Collas Crill explains... Share buybacks and redemptions under Jersey law

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This guide is one in a series of 'Collas Crill explains...' in which we examine areas of Jersey law that frequently arise in practice.

Jersey is a popular place to establish an asset holding company because the **Law** is modern, flexible and modelled on English companies legislation.

This guide looks at the key things you need to know about share buybacks and redemptions under the **Law**.

Words in bold text are defined at the end of this guide.

Buying shares

General requirements

A **company** may buy any of its **limited shares** (whether or not they are redeemable) including buying **depositary certificates** relating to **limited shares** if:

- the shares are fully paid;
- the directors who authorise the buyback make a solvency statement in the statutory form (See *Solvency statement* below);
- the shareholders pass a **special resolution** approving the buyback unless it is a wholly owned subsidiary;
- after the buyback, it would have at least one shareholder which holds shares other than **redeemable shares** or treasury shares; and
- it complies with any provisions in its **M&A** regarding the buyback.

Additional requirements for listed shares

Where a **company** buys its shares or **depositary certificates** on a stock exchange, the **special resolution** approving the buyback must state the:

- maximum number of shares or **depositary certificates** to be bought;
- maximum and minimum prices which may be paid (which may be specific prices or a basis or formula by which those prices may be calculated); and

- date on which the authority will expire, which must not be more than five years after the date on which the **special resolution** is passed.

Additional requirements for unlisted shares

Where a **company** buys its shares or **depositary certificates** and they are not listed on a stock exchange:

- the shares or **depositary certificates** may only be bought pursuant to a contract approved in advance by an ordinary resolution; and
- the shares to which the buyback relates may not vote in respect of the:
  - **special resolution** to approve the buyback of shares or **depositary certificates**; or
  - ordinary resolution to approve the contract to buy the shares or **depositary certificates**.

Redeeming shares

A **company** may redeem its redeemable **limited shares** if:

- the shares are fully paid;
- the directors who authorise the redemption make a solvency statement in the statutory form (See *Solvency statement* below); and
- it complies with the provisions in its **M&A** regarding the redemption.

Payments

A **company** may:

- pay the buyback or redemption price in cash, other assets or a combination of both; and
- fund the buyback or redemption from any source, including:
  - (in the case of a par value **company**) its the nominal capital account or share premium account; and
  - (in the case of a no par value **company**) its stated capital account.

Effect on share capital

In the case of a par value **company**, a buyback or redemption of shares:

- reduces its issued share capital by the nominal amount of the shares that have been bought or redeemed, unless those shares are held as treasury shares; and
- does not reduce its authorised share capital.

Solvency statement

The solvency statement to be made by the directors who authorise the buyback or redemption (mentioned in *Buying shares* and *Redeeming shares* above) is that they have formed the opinion that:

- immediately following the date on which the payment is proposed to be made, the **company** will be able to discharge its liabilities as they fall due; and
- having regard to:
  - the prospects of the **company** and to the intentions of the directors with respect to the management of the **company's** business; and
  - the amount and character of the financial resources that will in their view be available to the **company**, the **company** will be able to:
  - continue to carry on business; and
  - discharge its liabilities as they fall due,

  until the first to occur of the expiry of the period of 12 months, immediately following the date on which the payment is proposed to be made or the **company** is wound up on a solvent basis.

The solvency statement is normally included in the minutes of meeting of directors which approves the buyback or redemption or in a separate document that is signed by each director who authorised it.

Treasury shares

A **company** may hold as treasury shares any shares that it has bought (including by buying **depositary certificates**) or redeemed if:

- the **company** is not prohibited by its **M&A** from holding treasury shares; and
- its shareholders have passed an ordinary resolution authorising it to hold the shares as treasury shares.

A **company** that holds shares as treasury shares may cancel them, sell them, transfer them for the purposes of an employee share scheme or hold them.

While a **company** holds shares as treasury shares, the rights attaching to the shares are generally suspended. Consequently, the **company** cannot:

- exercise any voting rights attached to the shares and the shares are disregarded when determining the outcome of a vote;
- receive any dividends or other distributions in respect of the shares (other than fully paid bonus shares); and
- the rights and obligations attached to the shares cannot be exercised or enforced by or against the **company**.

Cancellation of shares

Where a **company** buys (including by buying **depositary certificates**) or redeems its shares, those shares will be treated as cancelled upon being bought or redeemed, unless it elects to hold them as treasury shares.

Potential liabilities of directors

Solvency statements

A director who makes a solvency statement, without having reasonable grounds for the opinion expressed in it, is guilty of an offence and, on conviction, is liable to a fine, imprisonment for up to two years or both.

Breach of duty

If:

- a director authorises a buyback or redemption of its shares;
- the **company** subsequently becomes insolvent; and
- the Jersey court finds that the director breached the director's duties to act in the best interests of the **company** and to exercise the necessary care, diligence and skill,

the director will be liable to the **company** for any damage suffered by it.

Share buybacks and redemptions

If:

- a **company** has its assets declared *en désastre* (ie it is placed in insolvent liquidation) or commences an insolvent winding up;
- the **company** has made a payment to buy or redeem shares in the 12 month period before the declaration was made or the winding up started;
- the payment was not lawfully made; and
- the aggregate realisable value of the:
- **company's** assets; and
- amount contributed to the **company's** assets by its shareholders,

is insufficient to pay the **company's** liabilities and the expenses of the *désastre* proceedings or winding up,

the court may, on the application of the Viscount (the executive officer of the Jersey court) or liquidator, order a director to contribute to the assets of the **company** to enable the shortfall to be met.

A director who has made a solvency statement in connection with the buyback or redemption of shares, may be ordered (jointly and individually with any other person liable to contribute in connection with the unlawful payment) to contribute to the assets of the **company** an amount not exceeding the amount of the unlawful payment, unless the court is satisfied that the director had grounds for holding the solvency opinion.

Relief

If an action is brought against a director alleging a breach of the director's duties to the **company**, the director may apply to the Jersey court to be relieved from any liability.

The **Law** allows the court to relieve the director (in whole or part) from liability for negligence, default or breach of duty, or trust on any terms the court thinks fit if it appears to the court that:

- the director acted honestly; and
- having regard to all the circumstances, the director ought fairly to be excused from liability.

In practice, however, the court is only likely to exercise these powers in favour of a director in rare cases.

Potential liabilities for shareholders

In the circumstances mentioned in *Potential liabilities of directors - Share buybacks and redemptions* above, a person from whom shares were bought or redeemed is liable to contribute to the assets of the **company** an amount not exceeding the amount of the unlawful payment received by the person.

The court will not order the person to contribute to the assets of the **company** unless the court is satisfied that, when the person received the unlawful payment, the person knew, or ought to have concluded from facts known to the person, that immediately after the unlawful payment was made:

- the **company** would be unable to discharge its liabilities as they fall due; and
- the realisable value of the **company's** assets would be less than its aggregate liabilities.

Terms used

company means a Jersey company that is not an open ended investment company.

depositary certificate means an instrument (no matter what it is called) which confers on the holder rights (other than an option or a security interest) in respect of **limited shares** held by another person.

Law means the Companies (Jersey) Law 1991.

limited share means a share in respect of which the liability of the holder to contribute to the debts of the **company** is limited to the amount (if any) unpaid on it.

M&A means a **company's** memorandum and articles of association.

redeemable share means a **limited share** that is liable to be redeemed in accordance with its terms or at the option of the company or the shareholder.

special resolution means a resolution that is required to be passed as a special resolution by a majority of two thirds (or any higher majority specified in the company's articles of association) of shareholders who (being entitled to do so) vote at a meeting of the company of which not less than 14 days' notice has been given.

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