

Companies Act 2006: October 2008 changes

Business Law Department

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The Story So Far

- Companies Act 2006
- Implementation in Stages
- Transitional Rules
- Guidance – published after implementation
- Variable effects on existing companies



The Story So Far

- January 2007
 - Communications between members and companies
 - Hard copy, electronic or website
 - Directors' liability for false & misleading reports



The Story So Far

- April 2007
 - Repeal of director's notification of dealing in company shares
 - Takeovers



The Story So Far

- October 2007
 - Statutory Duties of Directors
 - SS171-178
 - Especially 172
 - New rules on Directors dealing with own companies
 - Loans to Directors permitted
 - Payments for loss of office more regulated
 - Derivative Actions against Directors



The Story So Far

- October 2007
 - Written Resolutions by Majority
 - Effect on inconsistent Memorandum and Articles of Association?
 - New statutory procedure overrides
 - New Table A (modified twice)
 - Removes obsolete rules on Directors
 - Takes out old regulation on written resolutions



The Story So Far

- Casting Votes
 - SS 281 and 282 abolish casting vote
 - Saving for Articles of Association which provide for it
 - Can revert back if had it before 01.10.07
- Private Company AGMs
 - Still required if in Articles of Association
 - But not if Elective Resolution in place to dispense with AGMs
 - 1948 Table A companies most affected



The Story So Far

- April 2008
 - New Accounts and Audit Rules
 - Financial years starting on or after 6 April 2008
 - Reduced time for filing
 - New rules on rolling audit appointments
 - Audit Liability Limitation Agreements
 - Company Secretaries
 - Not needed in a private company
 - Execution of Documents
 - New rules on how to sign off contracts and deeds



Company Names

Alexandra Sagar



Company Names

- Common misconceptions under the current law
- Relationship with
 - Trade Marks
 - Common Law
- Objections can only be filed by companies already incorporated
- Discretion of Companies House



Company Names

- Part 5 of the Companies Act 2006
- Prohibited Company names
- Words or expressions - permission
- Reference to the corporate form
- Same or similar to those already registered
- Powers of the secretary of state to direct a change of name
- The process to change your company name
- Rules on disclosure of company names
- Why do we have these provisions?



Company Names

- 1 October 2008
- ss 69 – 74 CA 2006

- Company Names Adjudicator
- UK Intellectual Property Office



Company Names

- New ground to challenge a registered company name
- Similarity to business name
- Two potential grounds for filing an objection under section 69
 - the same + goodwill
 - sufficiently similar + mislead by suggesting connection
- Seven possible defences
- The burden of proof rests with the respondent



Company Names

- Procedure
- The Company Names Adjudicator Rules 2008 - draft
- Filing an objection
- Respondent files defence
- Evidence rounds
- Decision?
- Oral Hearing



Company Names

1. The name was registered before the applicant started to develop the goodwill
2. The Company is operating under the name
3. The Company is proposing to operate under the name and incurred substantial start up costs in preparation
4. The Company is formerly operating under the name and is now dormant



Company Names

- 5 The name was registered in the ordinary course of a company formation business and available for sale on standard terms
 - 6 The name was adopted in good faith
 - 7 The interests of the applicant are not adversely affected to a significant extent
- Defences 1- 5 may still fail
 - Money (or other consideration)
 - To prevent him from registering the name



Company Names

- Hearings can be held in public
- Costs
 - Adjudicator may at any stage award costs to any party
 - Security for costs
- Open hours
 - Mon – Fri 9.00am until midnight!
 - Saturday 9.00am until 1.00pm



Company Names

- Direction must be given within 12 months of registration of the offending company
- Deadline for complying
- Direction must be in writing
- Failure to comply with the direction is an offence
 - By Company
 - Every officer of the company in default



Company Names

- The new rules are not a substitute for protection of your business's Intellectual Property
- Trade Marks
- UK Intellectual Property Office
- Different classes of goods and services
- Can last indefinitely
- Advantage – role of Trading Standards



Directors

Pauline Rigby



Directors

- Companies required to have at least one director who is a natural person
- CA06 s155 – 156
- Power to order appointments
 - Offence by company and officers not to comply
 - Level 5 fine (£5000) and daily default fine (£500)
- Grace period until 2010 for companies having only corporate directors at 8 November 2006 (The Companies Act 2006 (Commencement No. 5, Transitional Provisions and Savings) Order 2007 Schedule 2 Part 4 paragraph 46)



Directors

- Companies required to have no directors aged under 16
- CA06 s157 – 159
- Existing appointments end automatically on 1 October 2008
- Later appointments void
- Company must update own registers
- Registrar will alter at Companies House



Conflict of Interest

- Duty to avoid conflicts of interest (s175)
- Applies in particular to exploitation of property information or opportunity (whether or not the company could take advantage)
- No infringement if:
 - Cannot reasonably be regarded as likely to give rise to a conflict of interest or
 - Authorised by the directors



Conflict of Interest

- Authorisation by directors (s175(5)-(6))
- In a private company there must be no prohibition in the Articles
- In a public company there must be express permission in the Articles
- Authorisation effective only if:
 - Quorum is present, not counting interested directors and
 - Interested directors do not vote or authorisation would have been approved if interested directors had not voted



Conflict of Interest

- Duty not to accept benefits from third parties (s176)
- “conferred by reason of: his being a director or his doing (or not doing) anything as a director”
- No infringement if:
 - Cannot reasonably be regarded as likely to give rise to a conflict of interest or
 - Benefit is from a company providing the director’s service



Conflict of Interest

- Duty to declare interest in proposed transaction or arrangement (s177)
- Declare the nature and extent of interest if directly or indirectly interested and update or correct as required
- Declare before the company enters into the transaction or arrangement
- No requirement to declare if:
 - not aware (means nothing of which “ought reasonably to be aware”)
 - cannot reasonably be regarded as likely to give rise to a conflict of interest or
 - other directors already aware or ought to be or
 - Relates to service contract and already addressed



Conflict of Interest

- Duty to declare interest in existing transaction or arrangement (s182)
- Declare the nature and extent of interest if directly or indirectly interested and update or correct as required
- Declare as soon as reasonably practicable
- No requirement to declare if:
 - Already declared under s177 or
 - not aware (means nothing of which “ought reasonably to be aware”)
 - cannot reasonably be regarded as likely to give rise to a conflict of interest or
 - other directors already aware or ought to be or
 - Relates to service contract and already addressed



Conflict of Interest

- Offence of not declaring interest in existing transaction or arrangement (s183)
 - Unlimited fine in Crown Court, Maximum Fine in Magistrates (£5000)
- Notice of declaration in writing (s184)
 - Hard copy – only electronic if agreed
 - Treated as in minutes of next meeting
- General Notice (s185)
 - Must give nature and extent of interest in other entity or connection to person
 - Must be given at or brought to attention of a board meeting



Conflict of Interest

- Declaration of interest in case of company with sole director (s186)
 - Where should have 2 or more
 - Must be in writing
 - Must be brought to next board meeting
- Shadow Directors (s187)
 - Notification of interest in existing transaction
 - Must be in writing (specific or general notice)
 - S177 already applies to shadow directors




Power of Court to Grant Relief

- Applies in certain cases (s1157)
- Proceedings for negligence, default, breach of duty or breach of trust
- Against an officer or auditor
- "...it appears to the court hearing the case that the officer...is or may be liable but...acted honestly and reasonably and that having regard to the circumstances of the case (including those connected with his appointment) he ought fairly to be excused..."
- Can apply for protective ruling (s1157(2))
- Judge can withdraw case from jury (s1157(3))




Reduction in Share Capital

Charlotte Wood



Reduction in Share Capital

- What is it?
- Why use it?
- How can I use it?
 - CA 1985 procedure
 - Express authority in Articles
 - 'Discernable Purpose'
 - Special resolution
 - Court application & hearing
 - CA 2006 procedure, simplifies old procedure for private companies



Reduction in Share Capital

- CA06 ss 641-644
 - No express authority in Articles
 - Special resolution of Shareholders
 - Directors' Statement of Solvency
 - Directors' additional statement
 - Registration at Companies House



Reduction in Share Capital

- Statement of Solvency: All Directors have formed the opinion that:
 - No grounds on which the company is unable to pay debts at the date of statement
 - Company will be able to pay debts due over the next 12 months
- Directors must consider all liabilities including prospective & contingent
- Offence to give statement without having reasonable grounds for opinion
 - Penalty: fine & up to 2 years imprisonment



Reduction in Share Capital

- Directors' additional statement
 - Statement of capital to include updated details of issued shares
 - Statement of validity of shareholders' resolution
- Process
 - Statement of solvency no more than 15 days before shareholders' resolution
 - Pass Shareholder resolution
 - Shareholder resolution filed at Companies House within 15 days with the 2 statements
 - Registrar must register on receipt and resolution only takes effect on registration



Reduction in Share Capital

- Proceeds of Reduction
 - General prohibition on distributing proceeds of the reduction
 - Exception: Companies (Reduction of Share Capital) Order 2008
 - If using Solvency Statement procedure or old Court procedure can treat proceeds as realised profit for the purpose of distribution to shareholders (some exceptions)



Abolition of Financial Assistance



Abolition of Financial Assistance

- CA85 prohibited a company providing financial assistance for the purpose of acquisition of shares in itself.
- The exception: 'Whitewash'
 - Shareholder Resolution
 - Directors' statutory declaration
 - Auditors' statutory and non-statutory reports



Abolition of Financial Assistance

- General prohibition will now be repealed for private companies
- BUT there may be other restrictions
 - Directors' duties
 - Insolvency rules e.g. preference, transactions at undervalue
 - Specific rules e.g. distributions, reduction in capital, registrations etc.
 - Wait until October?



Abolition of Financial Assistance

- Directors' Protection
 - Board minutes
 - Shareholder resolution?
 - Distributable profit?
 - Future solvency?
 - Auditor's opinion?



Abolition of Financial Assistance

- Lenders' Protection?
 - Non-statutory report still required?
 - Variation to usual pre-conditions
- Is 'Whitewash' dead?
 - Same thought process for directors
 - No statutory declaration
 - Potential cost saving if auditors & lawyers not required
 - Only time will tell



Pick & Mix

Daniel Milnes



Information on Voting

- The Treasury or the Secretary of State may make provision by regulations requiring certain institutions to provide information about the exercise of voting rights attached to certain shares
- Types of institutions include: unit trust schemes, open ended investment companies, investment trusts, pension schemes, undertakings authorised to carry on long term insurance business
- Types of shares include: shares of a description traded on a specific market and to which the institution has or is taken to have an interest



Political Donations

- A company must not make a political donation or incur political expenditure unless authorised by a resolution of the members of a company (and, in the case of a subsidiary, a resolution of the members of the parent company)
- If unauthorised, the directors in default are joint and severally liable to make good to the company the amount of the donation, plus interest and to compensate the company for any loss or damage sustained as a result of it being made



Political Donations

- From October 2008 the Act will apply to donations and expenditure relating to independent election candidates as well as political parties and political organisations
- There is an exemption to the rule that means that donations amounting to not more than £5,000 in a 12 month period do not require authorisation



Trading Disclosures

- The Companies (Trading Disclosures) Regulations 2008 in effect from 1 October 2008
- Replaces CA85 ss305, 348-9, 351 and Business Names Act 1985 s4
- Obligations to display:
 - In characters that can be read with the naked eye
- Where?
 - Registered Office
 - Inspection Place
 - Business Locations
 - Letters and other documents
 - Websites



Trading Disclosures

- Display registered name at
 - Registered Office,
 - Inspection Places and
 - Business Locations
- Easily seen by any visitor
- Display continuously
 - but if 6 or more share, display 15 seconds every 3 minutes



Trading Disclosures

- Disclose registered name in all letters, publications, cheques, orders, invoices, applications for licences etc
- Plus, in letters, orders and websites:
 - Where registered and number
 - Registered office
 - CICs and s30 Companies: state that limited
 - If disclose share capital – paid up only
- If letterhead names a director, name all directors
- Disclose Registered Office and Inspection Places on request



Trading Disclosures

- Penalties for failure to comply
- Offence by company and officers in default
- For each person committing the offence:
 - Fine up to level 3 (£1000)
 - £100 per day running fine for continued default
- More exemptions coming in October 2009
 - BERR says prosecutions unlikely in between



Forthcoming Attractions



Forthcoming Attractions

October 2009:

- General introductory provisions (ss1-6)
 - Types of companies and CICs
- Company formation (ss7-16)
 - New set form Memorandum and process
- A company's constitution (ss17-38)
 - Default application of model articles
 - Entrenchment provisions possible
 - Treat old Memoranda as Articles
 - New rules on objects of company



Forthcoming attractions

- A company's capacity and related matters (ss39-52)
- A company's name (ss53-85) (remaining sections)
- A company's registered office (ss86-88)
- Re-registration as a means of altering a company's status (ss89-111)
 - New procedures and information requirements



Forthcoming attractions

- A company's members (ss112-144)
 - New rules on keeping registers and dealing with requests for information
- A company's share capital (ss540-657)
 - New references to issued and allotted shares
 - Authorised share capital abolished
- Acquisition by limited company of its own shares (ss658-737)



Forthcoming attractions

- A company's annual return (ss854-859)
- Company charges (ss860-894)
- Dissolution and restoration to the register (ss1000-1034)
 - New out of court restoration process
- UK companies not formed under the Companies Acts (ss1040-1043)
- Overseas Companies (ss1044-1059)
 - Regulations to apply parts of CA06



Forthcoming attractions

- Registrar of Companies (ss1060-1120)
 - Wider powers to make rules for form and processing of documents delivered by companies
- Company directors: foreign disqualification etc (ss1182-1191)
- Business names (ss1192-1208)
 - Permitted names, disclosures etc for all businesses



Forthcoming attractions

Draft SIs:

- The Companies (Reduction of Share Capital) Order
- The Companies Act 2006 (Commencement No. 7 and Transitional Provisions) Order
- The Companies (Model Articles) Regulations
- The Companies (Disclosure of Address) Regulations



Forthcoming attractions

- The Companies Act 1985 (Annual Return) Regulations 2008
- The Companies Act 2006 (Annual Return and Service Addresses) Regulations
- The Companies (Registrar of Companies and Applications for Striking Off) Regulations
- The Companies (Registration) Regulations



Forthcoming attractions

- The Companies (Company Records) Regulations
- The Companies (Fees for Inspection and Copying of Company Records) Regulations
- The Companies (Shares, Share Capital & Authorised Minimum) Regulations
- The Companies (Trading Disclosures) (Amendment) Regulations