



COMPANY LAW MEMO 2007

Newsletter Issue 5

July 2007

▶ **Contents**▶ **News**▶ **Cases**▶ **Legislation**▶ **CA 2006**▷ **All newsletters**▷ **Online updates**▷ **Email us**PDF printer
friendly version

Welcome to the *Company Law Memo 2007* newsletter, highlighting important recent developments in company and insolvency law. You can also access comprehensive updates to specific paragraphs via our online updating service. We always welcome suggestions from readers, so please contact us if you have any comments.

In this issue...

Company and business names:

- » The Company and Business Names (Amendment) Regulations 2007
- » Use of company name after insolvency

Directors:

- » Procedural rules for directors' disqualification applications

Management:

- » DTI changes its name to BERR
- » EU corporate governance and company law plans
- » Companies House joins European Business Register

Company accounts:

- » Guidance on auditor liability limitation agreements

Company finance:

- » Priority between legal charge holders

Transactions:

- » Takeover Panel statement on derivatives and options regime
- » Pre-contractual negotiations in joint ventures

Insolvency:

- » Review of secondary insolvency legislation
- » Statutory demand an extreme abuse of process

Companies Act 2006:

- » Third Commencement Order
- » Consultation on draft regulations

Disclaimer

This newsletter is provided on the understanding that the information contained within it is for guidance only, and that the publisher is not in business to provide legal or accounting advice or other professional services. Readers entering into transactions on the basis of, or otherwise relying on, such information should seek the services of a competent professional adviser.

Whilst every care has been taken to ensure the accuracy of the contents, the editors and the publishers cannot accept responsibility for any loss occasioned to any person acting or refraining to act as a result of any statement in this newsletter.



NEWS ROUND-UP

▶ Contents

▶ News

▶ Cases

▶ Legislation

▶ CA 2006

▶ All newsletters

▶ Online updates

▶ Email us



PDF printer
friendly version

DTI changes its name to BERR

On 28 June, the DTI was replaced by a new ministry: the Department for Business, Enterprise and Regulatory Reform. BERR will have responsibility for corporate law matters, including the implementation of the new Companies Act. As well as taking over the DTI's remit, BERR's work will encompass that of the Better Regulation Executive, which was part of the Cabinet Office before the reshuffle. The Department's new Secretary of State is John Hutton.

EU corporate governance and company law plans

See CLM: ¶3199

In a speech to the 5th European Corporate Governance and Company Law Conference, Charlie McCreevy, the European Commissioner for Internal Market and Services, outlined the EU's plans for and progress in some key areas of company law:

- » The Commission was to submit a proposal for a directive concerning **transferring company seats** between member states this year. This has been delayed for two reasons. Firstly, the economic arguments for the directive are not as clear as they had seemed originally, and the Commission wants to be sure that a directive on this topic would result in added value for businesses. Secondly, a case is due to be heard by the European Court of Justice which deals with the current position, and the Commission hopes that the judgment, due in the autumn, will help to clarify some issues in this area.
- » The European Parliament has asked the Commission to propose legislation for a **European Private Company Statute**, in order to make setting up and running businesses across members states easier and cheaper. The Commission is therefore carrying out a detailed impact assessment to see whether there is really a need for this legislation and how it would work in practice.
- » For listed companies, the question of "**one share, one vote**" remains at the top of the agenda. A study into the different systems across the EU has been made, and the Commission proposes to carry out an impact assessment into whether any action on this issue is required at European level.
- » The Commission still aims to **simplify European company law**. In doing so, it wants to review how far the existing law is fit for purpose and to cut red tape where possible. In fact, the European Commission has subsequently published a communication setting out its plans for simplifying company law, accounting and auditing (COM(2007) 394 final). The paper suggests two options: to consider whether all of the company law directives are really necessary and whether the EU should only deal with cross-border problems; or to introduce individual simplification measures as the need arises to help EU companies. The paper sets out these options in more detail and invites interested parties to comment by mid-October 2007.

The European Commission has also announced that it plans to establish a **common framework for business registers** in order to make it easier to collect information on businesses in the EU. EC Regulation 2186/1993 will be amended to facilitate this, for example by setting out common quality standards for registers across the EU (COM(2007) 389 final).

Companies House joins European Business Register

Companies House has now joined the European Business Register (EBR). This is a **network of official registers** in various European countries, making company information accessible to the public for a reasonable fee. This information is already available from Companies House, but the EBR makes it easier for interested parties based outside the UK to obtain it through their central database.



NEWS ROUND-UP cont...

Similar **types of report** are available through the EBR as Companies House offers. For example, the “company profile” gives basic information about a company such as its name, registration number and address. An “officials list” will give the names and basic details of the company’s officers and auditors.

Companies House will start to make basic company information available via the EBR database in Spring 2008.

Currently, these **other countries** are also members of the EBR: Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Jersey, Latvia, Netherlands, Norway, Serbia, Spain, Sweden and Ukraine.

- ▶ Contents
- ▶ News
- ▶ Cases
- ▶ Legislation
- ▶ CA 2006

- ▶ All newsletters
- ▶ Online updates
- ▶ Email us



PDF printer
friendly version

Guidance on auditor liability limitation agreements

See CLM: ¶4303

On 4 July 2007, the Financial Reporting Council announced the establishment of an independent working group to produce guidance on the use of auditor liability limitation agreements. It will become possible for auditors to limit their liability to an amount that is “fair and reasonable in all the circumstances” from 6 April 2008 when the relevant sections of the Companies Act 2006 come into force (ss 534 – 538 CA 2006).

It is intended that the **guidance will include**, at least:

- » a suggested standard form, including the “principal terms”, for such an agreement; and
- » a suggested process for the effective implementation of such an agreement, including for obtaining shareholder approval.

The **guidance will not** address the assessment of what might be regarded as “fair and reasonable in all the circumstances” nor provide a mechanism for calculating such an amount. The FRC regards this as a matter for the courts.

Consultation on the draft guidance will occur later in 2007 and it is intended that any final **guidance will be published** no later than the first quarter of 2008.

Takeover Panel statement on derivatives and options regime

See CLM: ¶6716

On 29 June 2007, the Takeover Panel published a statement setting out its conclusions following a review of the new derivatives and options regime. The Code Committee has concluded that the new regime is working well and that no amendments need to be made at this stage.

The Code Committee does, however, intend to give further thought to the following dealing disclosure issues in due course:

- » **composite disclosure**, so as to reduce disclosures which can safely be regarded as inconsequential (for example, an interest of 1% in a class of convertible securities which on conversion gives the holder an interest of less than 1% in ordinary shares);
- » a requirement to **disclose all interests of 1% or more** in relevant securities at the start of the offer period (referred to as the “snapshot suggestion”), rather than the current requirement to disclose only if a person with such an interest deals in any relevant securities during the offer period; and
- » **securities borrowing** and **lending** and **short selling**.

The full statement may be downloaded from the Panel’s website (www.thetakeoverpanel.org.uk).



NEWS ROUND-UP cont...

Review of secondary insolvency legislation

See CLM: ¶7364

The Insolvency Service has issued an update on the **progress** of its project to modernise and consolidate secondary insolvency legislation.

The new Insolvency Rules 2008, like the current Rules, will be **divided into** parts. Parts 1 – 6 will deal with matters which are specific to particular procedures; the rest set out the Rules relating to topics which are common to most procedures. Most of the Rules grouped into the “common parts” will apply to all procedures except for CVAs and IVAs. The parts will be arranged as follows:

- Part 1: Company voluntary arrangements
- Part 2: Administration procedure
- Part 3: Administrative receivership
- Part 4: Companies winding up
- Part 5: Individual voluntary arrangements
- Part 6: Bankruptcy
- Part 7: Common part – claims by and distributions to creditors
- Part 8: Common part – court rules in proceedings under the Act or the Rules
- Part 9: Common part – creditors’ and liquidation committee
- Part 10: Common part – disclaimer
- Part 11: Common part – EC Regulation
- Part 12: Common part – insolvency register
- Part 13: Common part – meetings
- Part 14: Common part – proxies and company representation
- Part 15: Common part – public examination
- Part 16: Common part – remuneration and reporting to creditors
- Part 17: Common part – special manager
- Part 18: Miscellaneous and general
- Part 19: Interpretation
- Schedules

Some changes will also have to be made to the Insolvency Act 1986 to reflect the new Rules. The Insolvency Service will issue a public consultation document in the next few months setting out these changes. To allow for this consultation process to take place, the **anticipated commencement** of the new Rules has been postponed to October 2008, although some of the smaller statutory instruments within the review will still come into force in April 2008. The Insolvency Service hopes to publish a **draft** of the new Rules in the middle of 2008.

▶ Contents

▶ News

▶ Cases

▶ Legislation

▶ CA 2006

▶ All newsletters

▶ Online updates

▶ Email us



PDF printer
friendly version

News



RECENT CASES

Priority between legal charge holders

See CLM: ¶14674

Scottish & Newcastle plc v Lancashire Mortgage Corporation Ltd [2007] EWCA Civ 684

The Court of Appeal upheld a decision in which a legal charge holder was prevented from exercising its priority on the grounds of **proprietary estoppel**.

There were two charge holders in the case, LMC and S&N, which had taken charges over the same house. LMC's legal charge was executed first but registered second. According to the legislation (s 29 LRA 1925), priority was governed by the order of entry in the Charges Register, not by the order of creation so that S&N's legal charge had priority over LMC's legal charge.

The court found that S&N knew that LMC expected priority and took advantage of that expectation. This passive acquiescence was sufficient for proprietary estoppel to arise.

The court did not think that this finding was a contravention of the general principle that estoppel cannot be used to circumvent a statute, nor did it think that this was a case of **estoppel by convention** (which applies to a shared assumption by the parties about an existing state of affairs, not to a future state of affairs such as who would have priority if the legal charges were executed).

Pre-contractual negotiations in joint ventures

See CLM: ¶16591

Cayzer v Beddow [2007] EWCA Civ 644

A recent case before the Court of Appeal highlights the dangers of **developing an idea for a joint venture** without adequate legal protection.

In this case, Mr B had an idea regarding a project to raise money for the acquisition, consolidation and operation of veterinary surgeries and practices through a company to be floated on the Stock Exchange. He approached Mr C to discuss the project with a view to raising finance and Mr C agreed to participate as financier. After several months of negotiations with various parties, Mr C effectively joined forces with other joint venturers, found finance through a firm of venture capitalists and pursued the project through a joint venture company (JVC) without Mr B.

Mr B claimed **breach of contract**, or alternatively that Mr C held some of his shares in the JVC on trust for Mr B. Both of these claims were rejected by the court. The agreement between Mr B and Mr C was too vague to amount to an enforceable contract. The **constructive trust** point failed because there was no suggestion of an arrangement or understanding that Mr C would acquire or try to obtain shares in the JVC on behalf of Mr B, nor that Mr B relied on any such arrangement or understanding.

The court acknowledged that the project was Mr B's idea in the first place, that he had done work on the project to make it commercially viable; and that he had not been paid for what he had contributed by way of ideas or work. It suggested that protection for the idea may have been obtained by means of a binding contract, or by an action for **breach of confidence** (which was not pursued). Payment for work done in anticipation of a contract that is never concluded may have given rise to an **implied contract to pay for the work**, or to a restitutionary claim for **unjust enrichment** (no such claims were made in the case).

- ▶ Contents
- ▶ News
- ▶ Cases
- ▶ Legislation
- ▶ CA 2006

- ▷ All newsletters
- ▷ Online updates
- ▷ Email us



PDF printer
friendly version



RECENT CASES cont...

Statutory demand an extreme abuse of process

See CLM: ¶7641

Re Rare Ltd [2007] All ER (D) 381 (Jun)

The court **restrained the presentation of a winding up petition** against a company because the statutory demand upon which it was based was an “extreme abuse of process”.

Ms X alleged that an employee of the company, together with a member of the Royal family, had stalked her for a number of years. She alleged that the employee used the company’s helicopter when harassing her. The employee denied these allegations. Although Ms X’s claims were under investigation by the police, neither the employee nor the company had been found liable. Ms X presented a statutory demand against the company for over £86M, representing her own assessment of the company’s vicarious liability for its employee’s alleged harassment.

The company disputed the debt on which the statutory demand was based because it did not accept that there had been any harassment for which it could be held vicariously liable. It had no other relationship with Ms X under which it could be liable to her.

The court agreed with the company and **restrained Ms X from presenting a petition** on the basis of her statutory demand. For a statutory demand to be based on a tort, the alleged victim first had to prove that the company was liable. Ms X had not done so and, therefore, was not a creditor of the company. Her claim was “fanciful” and the use of a statutory demand in these circumstances was an “extreme abuse of process”.

As well as restraining the presentation of the petition, a company can apply for a petition which has already been presented to be struck out as an abuse of process, see ¶7705+.

- ▶ Contents
- ▶ News
- ▶ Cases
- ▶ Legislation
- ▶ CA 2006

- ▶ All newsletters
- ▶ Online updates
- ▶ Email us



PDF printer
friendly version

Case law



LEGISLATION

The Company and Business Names (Amendment) Regulations 2007

See CLM: ¶254

SI 2007/1947

The Company and Business Names (Amendment) Regulations 2007 came into force on 10 July 2007. Under these regulations, the word **“Government”** cannot form part of a company's registered name or a business name without the prior written approval of the Secretary of State.

There is an **exception** for persons who already carry on business under a name which includes the word “Government”. A person to whom such a business is transferred may also continue to use the word for 12 months after the transfer.

Use of company name after insolvency

See CLM: ¶267

The Government has published a draft statutory instrument, the Insolvency (Amendment) Rules 2007, which substitutes a **new version of r 4.228** into IR 1986.

The new version reverses the decision by the Court of Appeal in *Churchill v First Independent Factors and Finance Ltd* ([2006] EWCA Civ 1623). The **effect** is that the exception (to s 216 IA 1986 as set out in r 4.228 IR 1986) will be available to persons who are already directors of the successor company, or otherwise already involved in its management.

The **director will have to give notice** to all creditors known to him or whose names and addresses could be ascertained by him making reasonable enquiries. Notice will also have to be published in the *Gazette*. Notice will have to be given using the new Form 4.73, a specimen of which is contained in the statutory instrument. Notice will always have to be given before the director acts in a way that would be prohibited by s 216 IA 1986.

The statutory instrument **comes into force** on 6 August 2007. A copy may be freely downloaded from the OPSI website (www.opsi.gov.uk).

Procedural rules for directors' disqualification applications

See CLM: ¶3049

A draft Insolvent Companies (Disqualification of Unfit Directors) Proceedings (Amendment) Rules 2007 has been published. The Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987 (SI 1987/2023) set out the rules for various procedural matters to do with applying for a disqualification order, such as the form of the application, service, evidence and the hearing. Currently they only **apply to** applications for disqualification orders, so the amendment Rules will extend their remit to these other applications under the CDDA 1986:

1. for leave to commence proceedings after the time limit has expired (¶3047/mp);
2. to enforce the duty of a liquidator, administrator or administrative receiver of the company to provide information regarding the director's conduct (¶8166, ¶8856, ¶9377);
3. for a disqualification order by the secretary of state or official receiver on the ground of unfitness, by the secretary of state following the investigation of a company, or by the OFT or another regulator on the ground of a breach of competition law;
4. for variation of a disqualification undertaking (¶3072); and
5. for leave to act as a director (¶3074+).

The amendments also clarify that applications should be in the **form** of a Part 8 claim form or by application notice if a relevant CPR practice direction allows, except in the case of the applications at number 2 above, which should be made under the Insolvency Rules.

The Rules other than the one setting out the form of the application will only apply to applications at number 3 above.

These amendments are due to **come into force** on 6 August 2007, so will apply to applications made on or after that date.

▶ Contents

▶ News

▶ Cases

▶ Legislation

▶ CA 2006

▶ All newsletters

▶ Online updates

▶ Email us



PDF printer
friendly version

Legislation



COMPANIES ACT 2006: IMPLEMENTATION

The final **text** of the Companies Act 2006, explanatory **notes and tables** of destinations and origins are now freely available to download at: <http://www.opsi.gov.uk/acts/acts2006a.htm>

The Act received Royal Assent on 8 November 2006.

To see when specific sections of the Act will or have come into force, check the **implementation timetable** on the FL Memo Ltd newsletter homepage (follow the link to "Companies Act 2006 implementation timetable"). This document will be updated as new secondary legislation is passed and further announcements are made. The implementation timetable is now up to date to the Third Commencement Order (see below).

▶ Contents

▶ News

▶ Cases

▶ Legislation

▶ CA 2006

▶ All newsletters

▶ Online updates

▶ Email us



PDF printer friendly version

Third Commencement Order

The Companies Act 2006 (Commencement No. 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007 was laid before Parliament on 9 July.

This Third Commencement Order mainly deals with the provisions **coming into force on 1 October 2007** including parts relating to directors, derivative claims, resolutions and meetings and the business review. It also sets out transitional provisions and consequential repeals and amendments.

1. The **first draft** of the Order (see *Issue 4*) was withdrawn on 5 July because a number of drafting errors had been identified.
2. The Order brings the following provisions into force on 15 December 2007 so far as necessary for the purposes of any regulations made before that date to implement the EC Directive on **cross-border mergers** (EC Directive 2005/56):
 - » registrar's requirements as to form, authentication and manner of delivery (s 1068);
 - » hard copy and electronic form and related expressions (s 1168); and
 - » extension of Companies Acts to Northern Ireland (s 1284).

Directors

Most of Part 10 on directors, including the provisions relating to the directors' general duties, will come into force on 1 October 2007. The **relevant sections** are:

- » companies required to have directors (s 154);
- » appointment of directors of public company to be voted individually (s 160);
- » validity of acts of directors (s 161);
- » removal of directors (ss 168, 169);
- » general duties of directors (ss 170-174, 178-181);
- » transactions with directors requiring approval of members (ss 188-226);
- » directors' service contracts (ss 227-230);
- » contract with sole member who is also a director (s 231);
- » directors' liabilities (ss 232-239); and
- » supplementary provisions (ss 247-259).

Note that the following provisions are **not included** within the commencement order; they are expected to come into force in October 2008:

- » companies required to have at least one director who is a natural person (ss 155, 156);
- » minimum age for appointment as director (s 157);
- » register of directors etc (ss 162-165, 167)
- » duty to avoid conflict of interests (s 175);
- » duty not to accept benefits from third parties (s 176);
- » duty to declare interest in proposed transaction or arrangement (s 177);
- » declaration of interest in existing transaction or arrangement (ss 182-187); and
- » directors' residential addresses protection from disclosure (ss 240-246).

CA 2006



COMPANIES ACT 2006: IMPLEMENTATION cont...

Derivative claims

Part 11 on derivative claims will also come into force on 1 October 2007 (ss 260-269). These provisions contain the new derivative claim procedure.

As set out in the Government's response to consultation (see *Issue 4*), there are transitional provisions which provide that (para 20 Sch 3):

- » the new provisions will not apply (and the common law provisions only will continue to apply) where the claimant has applied for **permission to continue the claim before 1 October 2007**; and
- » if, or to the extent that, the claim arises from **acts or omissions that occurred before 1 October 2007**, the court must exercise its powers under those sections so as to secure that the claim is allowed to proceed as a derivative claim only if, or to the extent that, it would have been allowed to proceed under the common law.

Shareholders' resolutions and meetings

Most of Part 13 on resolutions and meetings will come into force on 1 October 2007, together with other miscellaneous provisions on the same subject. The **particular sections** are:

- » resolutions and agreements affecting a company's constitution to be filed at Companies House (ss 29, 30);
- » inspection of register of members (ss 116-119);
- » exercise of members' rights (ss 145-153);
- » general provisions about resolutions (ss 281-287);
- » written resolutions (ss 288-300);
- » resolutions at meetings (ss 301-307, 310-332, 334, 335, except s 327(2)(c) and s 330(6)(c));
- » public companies: additional requirements for AGMs (ss 336-340);
- » additional requirements for quoted companies (ss 341-354);
- » records of resolutions and meetings (ss 355-359);
- » supplementary resolutions and meetings provisions (ss 360-361); and
- » protection of members against unfair prejudice (ss 994-999).

Note that Order does not bring into force the sub-sections dealing with **proxy deadlines** when a poll vote is held within 48 hours of it being demanded (ss 327(2)(c), 330(6)(c)). The sub-sections were included in the first draft of the Order but omitted from the second draft. ICSA has reported that this is because the sections had been criticised for potentially making the appointment of proxies and the taking of polls unnecessarily complex. It is not known whether the sections have been shelved completely or simply delayed.

Shareholders' resolutions and meetings: transitional provisions

The Order contains various transitional provisions including that:

- » the new provisions apply to resolutions of which **notice** is given on or after 1 October 2007, or that are proposed at a meeting of which notice is given on or after 1 October 2007 (other than one which has been requisitioned under the 1985 Act) (para 22 Sch 3);
- » the new **written resolution** procedure may not be used to revoke, vary or renew the authority of the directors to allot securities under s 80A CA 1985 (para 13 Sch 1);
- » further procedural requirements will apply to the written resolution procedure when it is used to (para 13 Sch 1):
 - disapply **pre-emption rights** under s 95(2) CA 1985;
 - whitewash **financial assistance** under s 155 CA 1985;
 - authorise an **own share purchase**, or vary, revoke or renew an authority under s 164 CA 1985; or
 - approve **payment out of capital** to finance an own share purchase or share redemption under s 173 CA 1985.
- » any reference to an **extraordinary resolution** in a company's memorandum and articles or a contract will continue to have effect and be construed in accordance with s 378 CA 1985 (para 23 Sch 3).

▶ Contents

▶ News

▶ Cases

▶ Legislation

▶ CA 2006

▷ All newsletters

▷ Online updates

▷ Email us



PDF printer
friendly version

CA 2006



COMPANIES ACT 2006: IMPLEMENTATION cont...

- » a **private company** will continue to have to hold **AGMs** if its memorandum or articles expressly require, but not if they only specify that the directors are to retire at an AGM (para 32 Sch 3); and
- » an existing **public company** will have to follow s 366 CA 1985 to determine the date of its first **AGM** after 30 September 2007. Section 336 CA 2006 will determine the date of subsequent AGMs (para 35 Sch 3), however, this section has been amended so that a public company must hold its AGM within 7 months of its accounting reference date, rather than within 6 months as in the Act (para 15 Sch 1).

Business review

The provision requiring medium-sized and large companies to prepare a business review will come into force on 1 October 2007 (s 417). It will apply to directors' reports for **financial years beginning on or after** 1 October 2007. The 1985 Act provisions will apply to directors' reports for financial years beginning before that date (para 43 Sch 3).

Large companies will also welcome the statement by Stephen Timms, the new minister for enterprise and small business, who replaced Margaret Hodge. He has been reported as confirming that there will be no new corporate social responsibility legislation in the foreseeable future. This will be a disappointment to the CSR movement which had been promised a second bite of the cherry when the Companies Act 2006 was implemented in return for accepting last minute watered down CSR amendments to the business review sections of the Bill just before it was enacted in November 2006.

Miscellaneous provisions

The other following provisions will also be coming into force on 1 October 2007:

- » **control of political donations and expenditure** (ss 362-379), except the provisions which relate to independent election candidates which will come into force on 1 October 2008;
- » **appointment of auditors** of private companies (ss 485-488);
- » **company investigations**: amendments (ss 1035-1039, 1124, Sch 3); and
- » general supplementary provisions relating to **offences** (ss 1121-1123, 1125-1133).

Note that the control of political donations and expenditure provisions come into force on 1 November 2007 in Northern Ireland, instead of 1 October 2007.

Consultation on draft regulations

The Government has published a number of draft regulations, which have been prepared following the responses to February's consultation (see *Issue 1*). The draft regulations cover a number of areas, most notably company accounts. There are also draft regulations dealing with Companies House, auditors' remuneration and limitation of liability, the protection of directors' residential addresses, the inspection of company records, the information a company has to display about itself, the contents of the annual return and the details of charges that need to be provided to Companies House.

The Government is inviting comments on these draft regulations by 30 September. Separately, Companies House has also issued consultation documents on its rules and late filing penalties. Any responses to this consultation should be submitted to Companies House by 12 October.

The draft regulations are freely available from the new "Regulations - draft" page of the Companies Act 2006 section of BERR's website (<http://www.dti.gov.uk/bbf/co-act-2006/index.html>). They will be considered in more detail in the next issue of *Company Law Memo 2007 Newsletter*.

▶ Contents

▶ News

▶ Cases

▶ Legislation

▶ CA 2006

▶ All newsletters

▶ Online updates

▶ Email us



PDF printer
friendly version

CA 2006