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Bloomsbury Professional's Company Law Developments

Welcome to Bloomsbury Professional's Company Law Developments (6/25 December), 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, amongst eh developments noted are the decision of Quinn J in ***Re Cityjet Designated Activity Company*** [2025] IEHC 562 where the learned judge applies the new requirements before sanctioning a scheme in an examinership to consider the best interests of creditors and also that the proposals have a reasonable prospect of facilitating the survival of the company. In particular Quinn J found that the latter did not displace the rule that had developed since *Re Tivway Limited* [2010] IESC 11 that before confirming a scheme, the court should be satisfied that there is a reasonable prospect of the survival of the Company or the whole or part of its undertaking as a going concern. Also noted is the decision of Mulcahy J in ***Re GTLK Europe DAC*** [2025] IEHC 524 where he held that the High Court had jurisdiction to make an anti-suit injunction and that it was appropriate in that case to grant such an injunction to the joint liquidators of an Irish company to prevent a creditor from taking proceedings to enforce pledge security in circumstances where the Irish courts had already determined that the security was void or otherwise unenforceable. Also noted is the very important decision of Cahill J in ***Re Anvil Real Estate Limited*** [2025] IEHC 630 where the High Court had consider the circumstances in which, in exceptional cases, the Court would exercise its discretion in Ord 40, r 1 of the RSC to order cross examination of affidavit evidence in a winding-up petition.

Dr Thomas B Courtney

Directors' duties

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

Directors statutory duties – Duty to act honestly and responsibly – s 228(1)(b) of the Companies Act 2014 – McPartland, "The Director's Duty to Act Honestly and Responsibly in Relation to the Conduct of the Affairs of the Company under the Companies Act 2014" [2025] 73 The Irish Jurist 72 – 95. Senior Enforcement Manager in the Corporate Enforcement Authority, Dr Aoife McPartland has written a very interesting article which has been published in The Irish Jurist on directors' statutory duty to act honestly and responsibly. The article considers and analyses the new duty and concludes that there are positives gained from the creation of the duty to act honestly and responsibly in relation to the conduct of the affairs of the company, such as triggering the enforcement of expectations of honesty and responsibility beyond insolvency and allowing for direct financial gain to the company for a lack of honesty or responsibility. The article also considers some circularity arising from the history, meaning and enforcement of the duty which may impact on its definition.

Examinership

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

Application by joint examiners for confirmation of proposals for a scheme of arrangement between the company and its members and creditors – Petition successfully presented by directors and the company – Sole shareholder not a party to petition and opposing the application to confirm the examiners' proposals – Grounds of opposition – Unfairly prejudicial to creditors – Best interests of creditors test – Claim that company did not have a reasonable prospect of survival as a going concern and was bound to fail even if the proposals were accepted – Whether old test that court should be

satisfied that there is a reasonable prospect of the survival of the Company or the whole or part of its undertaking as a going concern was displaced by the recently inserted *s 541(4A)* of the Act – *Sections 541, 543(1A), s 541(4A)* of the Companies Act 2014 – ***Re Cityjet Designated Activity Company*** [2025] IEHC 562 (Quinn J). This was an unusual examinership in the sense that it was the third time that the company in question had petitioned to be placed under court protection, albeit that the first time was 29 years previous. This time, the petition was brought by the company and its directors and while its sole shareholder did not oppose the appointment of an examiner, when the joint-examiners applied to the High Court to have the scheme of arrangement approved pursuant to s 541 of the Companies Act 2014 (the 'Act') the sole shareholder opposed the confirmation of the scheme of arrangement, initially on four, but ultimately on two, grounds: first that it was unfairly prejudicial to the company's creditors, and in particular four companies which were part of the sole shareholder's group and, secondly, because it was claimed that there was no reasonable prospect of the company's survival. The examiners claimed that the proposals comply with s 539 of the Act and that they have been approved by the required majorities of creditors in accordance with s 540 of the Act. The examiners also said that the outcome for impaired creditors was better than the alternative financial outcome that would result in the event of a liquidation and they said that the implementation of the proposals would facilitate the survival of the company and the whole of its undertaking as a going concern. The scheme was supported by the company's largest unsecured creditor and its principal customer; Revenue were unaffected and were neutral on the application. The proposals included that the existing shares in the company were all to be cancelled and new shares issued to new investors. Unsecured creditors were to be paid a mere 2% of what was owed to them, but this was still more than they would get on a liquidation.

Quinn J did not accept the objections presented by the sole shareholder. The first objection was that the scheme was unfairly prejudicial to the company's creditors. Quinn J noted that the sole shareholder had initially claimed it was also unfairly prejudicial to it as its entire shareholding would be wiped out in the scheme but it did not pursue this objection. As for the objection that it was unfairly prejudicial to creditors, Quinn J noted that prior to the amendments to the Act effected by the European Union (Preventative Restructuring) Regulations 2022 (SI 380/2022) (the Regulations) the predominant feature of the analysis for unfair prejudice was to compare the dividend proposed for creditors, and the outcome on any alternative, typically on a liquidation, or in certain cases a receivership (as occurred in Re *McInerney Homes Limited* [2011] IEHC 4 and [2011] IESC 31, and *Re Siac Construction Limited* [2014] IESC 25. He noted that the test has been refined by the Regulations by the introduction of the more specific analysis required by the "best interest of creditors test". The learned judge went on to note that when an objection is made that the Proposals do not satisfy this test, the court is required to take a decision on the valuation of the Company's business (s 543(1A)) but that this presents challenges to the court where there are conflicting valuations.

As to the onus of proof, Quinn J held that it was for the examiners to establish that the proposals satisfy the best interest of creditors' test (s 541(3a)(e). He also noted that in the case before him all of the submissions made by reference to the test focused on the comparison between the proposed dividend of 2% for unsecured creditors under the proposals and the potential outcome on a winding up, the objectors having submitted that they would fare better on a liquidation than the 2% dividend provided for in the Proposals. This, Quinn J noted, was in essence an application of the best interest of creditors test and involved trying to establish an estimate of the dividend which would be payable to creditors in a winding up by estimating the realisable value of assets, and making provision for the costs of a liquidation and of the examinership and, having identified the amount of funds available for creditors, to identify the amount of creditors in each category and calculating the dividend. Quinn J noted that this was a very difficult exercise and an inexact science. Nevertheless, he reviewed the evidence before the court and ultimately concluded that the dividend to the creditors in a liquidation would be less than the 2% provided by the proposed scheme and concluded that the scheme was not unfairly prejudicial to the objecting shareholder-creditors.

As to the second objection, the sole shareholder had objected on the basis that the proposals would not have a reasonable prospect of facilitating the survival of the company or the whole or part of its undertaking as a going concern. Quinn J noted that where such is the case, s 541(4A) requires the Court to refuse to confirm the proposals and that while this was a new requirement, introduced by the Regulations, it accorded with the practice of the court on being asked to confirm a scheme and that in *Re Tivway Limited* [2010] IESC 11, the court extended the application of this test to scheme confirmation hearings. Quinn J noted that Denham J had made it clear that a matter so fundamental to

the purpose of the legislation, namely to facilitate the survival of a company and its undertaking as a going concern, is relevant to the court's consideration, not only of the appointment of an examiner but to the further progress of the proceedings including the ultimate step of confirming the Proposals for a scheme of arrangement. Quinn J noted that principle identified in Tivway had not been diluted by s 541(4A) and so that meant that the court must be satisfied of two matters. "Firstly, that there is a reasonable prospect of the survival of the Company or the whole or part of its undertaking as a going concern, and secondly that the Proposals before the court have a reasonable prospect of facilitating that survival" (at para 187). Quinn J went on to review the evidence presented by the company, its examiners and the objecting sole shareholder. He noted that in Re Tony Gray and Sons Limited [2009] IEHC 557 Clarke J had made clear that there is no requirement to establish with certainty that the Company will, if the proposals are confirmed, prosper indefinitely into the future. Nonetheless, Quinn J said that in an unusual case where the Company has availed of examinership on two previous occasions, albeit the first was 29 years ago, it was appropriate to proceed with caution. In the event, he concluded that the examiners had demonstrated that there was a reasonable prospect of survival of the company and its undertaking as a going concern and that the confirmation of the proposals would facilitate the survival, giving seven reasons for this finding. Quinn J also concluded that all of the matters which the Court was required to be satisfied on, as provided for in s 541(4) and (4A) were met and in those circumstances he approved the scheme of arrangement proposed by the joint examiners.

Liquidators

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

Company in the course of being wound up – Application by liquidators for anti-suit injunction to restrain the respondent from progressing three sets of legal proceedings in a foreign jurisdiction – Company purporting to have entered into security pledges in favour of a creditor – High Court having found pledges void or unenforceable – Creditor pursuing proceedings in Russia on foot of pledge agreements which it claimed remained valid – ***Re GTLK Europe DAC*** [2025] IEHC 524 (Mulcahy J). In this decision, Mulcahy J considered whether Irish law recognised the court's jurisdiction to make an anti-suit injunction restraining a person from prosecuting legal proceedings in another jurisdiction. There, the liquidators of an Irish company which was being wound up, applied for anti-suit injunction to restrain the respondent from progressing three sets of legal proceedings in a foreign jurisdiction. The liquidators had previously been successful in Irish High Court proceedings in having the pledge agreements declared to be void or unenforceable. The creditor who had not taken part in the High Court proceedings appealed to the Court of Appeal but was unsuccessful as the Court of Appeal found that its absence from the High Court proceedings had been tactical and so would not allow it to now raise arguments against the High Court decision. Leave to appeal to the Supreme Court was refused. Notwithstanding that it had been ruled that the pledges were void or unenforceable, the creditor had brought a number of proceedings in Russian courts and it was these proceedings which the liquidators sought to require the creditor to discontinue.

Noting that there had been no previous Irish written decision on the exercise of such a jurisdiction, Mulcahy J accepted that such a jurisdiction did indeed exist in Ireland, it having been established in the UK that their courts had such jurisdiction: *Ellerman Lines Ltd v Read* [1928] 2 KB 144, *Elektrim Holdings SA v Vivendi Holdings 1 Corp* [2008] 2 CLC 564, *Masri v Consolidated Contractors International (UK) Ltd* [2009] QB 503, *Rubin v Eurofinance SA* [2013] 1 AC 236, *Stichting Shell Pensioenfunds v Krys* [2015] AC 616, *SAS Institute Inc v World Programming Ltd* [2020] 1 CLC 820, *P Morgan Securities plc v VTB Bank PJSC* [2025] EWHC 1368 (Comm) and *Alsaady v Al Hamadani* [2025] EWHC 1801 (Ch).

Mulcahy J concluded that the Irish court's jurisdiction to grant an anti-suit injunction is an in personam jurisdiction, which can properly be exercised against a person subject to the Irish courts' jurisdiction. He also found that a person can be subject to the Irish courts' jurisdiction by virtue of an agreement (such as, an exclusive jurisdiction clause), by submitting to jurisdiction (entering an unconditional appearance), or, in the case of liquidation proceedings, by seeking to prove in the liquidation (at para 80). The learned judge also found that an order can be granted to restrain fraudulent conduct, to prevent foreign proceedings which are an abuse of an Irish court's process or which are vexatious or oppressive, or which seek to undermine or circumvent orders of the Irish courts. In the instant case he found that an order can also be granted where foreign proceedings undermine liquidation proceedings commenced in Ireland. Mulcahy J held that it was appropriate to make the orders sought against the creditor as it was necessary to preserve the integrity of the Irish court process, to prevent abusive

litigation conduct by JSC and to protect the interests of creditors in the Irish liquidation. He declined, however, to make an order which would purport to bind persons having notice of the anti-suit injunctions.

Meetings

[Courtney, *The Law of Companies* (4th ed) **Ch 14**]

Meetings – Informal agreement of members – Principle in Buchanan v McVey/ Duomatic – Whether directors acted in breach of their duties – Whether the directors' conduct has been informally sanctioned by the member of the company – Whether the principle in Duomatic applied – Fang Ankoong and another v Green Elite Ltd [2025] UKPC 47. This Privy Council decision arose from an appeal from the Court of Appeal of the British Virgin Islands. The facts were that Green Elite Limited instituted proceedings against its former directors and a company controlled by one of the former directors. The claim related to the payment of HK$150m, comprising the proceeds of sale of the company's only assets together with a further HK$87.7m, paid to the former directors and the company which Green Elite claimed were made and received in breach of the duties owed by the former directors. The claim succeeded in the BVI's High Court and the directors were ordered to pay the total sums claimed with interest and the company controlled by one of them to pay the sum claimed with interest. The BCI Court of Appeal dismissed an appeal by one of the former directors and the company and both appealed that decision to the Privy Council.

The primary grounds of appeal were that the directors were not in breach of their duties and that if the payments made did constitute a breach of duty, then they were saved by the fact that they were approved unanimously by the company's only two shareholders, in reliance on the principle in *Re Duomatic* [1969] 2 Ch 365.

The Privy Council held that absent a valid shareholder consent, the appellant and the other directors had acted in breach of their duty in receiving and distributing the proceeds of sale of the assets and dividends. The Privy Council noted that the High Court judge had found that there was no agreement by the shareholders to the steps that were taken by Mr Fang and the other directors: the receipt and retention by him personally of the proceeds of sale; the subsequent payments by Mr Fang to the other directors of the proceeds of sale of the shares and the receipt of those by the other directors and the payment of dividends on the shares to the other directors and the company controlled by Mr Fang. As they were not approved by the shareholder, as a finding of fact, then the *Re Duomatic* principle could not be invoked. The Privy Council did, however, confirm that assent given in accordance with the *Duomatic* principle need not have the particular features of a binding contract and the trial judge was misguided in suggesting a binding contract was needed. It agreed with the Court of Appeal that what the Judge had in mind was that the shareholders intended to bind themselves legally *as if they had passed a formal resolution* and he was not suggesting that there needed to be a contract.

Scheme of Arrangement

[Courtney, *The Law of Companies* (4th ed) **Ch 22**]

Scheme of arrangement – Whether the minority shareholders whose shares were to be cancelled under the scheme constituted a separate class such that there ought to have been a separate meeting of that class – Whether the scheme involved a reduction of share capital and if so whether the reduction was authorised – Cable & Wireless Jamacia Ltd v Jason Abrahams [2025] UKPC 44. In this appeal before the Privy Council, the company appealed against the decision of the Jamaican trial and Court of Appeal to refuse to sanction a scheme. The minority shareholders whose shares were to be cancelled claimed that they ought to be in a different class to other shareholders whose shares would remain unaffected such that the company would become a wholly-owned subsidiary. While the rights attaching to the shares of the minority and majority were the same, the treatment of them under the scheme could not have been more different and in those circumstances, the Privy Council had no hesitation in finding that the constituted separate classes and that without the approval of the statutory majorities as a meeting of the minority shareholders the court had no jurisdiction to sanction the scheme.

In coming to this conclusion the Privy Council conducted a useful, concise, review of the law applicable to the constitution of classes for the purposes of a scheme. It was noted that not only should a class be constituted by those with similar rights, but also the similarity or dissimilarity of the

way *in which those rights are affected by the scheme*: *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin* [2001] HKCFA 19: per Lord Millett NPJ at para 17. The Privy Council agreed with the principles set out there by Millett NPJ as regards the proper constitution of classes including that the test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights and that the question is whether the rights which are to be released or varied under the Scheme *or the new rights which the Scheme gives in their place* are so different that the Scheme must be treated as a compromise or arrangement with more than one class. The Privy Council, however, did not accept that Templeman J in *Re Hellenic & General Trust Limited* [1976] 1 WLR 123 had used imprecise language when he had referred to two groups of shareholders having conflicting interests – the Board of the Privy Council thought it was improbable that he had used imprecise language and that he had indeed focussed on the different interests of the two groups of shareholders there and, that being so, it was better to acknowledge that Templeman J's reasoning was erroneous. The Board also considered that there was a danger that the references to "interests not derived from … legal rights" may produce unnecessary confusion about the relevant distinction between rights and interests in this context and that it agreed with Jonathan Parker J in *Re BTR* [1999] 2 BCLC 675 where he observed that he found it difficult to understand the concept of an interest arising out of a right as being distinct from the right itself (p 682C-D). The Board of the Privy Council said that the interests not derived from legal rights concept was unnecessary and that "*[t]he focus ought to be on rights before the scheme and the effect of the scheme on those rights (be it removing, varying or conferring them*) (at para 37)".

The second substantive question considered by the Board of the Privy Council was whether the scheme involved a reduction in capital and if so whether it had been authorised. The trial judge had accepted that the cancellation of the minority's shares did result in a reduction in capital but reasoned that it was not permanent because the subsequent issue of shares to the parent would restore the company's capital. The Board considered the judge's reasoning on his point to be '*clearly erroneous*' (para 45). The Board made clear that the fact that a proposed reduction forms part of a scheme of arrangement does not relieve a company of the need to comply with the statutory requirements for reduction of share capital (*Re Guardian Assurance Company* [1917] 1 Ch 431). As the scheme did not comply with the statutory regime then it could not be approved.

Winding Up

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

Petition to wind up company – Whether it is appropriate to direct the cross-examination of a deponent in the context of a petition to wind up a company – Whether the company is insolvent for failure to repay a debt which the petitioner claims is owed – Whether payment made was a debt to be repaid on demand or an investment in shares – Conflict in affidavit evidence – ***Re Anvil Real Estate Limited*** [2025] IEHC 630 (Cahill J). In this case the petitioner to have a company wound up for failure to pay its debts claimed to be owed a debt which the company had failed to repay; the company's position was that the monies in question had been paid to it in return for an investment in shares in the company and not a loan and both sides challenged the credibility of the other's evidence. The petitioner served notices to cross-examine the sole director and beneficial owner of the company in respect of petitions relating to six companies, which he had issued. The basis asserted was Ord 40, r 36 RSC 1986 but the company objected saying a petition was not a trial on affidavit. The issue before the court was whether the petitioner's motion for leave to cross examine should be granted.

In analysing the legal issues, Cahill J began by noting the jurisdiction to wind up and the threshold for granting or refusing a petition to wind up a company based on its inability to pay its debts is addressed in s 570 of the Act. Cahill J noted that the onus is on the petitioner to show that the conditions for the grant of a winding-up order are met and then the burden shifts to the company which seeks to dispute a debt to demonstrate that the dispute is bona fide and on substantial grounds (para 40). Cahill J noted that the Company does not have to prove as a matter of probability that it is not liable for the debt, only that the debt is disputed in good faith. And that it is not the function of a court hearing a petition to make a final determination on conflicts of fact or decide whether the debt is in fact owed.

Cahill J held that the right to serve a cross-examination notice under Ord 40 r 36 only arises in trials on affidavit commenced by way of a summons and that in a petition to wind up a company, the leave of the court is required under Ord 40, r 1 to allow for the cross-examination of evidence given on affidavit. Cahill J said that it was clear that the Court has a discretion as to whether or not to order cross-

examination and that the issue before the court was how that discretion should be exercised, noting that the two most relevant precedents were RAS Medical Limited v. Royal College of Surgeons in Ireland [2019] 1 IR 63 and *Re Bayview Hotel (Waterville) Ltd* [2022] IEHC 516. Cahill J considered the Supreme Court's decision in RAS Medical where the court considered one party's complaint that the Court of Appeal had rejected the sworn evidence tendered without the relevant witness being subject to cross-examination.

After quoting the key passages in the decision, Cahill J said the following points arise: "First, if a party wants to impugn the reliability or credibility of sworn evidence (whether by reason of conflicting sworn evidence, documentary evidence or otherwise) they must do so by way of cross-examination ([88]). Second, it is open to a party to decide not to impugn the credibility or reliability of sworn evidence but instead to take it at its height and assert its insufficiency. No cross-examination is then required. Third, if there is a conflict of evidence (whether arising from affidavits or documents) the resolution of which is material to the final determination of the proceeding, it falls to the party who bears the onus on that question to challenge the evidence which conflicts with his case ([92])" (at para 54). After noting that in other cases it was important to determine whether the proceedings were interlocutory or final but she said it was not readily apparent whether a winding-up petition was either and said that the overriding question instead is whether the justifications for ordering cross-examination as identified in RAS Medical properly apply to the case in hand, bearing in mind the general and default approach that winding-up petitions should be heard on affidavit and with expedition. After reviewing other authorities including Bayview, and English authorities, Cahill J concluded that it was appropriate and necessary to grant an order directing cross-examination because there was a risk that if there were no cross-examination, the petition would fall to be dismissed on that basis rather than being weighed on its merits.

Cahill J said it was important to be clear that the need for cross-examination did not arise from the assessment of whether there is a 'bona fide dispute' as that criterion does not import some form of test of honesty, integrity or credibility of the individual deponent and that, 'credibility' rather than 'bona fides' is the benchmark adopted in RAS Medical for determining the need for cross-examination. Cahill J said that while there was no dispute that the petitioner had paid monies to the company, there was as to what they were paid for and noted that "on this factual question, the two deponents clash directly and there are inconsistencies and difficulties with the evidence presented by both sides. If there is no cross-examination, it is difficult to see how a court could resolve this, even at a relatively superficial, filtering level. Both deponents would also be denied the opportunity to deal with the challenges to their evidence in cross-examination" (at para 100). Cahill J noted also that the cross-examination should be limited to those paragraphs in the affidavit "the credibility or reliability of which are specifically, necessarily and directly challenged by a party bearing the burden of proof on the precise material issue to which they relate" (at para 104). Cahill J also noted that the case before her fell within the category of exceptional cases in which it would not be consistent with the fair disposition of the petition to refuse leave to conduct cross-examination.