

Selling Your Business?

Helen H. Whelan,
Senior Associate/Department
Head, Corporate Law

Business climate is an important factor in selling your business. If you had a choice about timing your sale, the present economic climate may not be the time you would pick. However, sometimes you don't have a choice and there are many reasons why you may have to sell a business even in a downturn, some personal (ill health, director dissension, divorce) and some performance based (a difficult competitive environment or growth in financial performance). Even in the current downturn, there are businesses and investors on the acquisition trail. So what can you do to prepare for a sale?

The following are some of the steps you can take to make sure you are prepared.

The first thing you need to do is look at your business through the eyes of a potential purchaser. Identify your strengths, find solutions to weaknesses and eliminate or reduce any risks that a purchaser may not wish to assume.

Legal Review

The O'Rourke Reid Health Check will audit your legislative compliance for company law. The Health Check will help you bring your company statutory books up to date and ensure that all statutory returns have been made in the Companies Registration Office.

You also need to review compliance with health and safety, data protection, environmental, employment and pension legislation.

If you have not already done so, you should collect together your licences, property title documents and insurance policies. These should be checked to confirm that they are up to date and available for review by a potential purchaser. This check also highlights renewal dates for licences, regulatory authorisations, rent review and break clause dates. Your repair and maintenance obligations should also be considered.

Check your intellectual property. Do you have your trademarks and patents registered? Are your licenses in place and up to date?

Review your existing and potential litigation and make adequate provision for those liabilities. Review your trading relationships including your customer and suppliers

contracts. Where you have informal relationships, record these in writing. Make sure that these relationships will continue after any sale.

Review your creditors and debtors and make appropriate provision.

Employee Review

Review your management team and employee teams. A strong committed management team will impress a purchaser. If you do not already have an employee participation scheme, consider putting one in place. Giving employees a stake in the business will help keep them motivated through a sales process.

Review and formalise your contracts of employment; these should include appropriate non-compete and confidentiality provisions. If your business owns or develops intellectual property, conditions ensuring that all ownership rights vest in the business should be included in your employment contracts.

Tax and Financial Review

Ensure all taxes are paid up to date and any tax reliefs that are available have been claimed.

This review should ensure that your financial records are accurate and complete. They will be essential in valuing the business. Appropriate advice should be sought first for an assessment of the balance sheet and second for preparing a business plan aimed at keeping the business focused and demonstrating its growth potential. Current market valuations should be sought for the business and its assets.

Planning for the future

If you are not interested in selling now, do you have a succession plan in place to cover ill health or an accident? Are you considering passing on the business to the next generation? In light of the current drop in the values, we are recommending that clients review their estate planning arrangements, as it may be an appropriate time to consider transferring assets to the next generation in a tax efficient manner.

Conclusion

These steps can help you to survive the present turbulence and the valuation process may be the motivation and encouragement you need to continue.



**orourke
reid**

LAW FIRM

DUBLIN
LEEDS

www.orourkereid.com

CORPORATE LAW NEWSLETTER



**quality
people
service
clients**

SEE INSIDE FOR ARTICLES ON...

SMEs	Page 2
Small Claims	Page 2
Corporate Governance	Page 3
Data Protection	Page 3
Examinership	Page 4

ISSUE No. 7
MAY 2009

orourke reid bookmark...

EU Small Claims Procedure

Erika O'Leary,
Corporate Law

The European Communities (European Small Claims Procedure) Regulations 2008 will allow consumers who have claims against suppliers or service providers from other member states, with a value of less than €2,000, to pursue these across the EU from 1st January 2009 (Denmark is the only country who have opted out).

The aim of the European Small Procedure is to improve access for citizens to cross-border justice, by reducing the cost and simplifying cross border small claims litigation in civil and commercial matters. It will not replace our existing small claims procedure but will rather work in tandem with it. It is intended to achieve a uniform procedure for obtaining a court decision for small claims across the Member States.

The most notable benefit for the consumer who wishes to pursue suppliers or service providers in other EU countries is that they will now be able to bring a claim in the District Court where they ordinarily reside. Any judgment in favour of the consumer will be recognised and enforceable in all member states.

The first step for a consumer is to lodge their claim with the Claims Register of that Court.

ISSUE No. 7
MAY 2009



**orourke
reid**

LAW FIRM

DUBLIN
LEEDS

www.orourkereid.com

Ensuring the Flow of Credit to SMEs

Brenda Phelan,
Solicitor,
Banking

Small and Medium Enterprises (SMEs) have been badly hit by the recession, due to a general down-turn in business and delays in the receipt of payments. During an economic down-turn, a lack of credit can have a crippling affect on the day-to-day running of any business but particularly SMEs. There is a concern that many well-established and profitable SMEs are finding it difficult to get access to bank credit because there is a perception that they are high risk.

There is some light, however, at the end of the tunnel for these businesses and which should go some way to instilling confidence in the small business community.

Many will welcome the newly-endorsed Code of Conduct for Business Lending to SMEs, which will have statutory effect from 13th March 2009. All licensed banks have agreed to be legally bound by the Code and it is not restricted to recapitalised banks. It sets out the principles and tangible requirements that must be applied when lending to an SME. A key item within the Code includes an option for an annual review meeting for all SMEs with their bank, to include a discussion on all credit facilities and the levels of security. This allows small businesses to ask for their security back if it is no longer required and they do not wish to leave it in place to cover future banking transactions.

Other key items within the Code include;

- applications being dealt with promptly;
- a commitment not to seek unnecessary security;
- clear explanations being given for decisions made; and
- a clear procedure for the handling of complaints.

The European Investment Bank (EIB) provided credit to SMEs during the month of March and this will be made available through most of the main retail banks.

The value of the SME package from the EIB for Ireland is thought to be in the region of €600 million. The President of the European Commission, Jose Manuel Barroso, has stated that this package should have a "strong and direct impact on the financial situation of SMEs".

Furthermore, as part of the Irish Government's recapitalisation plan both Bank of Ireland and AIB have agreed to increase lending capacity to SMEs by 10% and to provide an additional 30% capacity for lending to first-time buyers in 2009. If the money made available for mortgage lending is not taken up, then the extra capacity will be available to SMEs. Compliance with this commitment will be monitored by the Financial Regulator.

Both institutions have also expressed their commitment to fund and co-operate with an independent review of available credit and resolve the issues around the flow of credit to SMEs.

More generally, the banks have agreed to engage in a "clearing group" chaired by a Government representative alongside representatives from business interests and State agencies. The purpose of this group will be to identify specific patterns of events or cases where the flow of credit to viable projects appears to be blocked and to identify credit supply solutions. The recapitalised banks have also agreed to fund and co-operate with an independent review of credit availability which will be managed jointly by the main stakeholders.

We are now well into the economic down-turn and the banking crisis is far from resolved. However, viable businesses cannot be allowed to fail purely because of lack of credit facilities. The effectiveness of the above measures needs to be monitored on an ongoing basis to ensure that such support is available and take further action if necessary.

Get clicking!

Our website www.orourkereid.com was nominated for best website in the Best Professional Service Category in the Golden Spider Awards for 2008. We regularly update our website with articles and information regarding various legal issues. You can also find more information on the services that we can provide for you and all the back issues of both our Corporate Law Newsletters and Firm Newsletters.

So check us out at www.orourkereid.com



Please tear along perforated line & keep

Corporate Governance - Is Your Company Compliant?

Aoife Quinn,
Corporate Law

Corporate Governance is the system by which companies are directed and controlled. It is a vital element of every company in Ireland regardless of size.

Many company directors are under the impression that compliance with company law is a technical and difficult task, however, with the correct systems and procedures in place, compliance for Small and Medium Enterprise (SMEs) is relatively straightforward.

The following is a non-exhaustive list of the key considerations that must be taken into account to ensure compliance with corporate governance for SMEs.

1. Company filings with the Companies Registration Office (CRO) must be up to date, for example, annual returns, registered office details, company directors and secretary, names and addresses.
2. It is necessary for all companies to keep a set of statutory registers and these books and records must be kept at the registered office of the company.
3. Maintain proper books of accounts: failure to maintain accounts is an offence and may result in personal liability being imposed on directors in the event of the company becoming insolvent.
4. Directors, both executive and non executive, have various duties and responsibilities, which include a duty to act in the best interest of the company. A director that has shown a disregard towards his duties and responsibilities may be restricted or disqualified from acting as a director in any Irish registered company. Furthermore, the director may be held personally liable for the debts of their insolvent company if it can be shown that the director was involved in improper conduct, which contributed to the company's inability to pay its debts.

The recent publication by the Office of the Director of Corporate Enforcement (ODCE) of its Review of Activity in 2008 highlights 32 convictions secured last year. There was a 40% increase in disqualification of directors and a record amount of fines imposed on non-compliant companies. This trend of aggressively pursuing prosecutions is set to continue in the foreseeable future due to the unprecedented concern over

corporate governance in Irish companies. Due to the current economic climate the ODCE has predicted that there will be close to double the number of company liquidations in 2009 that occurred in 2008. It is now more important than ever for directors to demonstrate good corporate governance in this declining economy. The liquidator of an insolvent company is required by law to report to the ODCE on the company's demise and the conduct of all directors during the 12 months preceding its liquidation. The liquidator must also apply to the High Court to restrict all of the company's directors, unless relieved of that duty by the ODCE. Only companies who demonstrate good corporate governance will be granted relief by the ODCE.

Corporate governance provides a framework for an organization to pursue its strategy in an ethical and effective way and its offers safeguards against the misuse of company resources. In Ireland we follow the Combined Code for Corporate Governance (CCCG). The codes of best practice were drawn up specifically for listed companies; however, many of the principles can equally be applied to non-listed companies in the interests of furthering best practice. The Combined Code sets principles of good governance under headings such as directors, remuneration and interests, accountability and audit, relations with shareholders and internal control.

Regardless of the type of company you may be involved in, adherence to good corporate governance policies and procedures provide your company, directors and secretaries protection. Furthermore a strong compliance system gives stakeholders assurances that the organization is efficient, well-run and following best practice.

Conclusion

As adherence to corporate governance is a priority for all Irish businesses, O'Rourke Reid Law Firm have devised a full service compliance package 'Health Check your Company' to advise on compliance obligations and procedures under the Companies Act.

Contact Helen or Robert on 01 240 1200 or lex@orourkeid.com for more information.

Data Protection Update

Robert Haniver,
Solicitor,
Corporate Law

Since 2003 the Office of the Data Protection Commissioner ('ODPC') has conducted compliance audits of Irish based organisations handling personal data.

These audits examine whether organisations are operating in compliance with Irish Data Protection legislation and assess the level of data protection awareness in the organisation. This is judged by examining internal procedures, policies, systems and records.

The ODPC may conduct scheduled compliance audits or carry out unannounced 'on the spot' inspections. However, it is standard practice to provide several weeks notice in advance of the audit.

The audited organisation is given a report of the ODPC's findings. This describes any weaknesses in compliance with data protection obligations and stipulates the corrective measures required. The report is currently treated as confidential and is not made available to the public. However, the ODPC may comment on any aspect of an audit in its annual report which can have the effect of publicly naming the offending organisation.

The Data Protection Commissioner recently published the 'Data Protection Audit Resource' to assist organisations to self-assess their compliance with data protection laws in advance of a compliance audit.

The new publication details the powers of the ODPC under the Data Protection Acts 1988 and 2003. It also explains the pre-audit procedures and audit methodology employed by the Authorised Officer who conducts the audit. Standard audit recommendations, sample audit questions and a self-assessment checklist are provided as appendices to the publication.

The 'Audit Resource' should be examined by all organisations holding personal data and not just those facing a compliance audit.

What Does Examinership Mean to You?

Robert Haniver,
Solicitor,
Corporate Law

Examinership was introduced to provide companies in financial difficulty with breathing space from its creditors while a 'scheme of arrangement' is formulated. However, the company must have a reasonable prospect of survival.

The Court places the company under its protection for an initial 70 days, which can be extended to 100 days. Creditors generally cannot recover their debts during this period. The unsecured creditor's hope is to receive a meaningful dividend at the end of the process.

The Petition

If your debtor is considering examinership you should act fast to get paid. However, it is likely you will only learn of the impending appointment after your debtor has presented its petition for examinership to the High Court.

The Court sees to it that affected parties are aware of the debtor's plight as soon as possible. The filing of the petition must be followed by an application to the High Court for directions. The Court may fix a date for the full hearing of the petition, direct who the petition must be served on and provide for its advertisement.

The petition is accompanied by an Independent Accountant's report into the state of affairs of the debtor. You should request a copy of this report before the petition hearing as it will help you decide whether to object or support the Examiner's appointment.

Restrictions

The Court's protection prevents your debtor's pre-petition liabilities being paid unless recommended by the Independent Accountant or where the Court sanctions payment.

During examinership you cannot attempt to wind-up your debtor, appoint a receiver or repossess property. If you hold security for

the debt you cannot enforce it. Furthermore, the Examiner can make use of or even dispose of your security if it facilitates the survival of your debtor. You are restricted from suing your debtor during examinership and the Court can stay any pre-petition court proceedings.

If your debt is secured by guarantee, you are compelled to postpone enforcement until after the period of protection. For the guarantee to survive examinership, you will need to give the guarantor the opportunity to attend and vote at creditor meetings in your place. This is done by serving the guarantor with a written offer to transfer your rights to vote at the meetings. Failure to do so may result in you losing your rights under the guarantee. However, the rule does not apply if the scheme of arrangement is not confirmed by the Court or does not come into effect.

Powers

The directors of the debtor company retain the day-to-day control of the business during examinership. However, the Examiner can apply to the Court to have these powers transferred to him. In addition, the Court can grant the Examiner the powers of a liquidator which includes the power to disclaim onerous contracts, including leases. The Examiner also has the power to dispose of mortgaged property.

Meetings

The Examiner convenes meetings of creditors which gives you the opportunity to consider the Examiner's proposals and vote their approval. You can ask any questions or suggest modifications to the proposals at the meeting. The Examiner's proposals are deemed to be accepted by a meeting of a class of creditor when a simple majority in number and value vote in favour.

Confirmation

The outcome of the meetings is reported to the High Court which decides whether or not to confirm the proposals and make them

binding. The Court will not confirm the proposals unless at least one class of creditors whose interests will be impaired by their implementation vote in favour. The Court will also refuse to confirm the proposals if they are 'unfairly prejudicial' to a particular creditor, not fair and equitable or their primary purpose is to avoid tax liabilities.

Objection

An 'impaired' creditor can object to the Court confirming the scheme. The grounds for objection include a 'material irregularity' in the conduct of the statutory meetings, your acceptance of the proposals was obtained by improper means or for an improper purpose, or the proposals unfairly prejudice your interests when compared to similar creditors.

Liquidation

If the scheme of arrangement cannot be agreed by the affected parties or the Court does not confirm the proposals, the Court may order that the company be wound up.

Bookmark – ODCE Quick Guides

The Office of the Director of Corporate Enforcement (ODCE) has published 8 quick guides detailing the roles, duties, powers and rights of companies, their officers and other associated groups under the Companies Acts. These guides were developed with the non-professional in mind and provide a brief explanation of each group.

These guides can be found on the Office of the Director of Corporate Enforcement website (www.odce.ie) under the publications subsection.

These guides are not intended to give legal advice. If you require legal advice in relation to company law, please contact Helen or Robert on 01 240 1200 or lex@orourkereid.com.

Dublin office

Pepper Canister House,
Mount Street Crescent, Dublin 2
Telephone 00 353 1 240 1200
Facsimile 00 353 1 240 1210
DX number 109025
Email lex@orourkereid.com Web
www.orourkereid.com

Leeds office

17-19 York Place,
Leeds, LS1 2EX, England
Telephone 00 44 113 245 7811
Facsimile 00 44 113 245 7879
DX number 26450 Leeds Park Sq
Email lex@orourkereid.co.uk
Web www.orourkereid.com

Belfast office

33 Clarendon Dock,
Laganside,
Belfast BT1 3BG
Telephone 00 44 28 90 511 281
Facsimile 00 44 28 90 511 201
Email lex@orourkereid.com Web
www.orourkereid.com