Bloomsbury Professional's Irish Company Law Update – September 2024

Introduction

Welcome to Bloomsbury Professional's Irish Company Law Updates, a series where we plan to bring you a summary of the most important recent case and statute law developments in company law. In this issue there are a number of very significant decisions of both the Irish and UK courts concerning company law. If this issue has a theme it is **personal liability of directors** (as accessories to torts committed by their companies): see *Lifestyle Equities CV and another v Ahmed and another* [2024] UKSC 17 and in exceptional circumstances for costs as non-parties to litigation: see *Re Green Label Short Lets Limited; Pena-Herrera v Green Label Short Lets Ltd and Godart* [2024] IEHC 425, and for reckless trading: see amendment to s 610(1)(a) of the Companies Act 2014) and of **receivers** (in tort for breach of statutory duty for continuing to trade where preferential creditors are not paid). There have also been some significant developments in both primary and secondary legislation as well as other case law developments which are summarised.

Dr Thomas B Courtney

Corporate Borrowing and Floating Charges

[The Law of Companies Ch 19]

Corporate borrowing – floating charges – application for directions – receiver-managers appointed to company under a floating charge and fixed charge – receivers borrowing funds from bank to conduct receivership – whether receivers could repay some of the working capital advance to the bank out of floating charge realisations or whether the Revenue Commissioners had priority – whether loan was an expense of the receivership – High Court ruling in favour of receivers – appeal against that decision – ss 438 and 440 of the Companies Act 2014 – **Re Beggasa Limited; Revenue Commissioners v Burns and McCann** [2023] IECA 21 (only uploaded to the Courts Service website on 8 July 2024).

In this case receiver managers were appointed on foot of a floating charge debenture created by the company and a fixed charge created by the shareholder-director of the company over a hotel. To conduct the receivership, the receivers borrowed €293,000 from the bank and brought an application for directions as to whether they could repay that advance, an expense of the receivership, from the proceeds of the realisation of the floating charge or whether the Revenue had priority under s 440 of the Act. The High Court ([2021] IEHC 110 (Keane J)) found for the receivers and that there was no breach of s 440 of the Act in repaying the bank as the loan was an expense of the receivership. The Court of Appeal (per Murray J) made two findings of law, following a very comprehensive review of the case law on the relationship between receivers and preferential creditors under both UK and Irish law.

First, it was **held** that in relation to the proper order of priorities when a receiver is appointed over assets which are the subject of a floating charge, the receiver is entitled to be paid, in priority to the claims of preferential creditors or the debenture holder, the costs of realisation of assets subject to a floating charge, and the costs and expenses of the receivership. This followed from s 440 of the Act which affords priority to preferential debts only over assets to which the debenture holders would otherwise be entitled to have recourse, which does not include the costs and expenses of the receivership. In so finding, Murray J applied the decision in *Re Glyncorrwg Colliery Company, Railway Debenture and General Trust Company Ltd v The Company* [1926] Ch 951.

Second, it was **held** that the first finding of law related only to priorities and that one of the effects of s 440 of the Act is to impose on a receiver a duty to preferential creditors, the breach of which sounds in damages in tort. Murray J said:

> 'That duty is triggered at any point when the receiver, after taking the costs of realisation and the amounts then due to the receiver in respect of the costs and expenses of the receivership

> and his remuneration into consideration, has in his hands sufficient assets to enable him to discharge the preferential debts either in whole or in part. The effect of the duty is that if, in that event, the receiver determines to continue to trade, he does so at his own risk, and if he loses those moneys in the course of trading, he will be personally liable to the extent that preferential creditors have lost moneys they would otherwise have received had the receiver not embarked on that course of action.'

Murray J noted that the consequence of the findings was that the question of whether or not the receivers had any liability to the Revenue will depend, inter alia, on the assets available to them at given points in time having regard to the costs and expenses then deductible. The court recognised that the parties needed to consider their positions in the light of the judgment and, failing agreement being reached, a further hearing might be required to determine the question of the receivers' actual liability.

Corporate Borrowing and Receivers

[The Law of Companies Ch 21]

Receiver appointed to company by NAMA – applicant a director of the company seeking an order that the receiver file a form E11 ending his receivership with the CRO or in the alternative an order discharging the receiver – application brought under s 438 of the Companies Act – whether the applicant had standing to bring the application – whether the court had jurisdiction under s 438 to remove a receiver – ***Re Mardon Property Developments Limited; Martin v O'Donoghue*** [2024] IEHC 462.

Here, the respondent had been appointed a receiver to the company by NAMA. The applicant was a director and member of the company who claimed that since the receiver had been appointed receiver over certain specified property which had been disposed of, the receivership was exhausted and the receiver should discharge himself, but the receiver had declined. Accordingly the applicant sought an order for directions under s 438 and an order that the receiver file a form E11 with the CRO discharging his receivership or in the alternative an order discharging the receiver.

On the question of standing to bring the application, it was noted by Conor Dignam J that while s 438(1) expressly allows an officer of a company to bring an application under s 438, s 438(2) provides that an application by anyone other than a receiver 'shall be supported by such evidence that the applicant is being unfairly prejudiced by any actual or proposed act or omission of the receiver as the court may require'. The judge proceeded on the basis that s 438(2) only went to the *entitlement to relief* and did not affect an officer's *standing* to bring an application under s 438(1). It was acknowledged, however, that the point had not been fully argued and awaited determination at another time.

On the question of entitlement to relief under s 438(1), it was **held** by Conor Dignam J that the orders sought were not available under s 438 of the Act and that the appropriate provision under which to seek the removal of a receiver was s 435 of the Act.

Corporate Civil Litigation and Directors' Liability for Costs of Litigation

[The Law of Companies Ch 6]

Application successfully brought for the examination of a company director of a company not in liquidation – applicant was a tenant who had successfully obtained a judgment in the sum of €16,633 in the District Court for damages arising from the breach of her tenancy agreement with the first respondent company – purpose of the examination was to have the second respondent company's director examined on oath about the ability of the company to satisfy the District Court order – after the order for examination had been granted, the company agreed to settle the claim by borrowing the money – the applicant brought an application to have the second respondent made personally liable for the costs of the examination application – whether order to be made against the director – principles to be applied in such cases – ss 567 and 671 of the Companies Act 2014 – ***Re Green Label***

Short Lets Limited; Pena-Herrera v Green Label Short Lets Ltd and Godart [2024] IEHC 425 (Cregan J).

The facts in this 'exceptional case' (Cregan J at para 46) were that the applicant had leased an apartment from the first respondent company but after a number of months, had complained of health and safety issues and had requested an inspection by Dublin City Council. Within a week, the second respondent director directed the company to serve a notice of termination and thereafter the tenant complained to the RTB which agreed the notice was invalid and awarded the tenant €1,000. Two days later the company, at the direction of the second defendant, unlawfully evicted the tenant by packing up her belongings while she was at work. The tenant again complained to the RTB who agreed and awarded compensation of over €14,000 and the tenant then got a District Court order for the amounts awarded to her and costs, totalling €16,633. The sheriff's attempt to execute against the company was unsuccessful which prompted the tenant to apply for an order directing the examination of the director under oath pursuant to ss 567 and 671 of the Companies Act 2014. The applicant was ultimately given that order and thereafter the company agreed to and paid the amount due to her, saying it would borrow the money to do so. This decision concerned the applicant's application to have the second respondent director made personally liable for the applicant's costs. The director was joined as a second named respondent under Ord 15, r 13 of the RSC.

After noting the court's jurisdiction to award costs generally (Ord 99, r 2 RSC and s 169 of the Legal Services Act 2015) Cregan J went on to note that the circumstances in which a court could consider making non-parties be joined to proceedings in order to make such a party liable for costs had been considered by the High Court in *Mooreview Developments & Ors v First Active plc et al* [2011] 3 IR 615 and by the Supreme Court in the same case reported at [2019] 1 IR 417. After a detailed review of the six factors identified by McKechnie J in the Supreme Court, Cregan J determined that they were all present and justified the making of an order against the director personally. The exceptional nature of the case was, however, noted by Cregan J who gave three reasons for saying this: (1) because of the ruthless and unprincipled way in which the director moved to terminate the applicant's lease when she complained to Dublin City Council about overcrowding and other health and safety issues in her rented accommodation; (2) because of the director's ruthless and unacceptable behaviour in evicting the applicant 'bag and baggage' by seizing her personal belongings and putting them into storage whilst she was at work effectively rendering her homeless because she had the temerity to complain about it to the RTB; and (3) because the company at the direction of the director clearly decided that the company would defy the law and disobey a District Court order.

Corporate Personality and Directors' Liability in Tort

[*The Law of Companies* Chs 4, 5]

Company committing tort of infringing a trade mark – separate legal personality of a company – whether the directors of that company were liable as accessories for causing the company to commit a tort of strict liability – whether the directors' liability is also strict liability or whether it depends on knowledge or some other mental element – ***Lifestyle Equities CV and another v Ahmed and another*** [2024] UKSC 17.

The UK's Supreme Court has recently ruled on a matter which appears never to have come before the Irish courts, namely, the extent to which directors can be liable as accessories where they are instrumental in their company committing a tort. The facts in this case were that the plaintiff successfully sued a company called Hornby Street Limited for breach of its trademarks. The plaintiff also sued its directors, claiming that they were jointly liable with their company for the infringements. At trial, the judge agreed and found that the directors, Mr Ahmed and his sister Ms Ahmed, were indeed jointly liable with their company on the grounds that they had procured the infringements pursuant to a common design. While the trial judge did not find that the Ahmeds knew or ought to have known that there was a likelihood of infringement, he considered that this was not relevant to their liability. This decision was upheld by the Court of Appeal. The UK's Supreme Court unanimously allowed the Ahmed's appeal, the key finding being that even though trademark infringement was a strict liability tort, accessories could not be liable either for procuring the infringements or on the basis of a common design when they were not aware of the essential facts which make the use of their company's designs, wrongful.

What many company lawyers might find most startling is that Lord Leggatt said that he did not accept:

> 'that company law provides any support for shielding directors from personal liability in tort… The fact that a company is regarded as a separate person does not, however, justify treating a director whose act is attributed to the company as free from personal liability for that act. Rather, the opposite is true. To suggest that directors cannot be personally liable for acts which are regarded in law as acts of the company fails to respect the separate personality of the company…there is nothing inconsistent or incongruous in a situation where a company and a director are each legally liable to a claimant injured by a wrongful act.'

The main comfort for directors in this decision is that accessory liability in tort is not strict liability and in order to be liable, directors must be aware of the essential facts which make the company's acts wrongful.

Examiners

[*The Law of Companies* Ch 23]

Interim examiner appointed – application for the confirmation of the interim examiner – one creditor strenuously objecting to confirmation and urging the making of a winding-up order – objection based on the absence of a reasonable prospect of survival and on account of the company's alleged misconduct – whether court should confirm the appointment – ***Re Mainline Power Limited*** [2024] IEHC 437 (Mulcahy J).

This judgment was issued in the context of an application to confirm the appointment of an interim examiner which had been appointed to the company. One creditor strenuously objected to the confirmation of the interim examiner and urged the making of a winding-up order. The company's financial difficulties had a number of causes, but the one that allegedly broke the camel's back was an arbitration award in favour of the objecting creditor in the sum of €6.8m. Much was made by the company of the arbitral award which it claimed was wholly unexpected in the light of legal advice which it claimed it had received. The objecting creditor claimed that, based on the information before the court, the company did not have a reasonable prospect of survival and secondly that even if there was a reasonable prospect of survival, the court should exercise its discretion to refuse to appoint an examiner due to alleged misconduct by the company. This was said to be the wrongful transfer of settlement between group companies, the failure to show the legal advice which it was alleged said the company had a strong case in the arbitration, and the failure to produce financial projections allegedly evidencing the company's prospect of survival.

Mulcahy J reviewed the law on the requirement for a reasonable prospect of survival beginning with the test set out in *Re Vantive Holdings (No 1)* [2009] IESC 68 and the fact that the bar for establishing a reasonable prospect is a low one (per Baker J in *Re Claremorris Tourism Limited* [2015] IEHC 796). It was noted that even where a reasonable prospect of survival is established, the court retains a discretion to refuse to appoint an examiner (*Re Missford Limited* [2010] IEHC 11) and where there is wrongdoing that must be balanced with the potential benefits of the examinership (*Re Rathmond Ireland Limited* [2017] IEHC 273). Applying the law to the case in hand, Mulcahy J held that while it was disputed there was sufficient evidence to find that there was a reasonable prospect of survival, the court was entitled to rely on the independent expert and the interim examiner's view that the company did have a reasonable prospect of survival. After reviewing the evidence before the court Mulcahy J concluded that the company had established to the sufficient standard that it had a reasonable prospect of survival as a going concern.

Mulcahy J next considered the discretionary factors. The first matter was that the objecting creditor claimed that the company had made an unfair preference. In reliance on *Re Traffic Group Ltd* [2007] IEHC 445, Mulcahy J considered that it would be improper for him to reach a conclusion that there had been an unfair preference at that stage. The second matter was the company's failure to disclose legal advice which the objecting creditor considered had been 'deployed' (within the meaning of that term used in *Elsharkawy v Minister for Transport* [2023] IEHC 672). On this point the judge said he was not persuaded to furnish discovery of oral legal advice nor to conclude that the company's failure constituted misconduct. Finally, as to the failure to provide financial projections, Mulcahy J said that it was not necessary to review the projections to determine whether the company had a reasonable prospect of survival. In weighing the discretionary factors, Mulcahy J said that:

> 'the prospect of saving as many as 55 jobs in the Company weighed heavily in favour of confirming the examiner's appointment and allowing the Company the breathing space necessary to see if it can put in place the necessary measures to return to profitability'.

The fact that there have been 19 expressions of interest in investing in the company further confirmed the exercise of his discretion in favour of confirming the appointment.

Financial Statements

[*The Law of Companies* Ch 18]

Large companies – listed companies – corporate sustainability reporting – financial statements – Directors' report – **The European Union (Corporate Sustainability Reporting) Regulations 2024 (SI 335 of 2024)**.

These Regulations were signed by the Minister for Enterprise, Trade and Employment on 5 July 2024. They require all large and listed companies (except listed micro-enterprises) to provide information on sustainability matters, defined as environmental, social and governance (ie ESG) including human rights matters according to mandatory European Sustainability Reporting Standards in the directors' report. In addition to amending several existing provisions of the Companies Act 2014, the Regulations also insert a new Pt 28 on Sustainability Reporting. They also amend the Transparency Regulations 2007. Sustainability reporting is being phased in from 2024 to 2028 and will commence for financial years on or after 1 January 2024 (for PIEs with more than 500 employees); 1 January 2025 (for other larger companies with more than 250 employees); 1 January 2026 (for listed SMEs with an opt out until 2028) and 1 January 2028 for large subsidiaries and branches of non-EU companies with a net turnover of €150m within the EU.

Classification of companies by size – adjustments of size criteria for certain companies and groups – **European Union (Adjustments of Size Criteria for Certain Companies and Groups) Regulations 2024 (SI 301 of 2024)**.

These Regulations which came into operation on 1 July 2024 give effect to the EU Directive 2023/2775/EU and amend certain provisions of the Companies Act 2014 dealing with requirements for differently sized companies. The objective is to take account of inflation, and the various company size thresholds are increased by circa 25%. The result is to remove certain regulation from companies which will now fall outside a category to which greater regulation applies. The changes can be summarised thus:

	Old B/S	Old Turnover	New B/S	New Turnover
Micro Company	€350,000	€700,000	€450,000	€900,000
Small Company	€6m	€12m	€7.5m	€15m
Small Group	€6m net / €7.2m gross	€12m net / €14.4m gross	€7.5m net/ €9m gross	€15m net/€18m gross
Medium Company	€20m	€40m	€25m	€50m
Medium Group	€20m net / €24m gross	€40m net / €48m gross	€25m net / €30m gross	€50m net / €60m gross

Shares and Membership

[*The Law of Companies* Ch 8]

Register of members – meaning of member – whether register conclusive as to membership – stock transfer form forged, and transferee entered in the register of members – transferee purporting to pass a special resolution to appoint liquidators – whether resolution to appoint liquidators was a nullity –

whether register of members should be relied upon pending its rectification – s 112 of the UK Companies Act 2006 – ***Re JDK Construction Limited*** [2024] EWCA Civ 934.

The UK's Court of Appeal has held that unless and until an order for rectification was made, the identity of the members of a company for the purposes of determining the validity of a written resolution was to be determined by the entries in the company's register of members at the relevant time. This was found to be the case notwithstanding that the register had been updated on the basis of a forged stock transfer form. In upholding the earlier High Court decision, the Court of Appeal said that the finding was supported by the decision of the UK Supreme Court in *Enviroco Limited v Farstad Supply A/S* [2011] UKSC 16 where Lord Collins said it was a 'fundamental principle of United Kingdom company law' that:

> 'except where express provision is made to the contrary, the person on the register of the members is the member to the exclusion of any other person, unless and until the register is rectified'.

Giving the decision of the Court of Appeal Snowden LJ said the register should determine the validity of members' resolutions, even in a case where a member's name has been wrongly removed from the register as a result of forgery or fraud. The law does not simply disregard the entries on the register. Instead, the entries on the register of members are presumptively valid and the members of a company are taken to be those shown on the register 'unless and until the register is rectified'. For the materially similar definition of a member under Irish law, see s 168 of the Companies Act 2014.

Winding Up

[*The Law of Companies* Chs 16, 26]

Series of amendments to the Companies Act 2014 to enhance employee and creditor protection – new requirement on presenting a winding up petition – court to have regard to certain matters in hearing a just and equitable winding-up petition – new notification requirements imposed on provisional liquidators and liquidators – changes to contribution orders – changes to unfair preference – changes to improper transfer of assets – changes to reckless trading – **Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Act 2024**.

The Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Act 2024 ('E(CRMP)C(A)A 2024') which was commenced in totality with effect from 1 July 2024 (SI 303 of 2024) effects a number of amendments to provisions concerning the winding up of companies in the Companies Act 2014 (the 'Act'), some of which have the potential to be very far-reaching.

Section 571 of the Act is amended by the insertion of a new subs (1A) to require that the directors of a company which presents a petition for its own winding up must notify its employees and employees' representatives at the time the petition is presented or as soon as reasonably practicable after the presentation (s 20 of the E(CRMP)C(A)A 2024).

Section 572 of the Act is amended to require that in deciding whether it is just and equitable to make an order under s 572, the court must have regard to whether the new notification requirements in s 571(1A) have been met (s 21 of the E(CRMP)C(A)A 2024).

Section 573 of the Act which empowers the court to appoint a provisional liquidator is amended to require the court to direct, when appointing a provisional liquidator, that as soon as reasonably practicable and within such period as the court specifies, the provisional liquidator shall inform employees and employees' representatives of certain specified matters (s 22 of the E(CRMP)C(A)A 2024).

Section 594 of the Act which contains supplemental provisions relevant to the making of a statement of a company's affairs in a winding up, is amended by the insertion of three new subsections, the effect of which is to require a liquidator or provisional liquidator to notify employees and employees' representatives when they get a statement of affairs of a company and to supply a copy of it to them on request being made (s 23 of the E(CRMP)C(A)A 2024).

Section 599 of the Act empowers a court to make a contribution order which requires a company which is, or was related to another, to contribute to the liquidator of the company being wound up. This has a potentially far-reaching amendment. Whereas it was the case that before a contribution order

could be made, the court had to be satisfied that the circumstances that gave rise to the winding up of the company were attributable to the acts or omissions of the related company which was being obliged to make a contribution, this has now been removed as a precondition and, instead, this is but a factor which the court must consider in making a contribution order (s 24 of the E(CRMP)C(A)A 2024).

Section 604 of the Act concerns unfair preference. It was provided that a preference would be deemed to be an unfair preference where a winding up commenced within six months of the preference (s 604(2)) and within two years when in favour of a connected person (s 604(4)). These deeming provisions have now been amended so that in both cases, they will be deemed unfair within six months or within two years or, in both cases, within '(such longer period as the court considers just and equitable having regard to the circumstances of the act concerned)'. (s 25 of the E(CRMP)C(A)A 2024).

Section 608 concerns the court's power to order the return of assets which have been improperly transferred, ie where the effect is to perpetrate a fraud on the company, its creditors or members. This provision has been amended by substituting the reference from 'payment' to 'payment made in the ordinary course of business' in s 608(3) which disapplies the power to make an order returning assets to any conveyance, mortgage, delivery of goods, payment made in the ordinary course of business, execution or other act relating to property made or done by or against a company to which s 604 (unfair preference) applies (s 26 of the E(CRMP)C(A)A 2024).

Section 610(1)(a) which concerns reckless trading, has been amended by the deletion of 'knowingly' such that the court can make an order against an officer of a company who was party to the carrying on of any business of the company in an reckless manner, without it needing to be established that the person knew that the carrying on of business was reckless. This has changed the test from being essentially subjective to an objective test meaning that a person need not know that that carrying on of business was reckless, if it is objectively ascertained to have been reckless. Subsection (3) has also been amended so that it is no longer a deeming provision to establish a person was knowingly a party to reckless trading and instead this subsection provides an example of when a person can be found to be a party to reckless trading; also now it is sufficient that a person ought to have known that his or her actions or those of the company would *be likely* to cause loss to creditors. The court's power to grant relief where a person is found to have acted 'honestly and responsibly' in s 610(8) has been replaced with a new power to grant relief. The new relief will only arise where established that a person, from the 'relevant time', took such steps as were reasonably practicable with a view to minimising such loss as he or she ought to have taken. Where this is established, the court may, having regard to all the circumstances of the case, relieve him or her either wholly or in part, from personal liability on such terms as it may think fit. The 'relevant time' is defined to mean the time from which the person knew or ought to have known that his or her actions or those of the company would be likely to cause loss to the creditors of the company (s 27 of the E(CRMP)C(A)A 2024).