UK Corporate Briefing

Issue 3 - Autumn 2015

DENTONS

Welcome to the latest edition of Dentons' UK Corporate Briefing, a quarterly summary of the most significant recent and forthcoming developments in company law and corporate finance regulation in the UK.

Legislation update

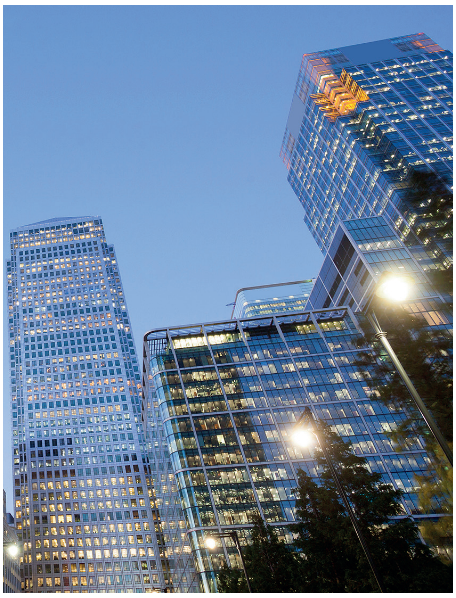
Companies Act 2006: notification of changes on auditors leaving office

Changes which have effect for financial years beginning on or after 1 October 2015 will reduce the Companies House, audit authority and shareholder notification requirements which the Act currently imposes on a company and its auditor when the auditor leaves office.

The Deregulation Act 2015 (Commencement No 3 and Transitional and Saving Provisions) Order 2015

Companies Act 2006: procedural changes on appointing company directors and secretaries

From 10 October 2015, there is a new procedure for notifying Companies House that a company has appointed a new director or secretary. The Companies House appointment forms have changed and no longer include a statement of consent to act which the appointee must sign or authenticate. Instead the company itself must confirm that an appointee has consented to act. For good order, companies should therefore ensure that they get that



consent and that they have evidence of it. This could, for example, take the form of a simple consent letter or a countersigned letter of appointment.

Companies House is, from the same date, suppressing the day of the date of a director's birth from the public register, so only the month and year are publicly visible for new appointments. However, companies must continue to file full date of birth information.

The Small Business, Enterprise and Employment Act 2015 (Commencement No. 2 and Transitional Provisions) Regulations 2015, regulation 4

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Please contact us if you would like to discuss any subject covered in this issue.

Companies Act 2006: faster striking-off of defunct companies

From 10 October 2015, the time it takes to strike a company which is not carrying on business off the register has come down.

Previously, if there was no objection, the Registrar of Companies could strike a company off a minimum of three months after publication of the first Gazette notice. Under the new timescales, the minimum is two months from publication of the first Gazette notice.

The Small Business, Enterprise and Employment Act 2015 (Commencement No. 2 and Transitional Provisions) Regulations 2015, regulation 4

Companies Act 2006: implementation of other changes made by the Small Business, Enterprise and Employment Act 2015

There has been some slippage in the timetable for bringing in the remaining changes to the Companies Act 2006. The current timetable for the remaining changes is in this table [below].

Change	Date
New procedures for dealing with certain registered office and director appointment disputes	**December 2015**
Companies must keep a register of people with significant control	**April 2016**
Companies must file information about people with significant control at Companies House	**June 2016**
Check and confirm statement replaces annual return	**June 2016**
Private companies can elect not to keep private registers	**June 2016**
Simplification of amounts unpaid on shares part of statement of capital form	**June 2016**
Ban on corporate directors (subject to certain exceptions)	**October 2016**

For a more detailed general summary, please see our **Spring 2015 issue**.

Modernisation of UK limited partnership legislation

In July 2015 the government consulted on proposed changes to the Limited Partnership Act 1907. The purpose of these is to ensure that a UK limited partnership remains the market standard structure for European private equity and venture capital funds.

The proposals, which include a draft Legislative Reform Order to amend the Act, involve a new form of limited partnership, a private fund limited partnership (PFLP). PFLP designation will only be available for limited partnerships which qualify as collective investment schemes and are constituted by written agreement.

A key proposal is to set out for the first time a non-exhaustive list of activities which a fund investor who is a limited partner in a PFLP can undertake without being considered to take part in the business's management, and therefore without losing limited liability protection. Unlike other jurisdictions there are no "safe harbours" for this currently in UK legislation.

Other proposed changes include: removing the requirement for limited partners in PFLPs to make a capital contribution, simplifying PFLP registration and reporting, and allowing the partners in a PFLP to agree among themselves who should wind up the limited partnership without having to get a court order.

The next step is for the government to consider the responses to the consultation.

HM Treasury Proposal on using Legislative Reform Order to change partnership legislation for private equity investments

Case law update

Liability for pre-incorporation contracts

The High Court has considered the liability of a person who purports to make a contract for a company that has not yet been incorporated. Although this case concerns a contract signed in 2008 and is therefore a decision under the Companies Act 1985, the relevant section was re-enacted in the Companies Act 2006.

Background

Section 36C of the Companies Act 1985 (now section 51 of the Companies Act 2006) provides that a contract or deed that purports to be made by or on behalf of a UK company when the company has not been formed has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the company or as its agent. That person is personally liable on the contract or deed accordingly.

The contract in this case related to the sale and purchase of a property in London. The contract included a clause which stated that "...the benefit of this Contract is personal to the Buyer...".

The defendant firm of solicitors signed the contract "for an on behalf of the Buyer". However, unknown to them and the seller, the buyer was not yet incorporated. The seller later sought to enforce the contract against the defendant firm. The defendant firm, however, applied to have the claim struck out. Its argument was that "...the benefit of this Contract is personal to the Buyer..." in the contract had effect as an agreement to the contrary for section 36C purposes.

Decision

The court rejected the defendant's interpretation. It held that it was necessary to be able to show that the parties had meant to exclude the effect of section 36C. It was not enough that the contract included a clause which, if given its widest interpretation, was inconsistent with treating the contract as made with the person signing.

Comment

This case highlights the importance of checking that a party to a contract is in existence before signature of the contract, and in particular the potential liability that an agent may incur if it is not. The position is also the same if the company in question is an overseas company. The Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 extend what is now section 51 to a contract or deed made by or on behalf of an overseas company when that company has not yet been incorporated.

Royal Mail Estates Ltd v. Maples Teesdale [2015] EWHC 1890 (Ch)

Read more >

Interpretation of material adverse effect condition in a share purchase agreement

This is a rare example of a reported case on a material adverse effect condition in a share purchase agreement.

Background

The parties signed the sale and purchase agreement in July 2011. Completion was conditional on no "Material Adverse Event" having occurred between signing and 30 September 2011. The agreement gave the buyer the right to end the agreement if the condition was not satisfied. Each party had to advise the other on becoming aware of any matter which might entitle the buyer to invoke the condition.

The agreement defined "Material Adverse Event" as: "...an act or omission, or the occurrence of a fact, matter, event or circumstance, affecting [target company] giving rise to, or which is likely to give rise to, a material adverse effect on the business, operations, assets, liabilities, financial condition or results of operations of [target company] taken as a whole...".

Completion took place in October 2011. However, later the buyer brought a claim against the seller. The buyer alleged the seller had failed to comply with its notification obligation. The buyer claimed that had the seller complied, it would have invoked the Material Adverse Event condition. It would not have completed the transaction at all or would have done so at a different price.

The buyer alleged that two matters fell within the Material Adverse Event condition. The first was that the target's sales, revenue and operating profit in September 2011 were significantly worse than the seller had previously forecast. They were down 24 per cent, 17.7 per cent and 84.6 per cent respectively against forecast. The second was that, between exchange and completion, the target's management made substantial downward revisions to its overall forecasts for 2011.

The seller applied to strike out the buyer's claim, arguing that neither of the events the buyer relied on amounted to a Material Adverse Event.

Decision

The court held that the buyer had an arguable case that the target's financial performance in September 2011 triggered the Material Adverse Event condition. However, it held struck out the buyer's claim about the revisions to the 2011 forecasts, finding that the buyer had no arguable case on this point.

The court decided that the revisions of forecasts satisfied neither limb of the Material Adverse Event condition. Revisions of forecasts did not fall naturally within the

words "act or omission, or the occurrence of a fact, matter, event or circumstance". Also, while it was true to say that things might follow from revising the forecasts, this was to do with what underlay the revision, not the revision itself.

The court also looked at the agreement as a whole. It noted that the buyer had expressly agreed that the seller gave no warranty about the accuracy of any financial forecasts made before signature of the share purchase agreement. Treating the revisions as a Material Adverse Event would in effect result in the post-exchange forecasts being treated as warranted, which was inconsistent. Finally, the court noted that including forecasts within the definition would produce uncertainty, which is highly undesirable in the M&A market.

Comment

This case is of interest because it is a rare for a material adverse event condition to come before the English courts. So although the result is not surprising, the court's analysis makes interesting reading. One of the points the case brings out, like the Wood case [page 6] which we also cover in this newsletter, is that the courts will have regard the agreement as a whole when interpreting a clause.

Ipsos SA v. Dentsu Aegis Network Ltd (formerly Aegis Group Plc) [2015] EWHC 1726 (Comm)

Finally, the court noted that including forecasts within the definition would produce uncertainty, which is highly undesirable in the M&A market.

Interpretation of a seller indemnity in a share purchase agreement

This Court of Appeal decision highlights that the courts will not intervene to improve a party's bargain by interpreting the agreement in a way which rewrites the agreement.

Background

The case concerned an indemnity in a share purchase agreement for the acquisition of the entire issued share capital of an insurance broker.

Under the indemnity, the seller agreed to indemnify the buyer in respect of "...all actions, proceedings, losses, claims, damages, costs, charges, expenses and liabilities suffered or incurred, and all fines, compensation or remedial action or payments imposed on or required to be made by the Company following and arising out of claims or complaints registered with the FSA, the Financial Services Ombudsman or any other authority against the Company ... pertaining to any mis-selling or suspected mis-selling of any insurance or insurance related product or service" in the period before the transaction took place.

The Court of Appeal had to decide whether the indemnity covered losses the buyer suffered as a result of the target company self-referring potential mis-selling to the FSA, as opposed to a customer making a claim or registering a complaint with the FSA.

Decision

Overruling the High Court, the court found that the proper interpretation of the indemnity meant that it only covered loss caused by mis-selling where the loss followed or arose from a customer claim or a complaint registered with the FSA. It rejected the buyer's interpretation which involved dividing the clause into different parts and putting forward different possible versions of which part related to which other part. It held that the parties had not written their contract that way and it was necessary to look at the clause read as a whole, in its original form, and give it its most natural meaning.

Comment

The case highlights the importance of clear and unambiguous drafting. Had the drafting been clearer, there might have been no argument about whether the indemnity covered the mis-selling in question. Like the Ipsos case [page 4] which we also cover in this newsletter, the case also shows that the courts will have regard the agreement as a whole when interpreting a clause.

Wood v. Sureterm Direct Ltd & Capita Insurance Services Ltd EWCA Civ 839

Limited liability partnerships: does the doctrine of repudiatory breach apply?

The High Court has, for the first time, considered whether the doctrine of repudiatory breach applies to multi-party limited liability partnerships.

Background

Section 5 of the Limited Liability Partnership Act 2000 provides that a limited liability partnership is governed by the agreement between its members or, if there is none, the default terms in the Limited Liability Partnerships Regulations 2001 apply. Regulation 7 entitles members to share equally in the capital and profits of an LLP, while Regulation 8 provides that a member cannot be expelled unless there is express agreement.

This case raised the question of what happens where there is a repudiatory breach of a multi-party LLP. Can the innocent party treat the LLP agreement as terminated, meaning the default statutory terms apply instead? The claimant argued that the service on him of an invalid retirement notice amounted to repudiatory breach, and that therefore the agreement between the members contracting out of Regulations 7 and 8 had ended. So, he could not be expelled and should receive a proportionate share of the LLP's profits, rather than his fixed share under the LLP agreement.

Held

The court rejected the claimant's argument. It held that multi-party LLP agreements that fall within section 5 implicitly exclude the doctrine of repudiatory breach. The court found that the co-existence of two different contractual regimes governing the same LLP was likely to lead to results which were legally incoherent and could only be resolved by further agreement between all the members.

Comment

Although the case resolves one question, it raises others. For example, what would the position be if there were a repudiatory breach by one member of every other member's rights and all the other members wished to accept the repudiation? Note also that the court did not decide whether the doctrine would also not apply where an LLP has only two members and therefore there is only one other affected party.

Flanagan v. Liontrust Investment Partners LLP [2015] EWHC 2171 (Ch)

Regulatory update

Takeover Code: changes on voting rights and acting in concert

The Takeover Panel has, over the summer, consulted on two changes to the Code. The first relates to voting rights and the second to the presumptions in the definition of "acting in concert". The consultations closed in September and we anticipate that, subject to review of the responses, the Panel will bring in the changes in the final quarter of 2015.

Voting rights

Where a shareholder has shares which are subject to a restriction on the exercise of voting rights, the proposal is to make clear that those voting rights should nevertheless be taken into account in considering the Code in relation to that person and to other shareholders. This codifies the Panel Executive's existing practice. An example of when a restriction could arise is where a shareholder has failed to comply with a notice about disclosure of interests in shares under section 793 of the Companies Act 2006. There is also a proposal to remove the scope for a company to issue suspended voting shares as a means of avoiding the normal application of Rule 9 (Mandatory offers) of the Code.

PCP 2015/2 14 July 2015 Code Committee consultation paper – Restrictions and suspensions of voting rights

Acting in concert

WThere are to be three new categories of persons who will be presumed to be acting in concert with each other. These are:

- a person, the person's close relatives, and the related trusts of any of them, all with each other;
- the close relatives of a founder of a company to which the Code applies, their close relatives, and the related trusts of any of them, all with each other;
- shareholders of a private company who sell their shares in that company in consideration for the issue of new shares in a company to which the Code applies, or who, following the re-registration of that company as a public company in connection with an IPO or otherwise, become shareholders in a company to which the Code applies.

Although additions to the presumptions included in the Code definition of "acting in concert", these changes will codify the Panel Executive's existing practice.

PCP 2015/3 14 July 2015 Code Committee consultation paper – Additional presumptions to the definition of acting in concert

Disclosure and Transparency Rules: changes to reflect the Transparency Directive Amending Directive

The Financial Conduct Authority is to make some changes to the Disclosure and Transparency Rules principally to bring them into line with new EU rules brought in by the Transparency Directive Amending Directive. Member states must implement this Amending Directive by 25 November 2015.

The major change which the Amending Directive makes is that it introduces at EU level the requirement to disclose holdings of financial instruments with similar economic effect to holding shares. As this has already been a feature of the FCA's Disclosure and Transparency Rule 5 since 2009, the UK regime will not change significantly in this area. However, there will be some changes to the text of DTR5 and the related guidance to reflect that they are Transparency Directive driven. Some exemptions and notification thresholds in DTR5 also will change.

There will also be some small changes to time periods included in Disclosure and Transparency Rule 4 (periodic financial reporting). The deadline to publish half yearly reports will go up from two months to three months from the end of the period to which the report relates. The periods for which financial reports, both half yearly and annual must be publicly available will increase from five to ten years.

Implementation of the Transparency Directive Amending Directive (2013/50/EU) and other Disclosure Rule and Transparency Rule Changes

AIM Rules: changes on electronic settlement

Under Rule 36 of the AIM Rules, securities admitted to AIM must be eligible for electronic settlement. In the past, the London Stock Exchange has provided derogations from Rule 36 to enable the admission to AIM of certain US securities that historically have not been eligible for electronic settlement in CREST. These were known as Regulation S, Category 3 securities.

However, the EU Regulation on Central Securities Depositories now requires electronic settlement of transactions in transferable securities that take place on a trading platform such as AIM. As a result, from 1 September 2015, the London Stock Exchange expects all Regulation S, Category 3 securities to be eligible for electronic settlement and, therefore, derogations from Rule 36 are no longer available for those securities.

AIM Notice 41 – Minor changes to the Aim Rules for Companies arising from the CSD Regulation

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CSCS2462-UK Corporate Briefing Newsletter_Issue3-Autumn-2015-V3 — 13/10/2015