

THE HIGH COURT
COMMERCIAL
2009 640 COS
IN THE MATTER OF IRISH LIFE AND PERMANENT PLC
AND
SECTION 201 OF THE COMPANIES ACT 1963
AND
THE COMPANIES ACTS 1963 – 2009

JUDGMENT of Mr. Justice Clarke delivered on the 21st of December, 2009

1. Introduction

1.1 The applicant (which, for reasons which will become obvious, I will refer to as "old ILP") has brought an application before the court under s. 201(1) of the Companies Act 1963 ("the Act"), whose principal purpose is to secure directions relating to necessary meetings which must be conducted of its shareholders for the purposes of considering, and if thought appropriate, approving of a scheme of arrangement. At its simplest, the scheme of arrangement involves a series of transactions which would lead to the creation of a new company ("new ILP") in which the existing shareholders of old ILP would, substantially, have the same shareholding.

1.2 However, an additional item of the relief claimed sought a declaration concerning the status of a reserve which would arise in the accounts of new ILP in the event that the scheme was approved. The question which arose was as to whether that reserve (to which more detailed reference will be made in due course), would be a profit within the meaning of s. 45 of the Companies (Amendment) Act 1983 ("s. 45").

1.3 Depending on the answer to that question, different procedural steps would need to be taken in order to allow for the proper implementation of the scheme of arrangement should it meet with the shareholders' approval. With that in mind, counsel for old ILP urged that I should first consider and rule on the question of the status, so far as profit within the meaning of the Companies Acts is concerned, of the relevant reserve. I agreed with counsel that it was appropriate that the question of the status of the reserve concerned should be determined first, but also suggested that it would be appropriate that there be a *legitimus contradictor* to put forward argument against the proposition which was to be urged on behalf of old ILP, which was to the effect that the relevant reserve did amount to a profit within the meaning of the s. 45.

1.4 A shareholder had indicated a willingness to instruct solicitor and counsel to present the relevant arguments and I, therefore, gave directions that the shareholder concerned be nominated for that purpose. Counsel for old ILP and counsel for the shareholder concerned, therefore, presented argument on the status of the relevant reserve. Having heard that argument, and having regard to the urgency of the matter, I indicated that I would inform the parties of my decision in a short number of days but would defer giving more detailed reasons for the conclusions which I had reached until a later stage. Accordingly, on the 3rd of November, I informed the parties that it was my view that the relevant reserve did amount to a profit for the purposes of s. 45. I indicated that I would deliver more detailed reasons for that conclusion in due course. This judgment is directed towards setting out those detailed reasons. In order to understand why the issue with which I was concerned had arisen it is necessary to say something about the proposed scheme of arrangement. I, therefore, turn to the scheme of arrangement.

2. Scheme of Arrangement

2.1 Old ILP was originally established as a mutual building society in 1884. On the 21st September, 1994, the then Irish Permanent Building Society converted to a public limited company operating under the Laws of Ireland under the name Irish Permanent Plc. In April, 1999 Irish Permanent Plc acquired Irish Life Assurance Plc, and shortly afterwards changed its name to Irish Life & Permanent Plc. Thus, old ILP is the same legal entity as Irish Permanent Plc, being a converted mutual building society and having acquired Irish Life Assurance Plc.

2.2 The proposed scheme of arrangement involves a series of transactions, some of which it will be necessary to refer to for the purposes of this judgment, whereby the shareholders of old ILP will become shareholders in new ILP, with old ILP becoming a subsidiary of new ILP. Thus, new ILP will be simply a holding company for the various entities within the ILP Group and will not carry out any direct business itself. It is the accounting treatment of the consequences of certain of the transactions which would be carried out for the purposes of giving effect to the scheme which lie at the heart of the problem which has arisen. In that context it is appropriate to turn, briefly, to the legal basis for the application of accounting standards in the preparation of companies accounts.

3. Accounting Standards

3.1 Section 148 of the Companies Act 1963 ("the Act") (as amended by Reg. 4 of the EC (IFRSMA) Regulation 2005) deals with the duty of companies to prepare accounts. Subject to certain exceptions which are not material to the issues which I have to decide, a company's accounts are required to be prepared either:-

A. In accordance with s. 149 (to be known and in the Act referred to as "Companies Act Individual Accounts"), or

B. In accordance with international financial reporting standards and s. 149A (to be known and in the Act referred to as "IFRS Individual Accounts").

3.2 Thus it is clear that accounts of companies, in order that they might comply with the Act as amended, must be prepared in accordance with the relevant standards. For reasons which it is not necessary to detail here, the standard applied so far as both old ILP and new ILP is the IFRS individual accounts standard.

3.3 Before going on to analyse the relevant provisions of the IFRS standard it is necessary to say something more about the scheme of arrangement proposed and, the reserve which will arise in the accounts of new ILP in the event that the scheme is implemented. I, therefore, turn to the reserve.

4. The Reserve

4.1 Under the scheme the existing issued share capital of old ILP (other than a nominal seven shares which are retained because old ILP, as a public limited company, is required by law to have a minimum of seven shareholders) are to be cancelled and extinguished. Immediately and contingent on that cancellation old ILP will apply the whole of the reserve arising in its books of account as a result of that cancellation in allotting and paying up in full and at par, such number of new old ILP shares as shall be equal to the number of existing shares cancelled. The new old ILP shares so created are to be issued to new ILP. Thus, in substance, the entirety of the shareholding in old ILP will be held by new ILP. In addition, in consideration of the cancellation of the existing shares, shares in new ILP will be allotted to its existing shareholders on the basis of one new ILP share for each old ILP share cancelled. As a consequence, it is clear that old ILP will become a wholly owned subsidiary of new ILP and the existing shareholders in old ILP will become the shareholders in new ILP.

4.2 As to the proper accounting treatment, in accordance with the IFRS standard, of those transactions I have had the benefit of the evidence of Una Curtis, a director with responsibility for technical accounting matters in the Department of Professional Practice of KPMG Chartered Accountants. I accept the evidence given by Ms. Curtis who, in addition to being a fellow of the Institute of Chartered Accountants in Ireland, has, as part of a most impressive Curriculum Vitae, been Chairperson (from 1996 to 2003) of the Accounting Committee of the Institute of Chartered Accountants in Ireland.

4.3 Ms. Curtis drew my attention to what appears to be the relevant IFRS guidance in relation to this transaction which is as set out in IAS 27. IAS 27 was most recently amended in 2008 and was subsequently endorsed by the EU in accordance with IAS Regulation (Regulation (EC) No. 1606/2002). The applicable guidance is to be found in para. 38B.

4.4 In order to understand the accounting treatment of the transaction, certain figures were given in the evidence of Ms. Curtis. It is important to note that these figures were based on the most up to date accounts available at the time of the hearing before me. However, the exact figures which are intended to be used in the transaction, should it go ahead, are figures which would be updated to that point in time. However, nothing turns on the precise figures and it is clear that the figures given in Ms. Curtis's evidence are most useful for the purposes of understanding the issue which had arisen. In that context, three figures are of particular importance.

4.5 Under the existing accounts of old ILP (as of the 31st December, 2008) total equity is given as €3,584M. The fair value of old ILP (based on its current market value as per the stock exchange) is of the order of €1,578M. The par value of the share capital of new ILP will be €89M.

4.6 Returning to the provisions of IAS 27.38B, same require that, when new ILP records its investment in its new subsidiary (that is old ILP), it is required to record this amount as €3,584M. I will return, in due course, to the reason for this. In substance, new ILP is required to record its investment in its subsidiary, in the circumstances which will arise in the context of this scheme, in the same amount as the subsidiary was required to record its equity in its existing accounts.

4.7 Ms. Curtis then describes the accounting effect of the implementation of the scheme as follows:-

"On implementation, NEW ILP will issue shares in return for this investment and under Section 62 of the Act the issue of these shares, which will have been issued at a premium, will result in the difference between the value of the consideration received and the nominal value of the shares being transferred to a share premium account. On the basis that the current market value of the old ILP is €1,578 million and the par value of the shares to be issued is €89 million, an amount of €1,489 million will be transferred to share premium. As the investment in old ILP must be recorded at €3,584, a reserve will arise in new ILP in the amount of €2,006 million. The summarised balance sheet of new ILP at the end of the first step will be as follows:

Balance sheet of NEW ILP €m

Investment in subsidiary 3,584

Total net assets 3,584

Share capital 89

Share premium 1,489

Other reserve 2,006

Total equity 3,584

This other reserve (the "Other Reserve") represents the difference between the amount that the investment in old ILP must be recorded at in accordance with IAS 27 and the amount that company law requires be included in share capital and share premium.

As an immediate second step, IFRS will require new ILP to consider the carrying amount of its investment in old ILP once it has been initially recorded and consider if it is impaired. It will apply the appropriate accounting standard (in this case IAS 36 Impairment of Assets) to determine the recoverable value of the asset and, since this asset represents the entire share capital of the old ILP Group, the recoverable value is likely to be approximately €1,578 million (being the approximate current market value of the old ILP Group). Consequently, it will be necessary to record an impairment of €2,006 million on the investment in old ILP. Normal accounting rules will record this impairment as a loss in the profit for the year. Therefore the summarised balance sheet of new ILP after the second step will be as follows:

Balance sheet of NEW ILP €m

Investment in subsidiary 1,578

Total net assets 1,578

Share capital 89

Share premium 1,489

Retained earnings (2,006)

Other reserve 2,006

Total equity 1,578 "

4.8 It will, therefore, be seen that the reason for the so called other reserve appearing in the accounts of new ILP stems from the following:-

1. The current accounts of old ILP, properly compiled in accordance with relevant standards, requires the equity of old ILP to be recorded as €3,584M.
2. IAS 27 requires that the investment by new ILP in what will then be its subsidiary (that is old ILP) must be recorded in the same sum.
3. The current market value of old ILP must be divided as to €89M, being the issued share capital, and the balance of its current market value of €1,489M being the share premium account, leaving it necessary to record another reserve of €2,006M which is, in substance, the difference between the amount that the investment in old ILP must be recorded at in accordance with IAS 27 and the amount that company law requires to be included in share capital and share premium accounts.

4.9 As pointed out it is the status of the other reserve that was the subject of the issue which I had to decide. Before going on to deal with that issue directly, it is also important to touch briefly on the reason why what might, on one view, appear to be an anomalous situation in the accounts arises, in the light of the relevant accounting standards. I turn to that issue.

5. The Rationale for the Relevant Accounting Standards

5.1 I propose first addressing the standards applicable to the balance sheet of old ILP. It appears on the evidence that one of the major assets on the balance sheet of old ILP is "loans to customers". This situation stems from the fact that old ILP is, in effect, the same entity as the former Irish Permanent Building Society, and is the legal entity which has directly made loans to many of the mortgage customers of old ILP. The accounting measurement rule for loans to customers is the so called "incurred loss" model. Under this model a company should only make provision for losses when it has objective evidence that the borrower is likely to default and that the loan asset is, therefore, impaired. The method for calculating the value of such impaired loans is set out in some detail in the relevant standard. On that basis a provision is made in respect of any loan where there is objective evidence currently available to the effect that the loan is impaired.

5.2 Thus the proper accounting treatment of a set of assets held by a company in the form of loans to its customers requires that each loan be separately assessed as to whether that loan is impaired, and if it be impaired, an exercise needs to be carried out as to the amount of provision that should be provided against that loan. I accept, on the evidence, that the current balance sheet of old ILP has been calculated in accordance with the relevant standards. The rationale behind that standard is that specific provision should be made for each individual asset, being the loan to the relevant customer, based on an objective appraisal of that customer's position.

5.3 The rationale behind the requirement (contained in IAS 27) that the amount to be recorded in new ILP's records in respect of its investment in its new subsidiary should be the same as the equity reflected in old ILP's accounts, is that a company or group of companies should not, by the simple expedient of creating a new holding company at the top of its structure, be entitled to achieve a reduction in capital without going through whatever procedures company law might require to give effect to such reduction. As pointed out in Ms. Curtis's evidence, the more normal situation that applies is that the true or fair or market value of a company is likely to be somewhat larger than the equity as per the company's books, because the company will probably have some form of intangible asset (such as goodwill) not formally recorded in the company's books. However, in the circumstances which have arisen in this case, it is clear that the market value of old ILP (which is, in effect, the total value of the shares at the price currently available on the stock exchange) is significantly less than the equity recorded in that company's books. The reason for this disparity is that the market clearly takes a more pessimistic view of the company's prospects and, in particular, the extent to which the company will be able to recover the loans which it has made to its customers, than is reflected in the case by case analysis which underlies the proper accounting treatment of the same set of loans as they currently stand on the books of old ILP. In other words, a particular set of loans looked at individually and subject to a suitable provision where there is currently objective evidence that the loan is impaired, can give rise to one value. The market may have regard to other factors such as the possibility that a general worsening in the economy may lead to loans which are not currently impaired becoming impaired and may, thus, value the book of loans concerned on a more pessimistic basis. While there may be other factors at work, it would appear likely that the factor which I have just identified is one of the principal reasons why the market values old ILP at a significant discount to the equity reflected in its balance sheet.

5.4 Be that as it may, the other reserve, reflecting that difference, will undoubtedly appear in the accounts of new ILP before the second step in the process to which I have referred above is taken. The question which I had to decide is as to whether that other reserve can properly be described as a profit for the purposes of s. 45.

5.5 I turn to that question.

6. Section 45

6.1 Insofar as material, s. 45 provides as follows:-

"(1) A company shall not make a distribution (as defined by section 51) except out of profits available for the purpose;

(2) For the purposes of this Part, but subject to section 47(1), a company's profits available for distribution are its accumulated, realised profits so far as not previously utilised by distribution or capitalisation, less its accumulated realised losses so far as not previously written off in a reduction or reorganisation of capital duly made."

6.2 The term profit is not defined. It, therefore, falls to be determined from first principles and having regard to the

jurisprudence of the courts. In that regard counsel for old ILP and counsel for the notice party drew my attention to a number of authorities in which the question of the meaning of the term "profit" was discussed. I, therefore, turn to the case law.

7. The Case Law

7.1 Attention was drawn to the 14th Ed. of Buckley on the Companies Acts (1981), in which the editors had the following to say about profits:-

"What are profits: the language of Table A 1862, Art 73 was "out of profits arising from the business of the company." The present article is wider. There may be profits arising not from business, but from other sources. If a company acquires assets and with them carries on business, every increment of value, whether by way of appreciation of the assets or by way of profit earned in employing them, is in some sense profit. The corporation is much the richer, actually or potentially, whether the additional wealth arises from appreciation of assets or by fruit produced by employment."

7.2 In *Re Spanish Prospecting Company* [1911] C.H. 92, Fletcher Moulton L.J. had to consider the phrase "profits" in company law. He said the following:-

"The word 'profits' has in my opinion a well-defined legal meaning, and this meaning coincides with the fundamental conception of profits in general parlance, although in mercantile phraseology the word may at times bear meanings indicated by the special context which deviate in some respects from this fundamental signification. 'Profits' implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates.

...

We start, therefore, with this fundamental definition of profits, namely, if the total assets of the business at the two dates to be compared, the increase which they show at the later date as compared with the earlier date (due allowance of course being made for any capital introduced into or taken out of the business in the meanwhile) represents in strictness the profits of the business during the period in question."

The above analysis of Fletcher Moulton L.J. has been approved in this jurisdiction by Kenny J. in *Wilson v. Dunnes Stores (Cork) Limited* (Unreported, High Court, Kenny J., 22nd January, 1976) and in *Meagher v. Meagher* [1961] I.R. 96.

7.3 In *Meagher Kingsmill Moore J.* set out the following considerations at p. 110:-

"In my opinion the increase in value of an asset due to a change in prices during the period of its retention can properly be regarded as a profit derived from its use...It appears to me, therefore, that any increase in value of the assets of the business between the date of the dissolution and the date of realisation, which is attributable to the use of the assets (in the sense which I give to "use") is properly to be regarded as profits, to one-third of which the plaintiff is entitled."

7.4 In addition, in *Rushden Heel Company Limited v. Keene* [1946] 2 All E.R. 141, Atkinson J. stated that:-

"Profits consist of a sum arrived at by adding up the receipts of a business and by deducting all the expenses and losses, including depreciation and the like, incurred in carrying on the business."

7.5 Also in *McClelland v. Hyde* [1942] N.I. 1, Babington L.J. stated:-

"The word 'profits' generally speaking means the excessive returns over outlay, but in commercial agreements, its meaning may be and often is restricted to annual pecuniary profits as would ordinarily appear in a profit and loss account."

7.6 Attention was also drawn by counsel on behalf of the notice party to the statement by Kenny J. in *Wilson v. Dunnes Stores (Cork) Limited* to the effect that the proper interpretation of the term "profits" must be determined by context.

7.7 Finally, it is important to note *Drown v. Gaumont-British Picture Corporation* [1937] Ch. 402 which was a case concerned with the distributability of a share premium at a time when a share premium account did not have the status of paid up share capital under the Companies Acts in the United Kingdom. In *Drown* the company had made trading losses of £780,000. Against that were available €362,000 of undoubted profits and a sum of £500,000 made up in part of premiums on the issue of shares and in part of profits carried to reserve but which had, in fact, been invested in the assets of the company. The Court held that, subject to the provisions of the articles of association of any company, there was, at the level of principle, nothing legally wrong in a company dividing amongst its shareholders a premium obtained on the issue of shares so long as the sum paid out did not form part of the capital subscribed on the shares.

7.8 It is correct, as was noted by counsel for the notice party, that none of the case law deals with circumstances which are, in any real way, similar to the situation with which I was faced in these proceedings. However, it does seem that certain general principles can be gleaned from the authorities.

7.9 These principles seem to me to be the following:-

A. The current assets of a commercial entity (and in principle, these comments would apply equally to a partnership or other trading entity as they would to a company) must, in logic, represent either the accumulated capital invested into the business or company (that is, all of the capital invested less any capital taken out) together with the accumulated net undistributed profits of the business (that is, all of the profits less all of the losses less any profits distributed, in whatever way might be appropriate, to the investors).

B. In this context, the term profits includes both what might, for Revenue purposes, be described as capital gains or income.

C. In principle, the term "profits" reflects a change in the assets of the entity concerned not explained by a movement in the capital invested in the entity. Obviously if further capital is invested, or if capital is returned to the investors, then that will explain a movement in the assets of the entity which does not derive from the entity having made profits. However, when any appropriate allowance is made for further investment or return of capital, then the remaining change in the assets of the entity must be its profits (or, in the case that there be a diminution, its losses).

D. Profits over any particular period (which will, of course, be most commonly calculated on a yearly basis) amount, therefore, to the change in the assets for the period in question which cannot be explained by a movement in the capital invested.

7.10 It seems to me to follow from the provisions of s. 148 of the 1963 Act that profits, for the purposes of a company incorporated under that Act, and, therefore, profits for the purposes of considering whether distribution under s. 45 can take place, must mean profits calculated in accordance with the relevant applicable accountancy standards. It follows, therefore, that it is movements in the assets of the company by reference to such standards that needs to be considered in the context of determining whether profits, within the meaning of the Act, can be said to have occurred.

8. Analysis

8.1 There can be little doubt, and it was indeed argued by counsel for the notice party and accepted by counsel for old ILP, that the characterisation of the other reserve as profits is not consistent with the normal intuitive understanding of the term profit. As is clear from the authorities to which I have referred, the general meaning of the word profit is that a company, partnership or the like has had an improvement in its assets, not explicable by a change in the amount of capital invested. It is also true that the context in which the term profit came to be analysed in the case law to which I have referred was undoubtedly different from that with which I was concerned.

8.2 However, the starting point has to be the fact that the other reserve is required to appear in the accounts of new ILP immediately after the scheme of arrangement is implemented and as a result of the proper application of applicable accountancy standards. If it is required to appear in new ILP's accounts, then what is its status?

8.3 It seems to me that logically one of a number of propositions must be correct given that the "other reserve" is required to appear in the accounts. It must be that either:-

A. The other reserve, while appearing in the accounts, is not, in fact, an asset of new ILP at all; or

B. If it is an asset of new ILP, then it follows from the case law to which I have referred that the other reserve must be either:-

(i) Part of the accumulated unreturned capital of new ILP; or

(ii) Part of the accumulated net undistributed profits of new ILP.

8.4 Each of those possibilities carries with it its own problems. I propose looking at those problems in turn.

8.5 The suggestion that the accounts of the company are required to include the other reserve in circumstances where the other reserve is not properly regarded as an asset of the company at all, seems to me to fly in the face of the most basic principles. If the other reserve is not an asset of the company, what is it doing on its balance sheet?

8.6 On the assumption, therefore, that the other reserve must represent some form of asset of the company, then it seems to follow from the fundamental definition of profit derived from the case law, that the other reserve must either amount to part of the net capital of the company (that is all capital contributed and not returned) or alternatively, must represent part of the net accumulated and undistributed profits of the company (that is all profits less all losses less any distributed profits). It is difficult to see how there is any other box into which the other reserve can fit without doing a complete injustice to the fundamental definition of profit as set out in the case law.

8.7 Of course the other reserve does not fit neatly into either of those boxes. To regard the other reserve as capital of new ILP is every bit as counterintuitive as to regard it as profit. I came to the view that, despite the fact that the other reserve does not easily sit in either box, it would be impossible (because it would do an injustice to the fundamental definition of how the assets of a company are made up) to regard it as being neither. It followed, in my view, that it was necessary to consider which consideration (that is net accumulated unreturned capital or net accumulated and undistributed profits) did least injustice to the logic of the situation.

8.8 Before going on to that question, it is necessary to pause to ask why one is being required to do any injustice to logic in the first place. It would seem unlikely (or even impossible) to be the case that, if all matters were being dealt with by reference to the same set of first principles, any such illogicality could arise. However, here not all matters are being dealt with by the application of the same first principles. The accounts of new ILP are required, as a matter of law, to be compiled in accordance with the relevant accountancy standards and not in accordance with first principles. There have been many areas in the past where deeming one thing to be another (doubtless for good reason) has had unintended consequences. Many of the more aggressive tax avoidance schemes utilised in the past built on anti-avoidance sections of tax law, which deemed things to be things which they were not, with the purpose of ensuring that parties could not artificially avoid tax which would otherwise become due. The aggressive tax scheme would build on the deeming provision to create a structure which led to a reduction in tax somewhere in the system. Once things are deemed to be something other than what they really are, then it follows that there can be all sorts of consequences, not all of which may have been anticipated at the time when the deeming provision was put in place.

8.9 While I am not here concerned with a deeming provision, I am concerned with something that seems to me to be analogous. The proper approach to the accounting treatment of the set of loans currently held by old ILP differs depending on whether those loans continue to be held by old ILP (in which case they must be regarded as being the value of the loans less any proper provision made for impaired loans) or whether they are held by new ILP through old ILP as a

subsidiary. In those circumstances new ILP is required to treat its equity as being the same as old ILP, but at the same time is, in truth, only subscribing the market value for old ILP shares which, for the reasons set out earlier, are valued by the market at approximately two billion euro less than the equity appearing in old ILP's books. In a sense, the same set of loans are deemed to have different values when they appear in different ways in the respective accounts of old ILP and new ILP. In those circumstances it is, perhaps, not completely surprising that, on the facts of this case, the application of those accountancy standards leads to the somewhat anomalous position with which I was faced. To the extent, therefore, that I was forced to choose between two possibilities, neither of which conformed with what might logically be said to arise on first principles, it seemed to me that that choice is forced by the appropriate accountancy treatment that is mandated by law. To the extent, therefore, that the choice will necessarily fall on an interpretation which does not strictly speaking make full logical sense, then that lack of complete logic stems from the relevant accountancy treatment.

8.10 In those circumstances, it is appropriate to turn to the choice with which I was faced.

9. The Choice

9.1 I could see no even theoretical basis for an argument in favour of treating the other reserve as net undistributed capital. New ILP received its assets, in substance, by being able to subscribe for the shares in old ILP created as part of the scheme and paid up by the cancellation of the existing shares. Those existing shares had their market value. In substance, the shareholders allowed, by virtue of the scheme, new ILP to acquire shares in old ILP in return for being given an equivalent amount of shares in new ILP. The "investment" by the shareholders, as a matter of reality, was the value of their shareholding which in substance was its market value. The other reserve was in addition to that sum. In those circumstances it is very hard to see how there could be any basis for treating it as capital. On the other hand there is a sense (albeit somewhat artificial), on which it could be said that the other reserve could be treated as a profit. The effect of the accountancy standards to which I have referred means that an investment by new ILP in obtaining the shares of old ILP for a value which, in substance, is of the order of €1.6BN must be written, at least initially, into the books of new ILP, at a value of approximately €3.6BN. While it is highly artificial to put it this way, there is at least a sense in which one could regard that fact as giving rise to an instantaneous profit in that an investment of €1.6BN acquires an asset which, while worth €1.6BN, has to be written into the books of the company in a manner which reflects the company as having assets of €3.6BN. It is only a profit in that sense. It only arises because the transaction requires the additional €2BN to be written into the books of the company. It is not a profit in any real or tangible sense. However, it seems to me that it can properly be regarded as a profit deriving from the need, in order to conform with company law, that the additional €2M requires to be written into the books of the company as a result of the transaction.

9.2 In that sense it seemed to me that treating the other reserve as a profit did less injustice to a logical approach to the company's accounts than treating it as net unreturned capital. For the reasons which I have already set out, I was persuaded that to regard the other reserve as being neither net accumulated unreturned capital or net accumulated undistributed profits still less as not being an asset at all, would do a level of injustice to the logic of the situation which could not be stood over. It followed that the other reserve had, therefore, in my view, to be treated as either capital or profit. It seemed to me that treating the other reserve as profit did less injustice to first principles than any other possible approach. It was for those reasons that I was satisfied that the other reserve was profit for the purposes of s. 45.

9.3 It was common case between the parties, and I agree, that, on the basis of the evidence of Ms. Curtis, it was clear that, in the event that, as a matter of law, as opposed to a matter of accountancy, the other reserve was properly to be treated as a profit, that it could be said, in the circumstances of the scheme, that it should be treated as a realised profit. It follows that I was satisfied that the other reserve was a realised profit capable of distribution for the purposes of s. 45.

10. Conclusions

10.1 I, therefore, indicated to the parties, and now confirm, that in my view, in the special and unusual circumstances of this case, the other reserve, arising in the way in which it does as a result of the proper application of relevant and applicable accountancy principles, gives rise to a realised profit for the purposes of s. 45.

10.2 It is also obvious that the unusual facts of this case have demonstrated that there is a problem with the relevant accountancy standards, at least insofar as they apply to circumstances such as those which have arisen in this case. There is, of course, an entirely logical basis for each of the accountancy principles looked at by itself. It may well be that the cumulative effect of a number of different provisions (each making sense on its own) has given rise to the unusual circumstances which have arisen in this case. Be that as it may, this case shows the need for an urgent revision, at least in part, of the relevant accountancy principles. The whole point of accountancy standards is to maximise the chances of the accounts of a company (or indeed any other business) properly reflecting the true economic position of the business concerned. Where the facts of a case (even an unusual one) demonstrate that that may not be always the case, then the proper solution is to revisit the appropriate accountancy standards to ensure that the lacuna that has been identified is dealt with in an appropriate fashion. It is not, of course, for me to suggest the manner in which the relevant standards ought be adjusted to prevent the problem which is at the heart of this case reoccurring.