

Business Law Bulletin

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LANDWELL Solicitors

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Cash Extraction – Unlocking Share Premium

Irish Limited Companies- Court Approved Reduction of Share Capital

In the absence of distributable reserves in an Irish company, restrictions apply in relation to the return of capital to its shareholders or parent company. With the tightening of available credit this can present challenges for multinational groups. Significant funds may be trapped in Irish limited liability companies as share capital or share premium which it would be helpful to release to support other operations within the group.

One cash extraction option available to such companies is the reduction and return of share capital and related share premium of an Irish limited liability company to its shareholders. Sections 72-77 of the Companies Act, 1963 (as amended) provide for the reduction of share capital by way of High Court approval. Provided it can be demonstrated that the proposed reduction will not prejudice any creditors of the limited

company (and in particular if all creditors are intra group), it should be possible to obtain approval for the reduction in **approximately three months** and on a **cost effective basis**.

The procedure is relatively straightforward. The company must have authority to reduce share capital in its articles of association. The company's shareholders resolve by special resolution to reduce the share capital/share premium. An application is then made to the High Court to approve the reduction. The application will be presented to the Court along with details of the company's finances and reasons for the reduction. The application should also address how the company will deal with creditors. The Court's usual practice is to direct that advertisements be placed in two Irish national daily newspapers and the Irish Companies Registration Office "CRO" Gazette notifying the company's creditors of the proposed reduction in share capital and giving the creditors 21 days to respond.

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At a second hearing following the 21 day period, assuming no creditors respond to the advertisements, or that any creditors are dealt with to the satisfaction of the Court, the Court will make an order confirming the reduction in share capital.

The Court order and details of the reduction (number and nominal value of shares and amount of share premium reduced, etc.) are then filed in the CRO. The CRO will issue a certificate of registration and the share capital reduction will take effect.

Unlimited Liability Companies - Unlocking Share Premium to Create Distributable Reserves

In the absence of an application to the High Court for a court approved reduction in share capital, the return of share premium to shareholders of limited liability companies (e.g. by way of share buyback or redemption) is only permitted in circumstances where the company has distributable reserves available to fund the return.

However an unlimited liability company is permitted to return share capital to its shareholders in any way. In addition there is a useful mechanism available which allows an unlimited liability company to reduce its share premium account to create distributable reserves which can then be distributed to its shareholders.

In this way (provided the share premium was originally funded by cash or cash equivalent) funds may be returned by the company to its shareholders in the form of **revenue as opposed to capital**.

The steps required to effect this release of share premium to distributable reserves are as follows:

- The shareholders of the unlimited company resolve to effect a share capital/share premium reduction by the transfer of some or all of the share premium account into reserves (subject to the company's auditors confirming that the reserves created may be treated as distributable).

- The board of directors of the unlimited company meets and resolves to pay a dividend to its shareholders funded from the newly created distributable reserves.

Limited liability companies may **convert to unlimited liability status** and then avail of the option to release share premium to distributable reserves as outlined above.

If you would like more information on cash extraction, please contact Pauline Louth or your usual Landwell contact.



Company Law Update

The Companies (Amendment) Act 2009

This Act gives increased powers of search and seizure to the Office of the Director of Corporate Enforcement and expands disclosure obligations with regard to transactions between a company and its directors (including specific changes for licensed banks). The previous requirement that at least one director of an Irish company must be Irish resident is also relaxed as one EU resident director will now suffice (or alternatively the company can post a bond with the CRO).

The Companies (Miscellaneous Provisions) Act 2009

This legislation was enacted in late December 2009. The principle provisions are as follows:

1. Where a company whose securities are registered with the SEC in the US has moved or is in the process of moving their parent company to Ireland they can now continue for a limited period to prepare their accounts in accordance with US GAAP, if they comply with specified criteria. The legislation stems from the logistical difficulties and financial implications involved with changing in a short time span to International Financial Reporting Standards, which are those normally followed in Ireland. The period in respect of which an

availing company can continue to use US GAAP is set at a maximum of four years, and the date of termination of the availability of this transitional measure is the end of 2015.

2. Certain collective investment fund entities will be able to migrate their registered offices into and out of Ireland without first having to wind up in their current jurisdiction. This measure was introduced at the request of the Irish funds industry to assist in attracting investment funds business from third countries. This mechanism will be available to funds migrating from and to jurisdictions that will be prescribed by the Minister. Inward migrating funds will be authorised and supervised by the Irish Financial Regulator in the same way as existing collective investment funds which are already based here.
3. The recognition, by order of the Minister, of Stock Exchanges outside the State on which an overseas market purchase of own shares can be made by companies. This power for the Minister to recognise foreign stock exchanges is designed to facilitate international groups relocating their parent undertaking to Ireland where that parent undertaking is not listed on the Irish Stock Exchange but wishes to make a market purchase of its own shares.

To date Ministerial Orders have been introduced to recognise the London Stock Exchange, the New York Stock Exchange and the NASDAQ.

The Companies Consolidation and Reform Bill

The progress of this hugely significant piece of legislation has been delayed and the latest indications are that the draft Bill will not be published until September 2011 with enactment now expected in early 2012. Provisions which are contained in the General Scheme of the Bill include the introduction of a new form of standard Irish company to replace private limited and unlimited companies, the facility for two or more Irish private companies to 'merge', the introduction of a single constitution to replace the current memorandum and articles of association, the ability for a company to have a single director and the creation of new mechanisms to more easily facilitate such transactions as a reduction of share capital, declaration of a dividend, financing the purchase of a company's own shares and the making of loans to directors.

If you would like more information on any of these issues contact Damian Maloney or your usual Landwell contact.

Land Law Update

Commercial Leases – Ban on Upward Only Rent Reviews

Section 132 of the Land and Conveyancing Law Reform Act, 2009 came into effect on 28 February 2010. It provides that any rent review provision in a lease which comes into effect after 28 February 2010 will be deemed to provide that the rent payable following a rent review can be an amount lower than, higher than or equal to the rent payable prior to the rent review date.

The Section only applies to property used wholly or partly for business purposes. Furthermore the Section only applies where a Lease or Agreement for Lease was not entered into prior to 28 February 2010. Therefore it will not apply to existing Leases or to reviews to be carried out under such Leases after 28 February 2010.

Section 32 cannot be contracted out of. However, its provisions would only seem to operate where a review is actually carried out.

Trusts

Part 4 of The Land and Conveyancing Law Reform Act, 2009 provides for a radical overhaul and simplification of the law relating to trusts.

Part 4 creates a trust of land scheme which provides that legal title to land will always vest in trustees giving them full power to deal with this land.

Commercial Leases – Examinership

The Courts had cause to look at whether a Lease could be affirmed or repudiated on examinership in great detail recently.

In the case of *Re Linen Supply of Ireland Limited* the Supreme Court allowed the repudiation of a Lease under Section 20 of the Companies (Amendment) Act, 1990. There was no previous case law setting out whether a Court would decide to exercise its discretion under Section 20 when deciding to approve a repudiation of a Lease.

It would seem that the factors that influenced the decision were:-

- the fact that the Leases were surplus to the Company's requirements;
- the investor was not willing to put money into the Company if the Lease remained; and
- the Examiner was of the view that he could not put together a scheme of arrangement unless the Leases were repudiated.

If you would like more information on rent reviews or commercial property generally please contact Susan Cosgrove.

Legal Nuggets

Arbitration Act, 2010:

The Arbitration Act, 2010 reflects the support shown for arbitration as a preferred means of dispute resolution by both the Irish government and the Irish judiciary. The new Act incorporates the UN Model Law for International Commercial Arbitration and will be instantly recognisable to international lawyers.

The legislation takes effect on 8 June 2010 and applies the Model Law to all arbitrations in Ireland. It severely curtails the potential for judicial intervention in the arbitration process.

Civil Partnership Bill, 2009:

The Civil Partnership Bill, 2009 is currently at Select Committee Stage in the Oireachtas. It provides for the introduction of civil registration of same sex relationships and sets out rights and duties in relation to civil partnerships. It also provides for certain rights and duties in relation to co-habiting mixed sex couples. The 2006 census indicated that there were over 2,000 same sex couples and 120,000 mixed sex unmarried couples living in Ireland. The Bill is expected to be enacted sometime this year.

Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010:

The Act was signed into law in May 2010 providing for the reform and consolidation of existing anti-money laundering legislation. Its main purpose is to transpose the Third EU Money Laundering Directive into Irish law. It also implements the recommendations of the third mutual evaluation report on Ireland of the Financial Action Task Force.

The Act increases the obligations on a wide range of persons, including accountants, tax advisers, lawyers, company service providers and financial institutions. Checks must now be conducted in relation to Politically Exposed Persons ("PEPs") residing outside Ireland. Casinos and private member clubs are now also included in the list of "designated persons" required to carry out customer due diligence.

Corporate Governance:

The National Standards Authority (NSAI) of Ireland and the Institute of Directors recently published a Code of Practice for Corporate Governance Assessment. This follows the introduction by the Department of Finance of a revised and updated Code of Practice for the Governance of State Bodies.

The NSAI Code is the first of its kind in the EU and the first to award certification to companies which reach the required standard.



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A list of some other current Landwell publications is also set out. If you would like a copy of any of these materials, please contact [Michael Moore](#) or your usual Landwell contact.



Directors' Duties



EU Cross-Border Mergers



Estate Planning Booklet



Enduring Powers of Attorney

Disclaimer

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