MAPLES GROUP

UPDATE

Company Law Update: Ireland

Contents

The Summary Rescue Process

The Company Law Review Group has recommended a "Summary Rescue Process" which is a corporate rescue mechanism similar in key respects to the existing examinership process. The recommended process would:

- be designed for "small and micro" companies (as defined by the Companies Act 2014[1]) which represent 98% of companies in Ireland;
- be commenced by resolution of directors rather than by application to Court;
- be concluded within a shorter period than examinership;
- be overseen and assisted by insolvency practitioners;
- provide that the rescue plan be passed by a simple majority in value of creditors;
- provide for a form of cross-class reduction of debts designed to manage costs;
- not require application to Court for approval of rescue plan (provided no creditor objections); and
- have safeguards against irresponsible and dishonest director behaviour.

It is envisaged that this process will reduce the associated costs and regulatory burden for ease of access for small companies while also maintaining appropriate safeguards for creditors.

While the legislation has not yet been drafted, the matter has undergone a public consultation process which concluded on 5 March 2021 and the Government's goal is that legislation can be implemented before the summer recess.

[1] This includes all companies that, in the most recent financial year, fulfil two or more of the following requirements: (a) the turnover of the company does not exceed €12 million; (b) the balance sheet total of the company does not exceed €6 million; and (c) the average number of employees does not exceed 50.

Extension of Arrangements Relating to the Filing of Annual Returns

The Registrar of Companies took a number of decisions during 2020 to assist companies with the filing of annual returns during the ongoing pandemic. In October 2020, the Registrar announced that any company with an Annual Return Date from 30 September 2020 onwards would be deemed to have filed on time if all elements of the annual return were completed and filed by 26 February 2021.

The Registrar has kept the situation under ongoing review and has made the decision to extend the current filing arrangements, until 28 May 2021, for those companies with an Annual Return Date from 30 September 2020 onwards.

Extension of Companies (Miscellaneous Provisions) (Covid-19) Act 2020

The measures introduced by the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 ("Covid Act") to assist companies during the pandemic were originally intended to apply up to 31 December 2020. This has been extended by SI No. 672/2020 so that those measures continue in force up to 9 June 2021.

For a reminder of the key measures introduced by the Covid Act, see our client update[2].

Commencement of the Investment Limited Partnerships (Amendment) Act 2020

The Investment Limited Partnerships (Amendment) Act 2020 (the "ILP Act"), which amends existing investment limited partnership ("ILP") law, has been welcomed as a positive development in Ireland. It introduces a number of important changes that aim to position the ILP as a leading EU fund vehicle for private equity, sustainable investments and closed-ended alternative funds.

The majority of the ILP Act's provisions commenced on 1 February 2021. The remaining sections, containing the new provisions relating to beneficial ownership for ILPs and common contractual funds, took effect on 1 March 2021.

For more information about the ILP Act, see our client update[3].

Court of Appeal Considers Jurisdiction of the High Court to Remove CRO Filings

The Court of Appeal recently addressed this question in *Wee Care Limited v Companies Registration Office*[4] and its conclusion highlights the importance of taking care when filing financial reports.

All companies have obligations to make certain statutory filings with the Companies Registration Office ("CRO") and it is the responsibility of the company and its officers to ensure that documents submitted to the CRO are accurate and properly completed. While the CRO may detect some errors upon registration, this is not a formal part of its function and errors would not normally be detected by the CRO when a company files its financial statements. Notably, Section 366 of the Companies Act 2014 (the "Act") introduced for the first time a statutory basis for the revision of defective statutory financial statements filed in the CRO – this section allows a company to file revised financial statements or a revised directors'

[2] https://maples.com/en/knowledge-centre/2020/8/covid-19-ireland-update-company-law-changes

[3] https://maples.com/en/knowledge-centre/2021/2/commencement-of-the-investment-limited-partnerships-amendment-act-2020

[4] [2020] IECA 266

report in respect of a filing that did not comply with the Act or, where applicable, Article 4 of the IAS Regulation.

The facts of this case relate to a company that filed a full set of financial statements when it was entitled to file abridged financial statements. The company sought a High Court order to have the full accounts replaced with the abridged accounts, but the High Court determined that it did not have the jurisdiction to grant this order.

The Court of Appeal was then asked to consider whether, subject to section 366 of the Act, or because of an inherent jurisdiction, the High Court could order the Registrar to replace the full financial statements with the abridged financial statements. It held that:

- Section 352 of the Act, which relates to the filing of abridged accounts by small companies, is a voluntary provision and accordingly it was not an error for the company to have filed full financial statements. This meant that the filing of such document was not defective so as to allow its revision pursuant to Section 366 of the Act. The Court also confirmed that Section 366 of the Act permits the revision of incorrect information rather than its complete removal from the CRO;

- it was "*at least arguable that, owing to the nature of its judicial function and constitutional role, the High Court has an inherent jurisdiction to intervene*" but if there is a jurisdiction to correct erroneous information, it is to be used "*sparingly*" and should be "*limited to remedying manifest injustice*"; and

- the error in filing unnecessary additional information did not seriously or significantly prejudice the commercial interests of the company and, therefore, the company was unable to meet the threshold to justify intervention by the Court. As a result, it was unnecessary for the Court to rule definitely on the point of inherent jurisdiction.

This case highlights the fact that only defective or incorrect documents can be revised by Section 366 of the Act, and the Courts will be reluctant to use its powers to rectify or replace financial statements solely because they contain commercially sensitive information.

When Does a Parent Company Become Liable for the Actions of its Subsidiary?

This issue has been considered once again by the Supreme Court of the United Kingdom ("UKSC") in Okapi v Royal Dutch Shell plc and another[5] ("Okapi").

The claimants in this case sought damages as a result of environmental damage caused by oil spills from the defendant's pipelines. The defendant is the parent company of the Shell Group and its subsidiary, which was responsible for the operations in question.

The UKSC:

- overturned the Court of Appeal's decision on the jurisdictional challenge of Royal Dutch Shell plc; and

- held that it was arguable that the ultimate holding company had assumed direct liability for losses resulting from the operations of one of its subsidiaries, effectively clearing the way for the claim to proceed to a full trial.

The Okapi case is one of three recent cases in which the UK courts have considered whether a holding company can assume direct liability for

[5] [2021] UKSC 3
https://www.bailii.org/uk/cases/UKSC/2021/3.html

the actions of its subsidiary. These cases are significant given the general position, in both Irish and English law, is that members of a limited liability company cannot be held responsible for that company's liabilities. In law the company is a legal person separate from its members, with its own property, debts and liabilities and the liability of each member is limited to any amount still unpaid on their share capital.

In *AAA v Unilver plc*[6] ("Unilever"), the Court of Appeal of England and Wales ("EWCA") held that:

- Unilever plc was not liable for losses suffered when its subsidiary failed to take measures to protect its workers and local residents from violence in the run-up to the 2007 Kenyan presidential election;

- this was due to the fact that the subsidiary had managed its own affairs independently and that Unilever plc had not intervened sufficiently to establish a direct duty of care to the workers and residents; and

- a parent can assume a direct duty of care where it provides advice to its subsidiary about how to manage a specific risk or it takes over the management of its subsidiary's activities.

In *Vedanta Resources plc V Lungowe*[7] ("Vedanta"), the UKSC:

- held that it is possible for a parent to assume liability for the activities of its subsidiary, provided it assumes a duty of care to third parties in relation to those activities; and

- rejected the idea that a duty of care could only arise in the circumstances cited in Unilver above. Instead, it said that a parent is at risk of assuming a duty of care where it administers and implements group-wide policies for its subsidiaries.

In *Okapi*, the UKSC held that the EWCA materially erred in law in its analysis of:

- the principles of parent company liability in its consideration of factors and circumstances which may give rise to a duty of care;

- the procedure for determining the arguability of the claim at an interlocutory stage; and

- the overall analytical framework for determining whether a duty of care exists in cases of this type and its reliance on the Caparo threefold test[8] and in particular, whether there was sufficient proximity and whether it would be fair, just and reasonable to impose a duty of care.

It also stated the following, building on what was found in *Vedanta*, as to when a parent might incur a duty of care in relation to its subsidiary operations:

- This depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations of the subsidiary;

- Control is just a starting point, the issue is the extent to which the parent did take over or share with the subsidiary the management of the relevant activity.
  A parent does not need to control a subsidiary to participate in its management.
  A subsidiary can maintain legal control over its activities, but nonetheless delegate management of them to "*emissaries of its*

[6] [2018] EWCA Civ 1532

[7] [2019] UKSC 20

[8] https://maples.com/en/knowledge-centre/2018/7/company-law-update

parent";

- A parent may incur liability to third parties if it holds itself out as exercising supervision and control of its subsidiaries, even if it does not in fact do so;

- It is not correct that simply laying down group-wide policies or standards without actively enforcing them can never create a duty of care. For example, group guidelines may contain systemic errors which, when implemented by its subsidiary, can cause harm to third parties;

- A parent is more likely to be exerting operational control where:

  - the group establishes vertical reporting and business lines that operate across entities;
  - it imposes internal corporate policies and procedures on its subsidiaries.

- The fact that a parent has set up a network of subsidiaries is not relevant to whether it can assume a duty of care.

While the issues await determination on their substance, the decision may guide companies in reviewing how their organisational structures and company documents may contribute to potential risks for their parent company.

The EWCA Considers Declarations of Interest by Directors

The EWCA has held that, where a director was interested in a proposed contract to be entered into by the company of which he was a director, he had to disclose his interest to the other directors at the first board meeting at which that contract was considered but did not have to disclose his interest again at each subsequent meeting held to consider that contract.

In this case, *Fairford Water Ski Club v Cohoon & Ors*[9], a company director successfully appealed against the High Court decision that he had failed sufficiently to disclose his conflict when he disclosed his interest at the first board meeting considering the relevant contract, because at that time the extent of his interest was not known because fees had not been agreed.

The case involved a company that ran a member's club centered on water skiing on a lake and related activities. One of the company's directors, Mr. Cohoon, ran a water ski school at the lake. The two businesses were independent of each other but were "*somewhat intertwined*". A management agreement was entered into between the company and the school in 2007. A board meeting was held in January 2007 to discuss formalising the company's arrangements with the school in a contract, including Mr. Cohoon's role. Discussions continued resulting in a further board meeting in May 2007 to finalise a new management agreement between the company and the school.

At the January 2007 board meeting, Mr. Cohoon declared that he had an interest in the proposed new contractual arrangements with the school by virtue of being a partner in the school. However, he did not declare his interest in the final management meeting at the May 2007 board meeting.

Ten years later, when new directors joined the company, they alleged that Mr. Cohoon had failed to disclose his interest in that management agreement to the company. In allowing the appeal against the High Court decision, the EWCA held that:

- if the nature of the director's interest is clear and obvious, as in the case of an

[9] [2021] EWCA Civ 143

uncomplicated contract between the company and the director, very little may need to be said. If the director's interest is more indirect, a fuller explanation may be necessary. What is required is a clear declaration of the nature of the director's interest so that the board is "*fully informed of the real state of things*";

- in the case of a proposed contract, the declaration must be made "*at the meeting of the directors at which the question of entering into the contract is first taken into consideration*". This contemplates that the question of entering into a contract may be under consideration by the directors over a series of board meetings. If so, the declaration must be made at the first such meeting, but need not be repeated at every subsequent meeting.

If you would like further information, please liaise with the below or your usual Maples Group contact.

Dublin

Edward Miller
+353 1 619 2028
edward.miller@maples.com

Colm Rafferty
+353 1 619 2058
colm.rafferty@maples.com

Patrick Quinlan
+353 1 619 2059
patrick.quinlan@maples.com

Deirdre MacCarthy
+353 1 619 2754
deirdre.maccarthy@maples.com