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Bloomsbury Professional's Company Law Developments

Welcome to Bloomsbury Professional's Company Law Developments (3/25 May), 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 summarise the decision of our Court of Appeal in ***Re Latzur Limited*** [2023] IECA 60 which although delivered on 16 March 2023 was only uploaded to the Courts Service website on 6 March 2025. This is a very important decision where Collins J for the Court of Appeal considers in some detail the nature of floating charges and how they crystallise and decrystallise. The High Court decision of Jackson J in the family law matter of AOC v FLN [2024] IEHC 756 is a reminder that a share transfer can be set aside under *s 35* of the Family Law Act 1995 where it is found to be a 'reviewable disposition' intended to defeat a spouses claims. Also noted is the recent High Court decision of Quinn J in ***Re Mercer Agencies Limited (In Administration)*** [2025] IEHC 261; this decision considers the circumstances in which the High Court will afford assistance in insolvency proceedings, in this case an administration order made by the High Court in Northern Ireland, something which necessitated by Brexit as the EU Insolvency Regulation could not be invoked by the company. T Also summarised is the recent decision of the UK's Supreme Court in ***Bilta (UK) Ltd v Tradition Financial Services Limited*** [2025] UKSC 18 which considers whether outsiders (i.e. persons who are not directors or employed by a company) can fall to be persons who have been knowingly parties to the carrying on of the business of a company for the purposes of fraudulent trading.

Dr Thomas B Courtney

Compulsory Transfer of Shares

Compulsory transfer of shares – Compelling dissenting minority to sell their shares where an offer to purchase has been accepted by 80% of the shareholders – Inability to pay the consideration price to the shareholders who dissented and whose shares are compulsorily acquired – Payment of consideration into a separate bank account – Facilitation of payment into an account – Procedure to be followed when lodging such funds to a separate account – *s 459(7)* of the Companies Act 2014 – ***Rules of the Superior Courts (Companies Act 2014 Section 459) 2025, SI 150 of 2025***. The Superior Courts Rules Committee has made new Rules of Court with which the Minister for Justice concurred which amend the Rules of the Superior Courts 1986 to 2025. The key change is the introduction of a new rule 31, Order 77 which facilitates an offeree company which desires to lodge money pursuant to s 459(7)(c) and s 459(9)(b) to swear and file an affidavit and schedule setting out prescribed details. It is also provided that after the expiration of seven years, the Accountant shall in accordance with s 459(11) of the Companies Act 2014 transfer to the Exchequer the amount of the lodgement then remaining unclaimed. The procedure thus established will be utilised where companies are unable to trace, usually, small shareholders who are bought out for example where the company does not have up to date bank account details or address details for the shareholders and so cannot send them the consideration for their shares.

Directors' Duties

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

Breach of directors' duties – Third parties alleged to have provided dishonest assistance – Appeal of finding that the claims were statute barred – Bilta (UK) Limited et al v Tradition Financial Services Limited [2025] UKSC 18. This case, which also concerned the interpretation of the UK's fraudulent trading provision, s 213 of the Insolvency Act 1986 (see **Fraudulent Trading** considered post)

required the UK's Supreme Court to consider whether the claimants had established an entitlement to a postponement of the running of time in their favour under s 32 of the UK's Statute of Limitations 1980, until a date less than 6 years before they issued their claim in dishonest assistance against the third party. The UK's Supreme Court held that the Court of Appeal was correct in finding that the burden lay upon the two companies to show that they could not with reasonable diligence have discovered the relevant fraud, and the Supreme Court determined that the companies had failed to discharge that burden and so the claims were statute barred.

Floating Charge

Courtney, *The Law of Companies* (4th ed), **Ch 20**

Floating charge – Crystallisation of floating charge – Events causing crystallisation – Express crystallisation – Automatic crystallisation – Whether floating charge and de-crystallise and re-crystallise in the context of an unsuccessful examinership – Events giving rise to crystallisation – Whether automatic crystallisation clauses void on grounds of public policy – Whether the charge under which the receiver was appointed was a fixed or floating charge – Whether the Revenue Commissioners had priority – Ss *98* and *285* of the Companies Act 1963 – ***Re Latzur Limited*** [2023] IECA 60 (delivered on 16 March 2023 but only uploaded to the Courts Service website on 6 March 2025). The background to this decision of the Court of Appeal was that Mr Fennell was appointed receiver of the assets of Latzur Limited which operated the A-Wear retail chain; he had previously acted as interim and then examiner of the company but had been unable to formulate any proposal for a compromise or scheme of arrangement which might have saved the company and so, by High Court order the court protection ceased after which time Mr Fennell was appointed receiver by one of the company's creditors, Chelsey. The Revenue Commissioners were also a substantial creditor of Latzur and claimed that a large proportion of the debts due to them ranked as preferential debts under s 98 of the Companies Act 1963 but this was disputed by Chelsey: it claimed that the charge under which the receiver had been appointed was a fixed charge, not a floating charge such that ss 285 and 98 did not confer priority on the Revenue Commissioners. The learned Collins J, giving the judgment of the Court of Appeal, noted that the Supreme Court had held in *JD Brian Limited* [2015] IESC 62 that the reference in s 285(7)(b) of the Companies Act 1963 to 'the claims of holders of debentures under any floating charge created by the company' meant claims advanced on a charge that was a floating charge as at the commencement of the winding up and thus the provision did not capture claims secured by a previously floating charge that had been converted into a fixed charge prior to such commencement with the result that the Revenue had no priority. And while the Oireachtas reversed the effects of that decision by amending s 621(7)(b) of the Companies Act 2014, it was common case that the amendment had no bearing on the proceedings which related to events which took place under the former legislation. Collins J noted that the effect of the decision in Re JD Brian Limited was that the Revenue's claim to priority was liable to be defeated if Chesley's floating charge had crystallised prior to the appointment of the receiver.

The debenture in that case provided for conversion or crystallisation to occur in a number of ways, including by notice and also automatic crystallisation upon the occurrence of certain events. The debenture did not make provision for the reversal or de-crystallisation of the floating charges once crystallised.

In this case the creditor, Chesley, relied on a number of crystallisation events: (1) that the floating charge crystallised on 3 October 2013 when the sole member of Latzur decided in writing to petition the High Court to appoint an examiner and did so in reliance on a clause in the Debenture which provided that a meeting convened for the purpose of considering a resolution for the appointment of an examiner triggered an automatic crystallisation. (2) that the floating charge crystallised on 8 October 2013 on the presentation of Latzur's petition for the appointment of an examiner in reliance upon a clause in the Debenture which so provided. (3) that the floating charge crystallised on 23 November 2013 by virtue of the delivery of a notice of crystallisation given under a clause of the Debenture. (4) the floating charge crystallised on 28 November 2013 as an automatic crystallisation event pursuant to the Debenture upon the appointment of a receiver to Latzur. This point was not pressed in the High Court or pursued on appeal because if this was the basis of the crystallisation of the floating charge, the creditor would not have had priority to the Revenue Commissioners.

Before considering if and when the floating charge crystallised, Collins J for the Court of Appeal considered the law on the crystallisation and de-crystallisation of floating charges. This involved considering the nature and characteristics of floating charges and the learned judge quoted from the decisions in *Re Keenan Bros Ltd* [1985] IR 401, *Re Yorkshire Woolcombers Association Limited* [1903] 2 Ch 284, *Re Spectrum Plus Ltd* [2005] UKHL 41 and *Agnew v Comr of Inland Revenue* [2001] UKPC 28. In this regard Collins J noted that there is some debate as to the nature of the interest created by a floating charge, but concluded it was not necessary to enter into that debate. Collings J then noted the effect of crystallisation which is that the charge ceases to float and becomes a fixed charge. It was also noted that the Debenture in the case in hand made express provision for the treatment of floating charge assets post conversion to a fixed charge.

Collins J went on to consider the concepts of express and automatic crystallisation and the decision of the Supreme Court in *JD Brian*. Collins J noted that both the High and Supreme Court in *JD Brian* concurred that there was no rule of law precluding the parties to a debenture agreeing that a floating charge would crystallise upon the happening of an event or the taking of a step by the chargee. Collins J also said (at para 32) that while *JD Brian* was concerned with express crystallisation the logic 'appears to apply with equal force to *automatic crystallisation* clauses'. It was also noted that aside from the provisions of any Debenture, certain events such as the commencement of a winding up or the appointment of a receiver, would crystallise a floating charge. Collins J also noted that the material distinction between express and automatic crystallisation clauses was that while the former involves active intervention by the debenture holder, the latter does not and may cause crystallisation without the debenture holder even being aware that crystallisation has occurred.

Collins J then considered the concept of decrystallisation and the decision in *Re Holidair* where Blayney J determined that upon the appointment of an examiner, a crystallised floating charge would resume its character of a floating charge. Collins J noted that s 5(2) of the Companies (Amendment) Act 1990 referred to the period of protection running from the presentation of the petition and that the substance of the Supreme Court's point is that it is the date of the presentation of the petition to appoint an examiner which operates to decrystallise a floating charge.

Collins J then considered the concept of re-crystallisation and whether, upon an examiner being discharged and court protection ended, the effect is to re-crystallise a floating charge which had crystallised and decrystallised, such that it becomes once again a fixed charge. While this had been accepted in the High Court, Collins J **held** that the trial judge's analysis represented a significant misunderstanding of the correct position which is that once a floating charge decrystallises it reverts to being a floating charge which, while capable of being re-crystallised, will only recrystallise where an event occurs to trigger that (see paras 54 – 56). Collins J **held** that the consequence of this finding was that the de-crystallised floating charge could only have crystallised upon the appointment of the receiver but that this would have meant that Chelsey would not have priority over the examiner and so that finding was sufficient to dispose of the appeal.

Given the finding that the decrystallised floating charge did not crystalise until the appointment of the receiver, it was not strictly necessary to consider whether the floating charge crystallised into a fixed charge at any point prior to the appointment of the receiver, Collins J considered each of the events which it was contended caused an earlier crystallisation.

The first contention was that it crystallised upon the written decision of the sole member to petition the High Court to appoint an examiner. The point here was that the debenture envisaged the convening of a meeting to consider a resolution to petition to appoint an examiner and did not refer to the possibility that the same decision could be effected by written decision. This was a point of purely contractual interpretation and Collins J determined that it was not the court's function to repair a deficiency of drafting and in so finding he upheld the High Court's decision that the floating charge was not crystallised by the written decision to petition for the appointment of an examiner because that was not contemplated by the Debenture. Importantly, however, Collins J said there was no reason to disallow such a crystallising event on the grounds of public policy as has been argued by the Revenue. However, Collins J noted that the legislature could, but did not, seek to prohibit such a clause in a debenture and that '[a]bsent such legislation, such a clause is, in principle, a valid and enforceable one' (at para 74).

The second contention was that the floating charge crystallised when Latzur presented the petition to appoint an examiner to the High Court. The Revenue disputed this saying that the presentation of the petition triggered court protection and that this prevented the crystallisation of the charge. Collins J said that Chesley's position on this was difficult since it sought to argue that the presentation

crystallised the charge but denied that the crystallisation was an action to realise its security (something prevented by s 5(2)(d) of the 1990 Act). Collins J agreed with the position of the Revenue here saying the alternative was not compatible with the policy behind s 5 of the 1990 Act and the decision in *Re Holidair* and so found that the floating charge did not crystallise on the presentation of the petition to appoint an examiner. Again, however, Collins J said he was not prepared to find that the clause was contrary to public policy, saying that this was a matter for the legislature.

The third contention was that the floating charge crystallised on the service of notice however on this point Collins J held that it was clear from *Holidair* that Chelsey was precluded from taking any action to crystallise the floating charge during the protection period. Accordingly, even if there were no issues on the validity of the service of the notice in that case, the notice could not crystallise the charge during the protection period.

Fraudulent Trading

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

Fraudulent trading – Whether only persons who have been knowingly parties to the carrying on of the business of a company with intent to defraud its creditors can be the subject of an order to make contributions to the company's assets – *s 213* of the Insolvency Ack 1986 (UK) – *Bilta (UK) Limited et al v Tradition Financial Services Limited* [2025] UKSC 18. In this case the UK's Supreme Court considered s 213 of the UK's Insolvency Act 1986 concerning fraudulent trading and in particular whether an order to contribute to the assets of a company could only be made against persons who were knowingly parties to the carrying on of the business with intent to defraud the company's creditors. The basic facts were that five companies were involved in a fraud which resulted in their being left with enormous VAT liabilities. The appellant, Tradition Financial Services Limited (Tradition), was sued by the liquidators of the five companies alleging, inter alia, dishonest assistance in breach of directors' duties and, for present purposes, that Tradition had knowingly participated in the fraudulent trading of the businesses of the five companies. Two questions were before the Supreme Court – whether Tradition came within s 213 and whether the claims in dishonest assistance were statute barred: see Directors' Duties, ante.

In relation to the first question, Tradition argued that s 213 was restricted to persons exercising management or control over the company in question but this was rejected at trial [2022] EWHC 723 (Ch) and by the Court of Appeal [2023] EWCA Civ 112. It was **held** by the UK's Supreme Court (per Lords Hodge and Briggs giving the court's judgment) that there is nothing in the language of s 213(2) which restricted the scope of the provision to directors and other 'insiders' who were directing or managing the business of the company. They **held** that the natural meaning of the statutory words – 'any persons who were knowingly parties to the carrying on of the business' of the company for any fraudulent purpose – was wide enough to cover not only such 'insiders' but also persons who were dealing with the company if they knowingly were parties to the fraudulent business activities in which the company was engaged. They said that such persons could include those who transacted with the company in the knowledge that by those transactions the company was carrying on its business for a fraudulent purpose (see para 26). They also **held** that s 213 stood in contra distinction to other insolvency provisions which were more narrowly targeted at directors and other insiders (paras 27, 28 29). They also conducted a useful review of the history of the fraudulent trading provision and concluded that there is nothing in the legislative history which militates against giving the words their natural meeting (which does not confine them to directors or insiders) (para 35). They also rejected that the canon of statutory interpretation, the presumption against doubtful penalisation, did not provide a basis for negating either civil or criminal liability in the present context. Interestingly, the UK Supreme Court noted the decision of the Irish Supreme Court in O'Keeffe v Ferris [1997] 3 IR 463 where O'Flaherty J held that a third party who knowingly participated in an act of fraudulent trading committed by the directors may incur civil liability (para 56). It may be noted that s 610(1)(b) of the Irish Companies Act 2014 uses the same phrase as s 213(2) of the UK Act.

Transfer of Shares

Courtney, *The Law of Companies* (4th ed), **Ch 9**

Transfer of shares in a company – Application to set aside transfer on the basis that it is a reviewable disposition intended to defeat the claim of a spouse in family law proceedings – *s 35* of the Family Law Act 1995 – AOC v FLN [2024] IEHC 756 (Jackson J). This decision concerned an application brought under s 35 of the Family Law Act 1995 ('the 1995 Act') to set aside a purported transfer of shares in a company owned by the applicant's spouse on the grounds that it was a reviewable disposition intended to defeat the claim of the applicant in family law proceedings following a foreign divorce. Jackson J noted that the court had jurisdiction under s 35(2)(a)(II) of the 1995 Act to set aside a disposition where satisfied that it is a reviewable disposition. The disposition in question took place less than three years before the date of the application and Jackson J noted that the burden of proof was reversed, such that it was presumed that there was an intention to defeat the applicant's claim. The respondent who had been 1000 per cent shareholder in a valuable company transferred 40 per cent of the shares to a Ms B and 20 per cent to a Mr S Jnr and Jackson J noted that the timing of the transfers appeared to be the same date as an email sent to him by the applicant's English solicitor, informing him of orders made in the English divorce proceedings. The respondent claimed that Ms B had been funding the company but no evidence was produced to support this. Moreover, no share purchase agreement was produced notwithstanding the court requesting same be discovered. Jackson J said she was of the view that there was no evidence that there was valuable consideration paid for the shares. In the circumstance, it was **held** that the share transfers were ordered to be set aside.

Liquidators

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

Liquidators – Administrators appointed under the laws of Northern Ireland – Application for recognition of administrators appointed to a company incorporated under the laws of the United Kingdom – Whether Irish courts should grant recognition to administrators who were not in an EU member state – Inherent jurisdiction of the courts to recognise foreign insolvency proceedings – *s 1417* of the Companies Act 2014 – *Re Mercer Agencies Limited (In Administration)* [2025] IEHC 261 (Quinn J). This decision concerned an application made by a UK company acting through its administrators for an order of the High Court recognising: (1) that the company was in a process of administration pursuant to the Insolvency (Northern Ireland) Order 1989; (2) the appointment of named joint-administrators; (3) the powers of the administrators to bring and defend legal proceedings on behalf of the company pursuant to s 627 of the Irish Companies Act 2014; (4) and the power of the administrators to collect and gather in property in accordance with s 624(2) of the 2014 Act. Quinn J had earlier granted the orders sought and this judgment explained his reasons for doing so. An order was also sought that the High Court and its officers act in aid or the Northern Ireland High Court. The application was made pursuant to the powers of the High Court at common law or pursuant to the inherent jurisdiction of the court. The necessity for assistance arose from the fact that there were 32 debtors of the Company in Ireland, one of which owed c $1.5m and which had not cooperated with the administrators. As Quinn J explained, the necessity for the application in the manner it was made, arose from the consequences of Brexit, being that a UK company can no longer invoke EU Council Regulation 1346/2000, the European Insolvency Regulation. Recognising that the orders made were pursuant to the court's inherent jurisdiction as a matter of common law to recognise foreign insolvency proceedings, Quinn J noted that such inherent jurisdiction in cases concerning non-EU states had been considered in *Fairfield Sentry Limited v Citico Nederland NV* [2012] IEHC 81 and in *Re Mount Capital Fund Limited* [2012] IEHC 97.

Having considered the decision of Laffoy J in Re Mount Capital Fund Limited, Quinn J noted that she had concluded that the court does have an inherent jurisdiction to give recognition to insolvent proceedings outside of the EU provided that the court is satisfied that recognition is being sought for a legitimate purpose. Laffoy J also noted that a legitimate purpose can be established where it is demonstrated that there is equivalence between the law of the foreign country and the law in this jurisdiction concerning corporate insolvency.

The learned Quinn J noted that the predecessor of s 1417 of the Act, s 250 of the Companies Act 1963, had been considered by Laffoy J but that it could not be invoked because it only related to affording assistance in windings up in relation to countries which had been recognised by Ministerial Order. Quinn J noted that the same applied in the instance case since the assistance sought was not in the context of a winding up and the fact that no Ministerial Order had been made under s 1417 of the Act recognising any other country.

After considering the nature of administration under the Northern Ireland regime, Quinn J went on to consider whether there was equivalence of jurisdiction. While finding that administration is not the same as liquidation or examinership in Ireland, because it can be used for a number of different purposes, each of the objectives and powers of the administration framework have an equivalence within different parts of the 2014 Act concerning examinership and winding up. The learned judge also found that most importantly 'the asset realisation function of the joint administrators, coupled with the power to bring or defend legal proceedings in the name of the company, directly corresponds with the provisions of Part 11 of the Act of 2014' (para 50). In so finding Quinn J concluded that there was sufficient evidence of equivalence between the two insolvency regimes to warrant the making of the orders of recognition sought. Finally, Quinn J determined that the orders were sought for a legitimate purpose (para 52), being to 'ensure that insofar as it may be necessary for the Joint Administrators, in the performance of their statutory duties of realising assets for the benefit of creditors, to take any action, whether by way of legal proceedings or otherwise, in the State they may do so without encountering delay associated with establishing their standing to do so on behalf of and in the name of the Company in administration'.