

Corporate M&A

Update on Substantial Property Transactions

Date: Mon 27 Jun 2011

Update on Substantial Property Transactions between Directors and the Company – The Courts Practical Approach to Resolutions under Section 29 of The Companies Act 1990

Section 29 of the Companies Act 1990 (Section 29) regulates substantial property transactions entered into between companies and their directors. Section 29 provides that if a director, or connected person, is acquiring or transferring a non-cash asset of a certain value, then the transaction must be approved by ordinary resolution of the company in a general meeting and if the person is a director, or connected person to a director, of the holding company a resolution of the holding company.

Section 29 of the 1990 Act has a wide application to various commercial property transactions between companies, directors and/or connected persons. Contravention of the section can result in the transaction being voidable at the instance of the company and any director (or connected person) authorising the transaction can be made liable to account for any gain made and to indemnify the company for any loss or damage to the company. However, compliance with the section is far less onerous when compared with that of Section 31 or indeed Section 60 of the Companies Acts.

Section 29 is not a prohibition on these transactions but it does ensure that they be considered properly before being implemented by requiring that the members of the company approve the transaction in a general meeting.

The Irish Courts have over the years demonstrated a judicial understanding of the realities of many private companies in Ireland where the owners and the management are one and the same. While adherence to formal procedures should always be followed, an omission to formally pass an ordinary resolution will not necessarily result in the invalidation of a property transaction provided it is honest and intra vires the company, and that all shareholders have agreed to enter into it.

The 2010 High Court decision of *Kerr and Others v Conduit Enterprises Ltd*¹, in following earlier case law dealing with the failure by companies to follow formal procedures in relation to shareholder approvals, took the view that a formal resolution at a general meeting (in circumstances where the obligation to pass a Section 29 had been overlooked) was not strictly necessary in respect of Section 29.

The *Kerr* case involved a transaction, which the defendant company was a party to, under which it leased premises from a number of individuals who were both shareholders and directors of the company. While no formal meeting was held by the defendant company at which a resolution was passed by the shareholders to enter into the lease, all four shareholders with an entitlement to attend and vote at a general meeting of the company, had agreed, at a meeting of the board of directors, that the defendant should enter into the lease. The company subsequently underwent multiple ownership changes and the new owners sought to void the property transaction on the grounds it had never been approved by ordinary resolution pursuant to Section 29.

¹ [2010] IEHC 300

The decision of Finlay Geoghegan J addresses those informal situations whereby all the shareholders of a company have agreed to carry out a transaction that is both honest and intra vires the company despite the fact that a formal ordinary resolution was never passed. Finlay Geoghegan J relied on the earlier decision of *Buchanan Ltd v McVey*² which held that the informal agreement of all shareholders to do something which is honest and intra vires the company is to be regarded as an act of the company and does not require a formal resolution of the company. Additionally Finlay Geoghegan J stated that the principle established in *Buchanan* is now well settled having been subsequently cited with approval in both *Re Greendale Developments (In Liquidation) (no 2)*³ and *In Re PMPA Garages Ltd*⁴. This decision is similar to the Duomatic principle adopted in the United Kingdom in *Re Duomatic Ltd*⁵.

As a result it appears that informal agreement between all shareholders to enter into a transaction can constitute an act of the company and thus will be sufficient to validate a transaction caught by Section 29 in circumstances where a company's obligations under Section 29 have been overlooked.

According to Finlay Geoghegan J in *Kerr* "the purpose of Section 29 of the Act of 1990 is to protect the shareholders of a company against directors entering into certain transactions with the company in which they have a personal interest, without the approval of at least those shareholders holding a simple majority of the voting shares". Once again contrasts can be made with the more restrictive provisions of Section 31 and Section 60 since Section 29 only requires an ordinary resolution. It does not require for notice of a proposed transaction to be given to third parties and it is not required for the resolution to be filed in the Companies Registration Office such as the types of resolutions contained in Section 143 of the Companies Act 1963.

While the approach of the courts may be of assistance in circumstances where a Section 29 validation procedure has been overlooked in error, strict adherence to statutory validation procedures (including Section 29) should be followed - this is particularly the case in respect of Section 31 and Section 60 validation procedures as it is unlikely the reasoning adopted by Finlay Geoghegan J in *Kerr* would be adopted for these more formal validation procedures where the passing of a special resolution is required and/or must be filed in the CRO.

For further information on this topic please contact: Garrett Miller, Partner, Corporate M&A,
E: gmillier@efc.ie

² [1954] IR 89

³ [1998] 1 IR 8

⁴ [1992] IR 315

⁵ [1969] 2 Ch 365