

# Company Law

*Fourth Edition*

*by*

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# COMPANY LAW

FOURTH EDITION

**C**ompany Law – Fourth Edition represents a complete overhaul and update of this extremely popular and accessible title, first published in 1985. This edition incorporates all major legislative developments, growing case law and E.C. directives since the third edition in 1999. As ever, it explains the fundamentals of the subject succinctly, without excessive citation of authority or academic literature. In addition to clear and direct exposition of legislation and case law, the authors provide comprehensive coverage of every aspect of Company Law as taught at university and professional course level.

*'The publication of the third edition of Dr Forde's Company Law is a timely and welcome update of the original text. Throughout the text it is evident that the author has carefully and painstakingly compiled the law in a thorough and erudite manner. Each topic is covered comprehensively, and analysed in a critical and scholarly way. Despite the titanic nature of the task, in an ever growing and complex area of law, the author has managed to write a book that is complete and I suspect will be hugely beneficial to academics and practitioners alike and for this he must be congratulated. This book is a most valuable and welcome publication. It is a scholarly and informative text and is a must for the shopping list of every commercial lawyer or academic.'*

**The Bar Review (Company Law – Third Edition)**

## THE AUTHORS

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*Minimum paid-up capital*

**6-25** There is no requirement that companies have a truly sizeable minimum actual capital. Except in the case of plcs, at least 5 per cent of a share's nominal value must be payable on application, *i.e.* if €1 shares are being allotted, they must be paid up to at least 5 per cent (1963 Act, s.53(3)). A plc may not allot shares unless the allottee has paid up at least one-quarter of their nominal value, together with the full amount of any premium payable on them (1983 Act, s.28). One of the prerequisites of a plc becoming entitled to do business or to borrow is that it has allotted shares valued at least €38,092. Nominally, no new plc may act until it has at the very minimum €9,523.04 in paid-up capital.

**6-26** Where a plc offers its shares for subscription but the offer is under-subscribed, the company is forbidden to allot those shares that were subscribed for unless the offer stated that allotments would be made in such circumstances and those very circumstances occurred (1983 Act, s.22).

**Discounts**

**6-27** Companies usually prefer to allot their shares for the highest premium over the nominal value that can be obtained. But occasions can arise where, without any suggestion of fraud, shares can be allotted only at a discount, *i.e.* for less than their nominal par value. The company, for instance, may have been doing so badly that its €1 shares now stand at 40 cent in the market; if it wishes to raise further capital by issuing additional shares of that class, it will not attract subscribers if it fixes the price at more than what those shares can be obtained for in the market. However, in the classic case of *Ooregum Gold Mining Co. v Roper*,<sup>2</sup> it was held that it was implicit in the very structure of the Companies Acts that limited companies may not allot shares for less than their par value. As Lord Macnaghten explained, the then Act "proceeds on the footing of recognising and maintaining the liability of the individual members to the company until the prescribed limit is reached. [Accordingly,] the liability of a member continues so long as anything remains unpaid upon his shares. Nothing but payment, and payment in full, can put an end to the liability".

*Allotment at a discount*

**6-28** The shares of all registered companies "shall not be allotted at a discount" (1983 Act, s.27). This iron rule admits of no exceptions or qualifications other than authorised brokerage and commissions and, possibly, though most unlikely, where the company was formed with the express object of acquiring a particular asset by allotting its shares to the vendor. This latter situation arose in *Re Leinster Contract Corp.*,<sup>3</sup> where the company was incorporated to acquire certain patent rights in return for its shares but the

(1892) A.C. 125.

[1902] 1 I.R. 349.

patents proved to be valueless. It was held that as there was no fraud here, the allotment to the vendor could not be set aside. Since the shares were issued as fully paid, the allotment was not regarded as *ultra vires* because the entire transaction "was not only contemplated, but imperatively required by the very constitution of the company". However, this decision may not represent the law today since it did not deal with an explicit statutory prohibition.

#### "Watering" shares

**6-29** "Watering" shares means a company allotting its shares for a consideration that is actually worth less than their issue price; in particular, for less than their par or nominal value. The objection to that practice is that it gives a wholly misleading picture of a company's true worth and can be a device for defrauding shareholders and creditors. To ensure some equivalence between the value of shares issued to subscribers and the consideration that the company receives in return, the 1963 Act prohibited issuing shares at a discount and struck at transactions where the discrepancy in value was patent or there was fraud. These standards are now supplemented by exacting provisions of the 1983 Act, the thrust of which is to prohibit plcs from allotting shares for consideration of dubious value and to ensure a degree of equality in exchange when allotting plcs' shares, and in transactions between plcs and their initial members.

**6-30** Subject to the conditions and exceptions outlined below, companies may allot their shares for a consideration other than cash, for instance, in return for property the company acquires from a promoter or investor, or for some service that someone has undertaken to perform for the company. This principle is now endorsed in the rule that "shares allotted by a company and any premium payable on them may be paid up in money or money's worth (including goodwill and expertise)" (1983 Act, s.26(1)). Until recently, when any company proposed to allot shares in return for some consideration other than cash, it was for the company itself to determine what that consideration was worth. In companies subject to Table A, this discretion was consigned to the board of directors, who could allot shares "on such terms and conditions ... as they may consider to be in the best interests of the company and its shareholders". This state of affairs made it relatively easy for companies to evade the proscription against allotting shares at a discount; acquiring property at a greatly over-valued price in consideration for its shares is no different in substance from allotting those shares for less than their par value.

**6-31** *Registering the contracts for allotment:* Where any limited company allots shares for a non-cash consideration, within one month it must deliver to the Registrar of Companies the relevant stamped contracts and returns (1963 Act, s.58). By these are meant a written contract constituting the allottee's title to the shares in question; the contract for the consideration, be it the sale of property or of goods, or the exchange of services or of other consideration; and a return stating the number and nominal value of the shares allotted, the extent to which they are treated as paid up and the consideration for them. If

any of these contracts particulars must be registered and the allottee can be informed of pre-

**6-32** These requirements require the allottee to pay money to the allottee a shares, for a cash payment and an applicant for its exercise of a right of set-off through the form of ha cross cheques".<sup>4</sup> According to the company first issued to the company for cash each other.

**6-33** *Bona fides and* some other advantage to the vendor, the director due care and skill, and where serious conflict between the company and not the company may exonerate

**6-34** So far as the court is concerned, it is to place a value on the in *Re Wragg Ltd*,<sup>5</sup> which were reviewed:

"the obligation of the company the no transaction which from payment in company can take impeached for fraud be inquired into. . . to accept the proceeds of the shareholder v

It has ... new property or pay them in fully paid and not colourable to be entitled to be and binding on t

<sup>4</sup> *North Sydney Investments Ltd v Registrar of Companies* [1987] 1 Ch. 796.