

corporate and commercial e-bulletin

Welcome to the first edition of Pritchard Englefield's corporate and commercial e-bulletin.

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SHAREHOLDER ACTION! DERIVATIVE CLAIMS UNDER THE COMPANIES ACT 2006

It has for a long time been a cornerstone of English law that a shareholder of a company cannot bring an action *on behalf of* the company for a wrong done *to* the company, for example in respect of wrongdoings by its directors. Such claims could only be brought by the company itself as the injured party. This is one of the principles laid down in the case of *Foss -v- Harbottle* (1843) which also set out the rule that the courts would not intervene in the internal management of a company acting within its powers (the "majority rule" principle).

Limited exceptions to the rule in *Foss -v- Harbottle* have developed over the years and the ability of shareholders to bring so called "derivative claims" is now also reflected in the Companies Act 2006. As a result, Part 11 of the Companies Act 2006 sets out the circumstances and the steps that need to be taken in order for a member to pursue a claim on behalf of the company.

The New Law

Section 260 of the Companies Act 2006 provides that a derivative claim may be brought in respect of an "actual or proposed act or omission involving negligence, default, breach or duty or breach of trust by a director of the company". It should be noted that it is not necessary for the director who is accused of the breach to have personally benefited from the breach or that such director, alone or together with others, controls the majority of the company's shares.

At the time when the relevant sections of the Companies Act 2006 were discussed in Parliament, there were concerns that the derivative claims procedure would enable activist shareholders to bring vexatious claims against large corporations, thereby log-jamming the courts and distracting management from running the business. For that purpose, various safeguards were built into the legislation and until now, concerns connected with the derivative claims procedure have not materialised.

The First Stage

In order to bring a claim under the derivative claims procedure, a shareholder will first need to establish a prima facie case that there has in fact been a wrongdoing by a director to the detriment of the

company. At this stage, the court will only take evidence from the applicant shareholder and initially there will be no hearing. As a result, only the applicant will incur costs and this is the main defence of the Companies Act 2006 against shareholders using the derivative claims procedure for the purpose of "fishing litigation".

In the event that the court finds that there is a prima facie case against the directors, the matter proceeds to a full application hearing which will also involve the company and its directors, as appropriate.

The Second Stage

On having heard both sides to the claim, the court must dismiss the claim if it finds that a hypothetical director acting in accordance with his statutory duties would not seek to continue the claim or where the matter has been authorised or ratified by the company.

A company may authorise or ratify a matter which would otherwise amount to a breach of duties by a director by passing ordinary resolution (disregarding any votes of the director in question or of any member connected with him). Certain acts are, however, not capable of authorisation or ratification, for example a deliberate misappropriation of company property by the director or negligence benefiting the director personally.

In deciding whether to allow the claim to proceed, the court will therefore also take into account certain other factors when deciding whether to allow a derivative claim to continue, such as whether the member is acting in good faith in seeking to continue the claim, whether the independent majority of the shareholders are being supportive and the importance of the matter generally.

Conclusion

Shareholders with a grievance against the company's directors may well be put off from bringing a derivative claim by the fact that they would not be able to recover any costs, even if judgment is made in their favour. However, derivative claims are very much a measure of last resort and shareholders may find claims e.g. under a shareholders' agreement or for "unfair prejudice" under section 994 of the Companies Act 2006 more attractive.

NOT IN MY FRONT YARD: DOORSTOP SELLING REGULATIONS 2008

The rather wordy Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008 ("the Regulations") came into force on 1 October 2008, replacing the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987. The effect of the Regulations is to afford protection to consumers entering into contracts during solicited and unsolicited visits from traders made at their home, place of work or whilst on an excursion organised by a trader.

Generally speaking, the Regulations have wider application than the previous legislation, and provide for the following:

- The Regulations apply to the sale of goods or services of a value of £35 or more.
- The statutory cooling-off period is set at seven calendar days from receipt of notice of the right to cancel the contract.
- Traders must inform consumers of the cooling-off period, during which consumers may cancel the contract they have entered into.
- In providing notice of the right to cancel the contract, traders must include a statement that payment may be required in the event that a consumer requests performance of the contract before the expiry of the cooling-off period and the contract is subsequently cancelled.
- Notice of the cancellation right must also be prominently displayed in the contract document, where any such document forms whole or part of the contract.
- Failure to provide such notice, or include all required information in that notice, constitutes an offence, which may result in a fine of up to £5,000.
- Any requests by the consumer for performance to be effected before the expiry of the cooling-off period should be agreed in writing.
- The scope of the Regulations is extended to solicited calls by traders concerning the supply of services to build extensions, patios, driveways and conservatories.

- Any credit agreements related to agreements covered by the Regulations are automatically cancelled where a cancellation notice is served on a trader.

TOP TIPS: HOW TO DO BUSINESS IN DIFFICULT TIMES?

The current crisis sees many businesses faced with the inability to obtain credit from their banks and some may also be threatened by insolvency. Although there are unfortunately no miracle solutions, what can you do to avoid being the next credit crunch victim?

1. Review existing credit agreements
If you are in danger of breaching the terms of your loan agreements, do not take a backseat position. Favour pro-activity and contact your bank/creditors to explain your financial difficulties to see whether a more favourable repayment plan can be agreed for the short term.
2. Re-evaluate your budget and business plan
It is likely that the company's budget and business plans were decided some months ago. See those as work in progress and tailor them to the current situation in order to assist the management in taking the best decisions for the survival and successful future of the business.
3. Monitor your financial position
In the light of various credit establishments experiencing trouble, you should check the safety of your cash deposits and diversify your portfolio. In addition, you should keep on eye on your cash flow in order to ensure that you will be able to pay your debts as they fall due in the short and medium term.
4. Review existing commercial arrangements and market yourself
Investigate the financial health of your suppliers and customers and try not to rely too heavily on only one or two. Consider stepping up your marketing efforts at a time when your competitors' efforts are likely to have become scarce.
5. Keep your work force happy
Remember that a happy and productive company's work force is generally key to its success. Make sure you congratulate your employees when they have done well and think of cost effective ways to incentivise your staff.
6. Directors beware
Although directors are generally not liable for the debts of a company, personal liability may be incurred in certain situations, including where insolvency looms. Directors are therefore advised to seek legal advice if the company is likely to face financial difficulties.

A well-prepared company is a company that will be equipped to survive the current economic downturn. If you need any further advice, please do not hesitate to contact us and we will happy to assist.

CORPORATE MANSLAUGHTER

Cotswold Geotechnical Holdings has become the first business to be charged under the Corporate Manslaughter and Corporate Homicide Act 2007. The firm was charged with corporate manslaughter after a junior geologist died when the sides of a pit he was collecting soil samples from, collapsed. This case highlights the need for businesses to be pro-active in ensuring the health and safety of their workers.

We will hold a seminar about health and safety issues on 15 October 2009 at our offices. For more information, please contact Ysaline Clero at yclero@pe-legal.com.

WHAT'S NEW AT PRITCHARD ENGLEFIELD?

New Partners

The Partners of Pritchard Englefield are delighted to announce that **Mark Harden** has joined the firm as a Partner in the Corporate Department and that **Geraldine Fabre** has become a partner of the firm.

Mark advises on a wide range of corporate transactions, including mergers and acquisitions, joint ventures and re-organisations. He also advises on all forms of partnerships. Mark has a wide range of clients from large corporations, including banks, insurance companies, hi-tech companies and construction companies to small and medium sized owner-managed businesses. A high proportion of the transactions he acts on have an international element and Mark has many clients in Russia and the Commonwealth of Independent States.

Prior to becoming a solicitor, Mark had a career in the electronics industry, including two years as a Commercial Manager at the Marconi Company. He completed his legal training and spent the first five years of his legal career at a magic circle firm. Since becoming a Partner, he has held a number of law firm management positions, but still enjoys the buzz of a complex corporate transaction.

You can contact Mark at: mharden@pe-legal.com.

Geraldine Fabre qualified as a solicitor in 1999. After a few years as an in-house counsel for a multinational utility company, she specialised in mergers and acquisitions work advising both English and foreign business of varying sizes, ranging from multinational corporations to smaller, family-run enterprises. She has strong experience in the areas of M&A, Corporate Finance, private equity and banking acting for Limited Companies, PLCs and institutional investors based in the UK or abroad.

As a native French speaker and dually-qualified lawyer, she also has a particular focus on assisting French-speaking clients with their legal requirements in the UK and developing the firm's international practice.

You can contact Geraldine at: gfabre@pe-legal.com.

Corporate Recovery and Insolvency Group

Pritchard Englefield has successfully launched its corporate recovery and insolvency service, a cross-departmental team of lawyers, each with relevant expertise to advise clients in financial difficulties. Click [here](#) for more information.

On Tuesday 9 June 2009, members of the Group will be presenting an evening seminar on "Business Opportunities in the Downturn", considering the main issues when you buy businesses or assets of companies in financial difficulty.

For further information or to register to attend this seminar, please email Ysaline Clero at yclero@pe-legal.com.

ABOUT US

Pritchard Englefield is a niche City firm of solicitors covering company commercial law, IP/IT, corporate/banking, disputes resolution, commercial property and construction, employment, probate and tax planning, family and personal injury. Further information can be found on our website at www.pe-legal.com.

We also prepare an employment and an information technology and e-commerce e-bulletins giving an overview of some of the more significant and interesting developments in this fast-moving area. If you wish to receive these bulletins, please email yclero@pe-legal.com with **Subscribe to employment e-bulletin** or **Subscribe to information technology and e-commerce e-bulletin** as the subject line.

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