



COMPANY LAW MEMO 2007

Newsletter Issue 9

November 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:

- » Company and business names regulations amended

Directors:

- » Director personally liable for debts of insolvent company
- » Extradition: follow up

Company management:

- » EU company law update

Company finance:

- » Directors personally liable under a guarantee
- » New guidance for private equity firms published

Litigation:

- » Director personally liable for litigation costs

Transactions:

- » Criticism of the UK mergers regime

General business issues:

- » Consultation on the EU Services Directive
- » Company's culpability in health and safety prosecution
- » Changes to waste laws affecting all businesses
- » New controls on money laundering

Companies Act 2006:

- » Provisions in force last month
- » Implementation delays
- » Consultation on the application of CA 2006 to LLPs

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

EU company law update

See CLM: ¶3199+

The Council of the European Union has adopted the Commission's communication on its plans for **simplifying company law**, accounting and auditing (see *Company Law Memo 2007 Newsletter, Issue 5*). In doing so, it urged the Commission to act on the responses to its consultation on this issue quickly (the consultation closed in October). The Council wants to see, by the end of 2008, proposals for reducing any unnecessary administrative and cost burdens revealed by the Commission's review of the law. It is particularly keen for the law to be updated to enable companies to take full advantage of developments in IT, such as electronic signatures.

New guidance for private equity firms published

See CLM: ¶4800+

Earlier this year, private equity found itself under scrutiny from the Treasury, politicians and the press (see *Issue 4*). One of the reasons for this attention was the review of the industry by Sir David Walker on behalf of the British Venture Capital & Private Equity Association (BVCA). This review has now come to an end, and new guidance for private equity firms and their portfolio companies has been published.

The guidance focuses on the need for transparency, so it sets out various requirements on firms and the companies they finance to **disclose information** about their financial position and structure. These measures should address some of the criticism levelled at the industry for its lack of openness. For example, the guidance calls on **each private equity firm** to:

- » publish an outline of its internal structure, specifically including information on the leadership of the firm in the UK and the UK companies within its portfolio;
- » follow established guidelines in reporting to its limited partners and valuing its assets;
- » provide information to the BVCA to enable it to monitor the industry effectively; and
- » communicate quickly and efficiently with employees of their portfolio companies.

The **portfolio companies** themselves will also be expected to publish regular information about its financial position, including the identity of its private equity funders and a review akin to quoted companies' business reviews that looks at factors affecting the company's future developments as well as various commercial issues.

Private equity firms are expected to comply with the guidance. If they do not comply with any aspect of it, they must specifically state why they have not done so. The guidance will be **monitored and updated by** a group set up by the BVCA, headed by Sir Mike Rake, Chairman of BT. Sir David Walker recommends that the BVCA strengthens its position as industry body, for example by analysing the economic impact of the industry so that it becomes the authoritative source of information on private equity.

The guidance can be found at:

http://walkerworkinggroup.com/sites/10051/files/wwg_report_final.pdf

Criticism of the UK mergers regime

See CLM: ¶5507+

The Confederation of British Industry (CBI) has published a report making recommendations on re-vamping the UK merger control regime.

The principal issue at the moment is the problem of **obtaining clearance** for a merger. This is a go-ahead for a deal on the basis that the merger does not harm competition between businesses in the UK and is therefore not against the public interest. Notification of mergers is voluntary in the UK but the OFT "calls in" increasing numbers of mergers for scrutiny. After a pre-notification discussion, there is a formal review by the OFT, followed by a possible reference to the

▶ Contents

▶ News

▶ Cases

▶ Legislation

▶ CA 2006

▶ All newsletters

▶ Online updates

▶ Email us



PDF printer
friendly version

News



NEWS ROUND-UP cont...

Competition Commission and then the possibility of an appeal to the Competition Appeal Tribunal. Third parties are able to intervene in the process, which can become long-winded and expensive.

Amongst the **recommendations** in the CBI report are that:

- » the turnover threshold for a “relevant merger” should be increased from £70 million to £80 million and should be index-linked;
- » in the interim, there should be a threshold below which investigations will not be made in small markets;
- » the barriers for a third party to intervene in an investigation should be increased;
- » OFT case managers should be empowered to interact with the parties and negotiate undertakings; and
- » changes should be made to avoid unnecessary mandatory references to the Competition.

A copy of the report, entitled “Fit to compete, improving the UK competition law regime”, can be found on the CBI website: <http://www.cbi.org.uk/pdf/fittocompete.pdf>.

▶ **Contents**

▶ **News**

▶ **Cases**

▶ **Legislation**

▶ **CA 2006**

Consultation on the EU Services Directive

BERR has issued a public consultation on the implementation of the EU Directive on Services in the Internal Market (EC Directive 2006/123). The main **aim** of the Directive is to open up the EU market for the services sector. The ultimate goal is to create a single market in this area. In order to achieve this, the Directive seeks to facilitate the cross-border provision of services by a number of means, including making it easier for businesses to set up in other members states. Opening up the EU market should be beneficial to member states, boosting their economies, creating new business opportunities and giving customers more choice.

BERR’s consultation explains the requirements imposed by the Directive and sets out how the UK will satisfy its obligations. The consultation focuses on **four main issues** arising out of the Directive:

- » the creation of a single point of contact so that businesses based in the EU can acquire information about the relevant rules and procedures in the UK and can apply for any necessary licences or authorisations from their home country;
- » administrative co-operation between the relevant authorities in the different member states;
- » how to make information about the requirements as to the quality of services and customer protection available to customers in their own country; and
- » the requirement on members states to review their domestic legislation and practices in this area to ensure that they do not hamper the creation of a single market. BERR indicates that this process is already under way, and few amendments appear to be required.

The consultation paper can be found at: <http://www.berr.gov.uk/files/file42207.pdf>. Responses are invited by 11 February 2008, and the government anticipates being able to publish its response by 11 May 2008. The Directive has to be implemented in the UK by 28 December 2009.

▶ **All newsletters**

▶ **Online updates**

▶ **Email us**



PDF printer
friendly version

News



RECENT CASES

Company's culpability in health and safety prosecution

See CLM: ¶623

R v Switchgear Services Ltd [2007] Lawtel 10/10/2007

C Ltd ran a steelwork factory. It sub-contracted the maintenance work in the factory to P Ltd, which in turn engaged SS Ltd to perform specialist maintenance on a particular piece of machinery. SS Ltd's employees had been working on the site when one of them was **fatally electrocuted**. The employees had not been given proper instructions, they had not been supervised and, crucially, they had not been made aware that part of the electrical equipment on which they were working was still live. The court found that all 3 companies were guilty of breaches of health and safety law and were ordered to pay fines and costs.

SS Ltd appealed against the **level of the fine** imposed on it. The Court of Appeal agreed that the fine and costs that SS Ltd should pay should be reduced, taking into account:

- » the relatively greater culpability of C Ltd and P Ltd (who, at the initial hearing, had been fined £100,000 and were ordered to pay £18,000 costs each);
- » the fact that SS Ltd had fully co-operated with the HSE's investigation and had pleaded guilty at an early stage; and
- » the financial means of the three companies. SS Ltd was a small local business with a modest turnover, compared to the other two, which were multi-national companies. The original fine and costs order was likely to close SS Ltd down.

SS Ltd's fine was reduced from £35,000 to £10,000, and it was ordered to pay £10,000 in costs (reduced from £30,000).

Director personally liable for debts of insolvent company

See CLM: ¶2448

Contex Drouzbha Ltd v Wiseman and another [2007] EWCA Civ 1201

Mr W was a director of SD Ltd. He caused SD Ltd to enter into a contract that contained a promise that SD Ltd would pay for goods ordered in the future but Mr W knew that it would not be able to do so. The contract had been in writing, and signed by W. He was held personally liable to the other party to the contract because of this **fraudulent misrepresentation**. Mr W appealed against the judgment.

The Court of Appeal upheld the judgment that Mr W had made a fraudulent misrepresentation. By the terms of the contract, Mr W had made representations about the solvency of SD Ltd. It is likely that the company was also liable, but it was insolvent so the point was not pursued.

s 6 Statute of Frauds Amendment Act 1826 creates liability for written representations of creditworthiness or solvency. Mr W would not have been liable under the statute for verbal representations. However, the tort of fraudulent misrepresentation does include verbal misrepresentation. This case is the appeal hearing of the case mentioned in ¶2448/mp.

Directors personally liable under a guarantee

See CLM: ¶4700+

Van der Merwe v IIG Capital LLC [2007] EWHC 2631 (Ch)

Mr and Mrs V were the directors of HPIE Ltd, which borrowed \$23 million from IIG. The loan agreement was secured by a debenture over HPIE Ltd's assets. Mr and Mrs V also personally guaranteed HPIE Ltd's obligations under the loan agreement. HPIE Ltd defaulted under the loan agreement, so IIG demanded payment under the personal guarantees. Mr and Mrs V wanted to

▶ Contents

▶ News

▶ Cases

▶ Legislation

▶ CA 2006

▶ All newsletters

▶ Online updates

▶ Email us



PDF printer friendly version

Case law



RECENT CASES cont...

raise **defences** to their liability under the guarantees that would have been available to HPIE Ltd if it had been sued for defaulting under the loan agreement. The court looked closely at **how the guarantees were drafted**. There were a number of features that pointed to the fact that Mr and Mrs V had no defence to IIG's claim under the guarantees:

- » in order to claim under the guarantee, IIG had to issue a certificate of how much was "due and payable". Mr and Mrs V were then obliged to pay this amount. The certificate only certified how much was due and payable by Mr and Mrs V under the guarantees (not how much was due and payable by HPIE Ltd under the loan agreement). Therefore, the extent of HPIE Ltd's liability under the loan agreement was not relevant;
 - » the definition of the guaranteed sum was drafted extremely widely. It included sums "expressed to be due, owing or payable". This therefore included the sums "expressed" in IIG's certificate; and
 - » Mr and Mrs V were "principal obligors". In addition, the guaranteed money had to be paid "on demand" (i.e. without the need to prove liability under the underlying loan). This created a separate obligation from the loan agreement. Normally, there is a presumption that such a meaning can only be implied in documents issued by a bank, but the presumption was overcome here by the express wording of the guarantee.
-

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

Director personally liable for litigation costs

See CLM: ¶7156

Sims v Hawkins [2007] EWCA Civ 1175

Mr and Mrs H were the only shareholders in a construction company. They were also its sole director and secretary. The company was sued by Mr S who had bought a property developed by the company. The property was alleged to have various defects and inadequate remedial works. The litigation dragged on for 5 years. By 2005, the company had little funds available, so Mr and Mrs H paid for the costs of the first trial. Mr S won and Mr and Mrs H were joined as parties to the action and made liable for the costs from shortly before the start of the trial. Mr S appealed on the ground that Mr and Mrs H should have been made liable for more of the costs.

The Court of Appeal upheld the order making Mr and Mrs H liable for the company's costs at trial but declined to extend it. The Court also warned of the dangers of extensive **litigation over comparatively small sums** (Mr S had only been awarded £15,000 in damages).

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



PDF printer
friendly version

Case law



LEGISLATION

Company and business names regulations amended

See CLM: ¶254

SI 2007/3152

SI 2007/1947 (see *Issue 5*) was replaced by SI 2007/3152 on 6 November 2007 because the first set of regulations came into force before they were laid before parliament, contrary to the correct procedure.

These regulations **restrict** the use of certain words in companies' names. Now, in addition to the word "Government" (which was covered by the original regulations) the abbreviations "HPSS", "HSC" and "NHS" also require consent if they are to be included in a company's name.

There is an **exception** for persons who already carry on business under a name including the word "Government" or one of these abbreviations. A person to whom such a business is transferred may also continue to use the word/abbreviation for 12 months after the transfer.

Changes to waste laws affecting all businesses

See CLM: ¶623, ¶5680

SI 2002/1559

Most waste in the UK is sent to landfill. From 30 October, all waste destined for landfill has to be **recycled or treated** in some way. This includes waste from all businesses, even office waste. Liquid wastes are now banned from being sent to landfill. The new requirements stem from the EU Directive on landfill (EC Directive 1999/31).

The **aim** is to reduce pollution of the environment, especially of water resources and land, by restricting the type and quantity of material that can be sent to landfill. All businesses have had a duty of care for waste that they produce since 1990. This means that they can only consign their waste to an authorised waste carrier and that they have to make sure that the waste is being disposed of legally. The new development is part of this regime.

All waste must now be treated. The "treatment" has to meet a **three-part test** in order to comply with the statutory requirements:

- » It must be a physical, thermal, chemical or biological process, including sorting.
- » It must change the characteristics of the waste.
- » It must do so in order to:
 - reduce its volume;
 - reduce its hazardous nature;
 - facilitate its handling; or
 - enhance its recovery.

Sorting waste and sending suitable waste for recycling, e.g. cardboard or paper, would comply. However, merely compacting unsorted waste would not meet the test.

The **advice for small businesses** from the Environment Agency is:

- » try to collect non-hazardous waste as individual waste streams, one or more of which can then be sent for recycling, as this counts as "treatment"; or
- » ask a waste management contractor to take your waste and sort out part of it for recycling.

The Environment Agency will **enforce** the new law by inspecting the records held by the operators of landfill sites, and by inspection visits to landfills. All waste arriving at a landfill must be accompanied by a consignment note, indicating its source. So, if there are any problems, the waste can be traced back to the original producer. In a separate development, the Environment Agency has announced that it intends to liaise with the Assets Recovery Agency to seize the assets of waste offenders who make substantial profits from their illegal activities.

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

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



PDF printer
friendly version



LEGISLATION cont...

New controls on money laundering

See CLM: ¶656

SI 2007/2157

New regulations on money laundering will come into force on 15 December 2007, replacing the 2003 version (SI 2007/2157). **Money laundering** is a term which **describes** actions taken to disguise the source of money. For example, money could have originated from drug dealing or other criminal activity and be "laundered" through a legitimate business to make it clean (i.e. to disassociate it from the crime). Laundered money often ends up being used to fund further criminal activity, including terrorism. The inadvertent targets of the laundering activities are often financial institutions but ordinary businesses are also vulnerable.

The new regulations require businesses to put preventative measures in place. Businesses are required to be sure they identify their customers properly, by examining identification documents and using independent sources such as credit reference agencies. There are obligations to report suspicious transactions to the Serious Organised Crime Agency.

Businesses are required to:

- » monitor their customers on a regular basis;
- » where a customer is a business, identify the beneficial owner of the customer (e.g. the shareholders), as well as the business itself; and
- » vary the level of due diligence according to the risk of money laundering or terrorist financing.

Businesses are allowed to sub-contract their customer identification work.

The new regulations **apply to** financial institutions as well as lawyers, accountants, casinos, tax advisers, auditors, estate agents, insolvency practitioners, persons selling goods worth more than €15,000, and trust or company service providers.

The maximum **penalty** is two years in jail and/or an unlimited fine. Civil penalties can also be imposed by the Financial Services Authority or the Office of Fair Trading.

These regulations implement EC Directive 2005/60. Equivalent regulations will therefore apply in due course across the EU. "Money laundering" means an act which falls within s 340(11) Proceeds of Crime Act 2002. Money laundering offences under the Act carry penalties of up to 14 years in jail and a fine.

Extradition: follow up

In the last issue of *Company Law Memo 2007 Newsletter*, we discussed the problems concerning the Extradition Act 2003. In response to a query from FL Memo, the Home Office has explained the latest developments in a letter to us. From 8 November, there is an option to enact a **new power** which would have the effect of introducing a new bar to extradition (the power is contained in the Police and Justice Act 2006). This means that extradition may be refused if a significant part of the allegedly unlawful conduct occurred in the UK. Also, it would have to be in the interests of justice for the offence to be tried in the UK rather than the country seeking extradition. The power, when enacted, would be exercised by a district judge, not by the home secretary.

In a separate development, a former deputy US attorney general in the Bush administration, Viet Dinh, has spoken of the increasing tendency of US courts to attack multinational business. He said that it was part of a pattern of the US trying to impose its laws on other countries. He added that a more restrictive UK extradition regime would be warranted in these circumstances, with a possible exception for serious violent offences such as terrorism.

▶ 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 up to date to the recent announcements (see below).

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

Provisions in force last month

Various provisions of the Companies Act 2006 come into force on 1 October 2007. This is the subject of the *Focus on...* in *Issue 7*, which looks at each of the areas affected, giving details of the provisions coming into force and the related paragraphs of *Company Law Memo 2007*.

Implementation delays

Stephen Timms, the Minister of State for Competitiveness, made a written statement to parliament on 7 November 2007 detailing changes to the Companies Act 2006 implementation timetable. The commencement date for most of the provisions due to be commenced on 1 October 2008 will be put back to **1 October 2009**. The vast majority of those provisions due to be commenced in April 2008 will not be affected and will go ahead as planned. The changes are reflected in our implementation timetable.

The issue has been the need to alter **Companies House systems** and processes to deal with the new filing requirements in the 2006 Act. However, there may still be a limited number of provisions which could be commenced on 1 October 2008 without affecting Companies House unduly. The government is consulting on the implementation of those provisions. A further statement will be made by the government in December, setting out the final commencement timetable that is expected to result from these discussions.

In the meantime, the government has produced an interim timetable. Most provisions initially intended for October 2008 have been put back until October 2009. However, some provisions may be treated differently. The key **problem areas** are set out in the table overleaf.

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



PDF printer friendly version

CA 2006



COMPANIES ACT 2006: IMPLEMENTATION cont...

| Provision | Subject | Implementation |
|-------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------|
| s 1175 | removal of special provisions about accounts and audit of charitable companies | Still due to come into force in March 2008 |
| ss 69-74 | objections to company names | Consultation pending: may still come into force on 1 October 2008 |
| ss 82-85 | disclosure of company name | |
| ss 155-159 | requirements to have one "human" director and only directors over 16 | |
| 175-177 | remaining directors' duties: to avoid conflicts of interest and duty, not to accept benefits from third parties and to declare interests in proposed transactions | |
| ss 180-181 | shareholders ratifying breach of duty | |
| ss 182-187 | directors' duty to declare interests in existing transactions | |
| ss 811(4), 812, 814 | inspection of a public company's register of interests in its shares | |
| - | repeal of the prohibition in CA 1985 on financial assistance for acquisition of shares in private companies | |
| ss 362-369 | requirement for approval of donations to/ expenditure relating to independent election candidates | Still due to come into force on 1 October 2008 |
| s 1157 | power of the court to grant relief from liability | |
| ss 1277-1280 | voting rights of institutional investors | |
| ss 275-279 | register of secretaries | Due to come into force on 1 October 2009, not 6 April 2008 |
| ss 327(2)(c), 330(6)(c) | notice of appointment of proxies | Not being implemented for the time being |

▶ Contents

▶ News

▶ Cases

▶ Legislation

▶ CA 2006

▷ All newsletters

▷ Online updates

▷ Email us



PDF printer friendly version

CA 2006

Consultation on the application of CA 2006 to LLPs

See CLM: ¶77+

BERR has published a consultation document on the application of the new Companies Act to Limited Liability Partnerships (LLPs). It sets out in more detail which provisions of the new Act are expected to apply to LLPs and proposals for related changes to the LLP regulations (SI 2001/1090).

In summary, the consultation seeks comments on a number of issues, including:

- » **amending the LLP regulations** to simplify them as well as to reflect the new Companies Act;



COMPANIES ACT 2006: IMPLEMENTATION cont...

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

- » the application of provisions in the new Act that will mean **no change** for LLPs because the sections have been restated and the CA 1985 equivalents apply to LLPs;
- » which of the **new provisions** in CA 2006 should apply to LLPs, including:
 - filing periods and late filing penalties for accounts;
 - the functions and powers of Companies House;
 - the rules for communicating with and serving documents on companies;
 - keeping members' residential addresses off the public record (set out in the draft Companies (Particulars of Usual Residential Address) Regulations 2008); and
- » which of the new provisions of CA 2006 will **not apply** to LLPs, including the provisions setting out directors' duties, the new derivative action procedure and the business review part of the directors' report to the accounts. These provisions are not expected to apply to LLPs because they are specific to the management structure of companies.

The government anticipates being able to publish draft regulations on the applicability of the new Companies Act to LLPs by mid-2008. These regulations and the relevant provisions of CA 2006 are expected to come into force for LLPs in October 2009.

The consultation paper can be found at: <http://www.dti.gov.uk/consultations/page42363.html>. Comments are invited by 8 February 2008.

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



PDF printer
friendly version

CA 2006