Bloomsbury Professional’s Irish Company Law Update – January 2025

Introduction

Welcome to Bloomsbury Professional’s Irish Company Law Updates, 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, I note the commencement of many, but far from all, of the provisions of the Companies (Corporate Governance, Enforcement and Regulatory Provisions) Act 2024 following the signing of SI 639 of 2024. From an Irish case law perspective, there is a very comprehensive and detailed judgment of Heslin J in the case of *Registrar of Companies v Greenay Limited and Registrar of Companies v Kitchen Innovations Limited* [2025] IEHC 16 in which the consequences of obtaining ultra vires orders from the District Court are considered; there the District Court purported to extend companies’ time to late file annual returns, twice. This judgment is also of interest for its consideration of the functions of the Registrar of Companies. Also included is a note of the decision of the Irish High Court in *Victoria Hall Management Limited et al v Cox et al* [2024] IEHC 674 which, although not concerned with directors’ fiduciary duties, will still be of interest as it considers how other persons can also have fiduciary duties. And while there are other cases considered, the decision in *Re Barclays Bank Ireland plc* [2024] IEHC 738 (Quinn J) on schemes of arrangement is worthy of special mention since instead of simply relying on the applicant’s obligation to show good faith on bringing an application in which no other party is directly affected, the court required the appointment of a legitimus contradictor to assist the court by submissions researched independently of the applicant. Finally, the far-reaching decision on the computation of legal costs by reference to time and hourly rates delivered by Mr Justice Michael Twomey J in *Beakonford Limited v Stokes and Wilding* [2025] IEHC 22 is noted.

Dr Thomas B Courtney

Annual Returns

[*The Law of Companies* Ch 18]

Annual return – filing out of time – extension of time to file annual return – application to District Court for an extension of time – District Court making an order for the extension of time on two occasions contrary to express words of statute – judicial review application by Registrar of Companies – whether annual return and financial statements filed pursuant to a second order were validly filed – s 343 of the Companies Act 2014 – Ord 93B of the District Court Rules – consequences of ultra vires orders – *Registrar of Companies v Greenay Limited and Registrar of Companies v Kitchen Innovations Limited* [2025] IEHC 16 (Heslin J).

This was a judicial review application brought by the Registrar of Companies relating to orders made by the District Court allowing two different companies permission to file their annual returns late for a second time. Section 343(5) of the Act provides that:

> ‘The court, on an application made (on notice to the Registrar) by a company, may, if it is satisfied that it would be just to do so, make an order extending the time for the purposes of subsection (2) or (3) in which the annual return of the company in relation to a particular period may be delivered to the Registrar; only one such order may be made as respects the particular period to which the return concerned of the company relates.’ (emphasis added).

Order 93B of the District Court Rules provides for an application to the District Court under s 343 of the 2014 Act, which application must include a statement that no *previous* order has been made by the District Court under s 343(5) in respect of the company as regards the period concerned. Heslin J noted that while Ord 39 allowed for the enlargement of abridgement of time fixed by a prior order of the District Court, that this did not permit the enlargement of any period specified in a statute. In the case of both Greenay Limited and Kitchen Innovations Limited, the District Court granted the companies an order under s 343(5) to extend the period permitted in which to file their annual returns; in both cases, for different reasons, both companies failed to file within the extended period and sought a further extension. Notwithstanding the clear wording of the section, both companies applied again for an order extending the period in which they could file their annual returns. Greenay Limited sought the extension on the basis that its solicitor admitted it was entirely due to his inadvertence and pointed out that the company (in losing its audit exemption) would be penalised for his error. Notwithstanding the oral and written objections of the Registrar of Companies, the order was granted extending the order in purported reliance on Ord 39 r 5 of the District Court Rules which allows the court to extend the time permitted for the doing of something fixed by a prior order of the District Court. The Registrar of Companies complied with the District Court Order and registered the annual return but expressly did so without prejudice to its application for judicial review of the District Court order. In the case of Kitchen Innovations Limited, it had failed to file annual returns for three years and got an order permitting late filing; it filed two of the three but failed to file the third and applied for an extension of the time, purporting to rely on Ord 39 r 5. It too was granted an extension in purported reliance on Ord 39 r 5 and the Registrar of Companies registered its annual return without prejudice to its judicial review of that decision.

Heslin J **held** that the objections of the Registrar of Companies were well founded and that the District Court Rules did not permit for the further extension of an order made under s 343. On the judicial review application, Heslin J noted that both counsel for the two companies then accepted that the Registrar of Companies' analysis was correct; however they both sought to retain the benefits derived from the ultra vires orders. In particular it was claimed that the Registrar had acquiesced in registering the annual returns and made various other arguments as to why the High Court could not, or should not, set aside the District Court orders.

As to the point that the High Court did not have jurisdiction, Heslin J **held** that the decision of the Court of Appeal in *Wee Care Limited v Companies Registration Office* [2020] IECA 266 had no application to the matter in hand and was not authority for saying that the High Court did not have authority to undo the effects of the ultra vires orders. At para 88 he said:

> 'Rather than the issue being whether there exists or not an inherent jurisdiction to direct the CRO to *replace* statements, filed within time, these proceedings concern the undoubted jurisdiction to grant relief where a decision is found to have been made unlawfully.'

The learned judge went on to reject that the High Court did not have jurisdiction to 'unscramble the egg' as the companies' counsel had submitted and also rejected that to undo the ultra vires orders would run contrary to public policy.

On the question of acquiescence, Heslin J **held** that the Registrar did not have any discretion to refuse to register the orders pointing to the functions of that office under s 887 of the Act and so neither acquiesced nor exercised discretion in registering the annual returns on foot of the District Court order. To have not registered them would have meant that the Registrar was ignoring her statutory function which is to register documents which are delivered. The companies had argued that the orders had not directed or required the Registrar to register the annual returns; Heslin J said this argument too was without substance as even a valid order made under s 343(5) did not direct or require the registrar to register the orders.

On the question of consequences of unwinding the orders, the companies pointed to various adverse consequences including that they would no longer be able to avail of the exemption from having a statutory audit. Heslin J **held** that those consequences came from the failure to comply with the requirements to file on time, not from the grant of relief of the court.

Heslin J **held** that while certiorari was a discretionary remedy, there was nothing unfair or unjust about quashing the ultra vires orders. Moreover, he found that the Registrar had not delayed and no third parties took on new commitments on foot of the ultra vires orders. He also declined to grant prospective only relief saying that to do so:

> 'would (i) facilitate the undermining of statutory obligations; (ii) permit the respondents to gain benefit from ultra vires orders; (iii) would not return the situation to that which pertained prior to the making of the invalid decisions; and (iv) would involve doing less than undoing the consequences of ultra vires orders made at the respondents' insistence'.

Heslin J also rejected that the Registrar had an alternative remedy under s 898 of the Act, finding that she had to comply with the District Court order. Heslin J also rejected the argument that the statutory register was sacrosanct as it was relied upon by the public, saying no authority had been provided in support of that position and that the argument was, in any event, addressed by the many other findings of the court. For the foregoing and other reasons Heslin J granted the Registrar the reliefs sought, concluding inter alia, by saying that the:

> '[f]ailure to grant this relief would be to permit the delivery and registration of annual returns contrary to the will of the Irish people as expressed through legislation enacted by the Oireachtas, specifically, s 343(5) of the 2014 Act'.

Civil Litigation

Civil litigation – security for costs – the requirement to use hourly rates in the estimation of fees due to lawyers in the context of a security for costs application – s 155(1) and paras 1(b) and 2(c) of Sch 1 of the Legal Services Regulation Act 2015 – s 52 of the Companies Act 2014 – *Beakonford Limited v Stokes and Wilding* [2025] IEHC 22 (Twomey J).

In what has the potential to be a very far-reaching judgment, Twomey J has **held** that para 2(c) of Sch 1 of the Legal Services Act 2015 makes it mandatory for the Legal Costs Adjudicator (LCA) (previously the taxing master) when adjudicating on costs to consider whether the effective hourly rates paid to individual lawyers are 'reasonable'; and that the word 'reasonable' in para 1(b) in Sch 1 means reasonable per se on objectively justifiable grounds. Twomey J concluded that a litigant who is forced to pay a winning party's costs is entitled to know the hourly rates of the lawyers whose costs he is required by the laws of the State to pay. He also concluded that '*it could not be just for a losing litigant to be forced by the laws of the State to pay his opponent's lawyers an hourly rate, that is multiples of the effective hourly rate paid to the person occupying the most important role in the State (the Taoiseach)*'. In the context of a security for costs application, Twomey J **held** that the:

> 'Court, when estimating the amount of security to be provided by a (presumed) losing litigant, should be presented with the hourly rates upon which any costs estimates are based. In this way, this Court can determine if those hourly rates are "reasonable" on objectively justifiable grounds and not by comparison with "prohibitive" costs that were paid in other cases.'

Twomey J **held** that it had been established by providing credible testimony that it was reasonable to believe that the plaintiff-company would be unable to pay the defendants' costs if the defendants were successful in defending the plaintiff-company's claim. Turning to the quantum of the security to be provided, Twomey J noted that three estimates of the costs of the defendants had been placed before the court: one for €250,796, one for €411,249 and one for €454,820. None had been broken down by reference to time and hourly rates. Twomey J found that this was unacceptable and commented that in respect of the solicitors' fee included in the highest estimate of €170,000, it would take the Taoiseach on a salary of €241,480, eight months to earn the sum which it was claimed was 'reasonable' to pay one legal practitioner for his time in a six-day trial (plus preparation). The learned judge **decided**

against requiring the three legal costs accountants to resubmit estimates based on time and hourly rate as this would have added significantly to the costs of the litigation and instead, on a pragmatic basis, preferred the first estimate of €250,796 for each of the two defendants, although the court could not say that the estimate was 'reasonable'. Twomey J noted that if the plaintiff lost the case, then the LCA would at that stage have to ensure that the costs are 'reasonable' by applying hourly rates that are reasonable on objectively justifiable grounds.

Commencement of a Number of Amendments to Companies Act 2014

Amendment of the Companies Act 2014 – Companies (Corporate Governance, Enforcement and Regulatory Provisions) Act 2024 – commencement of a significant number of the provisions of the 2024 Act – Companies (Corporate Governance, Enforcement and Regulatory Provisions) Act 2024 (Commencement) Order 2024, SI 639 of 2024.

Regulation 3 of SI 639 of 2024 provides that 3 December 2024 was appointed as the day on which the following provisions of the Companies (Corporate Governance, Enforcement and Regulatory Provisions) Act 2024 (No 44 of 2024) shall come into operation: Pt 1 and ss 4 and 5; 7; 9–14; 21; 23; 27–34; 36, 37; 39; 41; 43–46; 49, 50; 54; 57–70; and 73–89. It is apparent from this list that there remain a significant number of provisions which have *not* yet been commenced and so it is important that practitioners remain vigilant to further commencing statutory instruments.

Fiduciary Duties

[*The Law of Companies* Ch 16]

Fiduciary duties – whether an individual retained by a company as an employee or a consultant could be a fiduciary owing duties to the company – whether the categories of fiduciary were closed – if person was a fiduciary in such circumstances, what duties were owed to the company – whether fiduciary duty breached – remedies available against a person found to be a fiduciary – *Victoria Hall Management Limited et al v Cox et al* [2024] IEHC 674.

In this case the defendants developed a student accommodation scheme at Gardiner Street, Dublin; the opportunity for the development came to the first named defendant, Mr Cox and the plaintiffs claimed that at the time when he learned of and took the opportunity, Mr Cox held a senior and trusted position in the company and it was argued that he was under a duty to disclose to the company such an opportunity and not to divert it and the profits earned to himself and others. In the course of his lengthy and comprehensive judgment, Quinn J considered the nature of fiduciary relationships owed by persons *who were not company directors*. Of interest is that Quinn J cited with approval the Australian decision in *Oliver Hume South East Queensland PTY Limited v Investa Residential Group PTY Limited* [2017] FCAFC 141 where Greenwood J said that the '*categories of fiduciary are not closed*' so that the mere fact that a person is an employee or a consultant would not of itself determine whether fiduciary duties were owed and in each case a '*calculus of factual information*' needed to be examined. The decision in *Oliver Hume* was particularly relevant to company law, and the defendants in the Irish case sought to distinguish the principles described in the *Oliver Hume* case by reference to the fact that the court in that case was concerned with the conduct of a person who was an employee of the parent company of a group which was making managerial decisions, and giving directions on strategy, in relation to assets held by the subsidiary company to whom it was found by the court that the employee owed fiduciary duties. Quinn J rejected that this distinction was relevant to the central principle he identified and adopted for the unusual facts of the case before him, namely, that the categories of fiduciary are not closed and that a finding of fiduciary obligations can flow from evidence of one party reposing confidence in another who, in turn gains both confidence and influence. Quinn J held that the party gaining such confidence and influence cannot be allowed to profit from the abuse of that position.

Quinn J reviewed the nature of the relationship and found that Mr Cox gained knowledge of the plaintiffs' business plans and ambitions and was treated with the seniority, trust and confidence which

accompanied the title Investment Director which he continued to employ in his communications internally and externally. The learned judge went on to expressly adopt the test applied by the Federal Court of Australia in the *Oliver Hume* case that the category of fiduciaries is not closed and having applied the 'calculus of factual considerations' to the case in hand, Quinn J concluded that the trust reposed in Mr Cox to his knowledge was such as to render the plaintiffs vulnerable to his actions and he owed fiduciary duties to the plaintiffs.

As to what those duties were, Quinn J said that they were:

> '(1) Not to compete with the plaintiffs without their informed consent. (2) To disclose to the plaintiffs any opportunity which came to his attention in the sector in which the plaintiffs conducted business and in which, to his knowledge, the plaintiffs were seeking new opportunities, namely commercial property development including student accommodation, in Dublin and elsewhere. (3) Not to divert such opportunities and the profits thereof for his own benefit and the benefit of others. (4) To respect the confidentiality of business records and information of the plaintiffs, and not without their informed consent to divulge such information to others.' (at para 690).

Consistent with the remedies against a company director who is found to breach his or her fiduciary duty, Quinn J ordered that Mr Cox account for all profit made, an order which was extended to a company which was the vehicle used by the first defendant both as a recipient of payments from the plaintiffs, and as part of the structure for the construction and development of Gardiner Street.

Schemes, Reorganisations and Mergers

[*The Law of Companies* Ch 22]

Scheme of arrangement – cross border merger – whether the scheme was a reconstruction – whether it was appropriate to proceed by way of a members' scheme and not a creditors' scheme – whether the application was to be treated as proceedings against the applicant's customers – appointment of a legitimus contradictor to assist the court by submissions researched independently of the applicant – whether the scheme was a reconstruction – ss 453, 455(2) and Pt 9 of the Companies Act 2014 – *Re Barclays Bank Ireland plc* [2024] IEHC 738 (Quinn J).

The background to this decision was that the applicant, Barclays Bank Ireland plc (which was a subsidiary of Barclays Bank plc) was an Irish licensed credit institution which was one of the principal operating entities in the Barclays Group and conducted the majority of the group's cross-border banking and investment services in the EEA through a series of local branches. It was decided to discontinue customer services in that region and agreed to sell the business of the Hamburg branch which had 2.3m customers and €4.6b deposits, €4.3b in net loans and employed 650 persons to BAWAG PSK, an Austrian credit institution. The mechanics of the sale was that the applicant would first transfer the business conducted by the Hamburg branch to a new company pursuant to an Irish law governed scheme of arrangement in accordance with Pt 9 of the Companies Act 2014; secondly, one minute later, the new company would merge into BAWAG PSK by a cross border merger by acquisition under the European Union (Cross-Border Conversions, Mergers and Divisions) Regulations 2023 (SI 233 of 2023) and their Austrian equivalent. This was a complicated deal which involved both judicial approvals, by the ECB and by regulators in Germany and Austria. It was apprehended that were the sale to be effected by any other means, there would be significant challenges to prevent disruption to customers.

Ordinarily, applications to approve schemes of arrangement under Pt 9 of the Companies Act 2014 proceed on the basis that the applicant must act with utmost good faith, meaning that its legal advisors must not hide anything from the court, setting out the basis upon which it is open to the court to confirm the application and addressing any legal obstacles as might also exist to the court giving its confirmation. What makes this application unusual was that when the applicant sought directions, McDonald J directed that the court hear submissions by an independent *legitimus contradictor*. Although the judgment of Quinn J says that the direction was made by McDonald J '*having regard to the fact that the only respondent to the application is … a wholly-owned subsidiary of the applicant*' it is

thought that the complexity of the application and particularly that the regulated business being transferred involved the interests of consumers, must have weighted heavily in the decision. In this case, the Bar of Ireland's Council agreed to the appointment of counsel and solicitors to appear to research and identify case law and legal principles relevant to the questions identified, analyse differing arguments or conclusions which may be open to the court in relation to the questions raised, and to express their preferred conclusions. Quinn J noted that while differing on certain aspects of the analysis, the legitimus contradictor did not disagree with the fundamentals of the applicant's submissions.

The first question considered by Quinn J was whether the scheme was a members' scheme (and not a creditors' scheme). Section 453 of the Act requires that the scheme is a compromise or arrangement between the applicant and its shareholder, but that there was no compromise or arrangement with its creditors, although creditors would be affected since they would be bound by the novation by operation of law of their contracts from Barclays Bank Ireland plc to first its subsidiary and then to the Austrian bank, BAWAG. Creditors were put on notice of the hearing to sanction the scheme but no meetings of creditors were convened. Quinn J noted a number of authorities on whether a scheme was a members' scheme or a creditors' scheme (*Re Clydesdale Bank Limited* [1950] SC 30; *TSB Nuclear Energy Investment UK Limited* [2014] EWHC 1272; *Re Stork ICM Australia Prt Limited* [2006] FCA 1849 before concluding that he adopted the analysis from those cases and found that the terms of the scheme and orders sought did not impair or compromise the claims of creditors; that advertisement and direct notification of creditors was adequate and that the matter before him was an appropriate case in which to proceed by way of a members' scheme and hold a meeting of the scheme shareholder only.

Quinn J noted that the applicant had satisfied the five criteria identified by Kelly J in *Re Colonia Insurance (Ireland) Limited* [2005] IEHC 115 however, he said it was in the instant case necessary to consider questions of jurisdiction and recognition and analyse whether the scheme was truly a reconstruction for the purposes of s 455.

On the jurisdiction point, Quinn J held since the overwhelming majority of customers, creditors and other counterparties were located outside of the State, the court needed to consider the question of recognition and effectiveness of the scheme in the relevant jurisdictions. Quinn J concluded that the application was a commercial matter for the purposes of the Brussels Regulation and that the court had jurisdiction to make the order. Moreover, on the question of recognition and enforcement, Quinn J noted the several expert opinions provided and said he was satisfied that the scheme and scheme orders would be recognised and enforceable in the relevant jurisdictions.

Quinn J noted that it was a precondition to the making of orders under s 455 that the scheme be a scheme for reconstruction or amalgamation, and that since it was not an amalgamation, it needed to be established that it was a reconstruction. Noting that the term 'reconstruction' was not defined by the Act, Quinn J looked to case law. In this regard he noted the decision of Buckley J in the English decision of *South Africa Supply & Cold Storage Company* [1904] 2 Ch 268 that it was a commercial term, not a legal term, and that a reconstruction did not include a mere sale and that following a reconstruction the undertaking must continue:

> 'in some altered form to continue the undertaking in such a manner as that the persons now carrying it on will substantially continue to carry it on. It involves, I think, that substantially the same business shall be carried on and substantially the same persons shall carry it on.'

Quinn J accepted that if the scheme took effect as a standalone procedure it would be a reconstruction scheme; however he had to consider whether the fact that there was going to be a merger effected one minute after the transfer to the new company, meant that it was not a reconstruction. Quinn J looked at a number of authorities, most concerning tax law (*Keane v The Revenue Commissioners* [2008] ITR 57; *Crane Friehauf Limited v Inland Revenue Commissioners* [1975] 1 All ER 429) and after reasoned analysis concluded that despite the fact that there was a subsequent step to occur one minute after the scheme took effect, the scheme remained a reconstruction.

Quinn J concluded his judgment by making an orders pursuant to s 453 of the Act to sanction the scheme of arrangement between the applicant and its shareholder; and pursuant to s 455 for the transfer to the respondent of the assets, liabilities and agreement of the applicant.

Shareholders’ Remedies

[*The Law of Companies* Ch 11]

Shareholders’ remedies – applicant seeking relief for oppression and disregard of interests under s 212 of the Companies Act 2014 – whether applicant had standing to seek relief – whether applicant had to be a member of the company in order to bring an application under s 212 – whether to order a modular trial so as to address the standing point first – *Re Maxela Limited and Eastdeli Limited; Vakiy v Bulgakov* [2025] IEHC 11 (Mulcahy J).

The applicant for relief under s 212 claimed that the affairs of two companies had been conducted oppressively and in disregard of his interests. The respondent claimed that the applicant did not have standing to bring the application as he was not a member. The present application was not to consider the substantive legal issues in dispute but concerned an application by the respondent for a modular trial in which the issue of locus standi would first be determined.

The facts were that the applicant and respondent had established a company in 2005 to import and distribute Central and Eastern European food supplies and also to operate 14 retail stores throughout the State. One of the disputes between the two equal 50:50 shareholders concerned whether to build their own warehouse or to continue to rent. The applicant did not agree with the respondent that they should build their own. The respondent claimed that they had both agreed to sell their interests in their companies to a new company called Cortex in return for 50% each of the shares in that company. The respondent claimed that had been done and that the applicant had signed an irrevocable offer to do this and points to the fact that the CRO recorded that the two of them were issued with 50% of the shares in Cortex; he claimed that Cortex’s acquisition of their shares had not been recorded in the CRO because the applicant would not agree to the filings. The applicant claimed that the agreement had never been finalised and that if he had signed documentation, their contents had been misrepresented to him and in effect he claimed to continue to be a member of the original companies.

Mulcahy J said that the respondent’s position was clear: to bring s 212 proceedings the applicant had to be a member of the company and the respondent relied on the Supreme Court decision in *Re Via Net Works (Ireland) Ltd* [2002] 2 IR 47. He also noted that the applicant sought to rely on an exception to the principle in *Via Net Works* suggested in Courtney, *The Law of Companies*, (4th edn) at [11.049] where it was said:

> ‘It is thought that where the oppression or disregard of interests alleged is the expropriation of the petitioner’s shares, the decision in Re Via Net Works (Ireland) Ltd ought to be distinguished and should not preclude the petition being heard under s 212.’

Mulcahy J noted that the issue before him was to consider whether to order a modular trial or a unitary hearing and that the latter was the default position. Mulcahy J noted that the principles applicable to the question had been identified in *McCann v Desmond* [2010] 4 IR 554. The learned judge **decided** that he was not convinced that the case was an appropriate one in which to order a modular trial saying that the determination of the locus standi issue, isolated from the balance of the case, might not be possible and could operate to the disadvantage of the applicant. The learned judge **held** he would not order a modular trial on the standing issue.

Winding Up

[*The Law of Companies* Ch 24]

Winding up – inability to pay debts – just and equitable ground – locus standi to present petition to wind up company – whether petitioner was a creditor – whether petition debt was bona fide disputed on substantive grounds – ss 569(1), 570 and 571 of the Companies Act 2014 – *Re City Quarter Capital II plc* [2024] IEHC 686 (Mulcahy J).

This decision arose as a consequence of an earlier decision of Mulcahy J in *Re City Quarter Capital II PLC* [2024] IEHC 530 (which was noted and summarised in Bloomsbury Professional’s November *Irish Company Law Update*) which allowed the substitution of the original petitioner, following which

the joint liquidators of a company called Blackbee Investments Limited (Blackbee) were permitted to continue as petitioners. The joint liquidators claimed that the relationship between Blackbee and the company who were the subject of the petition (the 'Company') was that it was an arranger for the Company which issued bonds; that Blackbee had been paid €1m between 2017 and 2018 but they could see no evidence of fees having being paid in the period 2019 to 2022. They did claim for fees unpaid in 2023 and 2024 and raised 52 invoices in relation to those years. The Company's sole active director disputed these claims, saying the some of the fees claimed were dependent upon being 'agreed', some fees were addressed to other entities, some of the services had not been provided and that no basis was given for the percentage figures used to calculate charges, etc. Mulcahy J reviewed this and other affidavit evidence which had been put before the court and noted that one of the key points was that the liquidators claimed that the sole active director's evidence did not meet the test that the petition debt was bona fide disputed on substantial grounds.

Mulcahy J noted that the Company's opposition to the petition rested entirely on the proposition that the petitioner was not a creditor and that while the Company's counsel accepted that while the evidence was not compelling, it could not be rejected without being tested by way of cross-examination (relying on the Supreme Court decision in *RAS Medical Limited v The Royal College of Surgeons in Ireland* [2019] IESC 4) and referred to the application of the principles in that application for judicial review to a winding up petition in the High Court decision Butler J in *Re Bayview Hotel Limited* [2022] IEHC 516.

Mulcahy J noted that the question to be decided was whether the Company had put forward a potential defence to the petitioner's claim for the petition debt which went beyond mere assertion unsupported by evidence or facts which are contradictory and inconsistent with uncontested documentation. He noted that if it has, then the court must, for the purpose of the application, accept the facts as asserted by the Company and conclude that the petitioner has not met the evidential burden regarding proof of the debt on which it relies. In order to answer this question, it was necessary to interrogate carefully what precisely has been said on behalf of the Company and what has been tendered by way of documentation to support it (para 42). After examining the affidavit evidence, Mulcahy J determined that the Company had not established an arguable defence and was based on mere assertions and there was no requirement to cross-examine for the purposes of determining the application.

Mulcahy J concluded that the petitioner was a creditor of the Company and that the Company was unable to pay its debts and ordered the winding up of the Company pursuant to s 569(1)(d) of the Act. While acknowledging that it was not strictly necessary to consider whether an order for winding up on the just and equitable ground (s 569(1)(e)) was appropriate, Mulcahy J went on to say that had it been required, he would have had no hesitation in doing so because the Company was at the heart of a complex scheme of investments in relation to which investors had raised significant concerns and because its failure to file financial statements since 2018 had heightened those concerns.

Finally, Mulcahy J noted that it was not necessary to address the difficult question of whether the court would have retained jurisdiction to wind up the Company (on either the inability to pay debts or the just and equitable ground) had he concluded that the debt was disputed on substantial grounds. On this point the learned judge said that where no reliance is placed on the deeming provisions in s 570 of the Act:

> 'it may be, therefore, that a petitioner is not deprived of standing to present a petition merely because the debt is disputed, rather it may be that it is only deprived of the entitlement to have the company deemed insolvent by reason of an inability to pay the disputed debt. The resolution of this issue will have to await a case in which it may be determinative.' (at para 76).

Winding Up Petition

[The Law of Companies Ch 24]

Winding up – presentation of petition to wind up – time when a winding-up petition is presented – *In Re a Company* [2024] EWCA Civ 1436.

In this case the question before the UK's Court of Appeal was '*in an era of electronic working, when is a winding-up petition presented?*'. It was determined by Snowden LJ that a winding-up petition is only presented when a petition has been delivered to the court, and the requirements of any statute, rules or practice direction which apply to presentation have been complied with. In the course of this judgment, Snowden LJ considered the early history of the presentation of petitions to wind up companies, commencing with s 69 of the Joint Stock Companies Act 1856 before considering the UK's rules on electronic working which permit electronic delivery of documents to the court under the UK's 2016 Rules of Court. Snowden LJ noted that for over 150 years the concept of presentation of a winding-up petition had been a feature of the insolvency legislation and noted that while there was an attractive simplicity to the submission that the presentation of a winding-up petition is, and always has been, synonymous with mere delivery of the relevant document to the court, things are not quite that simple. While delivery of the document comprising the petition 'is the core element of the concept of presentation of a petition' as far back as s 69 of the 1856 Act, a verifying affidavit was required to be filed or lodged at the same time as the presentation of the petition and, Snowden LJ concluded, a petition could not be said to have been presented under s 69 until both petition *and* affidavit had been delivered. It was also determined that under the UK's rules, payment should be made before the presentation of the petition and so until payment was made the petition would not be considered to be presented.