The Advisor

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WHITNEYMOORE

Corporate and Commercial

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PRE-EMPTIVE STEPS FOR DIRECTORS OF STRUGGLING COMPANIES...

As global economies continue to contract many Irish companies are bracing themselves for a further downturn in trading and prolonged delays in accessing credit. Directors of companies experiencing difficulties, particularly those exposed to very large debts, are also considering their options and asking what pre-emptive or precautionary steps should be taken at this stage.

Any director who suspects that a company cannot pay its debts as they fall due or that its liabilities exceed its assets or is otherwise in financial difficulty, should immediately consider placing the company in examinership, pursuing an out of court scheme of arrangement with creditors or else liquidation.

Secured creditors such as banks generally prefer receivership, as it enables the bank to move quickly to take control, sell the charged asset and realise the money due to it. However, from a company's perspective, examinership is most often the remedy of first choice. This is because examinership allows a company to be placed under the protection of the Court for a period of up to 100 days and enables the examiner to formulate a scheme of arrangement to facilitate the future viability of the company. During examinership the directors also continue to stay involved in the running of the business. The examiner's appointment freezes new litigation against the company and it prevents creditors (secured and unsecured) from levying execution against the company's assets or repossessing retention of title goods. However, examinership can be an expensive restructuring process as the costs of the petition and the cost of the examiner's appointment are borne by the company.

Crucial to any petition for examinership is an independent accountant's report which shows that a company has a reasonable prospect of survival. As the examiner will try to ensure that creditors get at least as much under examinership as under liquidation or receivership, any scheme typically involves some sort of new investment. Attracting new investment, particularly within the 100 day protection window, can pose a problem in the current economic climate which is why some companies are favouring a scheme of arrangement outside examinership as an alternative solution.

A scheme of arrangement outside examinership is not subject to the 100 day restriction that applies under examinership. Such a scheme may be possible in cases where a compromise with co-operative creditors will restore the financial stability of the company. This can be dealt with by terms agreed privately with creditors. Otherwise an application can be made to Court under Section 201 of the Companies Act to sanction a scheme of arrangement and make it binding on all creditors of the company. The Court can do this where at least 75% in value of creditors approve the proposal. The Section 201 process also allows the Court to restrain proceedings against a company pending meetings of creditors in relation to the proposed scheme. This can afford some level of protection but would not prevent the appointment of a receiver.

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A scheme of arrangement outside examinership is cheaper for the company as it does not involve the cost of the examiner. However, if the directors are considering that route they should be satisfied (and thus should take advice confirming) that they are likely to succeed in putting together a scheme of arrangement which will have the requisite support from creditors. If there is any real doubt about that, or if receivership is threatened, then examinership is the appropriate approach to rescue the company.

The key for any company is to take corrective action early and to consult its accountants and legal advisors as soon as possible. In particular, a company faced with financial difficulty should make a business plan setting out how it will continue to trade as a going concern and meet its obligations in difficult times. Directors should take advice from the company's accountants, to ensure that the plan appears viable, and take steps to implement the plan as soon as possible. Based on recent enquiries, we anticipate that the number of companies seeking examinership and schemes of arrangement will increase significantly over the coming months.

UNSOLICITED ELECTRONIC COMMUNICATIONS FOR DIRECT MARKETING PURPOSES

New Regulations were brought into effect on 13 December 2008 by the Minister for Communications, Energy and Natural Recourses. The Regulations strengthen the law relating to sending unsolicited electronic communications for direct marketing purposes and amend the European Communities (Electronic Communications Networks and Services) (Data Protection and Privacy) Regulations 2003.

Before any business makes unsolicited contact for marketing purposes, it should consider the following changes introduced by the Regulations:

- An increase in fines if a person is found guilty of an offence under the Regulations:
  - On summary conviction, up to €5,000;
  - On indictment, if the person is a body corporate, a maximum fine of either €250,000 or 10% of the turnover of the company, whichever is the greater;
  - On indictment, if the person is a natural person, up to €50,000;
- The new Regulations provide that, if an offence under the Regulations has been committed by a body corporate and it is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, an officer of the body corporate, that officer commits a separate offence and is liable to be proceeded against and punished, regardless of whether the body corporate has been proceeded against or convicted of an offence.
- If the question of whether or not a subscriber accepted an unsolicited communication or call is disputed, the onus of establishing that the subscriber accepted the communication or call rests with the defendant.

In a press release issued by the Office of the Data Protection Commissioner, the Commissioner stated that ignorance of the law would not be an acceptable excuse for non-compliance and he warned that he will be pro-active in applying the full force of the Regulations.

It is also worth noting that each unsolicited communication or electronic mail sent, or each unsolicited call made, in contravention of the Regulations is treated as a separate offence.

EMPLOYERS' OBLIGATION TO ISSUE EMPLOYMENT DOCUMENTATION TO FOREIGN NATIONAL EMPLOYEES IN A LANGUAGE THEY CAN UNDERSTAND

The Equality Tribunal has ordered a Dublin based company, Goode Concrete Limited, to pay almost €300,000 to certain foreign national employees because it failed to issue all members of staff with contracts of employment and health and safety documentation in a language that they could understand or, alternatively, to appoint a translator to translate the documentation for each employee.

The case was taken by 58 foreign national employees who were largely employed as truck drivers. They alleged discriminatory treatment, discriminatory dismissal, harassment, victimisation and equal pay on the grounds of race.

The Equality Officer awarded each of the complainants the sum of €5,000 (€290,000 in aggregate) for discriminatory treatment on the grounds of race in relation to their contracts of employment and safety documentation. The Equality Officer did not uphold the claims for harassment, victimisation or equal pay.

In reaching its decision, the Equality Tribunal rejected the company's argument that requiring it to produce employment contracts in 13 different languages would pose an enormous financial and logistical burden, not only on it but on all employers.

It also ignored the company's submission that none of the employees had previously made any complaint directly to it in respect of any of the issues raised and that no employee had ever made a complaint about discrimination.

With regard to the provision of health and safety documentation, the Equality Tribunal held that the foreign national employees were treated less favourably than Irish nationals in relation to their access to and understanding of safety documentation despite the fact that each of the employees had received two weeks training by a fellow employee and that the training had been conducted by an employee who spoke the same language as the complainants.

The full extent of the burden imposed on employers with respect to safety documentation is highlighted by the fact that there was a finding of discrimination notwithstanding the fact that the employees had been provided with shortened particulars regarding health and safety issues in Russian and English, that the existence of a safety statement had been brought to their attention and that all employees were advised that an interpreter was available to interpret the health and safety statement.

This decision clearly represents a significant increase in the burden placed on employers and is currently under appeal to the Labour Court.

A NEW REGIME FOR CHARITIES

The Charities Bill 2007 is progressing through the Oireachtas and looks likely to complete all stages and be signed into law in Spring 2009. Whilst it will be the first major overhaul of charities legislation in Ireland in 30 years, and is designed to provide for the better regulation of charitable organisations, it is expected that commencement orders in respect of all or part of the legislation may not be signed for quite some time and, therefore, substantial delays in the implementation of the provisions should be expected.

However, once the legislation is in force it will provide, amongst other things, for:

- The establishment of an independent Charities Regulatory Authority (the "Authority").
- The dissolution of the Commissioners of Charitable Donations and Bequests for Ireland and the transfer of its functions to the Authority.
- The establishment of a register of charitable organisations. Every new charity will have to apply to the Authority to be registered. Existing charities will be given six months from the date of commencement of the section to register. It will be the duty of the Trustees to make the relevant application and it will be an offence for a body not on the register to claim that it is a charity or to operate or fundraise in Ireland.
- The establishment of a Charitable Appeals Tribunal. The Tribunal will be part-time only and should facilitate keeping disputes out of the court system to the extent possible. The option of appealing to the High Court will remain on a point of law.

In addition, the legislation will provide that:

- A separate application for tax exemption must still be made to the Revenue Commissioners.
- The Trustees shall be responsible for the charitable organisation keeping proper books of account.
- Any body, the principal object of which is to promote a political cause, shall not be entitled to be registered as a charity.

AIM: PUBLIC CENSURE

The London Stock Exchange plc (the "Exchange") imposed a public censure on Irish registered company, MinMet plc, on 4 December 2008. The censure concerned breaches of the AIM Rules in connection with various transactions between October 2006 and January 2008 and illustrates the Exchange's track record of enforcing the high quality disclosure standards required by the AIM Rules.

The Exchange found that MinMet had failed to:

- Release announcements without delay regarding reverse takeover and certain substantial and/or related party transactions.
- Include material information in certain announcements when made.

- Comply with the requirements of the AIM Rules concerning reverse takeovers, including (but not limited to) seeking shareholder consent for the transaction.

- Liaise appropriately with its nominated advisor ("nomad").

In determining the appropriate sanction against MinMet, the Exchange took into account the various factors set out in the censure, including the fact that the number, nature and duration of the breaches over a prolonged period demonstrated a disregard for the AIM Rules and amounted to reckless conduct. However, in light of the announced poor financial position of the company, the Exchange did not impose a fine.

Whilst no fine was imposed in this instance, the censure highlights the need for a company to liaise appropriately with its nomad, to provide the nomad with sufficient information to enable it to advise the company on compliance with the AIM Rules and to ensure that such advice is taken into account.

IS YOUR WEBSITE COMPLIANT?

Regulations came into effect in 2007 that extended the disclosure requirements that had been applicable only to letters and order forms to all communications in electronic form and to company websites.

Whilst the Regulations have been in force for almost two years, many companies are still not compliant.

By way of reminder, a company is required to display the following information on its website and in emails:

- The name and legal form of the company;

- The place of registration of the company and its registration number;

- The address of the registered office of the company;

- If the company is exempt from the obligation to use the word "limited" or "teoranta" as part of its name, the fact that it is a limited company;

- If the company is being wound up, the fact that it is being wound up; and

- If reference is made on the website to the share capital of the company, the reference shall be to the capital that is subscribed and paid up.

The disclosure requirements do not apply to unlimited companies.

A breach of the Regulations is a summary offence which carries a fine of up to €2,000 and, following a conviction, a daily default fine of up to €100 for each day on which the breach continues. Both the company and every officer of the company may be held liable.

It should be noted that, under section 196 of the Companies Act 1963, there is an additional requirement for a company to state in all business letters, in relation to every director of the company (including shadow directors), the following information:

- his or her first name, or initials, and surname;

- any former first name or surnames; and

- nationality, if not Irish.

Curiously, this requirement has not specifically been extended to electronic communications or websites by the Regulations but it would be prudent for a company to include such information in all business letters, whether sent in paper or in electronic form.

COMPANIES APPLYING FOR VOLUNTARY STRIKE-OFF

Companies applying for voluntary strike-off should note that, with effect from 1 February 2009, the following requirements will apply to the newspaper advertisement advertising the application for strike-off:

- Where a company has changed its name at any time during the 12 month period prior to the date of publication of the advertisement, the former name as well as the existing name of the company must be included in the advertisement.

- Where a company has changed the address of its registered office at any time during the 12 month period prior to the date of publication of the advertisement, the former registered office address as well as the existing registered office address must be included in the advertisement.

- Where a company uses a business name that is different to its company name, or has used such a business name at any time during the 12 month period prior to the date of the publication of the advertisement, such business name must also be included in the advertisement.

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