

# corporate and commercial e-bulletin

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## **COMPANIES ACT 2006: ARE YOU UP TO DATE?**

On 1 October 2009 the remaining provisions of the Companies Act 2006 were implemented, thereby finalising a far-reaching reform of English company law.

The final stage of the implementation of the Companies Act 2006 had arguably the biggest impact on private limited companies and it is recommended that companies take certain steps to ensure that their affairs are up to date.

In particular:

- The current form of model articles of association, known as "Table A" has been revised and replaced with a new form of "Model Articles" which contains updated references to the new provisions of the Companies Act 2006. The new Model Articles have been designed to simplify corporate affairs for many private limited companies and although it is not obligatory for companies to adopt the new Model Articles, this would allow them to take advantage of certain enabling provisions which were introduced by the new regime.
- The Companies Act 2006 introduces a streamlined form of Memorandum of Association and any "power" contained in existing Memoranda of Association will be considered part of the company's Articles and potentially a restriction of the company's ability to do business. As a result, companies may find that their ability to carry on business is no longer unlimited, unless such restrictions are removed.
- The concept of a company having an "authorised share capital" has been removed and new companies are therefore free to issue shares without such limitation. As regards an existing company, any reference to its authorised share capital in its Memorandum or Articles will be deemed to be a restriction on the company to issue shares beyond that limit.

For many companies it will be appropriate to update their Articles of Association and to remove any restrictions on their objects contained in their Memoranda of Association. This will also remove any scope for inconsistencies arising from the introduction of the Companies Act 2006 and update all statutory references.

NB: In some cases it will be necessary to obtain the consent of third parties, such as banks and other institutions, before a company's Articles of Association can be changed.

## **FOCUS ON HEALTH & SAFETY**

On 15<sup>th</sup> October 2009, David Glass (Corporate Partner) and Nelu Abeygunasekera (Employment Partner), combined forces with Oliver Campbell of Counsel, a barrister at Henderson Chambers, Temple, London to give a seminar on health and safety issues.

Nelu concentrated on health and safety issues in so far as they affected the employer employee relationship and quoted numerous statistics to show what a difference for the better having a clear health and safety policy makes. She referred to numerous relevant statutes both at the UK and the European level including the seminal Health and Safety at Work etc. Act 1974 which forms the foundation of modern UK health and safety law.

David Glass then talked about the health and safety duties of directors towards their companies and the wider public. He pointed out that there is no comprehensive express positive health and safety duty on directors but that there were a number of individual duties and obligations which meant that in effect there was a health and safety duty equal to the sum of its parts. He referred to relevant provisions of the Companies Act 2006 and to the Health and Safety (Offences) Act 2008 and also to Section 37 of the Health and Safety at Work etc. Act 1974 the last of which imposed criminal liability on directors where they had consented to or connived at or by their neglect caused their companies to commit health and safety offences.

Oliver Campbell spoke about the Corporate Manslaughter and Corporate Homicide Act 2007 which revolutionises the basis on which companies could be convicted of manslaughter and in the process of so doing extends the liability of the companies concerned. Directors cannot be guilty of corporate manslaughter in this context but to them the old common law of manslaughter could still apply.

The seminar was well attended by health and safety professionals, specialists in corporate social responsibility and a number of clients from the commercial and also the not-for-profit sectors.

## **BUSINESS OPPORTUNITIES IN THE DOWNTURN**

This article is a summary of a seminar delivered by Thilo Schneider, Helen Clifford and Nelu Abeygunasekera at Pritchard Englefield's offices on 23 June 2009.

### **Administrations**

The economic downturn presents opportunities for companies that are able to take advantage of businesses in financial distress having to sell off their assets or business units at a discount, often as part of a formal insolvency procedure.

The Enterprise Act 2002 introduced a new out-of-court procedure for the appointment of administrators which has made the appointment of an administrator quicker and more cost-effective than was previously possible.

As a result of the increase in popularity of the out-of-court procedure, administrations have become the principal means by which a fixed and floating charge holder would enforce his security and a buyer dealing with a company in financial difficulties is most likely to be dealing with an administrator.

### **Structuring the Deal**

The sale of the assets of an insolvent company may take a number of forms, depending on the types of assets involved and the interest they generate in the market. Sometimes a tender or an auction process may be appropriate.

The sale of the business – as opposed to individual assets – of the insolvent company will most commonly be carried out under a business sale agreement individually negotiated between the buyer and the administrator (acting as agent of the company).

### **Buyer's Concerns**

The purchaser of a business or assets from an administrator will have concerns which would not arise in "normal" transactions.

The first issue for the buyer to consider is whether the administrator has the necessary powers to enter into the transaction. This is the case even though the Insolvency Act 1986 states that a person dealing with the administrator in good faith and for value need not inquire whether the administrator is acting within his powers and also that an administrator's acts are valid despite any defect in his appointment or

qualification.

The second issue a buyer will be particularly concerned about when it comes to purchasing assets from the administrator is that the administrator will almost certainly give no warranties or representations as to the quality of and title to the assets he is selling on behalf of the company.

### **Due Diligence**

As a result, the buyer of the business or the assets from an administrator will want to conduct as much due diligence as he can into the affairs of the insolvent company.

#### **1. Who owns the rights/assets?**

One of the most common problems relates to retention of title. If a supplier of goods has supplied those goods under a valid retention of title clause then they will still own those goods and may be entitled to come onto the company's premises to collect and take them away.

#### **2. The special position of intellectual property**

The general principle with intellectual property is that the first creator is usually its owner. This means that if the target company has sub-contracted out some of its work to a third party then unless that third party has specifically assigned their rights they will still own them and the target company will only have an implied licence (on uncertain terms) to use the rights.

Intellectual property rights may be owned jointly by the target company and third parties with whom they have co-operated on specific projects and it will be important to establish what these rights might be and how ownership or a right to use can be obtained.

Although the law also provides that an employer owns the rights that an employee creates this principle is also subject to an important exception. This is that only work which is created during the normal course of employment is so owned.

Buyers will also need to consider if there are any third party claims arising from the rights such as for example a claim that the rights infringe that third party's rights.

#### **3. Recommendations**

Buyers will need to be conscious that this is very much a situation of "buyer beware". Administrators and other insolvency practitioners will not give warranties or indemnities save in very exceptional circumstances and for very limited matters.

### **Employment Considerations**

An insolvency situation gives rise to significant employment concerns for all parties involved. This is particularly true for the employees of the business, who may find their positions at risk of redundancy and face a situation where they may not be able to recover all sums due to them from their employer. In addition, there is a potential liability which may be inherited by a buyer under the Transfer of Undertaking (Protection of Employment) Regulations 2006 ("TUPE").

In practice, the parties should seek the view of an insolvency practitioner at an early stage to determine which of the TUPE insolvency provisions apply so they can assess the scope of their potential employment liabilities.

The full text of this article is available on our website ([www.pe-legal.com](http://www.pe-legal.com)).

### **LEGAL NEWS IN BRIEF**

- In its proposed revised **Guidance on Competition Disqualification Orders** (CDOs), the OFT made clear its intention to use CDOs as a powerful deterrent to encourage management to take personal responsibility for compliance. The OFT would impose CDOs following any serious breach of UK or EC Competition Law by a company, where a director should have taken steps to prevent a breach or where a director ought to have known of a breach but did not. The consultation period will end on 20 November 2009.
- The Department for Business, Innovation and Skills (BIS) is consulting on proposed amendments to section 413 of the Companies Act 2006 on the **disclosure of loans to directors in company accounts**. It was intended to maintain the position under the Companies Act 1985 that banks were

only required to disclose aggregate figures. However as currently drafted, disclosures are required for each individual director. The BIS is seeking views on the level of disclosures of directors' loans in the notes to the accounts and on possible amendments to section 413.

- Companies House recently published a note on its website highlighting that the **14-day concession for rejected accounts**, as previously set out in section 706 of the Companies Act 1985 (now repealed), ceased to exist on 1 October 2009. As a result, any accounts received by the Registrar on or after 1 October 2009 which have to be returned to a company for amendment will no longer receive the additional statutory 14 day period for re-filing.
- A recent Court of Appeal case (*The Pratchetts v SPATA [2009] EWCA Civ 717*) has highlighted the **importance and value of website disclaimers**. Companies could owe a duty of care to people who visit their website and rely on the information provided. However, website disclaimers encouraging further information to be obtained will mitigate liability in respect of false statements and misrepresentations made.
- The **Payment Services Regulations** came into force on 1 November 2009. Payment service providers will have to be either authorised or registered with the FSA and comply with the Conduct of Business Requirements as set out in the regulations. Further information can be found on our website ([www.pe-legal.com](http://www.pe-legal.com)).

## **WHAT'S NEW AT PRITCHARD ENGLEFIELD?**

### **New Assistant Solicitors**

The Partners of Pritchard Englefield are delighted to announce that on completion of their training at Pritchard Englefield, **Daniela Daeubler** and **Hannah Legg** have joined the firm as assistant solicitors in the **Commercial Litigation Department** and the **Employment Department** respectively.

### **12<sup>th</sup> Festival of German Films in London**

Pritchard Englefield is proud to sponsor the 12<sup>th</sup> Festival of German Films in London, taking place from Friday 27 November to Thursday 3 December 2009. This year's programme is "*an eclectic mix of films with captivating stories from Germany and further afield, exploring history and the more recent past as well as everyday life*".

For more information, please visit: [www.germanfilmfestival.co.uk](http://www.germanfilmfestival.co.uk).

## **ABOUT US**

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