus rests on the applicant for security for costs to persuade the court that there is ' reason to believe' that the company – the subject of the application – will be unable to pay the costs of the defendant, if successful in its defence. (b) The standard by which this inability has to be established is not the balance of probabilities. As the requirement is to establish that there is reason to believe that the company 'will' be unable to meet a costs order in favour of the defendant, something a lot stronger than a 'mere risk' of this event happening must be established. (c) The court must consider the issue on the basis of all of the material evidence and such evidence may emanate from both sides of the application. The evidence must be credible. (d) While the accounts or financial statements of the company are very relevant to the issue which the court has to determine and may afford a basis for deciding the application one way or the other, they are not necessarily determinative of the application. The accounts may disclose a positive net asset position and yet may raise other questions or issues requiring an explanation from the company. Depending on how those questions are explained or answered, the court may conclude that the true financial position of the company is very different to the financial position as it may appear in the accounts or financial statements. (e) Where there are gaps or uncertainties in the accounts or in the evidence available to the court which could be filled or answered by the company resisting the application and where the company does not fill those gaps or answer those uncertainties, the court will lean against filling the unexplained gaps or resolving the uncertainties in a manner favourable to the company.*' (at para 18). Applying those principles to the matter before the court, O'Donnell J noted that a letter which the defendant submitted in evidence from a chartered accountant which confirmed that his review of the plaintiff's finances as per its abridged financial statements indicated sustained losses, deteriorating liquidity and a debt of over €67k owed by related parties pointed in his view '*towards a looming financial crisis*'. The plaintiff company too submitted a letter from its accountants which said that the directors were confident that the business will generate further profits and that it has paid its creditors, staff and landlord over its 12 years of trading. O'Donnell J concluded that on balance he did not consider that the first letter (which was the only substantial analysis from the defendant's side) met the necessary threshold. He said that the letter did not '*establish by any thorough analysis a risk that could be described as appreciable or a lot stronger than mere risk that the company will be unable to pay costs. It was open to the defendant to seek to have Mr. Ganly respond to what was put in evidence by the plaintiff and to identify whether and if so why he remained of the view that there was a 'looming financial crisis', but this did not occur*. (at para 39)'.

Court Protection

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

Court protection – Application to appoint an examiner – Application to obtain court protection for a company – Company having two employees and being a special purpose vehicle incorporated for the limited purpose of investing in a site and building a property thereon – Exercise of the High Court's discretion as to whether the appoint an examiner – Whether company of this type suitable for examinership – ***Re KC Capital Property Group Limited*** [2026] IEHC 115 (Twomey J). This case concerned an application to have a company placed under court protection and an examiner appointed in circumstances where the company was a special purpose vehicle incorporated for the limited purpose of investing in a site and building a property thereon. The company had just two employees and Twomey J said the situation presented to the court was akin to two friends deciding to borrow €500,000 to buy a site to build a house for rental, through a company, and then when the company fails to meet its loan repayments to the bank, the two friends seek to prevent the bank enforcing its security by having an examiner appointed. Twomey J said that the court does not believe that a company with just two employees, which is simply a vehicle for investing in property is the type of company for which examinership was designed. The matter came before the High Court following an appeal from the decision of Judge O'Connor in the Circuit Court in which he refused to confirm the appointment of interim examiners to three companies. It was explained that the two related companies had no employees and simply operated as conduits for rent on two commercial properties which had a combined value of €2m; both companies had guaranteed KC Capital Property Group Limited which was the focus of the examinership application.

An unusual aspect of the decision was that it was heard over the course of a day on 25 February 2026 and detailed affidavits and submissions were made to the court on behalf of the interim examiner, the

company and its creditors. The court was informed that it was required to give its decision on 27 February as on that date the examiner's appointment would terminate automatically. Twomey J said that in light of that fact, the court decided to focus only on the key reasons for its decision and although the creditors had made plausible arguments that the examiner was wrong to conclude that the company had a reasonable prospect of survival, the court decided to *assume that* the company had a reasonable prospect of survival for the purposes of s 509(2)(a) of the Act and to concentrate on what it considered to be the key issue, namely the exercise of the court's discretion as to whether to confirm the appointment of an examiner in the particular circumstances of the case.

Twomey J held that there were nine substantive reasons for his decision to exercise the court's discretion against the confirmation of the examiner's appointment. The first reason was that there was no benefit to the economy and no saving of a significant number of substantive jobs and in this regard Twomey J relied on the description of the 'principal focus' of the examinership legislation as set out by Clarke J in *Re Traffic Group* [2008] 3 IR 253 at para 5.5 and Hogan J in *Re Kitty Hall* [2017] IECA 47 at para 4.3. Rather than focus on the two jobs of the company's only employees who were property investors, Twomey J focussed instead on the delays the appointment of the interim examiner had on the completion of the building which was stalled and that the confirmation of the examiner would only add to further delay in subcontractors returning to work. Twomey J found that these delays could not be said to be positive for the general economic welfare of the community. The other eight reasons given for exercising the court's discretion against the appointment of an examiner were: (ii) the conclusion that everything, including a claim which the company claimed was an asset, be achieved through receivership; (iii) no real necessity to appoint an examiner; (iv) absence of uberrimae fides and absence of good faith by the company which included the removal of €50,000 from an account beneficially owned by the company's creditor; (v) the cost of the examinership would be have to be borne by the only creditor in the money; (vi) the examiner's failure to disclose fees to the creditor which would end up paying them; (vii) there was little prospect of an approved scheme of arrangement; (viii) the nature of the company's 'trading'; and (ix) after balancing the interests of creditors against those of the company. Twomey J concluded that the company was a long way from being '*a real enterprise with real jobs*' or from being described as a company which should be granted protection on the grounds that it is for the *'benefit of the economy as a whole'* and, in order to save '*as many as possible of the jobs which may be at stake'* (which in this case amounts to the sum total of the two jobs of the investors).

Shareholders' Remedies

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

Shareholders' remedies – Whether there is a statutory limitation period which bars a member of a company from petitioning the court for a remedy for unfair prejudice – Sections 994 and 996 of the Companies Act 2006 (UK) – Sections 8, 9 of the Limitation Act 1980 (UK) – ***THG plc v Zedra Trust Company (Jersey) Limited*** [2026] UKSC 6. The UK's Supreme Court held by a four to one majority that a claim for unfair prejudice under s 994 of the Companies Act 2006 (UK) is neither an 'action upon a specialty' under s 8 of the Limitation Act 1980 (UK) nor, as regards any claim for monetary relief, an 'action to recover any sum recoverable by virtue of any enactment' under s 9 of the 1980 Act. Therefore, in reversing the Court of Appeal, the Supreme Court held that no limitation period applies to claims brought under s 994.

Winding Up Companies

[Courtney, *The Law of Companies* (4th ed) **Ch 24**]

Winding up petition – Creditors of a company who were its solicitors applying to have the company wound up having previously obtained judgment for this costs against the company – Statutory demand having been served – Whether the company should be wound up as being insolvent or because of the

debt for the substantial legal fee which was not assessed due to the company's default – Sections 569, 570, 572 of the Companies Act 2014 – ***Re Charles Kelly Limited*** [2026] IEHC 140 (Charleton J). This case concerned an application to wind up a company on the grounds that it was unable to pay its debts. The creditor bringing the petition, the company's former solicitors, obtained judgment in default of appearance for the recovery of legal fees. The fees related to work carried out by the solicitors for the company over a four-year period from 2018 to 2022, some in ligation against Ulster Bank in which there existed at least one order for costs in favour of the company but which was not recovered from the Bank because the company failed to give its solicitors instructions. Also ignored was the imminent marking of judgment, despite a consent to late filing of an appearance. The sum owed grew with interest and that too was ignored and no attempt made to tax or agree the solicitor's costs. When the matter came before the High Court, the company only then asserted that the bill was excessive, should not have been marked in default and should not be sent to adjudication.

The petition to wind up the company was refused. What makes the case interesting is that it was decided, exclusively, on the basis of the court's discretion under s 572(1) of the Act. Charleton J identified (at para 21) eleven factors which have been recognised in case law as being relevant to the court's assessment of whether it should grant or refuse a winding-up order in the exercise of its discretion. Charleton J determined that on the facts so the case the immediate liquidation of the company was unnecessary to protect the debt and that liquidation was unnecessary and disproportionate. He determined that the creditor solicitors possessed adequate enforcement routes of a High Court judgment, referencing a judgment mortgage. Less intrusive remedies were available and he considered compulsory liquidation to be unwarranted. In so concluding, Charleton J went on to consider whether the other statutory ground relied upon was truly engaged and whether the company was unable to pay its debts as they fell due. Charleton J then considered the 'as they fall due' test. While acknowledging that the failure to pay the statutory demand within the 21 days indicated the company did not have realisable funds, he went on to say that 'the default judgment arises from, what is claimed to be untaxed and allegedly un-agreed professional fees, and the company indicates it will seek adjudication and an application to set aside the default judgment. The company strongly appears to be asset-rich and the petitioning solicitors already hold judgment mortgages over identified non-core assets, offering an alternative enforcement route that does not require liquidation'. While Charleton J acknowledged that those facts did not negate the engaging of the deeming provisions, they did '*inform the discretion available to this court as to whether a winding-up order should issue now or whether alternative means would adequately protect the creditor without the effects of liquidation*' (at para 24).

Charleton J was clearly influenced by the fact that winding up the company was a grave step that would put 23 employees potentially on the dole and even though the liquidator was likely to keep the company working as a going concern, the step of winding up would '*likely come as a seismic shock in the close community of Letterkenny*'. Winding up would damage what he said was a valuable business and he said that the creditor's 'very large legal fees debt' was secured at least in part by other means and that in the exercise of judicial discretion, the balance favours refusal of the petition.

Winding up petition – Application for an injunction to restrain the presentation of the winding up petition – Whether the petition grounds were disputed on bona fide and substantial grounds – Whether the presentation of the petition would be an abuse of process as the parties' agreement contained an arbitration clause – *Section 570* of the Companies Act 2014 – ***San Leon Energy plc v Brightwaters Energy Limited*** [2026] IEHC 1 (Kennedy J). In this application, the defendant sought to bring a petition pursuant to s 570 of the Companies Act 2014. The background was that the defendant was owed US$15,652,608 by the plaintiff after it undertook to pay the debt, which was in fact originally due by another entity to the defendant, in return for investment in a company called Energy Link Infrastructure (Malta) Ltd (ELI). Despite assurances that the plaintiff had received funding the monies were not paid as it appears that the plaintiff was unsuccessful in fund raising. After the defendant served a statutory 21-day letter demanding payment, the plaintiff contended that its undertaking to pay the defendant was contingent upon the plaintiff receiving investment and as such the undertaking to pay the defendant the sums due was null and void.

Kennedy J applied the principles of law applicable to injunctions to restrain the presentation of a petition to wind up a company and determined that he was not satisfied that there was a bona fide and substantial dispute which justifies restraining the defendant from bringing the winding up petition and also because there was unchallenged evidence of the plaintiff's insolvency. On the law governing the restraint of winding-up petitions, Kennedy J said that there was no real controversy concerning the Irish law principles applicable, citing a line of Irish authorities which culminated in the Supreme Court

decision in *Meridian Communications Ltd v Eircell Ltd* [2001] IESC 42 where McGuinness J said that "since a winding-up petition was not a legitimate means of enforcing payment of a debt which was bona fide disputed, the presentation of a petition would in normal circumstances be restrained if the company, in good faith and on substantial grounds disputed all liability in respect of the debt claimed".

Kennedy J also considered the significance of an arbitration clause in the agreement between the plaintiff and the defendant. On this point, it was noted that is common ground that the petition cannot proceed if there is a bona fide and substantial dispute, and that any such dispute would have to be resolved by arbitration. At the hearing, I understood the plaintiff to also argue that the question of whether there is such a dispute must itself be resolved by arbitration and that, on that latter point, there was conflicting international jurisprudence, with such a position being reflected in the English Court of Appeal's controversial decision in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575. However, Kennedy J noted that the issue was more recently analysed by the Privy Counsel in *Sian Participation Corp (In Liquidation) v Halimeda International Ltd* [2024] UKPC 16 and that there, the Board rejected the proposition that a winding-up petition should be stayed on the basis of a wide arbitration clause unless the debt was genuinely disputed on substantial grounds. On this point Kennedy J said that the arbitration clause did not change his opinion on the fact that there was not a substantial and bone fide dispute in issue and that the existence of an arbitration clause would only go to how any such dispute would be resolved. Kennedy J concluded on this point that the arbitration clause was clearly intended to determine how any contractual disputes should be resolved and it followed that: "If (but only if) a substantive or bona fide dispute was to arise, then as a matter of Irish law (if the agreement was governed by Irish law) the plaintiff would have been entitled to seek a stay" (at para 56).

Winding up – Members' voluntary winding up – Conditions under which it is acceptable in the UK to place a company into members' voluntary liquidation – Test for ability to pay debts within 12 months – *s 89* of the Insolvency Act 1986 (UK) ***Noal SCSp and ors v Novalpina Capital LLP and ors*** [2025] EWHC 1392 (Ch) (ICC Judge Agnello KC). In this important decision of practitioners of English law, the English High Court held that a company should only enter a members voluntary winding up where there is a clear, demonstrable ability that the company is able to pay all debts (including interest) within the period of 12 months from commencement of the winding-up, declared under s 89 of the Insolvency Act 1986. It was also held that s 89 sets out a standalone test, separate from both the cash flow and balance sheet tests. As to what must happen within the 12-month period, Judge Agnello KC said that adjudication, and payment of disputed debts is required within the 12-month period and that where payment in full of all debts within the 12 months is not possible, then a members' voluntary winding up is not appropriate. It was also held that if debts remain unpaid after 12 months, the liquidator has no discretion to extend this period, even if payment is imminent and that while the liquidation can continue beyond 12 months, this is only the case where all debts have been paid within the 12-month period.