The history of the state law company business partnership essay

Law

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COURSEWORK SUBMISSION SHEET

STUDENT NAME: Shauna QuinnSTUDENT NUMBER : B00346964Course Title: MSc in Management and Corporate Governance (Dublin)Module Code/Title: CRN 38933 Company LawLecturer: Dr. Venkat IyerDate of Submission: 15th April 2013" When implemented, (the new Companies Bill) will be the most dramatic modernisation and simplification of company law in the history of the State." Dr. T. Courtney (Chairman CLRG). DiscussThe Companies Bill has been introduced to facilitate the Governments aim of " making Ireland the best small country in the World in which to do business."[1]The most notable changes implemented in the new Companies Bill are mainly concerned with the private company limited by shares. The Company Law Review Group motto is to think small first which Dr. Thomas Courtney states has served them well in " developing a robust new legislative model."[2]The 1963 Principal Act and the subsequent acts that followed applied the same law to private companies and public companies despite them been two different business models.[3]Furthermore private companies are unquestionably the most common type of business model in Ireland and have been for a long period of time. It is estimated that today 90% of businesses in Ireland are private companies. It is for this reason that the private company takes centre stage in this new piece of legislation for the first time in the history of the State. The Companies Bill is separated into two divisions known as Pillar A and Pillar B. Pillar A is solely concentrated on the life of a private company. Pillar B contains the law applicable to all other company types. The new Companies Bill is the largest piece of legislation in the history of the State

and is according to Amy Brennan pg. 1 the " most significant reform in Irish Company law since 1963."[4]There are 12, 500 start ups in the Irish economy each year. It is anticipated that this new legislation will save the new start ups a combined total of €6 million in professional fees each year. In order for this to be achieved there was a series of reforms introduced in the new Companies Bills discussed below. These reforms have reduced red tape and according to Minister Bruton have made " company law obligations easier to understand."[5]The new Companies Bill means it is now possible for a company to have only one director. Previous acts stated that there had to be at least two directors and one of them must be resident in Ireland. This new legislation however provides that a company may now have a director resident in a European Economic Area.[6]There is also a fixed age of 18 instated now for directors which eliminates the possibility of listing minors as directors. In addition to this Kennington and Conroy pg. 31 expresses the view that the rule of one director will" facilitate sole entrepreneurs especially since the possibility of a single member company is also recognised for the first time within the body of the bill as the provisions permitting this form of company were previously contained only in the EC (single members company) Regulations 1994."[7]This new legislation regarding the one director rule is an example of modernising company law in Ireland. Furthermore one of the main aims of the new Companies Bill is to attract foreign investment and because it is now not a necessity to have a resident director in Ireland this will be an advantage for Ireland over other countries. There is also the added attraction of particularly low corporation rates compared to corporation rates in other countries such as the United

Kingdom. The new bill includes a section codifying directors' duties and responsibilities. This will make the law more transparent by setting out for the first time in statute law " eight principal fiduciary duties, based largely on common law and equitable principles."[8]Previously these duties were difficult for any prospective or indeed working directors to find as they were largely " derived from common law and case law."[9]Directors' duties have been problematic in the past for Irish Law. A report conducted in the 1990's found that only 13% of companies filed their annual reports on time and the disqualification of directors was extremely rare with only four being disqualified in 2000. It was because of this that the Company Law Enforcement Act was introduced in 2001. This law aimed to address the so called " Phoenix Syndrome". It also established a Director of Corporate Enforcement. Their role was to ensure that " companies and their officers pay greater respect to the law."[10]This new Companies Bill has further addressed this problem with listing the directors' duties clearly within Pillar A in the expectation of further reinforcing the importance of honouring their duties to the company. Nonetheless in recent years since the 2001 Company Enforcement Act there has been stricter restrictions placed upon directors such as in the case of DPP v Denis Manning and DPP V Duffy, who were both owner-directors involved in activities that were related to price fixing in the motor industry strictly prohibited in Irish Company Law. The penalty for both men involved in this type of activity was severe sentences of 12 months in prison (suspended for five years) and a fine of €30, 000.[11]Another example of directors not acting in the best interests of the company is in the 2004 High Court case 360 Atlantic (Ireland) Ltd. In this case two Irish directors

failed to act " honestly and responsibly" by refusing to involve themselves in the activities of a " company which existed for tax reasons."[12]Furthermore the new bill has established that it is the duty of directors and not company secretaries to ensure compliance with the Companies Act. The new Compliance Statement has been adapted from the Companies Auditing and Accounting Act 2003. However this new Directors Compliance Statement is not as rigorous as the 2003 Act which was not brought into effect due to recommendations that the " scope of the compliance statement as proposed be reduced"[13]. Nonetheless according to Aidan Lambe the new Compliance Statement may still cause some issues in terms of terminology used. [14]Therefore although the new Companies Bill aim is to simplify company law there is still going to be areas that will need clarified in terms of the compliance statement so this will still have a significant cost impact on the private companies due to requirements of professional advice and guidance. Another major change in the new Companies Bill compared to the Principal Act of 1963 and the subsequent acts that followed is the introduction of a single document constitution. This replaces the current memorandum and articles of association and is provided by default unless the company decides to become a Designated Activity Company and in which case it will have to provide an objects clause[15]. The single document constitution will not have an objects clause, resulting in the doctrine of ultra vires rule being abolished for the first time in the state’s history. In abolishing the doctrine of ultra vires it will aid commercial transactions and companies interactions with banks. Previous acts stated that the company must prove to the bank that it has the legal power to borrow money.[16]For private companies this will be a

welcome relief as the objects clause rule restricted your business activities and in order to change the objects clause it required 75% of members agreeing to the newly proposed objects clause. As a result of the elimination of the objects clause companies are now free to carry out any activities the Directors decide in a legal manner that will benefit the company. This freedom will not only encourage residents in Ireland to start up a business but it will also attract foreign investment. However with no objects clause and the Directors Statement of Compliance been somewhat reduced in the bill one has to question whether this will encourage malpractice or will it encourage more trade, investment and entrepreneurship. The new reforms have to a certain degree relaxed certain areas of company law in order to modernise and in particular simplify it in order to reduce red tape. The consequences of doing so means the Director of Corporate Enforcement will have to be more vigilant in ensuring companies are all fulfilling their duties in a legal manner as reducing red tape does not mean the law will be more flexible in the area of compliance. An additional measure to reinforce the importance of compliance included in the bill is the introduction of company law offences been categorised on a scale of 1 to 4 . The maximum penalty will be imprisonment of up to 10 years and / or €500, 000 fine.[17]As the penalty is so severe it should act as a deterrent to fraudulent and illegal activities been conducted by directors. The introduction of company law offences also protects shareholders and creditors due to its aim of ensuring companies activities are conducted bona fide by directors. Another additional change in the new Companies Bill is the right to dispense of physically holding an Annual General Meeting, instead the directors can hold

the Annual General Meeting by written resolution of the members.[18]The present law in Ireland only permits sole traders to dispense of an AGM. However many private companies in Ireland only have a minority of members so it is logical to dispense of the physical holding of an AGM.[19]This rule was established in the U. K. Companies Act 2006 so for this to be introduced in the new Companies Bill is another example of modernisation. Nonetheless because a company is not physically holding an AGM the members still need to receive the relevant information such as financial statements relating to the company. There is a possibility that not holding a physical AGM could result in directors been able to choose which information they provide to members as it will be in written format. The audit exemption rule has applied to previous acts. However in this new companies bill the balance sheet total has been increased to €4. 4 million and the turnover does not exceed €8. 8 million. In addition to this for the first time it includes group companies and dormant companies. This will therefore reduce costs for businesses. Nonetheless one criticism illustrated by McGibney is that if accounts are filed one day late to the Companies Registrar Office the company immediately loses the right to audit exemption for two years.[20]Therefore despite the new Companies Bill exemptions been extended there is still extremely strict legislation with regards to the benefit of incorporation. It must be recognised that there is a lot of privileges to been an incorporated company however with that there is also serious consequences if you " pierce the veil" of incorporation. The Bill also introduces the new concept of the Summary Approval Procedure. The main reason for this been introduced is to minimise professional costs for

companies of solicitors and barristers. This is because certain transactions such as solvent winding ups and capital reductions previously required High Court approval whereas now it can occur on members agreement.[21]In addition to the members agreeing directors will also swear a statutory declaration of solvency.[22]Thus shareholders are been protected. Aside from the savings of professional costs there is also the issue of been able to commence activities immediately after members resolution instead of waiting on court decisions. A further major reform in the new Companies Bill is the allowance of mergers. Currently if two companies intend to merge, it involves the winding down of the two companies who intend to merge. After that process commencement of the formation of a new company is allowed. However this new Companies Bill does not require this process and therefore it is a much more simplified and cost saving operation. Despite the fact that the new Companies Bill primary focus is on private companies limited by shares, this is highlighted by Pillar A been substantially larger than Pillar B, there is still simplifications of the company law applied to Pillar B. For the first time in the history of the State each company type whether it is PLC's, guarantee companies or unlimited companies will all have its own dedicated part within the Bill.[23]Therefore the accessibility and indeed relevant information is all in each allocated part making it easier to read the legislation that is applicable to the company type. In addition to this another simplification is the ease of converting to another company type such as from a private company limited by shares to a designated activity company. This new piece of legislation will be beneficial to new start ups, existing companies and indeed potential new investors either resident in Ireland or

other countries as it will provide flexibility and more options for companies who find a change in their circumstances. Finally, a public limited company will be able to prepare a summary financial statement for shareholders. This is in place of the full annual accounts, which could be an advantage for companies with a lot of members. This new reform is saving administrative costs[24]. To conclude this new Companies Bill is the most dramatic modernisation and simplification of Company Law in the history of the State. There are a lot of new reforms introduced to reduce red tape which in theory appear to be more beneficial and practical. The Private Company is for the first time at the very centre of the legislation and rightfully so. The question has to be asked is why did it take so long to place the private company at the centre of the legislation. This simplification of company law should encourage new start ups and satisfy existing companies. It should also aid foreign direct investment as Ireland is still regarded as a safe and stable place to conduct business although due to recent economic downturns it is considered more high risk than 10 years ago. However the transition period from when the new Companies Bill is introduced may cause some problems for companies and they may need to recruit professionals for guidance. Nonetheless in the long term it will improve the Governments aim of making Ireland the best small country in the World to do business.