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Bloomsbury Professional's Company Law Developments

Welcome to Bloomsbury Professional's Company Law Developments (5/25 September), 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, the most significant development comes from the UK's Privy Council in ***Jardine Strategic Limited v Oasis Investments II Master Fund Ltd and 80 others*** [2025] UKPC 34. There, the Privy Council determined that the so-called 'disclosure rule' or 'shareholder rule' which said that the shareholders in a company were entitled to see the legal advice provided to the company was misconceived and had no proper juristic basis since it ignored the most fundamental of all company law principles, that the company is a separate legal entity from its shareholders and that its assets are its assets, not its shareholders' assets. Not alone did the court find that the rule did not apply in Bermuda (from where the appeal came) but they issued a direction that the shareholder rule did not form part of the laws of England and Wales! Meanwhile, in Ireland the Rule in Battle had another outing before the High Court in ***Caraglass Limited t/s Zeeko v Minister for Education*** [2025] IEHC 443 of 31 July 2025 (Geary J) where it was found that there were no exceptional circumstances which justified a director representing the company in a proposed judicial review of a procurement process. Personal liability was imposed on directors for the costs of a winding-up petition in **Re MPB Developments Limited** [2025] EWHC (Ch) 1291 where their defence was found to be in their own interests and not those of the company. The non-application of the Rules of the Superior Courts on derivative actions to actions brought in respect of non-Irish companies was considered in ***O'Donoghue and Manning v Murphy, Quigley and Walsh*** [2025] IEHC 435. Statutory developments include **SI 235 of 2025** which commenced the changes to the audit exemption introduced to s 363 of the Companies Act 2014 by s 22 of the Companies (Corporate Governance, Enforcement and Regulatory Provisions) Act 2024 with effect from 16 July 2025 and also three other statutory instruments (**SI 328 of 2025** and **SI 329 of 2025**) which prescribe new CRO forms and introduce new CRO fees and which should be of interest to company law practitioners and company secretaries and **SI 309 of 2025** which makes to corporate sustainability reporting.

Dr Thomas B Courtney

Audit Exemption

[Courtney, *The Law of Companies* (4th ed), **Ch 18**]

Audit exemption – Relaxation of circumstances in which a company will be unable to rely on the exemption from audit – Commencement of section 22 of the Companies (Corporate Governance, Enforcement and Regulatory Provisions) Act 2024 – Reg 2 of the Companies (Corporate Governance, Enforcement and Regulatory Provisions) Act 2024 (Commencement) Order 2025 ***SI 325 of 2025***. Section 22 of the Companies (Corporate Governance, Enforcement and Regulatory Provisions) Act 2024 has been commenced with effect from 16 July 2025. In consequence, s 363 of the Companies Act 2014 has been substituted so that it not provides: (1) Subject to subsection (2), and notwithstanding that section 358 is complied with, a company is not entitled to the audit exemption referred to in that section in respect of its statutory financial statements for the 2 financial years immediately succeeding a financial year (in this section referred to as the 'relevant financial year') where the company— (a) failed to deliver to the Registrar, in compliance with section 343, the company's annual return in respect of the relevant financial year, and (b) previously failed to deliver to

the Registrar, in compliance with s 343, the company's annual return in respect of any of the 5 financial years immediately preceding the relevant financial year. (2) The following shall be disregarded for the purposes of paragraph (b) of subsection (1): (a) a failure by a company to deliver its annual return which is the company's first annual return as referred to in s 349; (b) a failure by a company to deliver its annual return before the operative date. (3) In this section, 'operative date' means the date of commencement of '*section 22* of the *Companies (Corporate Governance, Enforcement and Regulatory Provisions) Act 2024*.'. Note, for the purposes of s 363(3), the 'operative date' is the 16 July 2025.

Companies Registration Office

[Courtney, *The Law of Companies* (4th ed), **Ch 2**]

Companies Registration Office – Filings – Fees to accompany prescribed forms – Companies Act 2014 (Fees) Regulations 2025 ***SI 329 of 2025***. These Regulations set out the fees to be paid to the Registrar of Companies in respect of documents and forms required to be filed under the Companies Act 2014. They revoke the Companies Act 2014 (Fees) Regulations 2023 (SI 294 of 2023). The Regulations were signed on 15 July 2025 and effective from that date.

Companies Registration Office – Forms – Prescribed forms – Companies Act 2014 (Forms) Regulations 2025, ***SI 328 of 2025***. These Regulations which were signed into law on 15 July 2025 prescribe three new forms: *Form B7* which is to be used for delivering particulars of a variation of company capital pursuant to s 83(6) of the Companies Act 2014, *Form QP83* to be used for notifying the alteration of a financial year end in the case of EU qualifying partnerships and a *Form QP73 for nominating a new ARD.*

Corporate Litigation

[Courtney, *The Law of Companies* (4th ed), **Ch 6**]

Disclosure rule that legal advice given to a company is entitled to be produced to shareholders – Reconsideration of the juristic basis of the disclosure rule – Whether the disclosure or shareholder rule should be recognised or abolished – ***Jardine Strategic Limited v Oasis Investments II Master Fund Ltd and 80 others*** [2025] UKPC 34. The Privy Council has determined that the shareholder rule, which would say that the shareholders in a company are, save in particular circumstances, entitled to see legal advice provided to the separate legal entity which is the company forms no part of the law of Bermuda and ought not to continue to be recognised in England and Wales either. So strongly did the Privy Council feel about the abolition of the rule which had developed and come to be accepted by the English (and Irish) courts that it issued a *Willers v Joyce* direction, which applied their decision so as to bind the courts of England and Wales, so that their decision was not confined to the case in hand or to the laws of Bermuda, from where the appeal came.

The Privy Council noted the importance of legal professional privilege which it said was a fundamental condition on which the administration of justice rests. Against this, the Privy Council decision (given by Lord Briggs and Lady Rose) noted that the disclosure or, as they referred to it, the *shareholder rule* is an exception to the principle of the sanctity of legal professional privilege which it said has been based, traditionally, on the now-antiquated principle that shareholders have a proprietary interest in the assets of the companies in which they own shares and so have a right to see any legal advice which has been paid for from the company's assets and obtained prior to shareholders' disputes arising. It also noted that it was justified on the basis of joint interest privilege.

The Privy Council held that it was satisfied that the rule forms no part of the law of Bermuda and ought not to continue to be recognised in England and Wales, describing it as being like an emperor who has worn no clothes and saying that it was time to acknowledge that. The reasons given for so concluding included that its original proprietorial basis is wholly inconsistent with the proper analysis of a registered company as a legal person separate from its members, and that neither could it be justified as a form of joint interest privilege, it being an oversimplification to say that a company's interests are aligned with those of its shareholders.

Separate legal personality – The rule in Battle – Rule that a company can only be represented in court by either a barrister or solicitor and cannot be represented by a director or shareholder – Company seeking to judicially review a decision by the Minister of Education to cancel a procurement process to supply mobile phone pouches to schools – Director and CEO of the company seeking to represent the company owing to its inability to afford legal representation – Whether there were exceptional circumstances – ***Caraglass Limited t/s Zeeko v Minister for Education*** [2025] IEHC 443 of 31 July 2025 (Geary J). In this ex tempore decision of the High Court, Geary J considered the law which requires companies to be represented in court which originated in *Battle v Irish Art Promotion Centre Ltd* [1968] 1 IR 252. Geary J noted that the starting point (per Finlay Geoghegan J in *Allied Irish Bank plc v Aqua Fresh Fish Ltd* [2018] IESC 49) is that a company has no right to lay representation and the circumstances which warrant departure from the rule are rare. The lack of availability of funds to procure legal representation is not an exceptional circumstance. Geary J noted that challenges to a procurement decision must be taken within 30 days of the decision; there the decision to cancel the procurement was made on 30 May but the application was only made by the company in July. It was noted that the CEO claimed the company was in time because it was only on 14 June that he successfully set the pouches produced by competitors on fire – a fact he claimed meant his competitors products did not comply with relevant product safety regulations. What is interesting is that Geary J looked into the substance of the company's case and said she did not agree with the assertion that the reasons given for cancelling the first procurement process involved evidence of any lack of transparency; she also said that the running of time was an important question and that the fact the company was trying to conduct tests on competitors' products by setting them on fire did not form the basis for an extension of time and there was no evidence of a serious injustice which will not be addressed unless the CEO was permitted to represent the company. Geary J concluded that the court had not identified any kind of exceptional grounds and refused the CEO's application to represent the applicant company in the intended action.

Shareholders' remedies

[Courtney, *The Law of Companies* (4th ed), Ch 11]
Shareholders' dispute between the shareholders of a US company formed by the plaintiffs and the defendants to invest in a property development project in San Francisco, USA in 2007 – The facts involved the entering into by the US company of a settlement – Plaintiff investors objecting to the defendant investors' actions in relation to settlement – Whether the plaintiffs were bringing a derivative action – Whether Foss v Harbottle applied – ***O'Donoghue and Manning v Murphy, Quigley and Walsh*** [2025] IEHC 435. In this case the question arose as to whether the plaintiffs had locus standi to bring the proceedings and in that point the defendant succeeded, Barr J being satisfied that the plaintiffs had not sued an essential defendant who was the registered shareholder in the company. However, Barr J went on to consider some of the other points which had been raised. In particular, it was submitted that under the rule in *Foss v Harbottle* [1843] 2 Hare 461, the plaintiffs could not sue the defendants for a loss that had allegedly been suffered by the company. It was submitted that if any wrong had been committed against the company, thereby causing it a loss; only the company could sue in respect of that loss. The defendants accepted that an exception to the rule arose when it was contended that the majority shareholders had caused or permitted the loss to the company and by failing to take action in respect of it, they had effectively committed a fraud or oppression on the minority shareholders but it was further contended that while the minority shareholders might be permitted to bring a derivative action against the majority shareholders in respect of the loss allegedly suffered by the company; Ord 15, r 39 of the Rules of the Superior Courts provided that such a derivative action could only be brought with the leave of the court, which had not been given. On this point Barr J held that the court was satisfied that the plaintiffs' action does not fail i*n limine* under the rule in *Foss v Harbottle* because the first plaintiff is effectively a minority shareholder in 973MA. As assets of the company, being the extant litigation in the US

against Mr Joe Cassidy and the vendors, was effectively alienated from the company by a vote of the majority shareholder, the first plaintiff is entitled to mount a derivative action on the basis that such action by the majority shareholder constituted a fraud on the company and on the minority shareholders as the proceedings could be seen as coming within one of the exceptions to the Rule. Of significance was the obiter comment by Barr J that the court was '*not satisfied that the provisions of O.15, r.39 of RSC apply, as 'company' is defined therein as an existing company within the meaning of s. 2(1) of the Companies Act 2014, or a company capable of being wound up under that Act, which effectively refer to companies registered in the State'* (at para 70) and he went on to '*hold that the provisions of O.15, r. 39 do not apply to the present action. Accordingly, I hold that the rule in Foss v Harbottle does not prevent the plaintiffs from maintaining the within proceedings against the defendants, either in their own right, or on behalf of the company*' (at para 71).

Financial Statements

[Courtney, *The Law of Companies* (4th ed), **Ch 18**]

*Financial statements – Reporting – Corporate sustainability reporting – European Union (Corporate Sustainability Reporting) Regulations (**SI 309 of 2025**).* These Regulations which were signed into law on 7 July 2025 make amendments further to the European Union (Corporate Sustainability Reporting) Regulations 2024 (SI No 336 of 2024), and transpose Article 1 of Directive EU 2025/794 as regards the dates from which certain corporate sustainability reporting requirements apply.

Winding Up

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

Petition to wind up company – Petition successful despite having been defended by the company – Costs of petitioners – Application for order against the company's directors to pay the costs of the petitioners – Non-party costs order – Circumstances in which directors can be found liable for the costs of the petitioner and the company's costs – Re MPB Developments Limited [2025] EWHC (Ch) 1291. This decision was delivered by Smith J in the English High Court, Chancery division in the context of a non-party costs order sought against the directors of a company which had been placed into liquidation following a successful petition to the court. Smith J approached the application by noting that the jurisdiction to award costs against a non-party was to be found in s 51(1) and (3) of the UK's Senior Courts Act 1981; that such an award is an exceptional jurisdiction and that it is highly fact specific.

Smith J then noted that there were two central questions on such an application. First, whether the non-party (the directors in the instant case) was the "*real party*" to the litigation which in the instant case meant whether the director was seeking to benefit personally from the litigation. Secondly, whether there is some other reason why it would be just to make the order, usually to be found in evidence of impropriety or bad faith on the part of the director in connection with the litigation. In this regard Smith applied the principles in *Goknur Gida Maddeleri Enerji Imalet Ithalat Ihracat Ticaret Ve Sanayi SA v Aytacli* [2021] EWCA Civ 1037 (per Coulson LJ).

Applying those principles to the matter in hand, Smith J noted that the two directors whom it was sought to fix with costs accepted that they controlled the company's defence to the winding up petition. In addition to using their majority on the board to instruct solicitors to defend the petition, they filed joint points of defence with the company and did so against the wishes of the third director which was a 50% shareholder in the company. The directors also funded the defence as a bill for £70,000 was paid by a company owned and controlled by them. It appears that the foregoing was considered to be evidence that the directors were the 'real party' – the first limb of the two-limb test – although this was not specifically stated by Smith J.

Turning to personal benefit, Smith J noted that the directors denied they were seeking to benefit personally, claiming they believed the company was solvent initially and when it became clear it was insolvent, they believed a negotiated settlement with the company's creditors would have been a better outcome for the company. Smith J did not accept this to be the case saying there was ample evidence to support the proposition that the directors were acting in their own interests rather than in the best interests of the company. In this respect she relied upon the three instances: first the transcript of a meeting which recorded the directors as having benefited from controlling the company; second by defending the petition they continued to receive directors' salaries from the company; thirdly, by defending the petition they were able to engage in settlement discussions which envisaged global settlements with a view to their own personal interests too. Smith J also rejected that they were at all times acting in the best interests of the company, citing eight examples of where this was not borne out by the evidence.

Smith J conclude that in all of the circumstances, she considered that the directors had been the real parties in the litigation, that their conduct "infected the conduct of the proceedings" and that she considered, on balance, that they were at all times, "operating in their own best interests and without appropriate propriety, engaging, at best, in a highly speculative defence of the petition". Smith J ordered the directors to pay the petitioner's costs of the petition and also that they pay the company's costs of the petition.