

CHAPTER ONE

Introduction

Company law in Ireland is undergoing the most significant shake-up it has experienced in more than a generation. The Companies Act 2014, which was signed into law on the 23rd December 2014, and came into force on the 1st June 2015, is the result of a long process of review of how companies are regulated in this country. One of the most welcome developments for students and practitioners alike is the codification of company law in one place: over fifty years worth of legislation in the form of primary acts, statutory instruments and EU directives have been re-cast into the 2014 Act. The 2014 Act also makes a number of fundamental changes to the substantive law of companies, putting the private company limited by shares at the heart of company law and allowing for company structures more suited to the realities of modern commerce.

The Law Society has indicated that from the March 2016 must answer the questions by reference to the 2014 Act and relevant case law. This manual addresses the subject only by reference to the 2014 Act.

What is a Company ?

Usually, we mean a group of people combined together for a common commercial purpose.

However, the purpose does not have to be commercial, and the group of people does not have to be large. Historically, a minimum of two persons was required to form a Company, and since a 1994 EU Regulation / S.I. it has been legally possible to have a Company under the Acts with only one member.

We will come to the precise characteristics later, but perhaps the most familiar feature is the limited liability nature of most companies – if the company runs out of money, the members are not personally liable.

Concept of corporate personality is a familiar one – this is the idea that a company has an identity legally separate from that of its individual members.

Forms of Business Organisation

The law provides for a number of different forms which businesses can be organised into, each of which has its own benefits and drawbacks and which will suit different purposes. Three broad classifications, which describe the bulk of businesses operating in Ireland, are sole traders, partnerships and companies.

The most basic form of business is the sole trader. Simply put, anyone who engages in a trade, profession or other business on their own account, without organising their business through another legal form, is a sole trader. Sole traders enjoy broad freedom of action in running their businesses, being subject to significantly less regulation in organising their business affairs, and

enjoying greater privacy, than other forms of business.¹ On the other hand, sole traders are personally liable for any business debts, so this form of business can present greater risks for entrepreneurs than incorporation as a limited liability company.

Partnerships are defined by section 1 of the Partnership Act 1890 as ‘the relationship which subsists between persons carrying on a business in common with a view to a profit’. In this context, a business means a series of acts which, if successful, will produce profit or gain. A person includes a legal person, such as a company, thus it is possible for an individual to enter into a partnership with a registered company. The benefits of organising a business as a partnership is that it enables a number of people to pool their resources and abilities to run a business, and to share in the profits generated, with minimal formality.² Again however, there is the concept, as an unincorporated business organisation, of a partner being fully liable and responsible for the debts and obligations of the partnership.³

Companies are a form of organisation which allow for business to be done in the name of an entity entirely separate legally from the people who own and are involved in the running of it. There are a number of similarities between companies and partnerships, and the modern company can indeed be seen as having evolved from the idea of a partnership. Both involve a number of people cooperating in the running of a business, but incorporation as a company involves registration and ongoing compliance with a range of regulatory requirements which do not apply to partnerships. However, there are a number of advantages to operating as a company, in particular the possibility for limited liability of company members, which have led to the company, and in particular the private company limited by shares, becoming the most popular way of structuring a business in Ireland. There are further variations in the types and nature of different companies – but our course and syllabus will focus on the main type of company in Irish law – that of the limited liability private company.

Origins of Company Law and the Limited Liability Private Company

Prior to 1844, persons who associated for the purpose of carrying on business generally did so by way of a partnership arrangement. Although companies existed, they were rare and enjoyed only by the privileged. This was because company incorporation (formation) was only possible by obtaining a charter from the Crown or by the authority of a special Act of Parliament. In the 17th century joint stock companies emerged, possessing some of the critical characteristics of the modern company, in that:

- The shares were transferable;
- The assets and liabilities of the Company were separate from those of the members; and
- The company could sue in its own name.

However these companies did not enjoy the main advantage of the modern company, the limited liability of its members. Following various further pieces of legislation, including the so-called Bubble Act in 1720, where serious concerns over fraud by company promoters arose, the legislation continued to develop and eventually in 1885, the principle of limited liability was formally reflected.

¹ No formal permission is required to commence a business as a sole trader, although there are some ancillary business requirements depending upon the type of business being set up. For example, if a person is trading by using a name other than their own name, then such name must be registered under the Registration of Business Name Act 1963. They must also contact the local Inspector of Taxes, so with a VAT number/Self Assessment Tax Certificate in due course.

² Sole traders and partnerships may also employ other people, who are not partners, and are therefore not liable for business debts and do not enjoy a right to a share in the business’s profits. Employees act in the name of the sole trader or partnership (as the case may be), and the sole trader or partnership is vicariously liable for an employee’s actions.

³ Save for a limited partner under a Limited Partnership formed in accordance with the Limited Partnership Act 1907.

Initially, in 1844, the Joint Stock Companies Act introduced some of the further key features of modern company law, including:

1. The incorporation of companies by registration;
2. The recognition of the company as a separate legal entity from its owners;
3. The registration as companies of all associations with more than 25 members or with freely transferable shares;
4. The introduction of publicity requirements;
5. The establishment of the office of the Registrar of Companies in both England and Ireland.

The Limited Liability Act 1855 then brought in the principle that members of companies could enjoy the privilege of limited liability and the Joint Stock Companies Act 1856 relaxed many of the conditions for registration and introduced for the first time the requirement that registered companies provide constitutional documents, known as the memorandum and articles of association.

Today the idea of limited liability can be regarded as one of the critical elements for the success of the company as the most common form of organising a business in Ireland.⁴ It acts, in conjunction with the principle of separate legal personality,⁵ to encourage investment by providing an efficient entity for conducting business, while shielding investors from the risks of commercial failure.

Let us now consider some of the core introductory elements to company law generally, namely the sources of Irish company law and the types of companies that arise.

Sources of Irish Company Law

There are a number of sources for the laws governing Companies in Ireland. They will be addressed under the following headings:

1. The Companies Acts;
2. EU legislation;
3. case law.

Companies Acts

The starting point for any student of company law has to be the statutory framework which provides for the creation and operation of companies. The Companies Acts set out the rules governing, among other things:

1. How companies are formed and the contents of their constitutional documents;
2. how companies are required to keep their accounts and what requirements companies have to disclose information about their finances to their members and to the public at large;
3. the management and administration of companies; and
4. how companies are wound up, and the mechanisms for dealing with corporate insolvency.

⁴ The 2014 Act creates two types of private limited companies. First and most importantly is the Private Limited Companies by Share ('CLS') s. This is a new type of company and is regulated by parts 1-15 of the Companies Act 2014 and is centre stage under it. Secondly, is Designated Activity Companies ('DAC's). This is a new type of private limited company introduced by s. 963 of the Companies Act 2014. A DAC is regulated by parts 16, however, parts 1-15 of the Companies Act 2014 also apply except where specifically excluded.

⁵ It must be remembered that this principle drives the reality as to why members are generally not liable to third parties for company debts – as it is not their debt, but that of the company, who exists independently from them at law.

The Companies Act 2014 was signed into law on the 23rd December 2014. It repeals all prior companies acts, namely the Companies Acts 1963 to 2013. The Act is over 1,100 pages long and is divided into 25 parts.

Introduction of 2014 Act

The Company Law Review Group ('CLRG') came into existence with the Company Law Enforcement Act 2001. It was given the task of advising the minister for enterprise on possible reforms to Irish company law. Its aim was to give Ireland an 'efficient world-class company law infrastructure.' Chaired by Thomas Courtney, your examiner. Over course of a decade the CLRG assembled a powerfully body of recommendations that have become the most radical overhaul of company law since 1963. The result is the 2014 Act. All previous company acts have been replaced. There are a lot of small new changes and a huge amount of re-enactments. In substance 95% of the jurisprudence behind the sections will remain as guiding a force in most cases as it is now.

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Parts 1 to 15 apply to all companies and contain all of the company law applying to private companies limited by share. Given that this is by a significant margin the most common form of company in Ireland, this alone helps the Act to go some way towards making company law more user-friendly for the vast majority of companies. Parts 16 to 25 contain additional law governing particular types of company, re-registering as a different type of company and miscellaneous provisions.

While much of the 2014 Act consists of re-statements of the existing law, the substance of Act is approximately 95% the same, and the jurisprudence behind the sections - case law - will remain as guiding certain areas have been changed more dramatically, for instance the memorandum and articles of association have been replaced with a single document constitution for private companies limited by shares. Such companies will no longer have an objects clause and a new type of entity - the Designated Activity Company or DAC - has been introduced to cater for special purpose vehicles which are not intended to be general trading companies. Much of the machinery of corporate governance which was previously set out in the model articles of association is now contained in the main body of the 2014 Act.'

Transition for Private Limited Companies

The Act provides for a transition period of eighteen months, or such longer period as the Minister may allow for existing private companies limited by share to convert to a new form private company limited by share or to a DAC or to re-register as another type of company.

There were 187,139 Irish registered companies at the end of 2013 (note: prior to implementation of the 2014 Act) with the following breakdown:

- Private Limited Companies 161,071 (86.07%)
- Limited by Guarantee 15,461 (8.26%)
- Public Limited Company 1,706 (0.91%)
- Unlimited 4,324 (2.31%)
- External 4,552 (2.43%)

The sheer disparity of numbers is one reason why private companies is the principal focus your FE1 exam.

The Companies Act 2014

The Companies Act 2014 was enacted following the recommendations made by the Company Law Review Group established under the Company Law Enforcement Act 2001. The Act consolidates the patchwork of existing company law into one place and introduces a number of reforms aimed at simplifying company law. Simple is not of course to say concise: Consolidating the Companies Acts 1963 to 2013 was a mammoth project and the 2014 Act contains an astonishing 1448 sections, which are divided up into 25 parts, with a further 17 Schedules.

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This manual will address the law primarily by reference to the Companies Acts 1963 to 2013, but will identify the relevant provisions of the 2014 Act which replace the old law in each area, and will highlight the most important substantive changes brought about by the 2014 Act.⁶

EU Legislation

When Ireland joined what was then the European Economic Community in 1973, it had to introduce changes to company law to bring Irish law into line with the First Directive on Company Law⁷, which aimed to provide protections for people dealing with companies.⁸ Since then, the organisation has advanced reforms aimed at creating a single market across what is now the EU. As part of this process, a number of changes were made to harmonise certain areas of company law across all member states. This harmonisation is achieved through the use of Directives - European legal measures which member states are required to “transpose” into national law. This is achieved in Ireland by way of either primary legislation enacted by the Oireachtas, or alternatively as Statutory Instruments. Areas of company law which have changed as a result of harmonisation at a European level include the imposition of minimum capital requirements for PLCs, the provision for cross-border mergers and the introduction of single member private companies.

⁶ For a general overview of the changes introduced in the Companies Act 2014, see Smith, C, “Companies Act 2014” (2015) *Bar Review* 20(2), 22.

⁷ 68/51/EEC.

⁸ For example, to prevent the *ultra vires* doctrine being invoked in certain circumstances to invalidate contracts purportedly entered into by a company.

Case Law

Since the 19th century the courts have played an important role in the development of Company Law. The interpretation of the Companies Acts in line with common law rules, and the application of equitable principles to the realm of company law have given shape to the legislative framework. In interpreting legislative provisions and adjudicating disputes, judges have developed many of the key principles in modern company law.

Types of Companies

Companies can be classified according to the manner in which they are formed. While companies registered in accordance with the terms of the Companies Acts are the primary focus of this manual and will be discussed in detail below, two other forms of companies should be considered by way of comparison: Chartered companies and statutory companies.

Chartered companies were created by the grant of a royal charter. Prior to the enactment of legislation allowing for the incorporation of companies, this was the only method, apart from the creation of a company by statute, for creating a company that had a legal personality distinct from its members. While it is likely that the Government inherited the power to create companies in this way, no company has been created by charter since the foundation of the state, although a number of pre-1922 chartered companies still exist in Ireland, such as the Law Society of Ireland, Trinity College Dublin and the Governor and Company of the Bank of Ireland.

Statutory companies are granted their status by the authority of an Act of Legislature (other than the Companies Act). They may be conferred with special powers or monopolistic rights. Since independence many older statutory corporations, such as railway or canal companies have been dissolved and their business dealings transferred to new State bodies. The practice of incorporating privately owned, profit-making companies through the mechanism of a statute other than the Companies Acts has died off. However, several semi state bodies have been established as statutory companies since 1921. These include RTÉ, the Central Bank and the National Asset Management Agency. Other semi state bodies may be incorporated under the Companies Acts, but have their power limited by statute, such as Irish Water and An Post.

Registered Companies

The most common method of company formation is by registration under the Companies Acts. These Acts prescribe the procedure to be followed before the Registrar of Companies can effect registration. The Companies Acts provide for a number of different types of companies. The Companies Act 2014 provides for largely the same types of companies as were available under the Companies Acts 1963 to 2013.

Public companies

In contrast to private companies, there is no upper limit on the number of members a public company can have, but it must have at least seven members⁹, and the name of the company must end with the words “public limited company”, “plc” or their Irish language equivalents. Public companies are required to have a minimum share capital of €38,092, at least 25% of which must be fully paid-up¹⁰. This capital may be raised by offering shares and debentures to

⁹ Companies Act 1963, s.5.

¹⁰ Companies (Amendment) Act 1983, s.5(2).

the general public, something that is prohibited for private companies, and the shares of public companies can be traded on the stock exchange.

Limited Liability

Another important distinction is between companies the members of which enjoy limited liability and those whose members do not. If a company is registered as a limited liability company it means that in the event that the company fails, the shareholders will not normally have to pay any more than the amount of their unpaid share capital (if any) or, in the case of a company limited by guarantee, the amount of the guarantee.¹¹ Limited liability is a product of statute and does not stem from the fact that the company is a separate legal person.

There are three principal types of limited liability company:

- A company limited by shares
- A company limited by guarantee
- A company limited by guarantee and having a share capital

Unlimited liability

It is also possible to incorporate a company the members of which do not enjoy limited liability. In an unlimited liability company, of which there are very few, can also be created.

Unlimited liability companies still enjoy separate legal personality and so, unlike a sole trader or the members of a partnership, a member of an unlimited liability company is not directly liable to the company's creditors. Rather, an unpaid creditor must still secure the liquidation of the company and it is for the liquidator to pursue the members for funds to discharge company's debts.

While unlimited liability may be seen as a significant drawback, there are some advantages connected to unlimited companies:

- Unlimited companies are exempted from many disclosure requirements for financial information filed with the Companies Registration Office, and can thus keep its financial standing private.
- Capital maintenance rules do not apply and thus it is far easier for the company to return contributed capital to members.
- These companies don't have to pay stamp duty on registration.
- The Companies Acts place a numerical ceiling on the size of partnerships (other than solicitors or accountants) of 20 persons, or 10 in the case of bankers. Unlimited companies have many of the same attributes as partnerships but are not subject to the same restrictions.

Companies Registered Under the Companies Act 2014

The Private Company Limited by Shares

At the heart of the 2014 Act is the private company limited by shares ("LTD"). Like their predecessor under the old regime, such a company can have between 1 and 149 members

¹¹ See Chapter Three for a discussion of the circumstances when a Court will 'pierce the corporate veil' to impose personal liability on shareholders for company debts.

(s. 17(4)), who enjoy limited liability (s. 17(2)). No securities in LTDs can be offered to the public or traded on an open market. Its name will have to end with “ltd” or “limited” unless exempted.

In a departure from the law under the old regime, LTDs are permitted to have only one director (s. 128). Such companies only have one constitutional document rather than two (s. 19), and will not have an objects clause (any objects clause will have no effect - s. 38). A CLS is the only company that will not contain a memorandum and articles of association, therefore, it will not have an objects clause or the *ultra vires* will not apply to it.

It has had the option of dispensing with the requirement to hold an Annual General Meeting.

This is by some distance, the most common category. Where a company is limited by shares, liability of the members is limited to the amount that they have paid, or have agreed to pay for those shares. The members / shareholders own the company by their ownership of the share capital.

As we will see as we go through the course ownership of shares generally gives certain basic rights as a member including the right to receive a share of the company’s profits at fixed intervals (dividends); the right to attend meetings of the company, and normally, to vote at those meetings; the right to receive copies of certain important documents, i.e. the balance sheet, profit and loss account, the directors’ and auditors’ reports; the right to participate in the surplus assets of the company in the event of it being wound up etc....

Existing private companies limited by shares will become LTDs 18 months after the commencement of the Act (s. 55) unless they adopt a special resolution to re-register as a “Designated Activity Company” (“DAC”) (s. 56). There are also rights for certain members and creditors to protect their positions by obtaining a court order directing the company to re-register as a DAC. An existing private limited company can register as an LTD before the end of the transition period by adopting a new constitution by special resolution (s. 59).

The Designated Activity Company

The DAC is provided for in Part 16 of the 2014 Act. Similarly to a LTD, it is also a private company limited by shares but keeps some of the features of such companies under the old regime which do not apply to LTDs. Parts 1-15 will also apply except to the extent that they are disapplied or modified. Primarily, the DAC will have a two document constitution (s. 967) which includes a memorandum of association and articles of association. A DAC will have an objects clause, and must have at least two directors. If a private limited company is part of an international group then it may be required by their holding company to have objects similar to other companies in the group. A private limited company wishing to list debt securities must be a DAC.

The Public Limited Company

Part 17 of the 2014 Act provides for Public Limited Companies (“PLCs”). Such companies can now for the first time be incorporated with just one member (s. 1004). However, their primary purpose for PLCs will be where it is wished to list shares on the stock exchange. Such companies must have a minimum issued share capital of €25,000 and possess a trading certificate before they can commence trading.

The Company Limited by Guarantee

The Company Limited by Guarantee is provided for in Part 18 of the 2004 Act. The members of such a company do not pay towards share capital, so in the event of insolvency, they will be

called on to pay into the company up to the amount of their guarantee. This form of company is popular with charities.

The Unlimited Company

Part 19 of the Companies Act 2014 provides for three different types of unlimited company: private unlimited companies and public unlimited companies which have a share capital, and public unlimited companies without a share capital, the debts of which are guaranteed by the members.

Can a company be held in contempt of Court?

If the company wilfully disobeys the court judgment/order, you can apply to the High Court to have it enforced. The application is made to the High Court, even if the judgment/order was made by a lower court. The High Court will typically deal with the application on affidavit only, and will not hear oral evidence.

The statutory basis for such an application is section 53 of the Companies Act 2014, which effectively provides for a statutory form of civil contempt. Section 53 came into effect on 1 June 2015. The Rules of the Superior Courts also provide for such an application.

On hearing the application, the Court can make orders for the following:

- sequestration against the company's property;
- attachment against the directors/officers of the company; or
- sequestration against the property of the directors/officers.

The Court will only make an order under section 53 where the company wilfully disobeyed the relevant judgment/order. In all other cases, you must look to the usual litigation remedies, e.g. obtaining a judgment mortgage or an order for possession or appointing a receiver. These remedies are not specific to companies.