Bloomsbury Professional's Irish Company Law Update – November 2024

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, the most significant development is the enactment of the Companies (Corporate Governance, Enforcement and Regulatory Provisions) Act 2024 which passed all stages earlier this month. Three of its most notable features which will have a significant (positive) effect for most companies are included in this round up of developments. Of course there are many others as the 90 section Act makes multiple amendments to the Companies Act 2014. In relation to case law, there is another reported decision of the High Court where it was invited (but on this occasion, declined) to make a Moorview Order directing a non-party director of a plaintiff company to pay the successful defendant's costs. There is an interesting decision of the English Court of Appeal which considers whether two company directors crossed the line in making preparatory steps to set up in competition with their company, in breach of their fiduciary and statutory duties. There is also a really interesting decision of the Privy Council which identifies the legal basis for a shareholder taking an action against a company where its directors, in breach of their fiduciary duties, improperly allot shares to the detriment of the shareholder. Two recent decisions of the Irish High Court concerning winding up are considered – one with the substitution of a petitioner to wind up a company and the other with the nature of s 608 application and whether it can be made against persons located outside of Ireland. This is the last update for 2024 and the next will be published in January 2025.

Dr Thomas B Courtney

Corporate Contracts: Documents under Seal

[*The Law of Companies* Ch 7]

Execution of documents under company's common seal – execution of several documents in like form – s 43A of the Companies Act 2014 – **s 7 of the Companies (Corporate Governance, Enforcement and Regulatory Provisions) Act 2024**.

When commenced, s 7 of the Act of 2024 will amend the Companies Act 2014 by the insertion of a new s 43A which will make permanent the provisional measure introduced during Covid-19 as a temporary measure. Section 43A will apply notwithstanding anything contained in a company's constitution or in s 43(2)(b) or (3) of the Act and is, therefore, a mandatory provision which cannot be displaced. For most companies, the important provision is s 43A(2) (since s 43A(3) concerns execution by registered persons of which there are very few) and will mean that where a document is to be executed under seal it *may* consist of several documents: one signed by a person referred to in s 43(2)(b)(i), one document signed by a person referred to in s 43(2)(b)(ii) and one such document to which the company's common seal has been affixed. Section 43A(4) provides that an instrument consisting of several documents that comply with the provisions of the section '*shall be valid and effective for all purposes as if the documents were, taken together, one document*'.

Corporate Personality

[*The Law of Companies* Ch 4]

Application under the Equal Status Acts 2000 to 2018 – company limited by shares incorporated in England and Wales seeking to bring an application for discrimination on grounds of race contrary to s 3(2) of the Equal Status Acts – whether an artificial legal person has standing under the Equal Status Acts – ***XTX Markets Technologies Limited v AVIVA Investors Liquidity Funds plc*** [2024] IECC 18.

This was an appeal to the Circuit Court brought by a UK registered company limited by shares, alleging discrimination on grounds of race brought under the Equal Status Acts 2000 to 2018 against a decision of the Workplace Relations Commission's Adjudication Officer who found that a limited liability company is not a person within the meaning of the legislation. Judge John O'Connor did not dispute that a company can suffer discrimination but pointed out that was not the issue before the court. The issue was, can a company bring an action for discrimination under the Equal Status Acts. Judge O'Connor determined that a review of the Equal Status Acts demonstrated that the Oireachtas did not intend to confer a right upon a private company to take an action for discrimination under the Equal Status Acts and that therefore the decision of the Adjudication Officer should be upheld as the complainant did not have *locus standi* to bring a complaint under the Act.

Corporate Civil Litigation and Directors' Liability for Costs of Litigation

[*The Law of Companies* Ch 6]

Application for Moorview order – defendant who was successful in defending proceedings brought by a company seeking to have one of its shareholding-directors who had been joined as a notice party made liable for costs – director not being a party to the proceedings when the case had been heard and determined – criteria for the grant of a Moorview order – exceptional nature of the jurisdiction – ***Atlantis Developments Limited (in receivership) v Considine and Liscannor Development Company Limited*** [2024] IEHC 637.

In this case, the plaintiff company which was in receivership claimed damages in relation to its purchase from the first defendant of certain lands in Co Clare. Ultimately, the plaintiff's claim failed and the plaintiff was ordered to pay the defendant's costs. The first defendant was given liberty to issue a motion seeking an order joining a shareholding-director of the plaintiff to the proceedings for the purposes of making him liable for the defendant's costs. The basis for the first defendant's application was that: the plaintiff company was in receivership and had 14 charges registered against its assets and undertaking; it was alleged that the plaintiff would be unable to discharge the costs order; that the shareholder-director was the moving force in bringing the proceedings; and that he had a direct personal financial interest in the outcome of the proceedings as well as other matters. Mulcahy J began his consideration of the application by reviewing the basis of the jurisdiction to make a costs order against a non-party to proceedings, being the decision in *Moorview Developments Limited v First Active plc* [2019] IESC 33, and in particular the eight factors which McKechnie J had identified should be taken into account in making a Moorview order.

It was **held** by Mulcahy J that it was not appropriate to make a Moorview order in the instant case. Although contended by the first defendant, Mulcahy J said there was no evidence that the shareholding-director had a 'direct personal financial interest' in the litigation; neither was there evidence about how the litigation was funded by the plaintiff and it was not established that the shareholding-director was the 'real party' to the proceedings such that the interests of justice dictated that a non-party costs order should follow. Mulcahy J also found that the claims brought by the plaintiff company were not so unreasonable as to expose the shareholding-director to a costs order. Of particular significance to Mulcahy J was the fact that, at no time prior to the conclusion of the proceedings, had the direct defendant indicated an intention to seek to make the shareholding-director personally liable for his costs. Only after all costs had been incurred, was it suggested that such an order would be sought. In this regard Mulcahy J noted the importance of putting the non-party on notice of the potential that he or she is exposed to the risk of costs as was noted by Hogan J in *WL*

Construction Limited v Chawke [2018] IECA 113. While the failure to put the non-party on notice is not a jurisdictional bar to making an order, it was said to be a strong factor. The failure to put the non-party on notice in the case in hand suggested that it would not be in the interests of justice to make an order, particularly since a security for costs application had been (unsuccessfully) which indicated the defendant considered that the plaintiff company might have solvency issues.

Shareholders' Remedies

[*The Law of Companies* Ch 11]

Shareholders' remedies – shareholders' personal rights – directors of a company allotting shares for an improper purpose – result being to reduce a shareholder's holding below 25% thereby removing his right to block special resolutions – whether shareholder had a personal action, rather than a derivative action, against the company notwithstanding that the directors' duties are owed to the company – whether the rule in *Foss v Harbottle* applied – juridical basis for shareholder's personal claim against a company – ***Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd*** [2024] UKPC 36.

In this decision of the common law melting pot which is the UK's Privy Council, the Privy Council considered the juridical basis for the standing of an individual shareholder to take an action against a company where, in breach of the fiduciary duty owed to the company, its directors improperly allot shares to the shareholder's detriment. It was **held** that a shareholder does have such a right of action against the company to challenge the allotment of shares. Following a number of transactions involving the issue of bonds and allotment of shares, the shareholder alleging it had been harmed by the improper allotment of shares, sought to have the company wound up on the just and equitable ground. The company resisted this and sought to have the petition struck out. At trial, the judge refused to strike out the petition and refused to follow a judgment in the Grand Court of Caymen in *Gao v China Biologic Products Holdings Inc* (2018) (2) CILR 591 where it had been decided that a shareholder did not have a claim against a company where shares had been improperly allotted. That decision was successfully appealed to the Court of Appeal which held that an aggrieved shareholder had no personal right of action against the company for the diminution of his voting power caused by the issue of shares in breach of a fiduciary duty owed to the company: (2022) (2) CILR 28.

As noted, the Privy Council reversed the Court of Appeal's decision finding that the shareholder's petition should not be struck out as disclosing no cause of action. In its decision, it said there were four questions to be answered:

> '(i) Bearing in mind that the duty of the directors alleged to have been breached is owed to [the company] and not to its shareholders, what, if anything, is the shareholder's cause of action? (ii) What, if any, distinctive aspects of the shareholder's cause of action mean that it may be pursued notwithstanding the rule in *Foss v Harbottle*? (iii) Was the impugned exercise of the board's power void or voidable? (iv) Was the alleged breach of duty capable of being ratified by a majority of [the company's] shareholders? If so, what is the consequence of the theoretical availability of ratification for the pursuit of the shareholder's claim in the meantime?'

In its decision, the Privy Council (per Lords Hodge and Briggs) began by recapitulating on the principles underpinning what they persisted in referring to as the 'rule' in *Foss v Harbottle* before going on to recognise that in parallel to the rule that the company is the proper plaintiff in an action where it has been harmed, there has been a long-standing acknowledgement that shareholders have independently exercisable personal rights (eg *Pender v Lushington* (1877) 6 Ch D 70; *Edwards v Haliwell* [1950] 2 All ER 1064). The Privy Council determined that the juridical basis (or cause of action) which entitles shareholders to proceed against their companies is because:

> 'as an intrinsic feature of the contract constituted by the memorandum and articles of association, it is implicit that when exercising their powers on behalf of the company the directors will exercise them in accordance with their fiduciary duties, including the duty to exercise powers only for a proper purpose' (at para 43).

The Privy Council recognised that there were circumstances in which the shareholders in general meeting can ratify the offending exercise of power by the directors; indeed, it recognised that there have been and always will be cases where a personal claim by a shareholder may be defeated by ratification by the other shareholders in general meeting. However, it was pointed out that the majority cannot ratify a wrong and thereby defeat a shareholder's claim where to do so would fall foul of the equitable principle that they may not do so by way of oppression of the dissenting minority, citing: *Allen v Gold Reefs of West Africa Ltd* [1990] 1 Ch 656, Lindley MR at pp 671-672; *Cook v Deeks* [1916] 1 AC 554, Lord Buckmaster LC at pp 563-565; *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286, Evershed MR at p 291; *Peters' American Delicacy Co Ltd v Heath* (1939) 61 CLR 457, Latham CJ at pp 480-482; *Ashburton*, Barwick CJ at p 620.

It was **held** that the writ ought not to have been struck out. If the assumed facts were proved to be true, the directors had acted for an improper purpose in the issue and allotment of the disputed shares, and that the purported ratification of their actions was itself vitiated by the intent of the majority to oppress the shareholder as a minority shareholder.

Company Meetings: General Meetings

[*The Law of Companies* Ch 14]

General meetings of company members – facilitation of virtual meetings – s 176A of the Companies Act 2014 – new optional provision – consequential changes to other provisions of the 2014 Act – **ss 11 – 14 of the Companies (Corporate Governance, Enforcement and Regulatory Provisions) Act 2024.**

The facilitation of the convening and holding of general meetings of companies using electronic technology (such as Teams, Zoom and other platforms), which was introduced as an interim measure during the Covid-19 pandemic, has been normalised as a permanent means of holding general meetings. When commenced, ss 11 to 14 will amend the 2014 Act, primarily by the introduction of a new section, s 176A which is supported by the amendment of other provisions (ss 176, 181, and 187 of the 2014 Act) concerning meetings of members. The key enabling provision is found in s 176A(1) which creates a new *optional provision*: save to the extent a company's constitution provides otherwise, a company need not hold a general meeting at a physical venue but can conduct the meeting wholly or partly by the use of electronic communications technology as long as all attendees have a reasonable opportunity to participate in the meeting as provided for in the section. It should be noted that while s 176A(1) is an optional provision, which can be excluded, the procedural requirements in s 176A(2) to (11) are not expressed to be optional provisions and so, by default, are mandatory provisions. The net effect is that while a company can opt out of permitting virtual general meetings by disapplying s 176A(1) in its constitution, if it does opt in, then all virtual meetings must be held in compliance with the mandatory provisions in s 176A(2) to (11).

Directors' Fiduciary Duties

[*The Law of Companies* Ch 16]

Directors' fiduciary duties – duty not to compete with company – whether directors were in breach of their fiduciary and statutory duties by taking preparatory steps towards setting up a competing business prior to resigning their offices – ***Cheshire Estate & Legal Limited v Blanchfield et al*** [2024] EWCA Civ 1317.

In this case two directors of the plaintiff company which was a corporate firm of solicitors specialising in financial mis-selling and fraud claims resigned, giving 6 months' notice. Two days later they were placed on gardening leave for three months. It transpired that prior to their giving notice, they had taken preparatory steps to set up a new law firm: registering a trade name, incorporating a new

company with them as directors; seeking professional indemnity insurance, opening a bank account, applying to the UK's Solicitors Regulation Authority to register the new firm; entering into discussions with several litigation funders, one of which was a company with which they had previously negotiated on behalf of the plaintiff company. At trial, it had been held, *inter alia*, that the directors' preparatory steps had not 'crossed the line' or put them in a position of conflict so as to be a breach of their fiduciary duties. In considering whether the directors had breached their fiduciary duties, the Court of Appeal (per Phillips LJ) considered a number of relevant authorities, particularly *Shepherds Investments Ltd v Walters* [2006] EWHC 836, *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, *British Midland Tool Ltd v Midlands International Tooling Limited* [2003] EWHC 466 and *Balston Ltd v Headline Filters Ltd* [1990] FSR 385. In reviewing these, Phillips LJ noted that a director must resign as soon as his intention to compete is irrevocable or the director would be obliged to make disclosure to the company (per Hart J in *British Midland Tool*) and distinguishing the view that somehow the public policy as to restraint of trade being bad, trumps the director's duty (as suggested by Falconer J in *Balston*). That said, Phillips LJ noted with approval the views of Etherton J in *Shepherds Investments*) where he said that the precise point at which preparations for the establishment of a competing business by a director become unlawful, will turn on the actual facts of any particular case and said that even an irrevocable intention to compete does not necessarily mean that merely preparatory steps are unlawful (para 25).

In the instant case it was noted that the trial judge had made certain findings as to fact which included: the directors did not intend to trade until after their contractual notice period; they had not formed a settled or irrevocable intention to compete until c 4 weeks before giving notice or even later and that intention had not solidified until the Solicitors Regulatory Authority gave them a 'minded to approve' notice a few days before they gave their notice; even when they gave notice, their plans were at a very early stage and they had no clients, no funding, no premises, no staff and no settled decision on the services they would offer; and their dealings with the supplier was at a time when it no longer represented a business opportunity for the plaintiff company.

In these circumstances the Court of Appeal **held** that steps taken did not breach the directors' duties. The judge had conducted a thorough review of the evidence and concluded there had been no breach, a conclusion which Phillips LJ said was open to him since (i) the steps taken were entirely preparatory to trading which was not to start until six months after their departures; (ii) the venture might not have proceeded without regulatory approval; (iii) they served notice four days after that approval; (iv) in the meantime the directors were able to and did serve the plaintiff company faithfully.

Statutory Audit Exemption

[*The Law of Companies* Ch 18]

Loss of entitlement to avail of statutory audit exemption – substitution of s 363 of the Companies Act 2014 – mitigation of consequences where companies are late filing annual return – **s 22 of the Companies (Corporate Governance, Enforcement and Regulation) Act 2024.**

When commenced, s 22 of the 2024 Act will substitute s 363 of the Companies Act 2014 which currently provides that a company will lose the entitlement to avail of an exemption from having a statutory audit on the first occasion it fails to deliver an annual return to the Registrar of Companies. The new rule will be that a company that qualifies as a small company will not be entitled to audit exemption for the following two years where it fails to deliver its annual return *and has previously failed to file an annual return on time in any of the previous five financial years*. Note, it is provided that a failure by a company to deliver its first (six month) annual return (as referred to in s 349) and any failure by a company to deliver its annual return before this new section is commenced will both be disregarded for the purposes of determining whether there has been a failure to file within the previous five financial years.

Winding Up

[*The Law of Companies* Ch 24]

Winding-up petition – application to substitute petitioner – whether it was a precondition to substitution that the original petitioner was a creditor with *locus standi* to present the original petition – s 572(5) of the Companies Act 2014 – Ord 74, r 18 of the RSC 1986 – ***Re City Quarter Capital II PLC*** [2024] IEHC 530.

This case concerned an application under s 572(5) of the Companies Act 2014 (the 'Act') to substitute a petitioner to have a company wound up. The original petition was presented by a Mr Finneran who claimed to be owed, along with his wife, €300,000; the petition was brought under s 569(1)(d) of the Act, being inability to pay the company's debts, a demand having been served under s 570(a) of the Act. In a replying affidavit, a director of the company averred that Mr Finneran was not a creditor and so had no *locus standi* to petition the court. The original petitioner did not reply to this but instead indicated that he did not wish to proceed with the petition but instead supported the application of the joint liquidators of a company called Blackbee Investments Limited to have that company substituted as petitioner pursuant to s 572(5) of the Act. The question which the High Court (per Mulcahy J) had to determine was whether it was a prerequisite for substitution that the original petition was presented by a party who had standing to present it and whether, where the original petitioner did not have standing, substitution would be an abuse of process. The company argued that any money owed to the original petitioner had not yet fallen due and that the money was not owed by the company but by another entity.

Mulcahy J **held** it was appropriate to make an order substituting the petitioner. He noted that there was nothing in s 572(5) or Ord 74, r 18 which reflected the restrictions on substitution proposed by the company, and that it was accepted that the court's power to substitute is a discretionary power. Finding that there was little judicial guidance, Mulcahy J noted the Australian decision in *South East Water Limited v Kitoria Pty Ltd* [1996] 14 ACLC 1328 and the comments made by Ryan J as to the proper exercise of the discretion conferred by their similar, but not identical, substitution power: that an insolvent company should not be permitted to trade but should be wound up as expeditiously as possible and also that winding up proceedings should not be used as a debt collection mechanism. Mulcahy J found that the policy considerations identified there apply in this jurisdiction too. Mulcahy J **held** that the focus of the court in exercising its discretion '*should be on whether the substitution of the petitioner would amount to an abuse of process, rather than on whether the original presentation of the petition constituted an abuse of process*' (at para 32). The learned judge said that it may be that in another case it might be an abuse of process where the original petition was manifestly bad on its face or where the original petitioner accepted it was not a creditor but noted that was not the case before the court as there was a dispute as to whether the original petitioner was a creditor with *locus standi*. The judge also said that it was fatal to the company's case that it was an abuse of process not to respond to the s 570(a) demand. In so finding, Mulcahy J found that there was a prima facie case that the original petitioner was entitled to present the petition. The court also **held** that in exercising its discretion to substitute, the court should consider whether any injustice would be done by exposing the company to the risk of having transactions entered into since the date of the original petition rendered void by the operation of s 602 of the Act although it was said that it was difficult to see what prejudice or injustice the company would suffer if the application were to proceed on the basis of the original petition. It was noted that the court had jurisdiction to declare particular transactions not to be void so it was open to the company to advance its position in due course.

Realisation and Distribution of Assets in a Winding Up

[*The Law of Companies* Ch 26]

Power of court to return assets which have been improperly transferred – whether appropriate to apply for service out of the jurisdiction under Ord 11, r 1 where intended respondent is resident in the UK – whether an application for the return of assets improperly transferred can be brought against a person

outside of the jurisdiction – ***Re Irish Gold and Silver Bullion Limited; Kirby v Veale Wasbrough Vizards LLP*** [2024] IEHC 591.

In this case the respondents, a firm of English solicitors, brought a motion seeking an order that service of the proceedings was not properly effected and that service of the originating notice of motion should be set aside. The background was that the company was in liquidation and one of the directors (Mr Wickham) was the subject of a disqualification order for seven years for his conduct in managing the company which the High Court found involved him running a Ponzi scheme, the company having been operated in an entirely fraudulent manner. The liquidator claimed that the English solicitors had provided legal services to Mr Wickham personally but the company had paid at least two sums for that advice in the amounts of €84,250 and £66,673 and the firm refused to reimburse the company following the liquidator's request. The solicitors also held a gold bar which had not been returned to the company, the return of the gold bar being said to be dependent upon their fees being paid. In these circumstances the liquidator issued a motion under s 608 of the Act seeking the return of the gold bar and of the sums paid for Mr Wickham's fees. These proceedings were commenced by originating notice of motion but the liquidator accepted this was in error and that the proceedings ought to have been brought by notice of motion in the winding up proceedings. The liquidator brought a motion to have the proceedings thus amended.

The English solicitors claimed that the service of the proceedings on them by courier to their London office was ineffective and that leave to serve the claim outside of the jurisdiction was required. The High Court **held** (per Cregan J) that service out of the jurisdiction pursuant to Order 11 of the Rules of the Superior Courts was not required in the case of an application brought under s 608 of the Act as the winding up proceedings gave the High Court jurisdiction over the winding up and all applications as might be brought in the winding up, such as a s 608 application. In so holding, Cregan J pointed out that a s 608 application is not a plenary proceeding and an order under Ord 11 (the purpose of which was to show that there is a link between the proceedings and the Irish jurisdiction) was not required since it had already been established that the Irish courts had jurisdiction.

The second question considered by the Court was whether s 608 permits applications to be brought against persons who are outside of the jurisdiction or whether they can only be brought against persons within the Irish jurisdiction. On this point Cregan J **held** that applications under s 608 can be brought against people outside of the Irish jurisdiction and in so finding interpreted the words 'any person' in s 608 to mean any persons who are resident or domiciled within the jurisdiction or Ireland but also any such persons who are resident or domiciled abroad. In so finding, Cregan J relied on the decision of Finlay Geoghegan J in *Euroking America (Ireland) Ltd* [2003] 3 IR 80.

The third question addressed concerned giving respondents to a s 608 application notice of the application and an opportunity to respond. Cregan J held that while s 608 was silent on the point, it was implicit, as Finlay Geoghegan J had also found that persons who might be affected should be given notice of the application and an opportunity to be heard before the court reaches a decision. Cregan J **held** that while the RSC were silent on the service of proceedings in the circumstances under consideration, that cannot mean that jurisdiction cannot be exercised and he determined he was satisfied that the respondents had been given sufficient notice by means of a process server with the relevant documents at their office in London.

Finally, the liquidator was given liberty to amend the originating notice of motion to a notice of motion in the winding up proceedings.