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Banking News

IMPLEMENTATION OF THE COMPANIES ACT 2006

1 October 2009 saw the implementation of the final parts of the new Companies Act 2006 (the "Act") which has been brought into force in tranches since it was enacted. The Act and related regulations are of wide-ranging implication for companies generally and give effect to a number of amendments affecting finance transactions.

Charges

Perhaps the most obvious change is the introduction of new forms for the registration of security documents at Companies House. Scottish companies will now submit form MG01s in place of form 410 and the form 419a which was filed when a charge was satisfied is replaced by forms MG02s and MG03s. For companies registered in England and Wales, forms 395 and 403a are replaced by forms MG01 and MG02 respectively. The content of the forms has not changed substantially however.

Another change to registration requirements came in the form of the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, which were made under the Act. These provide that charges created by overseas companies will not have to be registered at all unless the company in question is registered in the UK. Accordingly, the Slavenburg Register, which was previously held by Companies House to archive charges created by overseas companies who had not registered in the UK is rendered obsolete.

Corporate

The Act provides that companies incorporated under it have a short-form memorandum which will not be of significance in the operation of the company going forward. This is in contrast to the previous style of memorandum which contained the objects of the company. Full-form memoranda, where they appear in the constitution of companies incorporated prior to the implementation of the Act, shall now be deemed to form part of the articles of the company (though the company may choose to delete them). The effect of this is that a company may no longer be said to be acting *ultra vires* in relation to its powers to act as set out in its objects. In short, establishing whether a company has express power to take certain actions will not impact on the validity of such an act (unless there is bad faith). This said, however, it is still recommended that such enquiries be made to avoid disputes in the future.

A further effect of the changes to memoranda is that, for companies incorporated prior to 1 October 2009, the statement of limited liability currently contained in the company's memorandum will be deemed to be contained in its articles of association. The articles of companies incorporated under the Act will have to be checked to ensure that they include express provision limiting the liability of the members.

Companies incorporated under the Act and using the new model articles will benefit from more relaxed rules on decision making by directors as the model articles allow a "unanimous decision" to take the place of a board meeting. This means that a decision is made where all eligible directors "indicate to each other by any means that they share a common view on a matter" and thus paves the way for written resolution documents, or even emails or text messages, to replace the need for board meetings. It should be noted, however, that for reasons of evidence and certainty, approval of financing arrangements should continue to be evidenced by written board resolutions.

BANKING ON CLEARANCE FROM THE PENSIONS REGULATOR

In a world where The Pensions Regulator can issue contribution notices and financial support directions, putting in place new or additional banking facilities may not be as simple as it was in the past.

The Pensions Act 2004 allows the Regulator to issue contribution notices (requiring the payment of funds to a company's pension scheme) to an employer or a person connected to or associated with it.

Amongst other reasons, the Regulator can do so if:

(a) it is of the opinion that it is reasonable to do so; and

(b) the recipient of the notice was party to any act or a deliberate failure to act, the main purpose of which or one of the main purposes of which:

  (i) was to prevent the recovery of the whole or any part of a debt which was, or might become, due from the employer in relation to a defined benefit pension scheme under section 75 of the Pensions Act 1995 (deficiencies in the scheme assets, e.g. on employer insolvency); or

  (ii) satisfied the 'material detriment test' (i.e. if the Regulator is of the opinion that the act or failure to act has detrimentally affected, in a material way, the likelihood of scheme benefits that have accrued being received).

While this may seem to be targeted at companies that are expressly trying to avoid paying funds to their pension schemes, that need not be the case and the granting of a new security for existing debt (i.e. where the security does not relate exclusively to new funds) would potentially fall foul of the statutory provisions.

Take, for example, a company that has a defined benefit (e.g. final salary) pension scheme with a funding shortfall and which is entering into a new facility with its bank. If the bank has no security over the company's assets, it is likely to insist on it as part of the new package. This may not seem like an uncommon or unreasonable request for the bank to make: so, what's the problem?

As matters stand and assuming that the scheme also does not hold a security, the bank and the scheme would rank equally in the event of the company's insolvency. However, if the security that the bank is requesting is granted, any claim that it would have against the company's assets would rank ahead of any claim by the scheme and this could be viewed by the Regulator as being a course of action one of the main purposes of which is to prevent the recovery of the whole or any part of a debt which was, or might become, due from the employer under section 75 of the 1995 Act.

It is not all doom and gloom, though. The Regulator has the power to issue clearance statements in relation to a proposed transaction, in terms of which it confirms that it will not issue a contribution notice and/or a financial support direction (another form of funding direction that could justify an article to itself).

The Regulator will ask what the scheme trustees' views are on the proposed transaction and will require sufficient information to allow it to consider any application: e.g. information on the funding position of the scheme, details of any employer group structure and, most importantly, an assessment of the relative 'before and after' position of the scheme. In that context, it need not be fatal to a proposal or an application for clearance if the scheme suffers some detriment, provided that it is not "material" – the scheme trustees should and will, of course, seek to avoid it suffering any detriment.

Time should be allowed for the various parties (including the trustees) to obtain and consider advice and to discuss and, hopefully, agree matters, as well as for the Regulator to consider any application. Helpfully, the Regulator is conscious that clearance is usually sought in connection with time-critical matters and does its utmost to deal with applications as quickly as possible and actively assists in progressing matters.

Seeking clearance is optional, but many banks will make the provision of new facilities subject to clearance having been obtained.

The key thing to remember is that, with proper preparation and consideration, there is no reason that a balanced proposal cannot be agreed to by scheme trustees and receive regulatory clearance.

LIVINGSTON GO INTO "EXTRA TIME"

One of the more interesting recent appointments in which MacRoberts have been acting relates to the administration of Livingston Football Club Limited ("Livingston") where we acted for Donnie McGruther of Mazars. Donnie was interim manager and subsequently administrator of Livingston.

This case contained many interesting challenges and while most of these may be of interest only to the football fraternity, we believe that some of the lessons learned may be of wider interest.

Some background

Livingston Football Club is a member of the Scottish Football League ("SFL") and that body therefore had a substantial interest in the insolvency process. In particular, three rules of the SFL became extremely important:-

(i) a rule prohibiting transfer of membership of the SFL to a new legal entity ("the No Transfer Rule");
(ii) a rule permitting the SFL to penalise the company for going into administration ("the Insolvency Rule"); and
(iii) a rule requiring that all football creditors be paid in full ("the Football Creditor Rule").

Each of these rules is an obstacle to the reconstruction process in an insolvency of a football club. No doubt it is for the members of the SFL to make up their own rules as they see fit, but these rules may lead to the death of distressed clubs rather than their salvation.

The No Transfer Rule effectively precluded a sale of the business and assets of Livingston. This of course would be the preferred route in most insolvencies. This meant that the shareholding in Livingston became of paramount importance and, without control of that shareholding, it would be impossible to attract new investors into the football club. The No Transfer Rule also meant that a company voluntary arrangement ("CVA") became necessary.

The Insolvency Rule meant that the SFL were entitled to penalise Livingston simply for being subject to an insolvency process. In the end, the SFL decided to relegate Livingston from Division One to Division Three. The impact on the consortium who were interested in investing was substantial as the business model upon which they had initially been prepared to invest was based on the income available to the club in Division One. Division Three income is considerably lower than that achievable in Division One.

Mr McGruther managed to obtain control of the majority shareholding. Unless such control was secured at an early stage, it is likely that the club would have been liquidated and put out of business soon after Mr McGruther's initial appointment. Unless there was any prospect of new money coming in from investors (who would of course require the assurance that they would end up with a controlling shareholding) there could be no future for the club whatsoever.

Having ensured that control would be available to any purchaser, it was necessary to propose a CVA to eliminate Livingston's historic balance sheet deficit. This brought the Football Creditor Rule into play. HMRC (a substantial creditor in the insolvency) have published guidelines indicating that they are not prepared to support a CVA whereby one group of creditors is given special treatment. Such special treatment is exactly what the Football Creditor Rule requires. It is difficult not to be sympathetic to the position of HMRC but, as the SFL insist upon looking after the interests of their members and the members of other football associations, it is unlikely that the Football Creditor Rule will be dropped. Indeed given the requirements of UEFA and FIFA, it may not even be open to the SFL to abolish that rule.

The Livingston CVA was ultimately passed, however we believe that HMRC will not vote in favour of any other CVA where the Football Creditor Rule is observed.

Lessons

So some pointers for those that may become involved in football insolvencies:

(i) be prepared for a fight to obtain control of the majority shareholding. If you can't get control – it may be impossible to save the club;
(ii) if HMRC are a creditor in the insolvency with sufficient indebtedness to block a CVA, you may well have an insurmountable problem;
(iii) be prepared to accept that the club will be relegated and consider the impact that this may have on the willingness of new investors to become involved; and
(v) make sure you get the media on your side. It will be very difficult to carry out this process without public support.

MacRoberts publishes regular e-updates regarding various aspects of corporate and commercial law. If you would like to receive, free of charge, a copy of any of these publications, please register for the topics of interest to you by logging on to www.macroberts.com/e-updates.

SAVE MONEY. STAY OUT OF JAIL.

The dawn of another year ahead of us presents the conventional opportunity to commit to changing one's ways and abandoning bad habits. So what laudable goal is fitting of not only a new year, but also a new decade? While '*lose weight*', '*quit smoking*' and '*get fit*' are often popular choices, changes afoot in the world of data protection law push '*save money*' and '*stay out of jail*' rather further up the priority list.

Even in the season of merriment, regulatory fines can pose a sobering prospect. The FSA's '*Principles for Businesses*' require that an organisation takes "*reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems*" or else face a fine levied by the FSA. This principle extends to maintaining the security of customer data, as was made readily apparent by the fines exceeding £3 million levied on financial services businesses for data mishandling in 2009 alone.

The risk of financial penalties being imposed by the FSA for data security lapses is nothing new. However, the FSA has indicated that in the first quarter of 2010 it will publish the results of its recent financial penalties consultation, which could well see the level of penalties significantly increase next year (possibly even triple), together with the amount of FSA enforcement action.

As if that wasn't enough to put you off your festive turkey, as of April 2010, you could be fined *twice* for customer data mismanagement, when the Information Commissioner's Office receives its long sought after powers under Section 55A of the *Data Protection Act 1998*. Section 55A has been on the statute book for quite some time now (having been introduced by the *Criminal Justice and Immigration Act 2008*), but although currently dormant, publication of the Ministry of Justice's final impact assessment in November 2009 is likely to mean that it will come into effect in 2010.

Section 55A empowers the ICO to levy fines on organisations who knowingly or recklessly commit serious breaches of any of the data protection principles, where substantial damage or distress is likely. These principles relate not only to data security but also to matters such as data retention, accuracy and fair processing - and financial services businesses would do well to ensure that they are aware of the ICO's latest guidance on each of these matters. While the Ministry has considered maximum fines of £2.5 million or even setting them at 10% of the organisation's turnover, it now looks more likely that a £500,000 option will be chosen.

The Ministry is also currently consulting on the introduction of custodial sentences in 2010 for infringement of Section 55 of the Data Protection Act. This section makes it a criminal offence to knowingly or recklessly obtain or disclose personal data without the consent of the data controller. While 'blagging' (as the offence is colloquially known) is more often suffered by, rather than committed by, financial services personnel, the proposed change in penalties highlights the need for care when instructing external parties in relation to debt collection and other such matters.

So as we see out the first decade of the millennium, make a New Year's resolution worth sticking out: save money and stay out of jail!

RECENT DEALS ROUND-UP

- Advising on the Scots law aspects of the putting in place of new banking facilities for Johnston Press plc and its group companies which was announced to the London Stock Exchange on 28 August.
- Advising on the banking side of the Shanks Waste Management Limited joint venture with Energen Biogas Limited. The JV will develop a facility on a North Lanarkshire site that they expect to be capable of generating up to 3MWhrs renewable energy from next summer which could power 3,000 homes. This will be produced from 60,000 tonnes of organic waste, which will come from a range of sources including supermarkets, household and commercial kitchens and food processing plants.
- Acting for American Axle & Manufacturing, Inc., part of the American Axle & Manufacturing global group of companies, in relation to amendments to Scots law securities required as part of AAM's banking arrangements with JPMorgan Chase Bank (in respect of which we had previously advised) and also in relation to the addition of a second lien lender.
- Advising Clydesdale Bank plc, in relation to the funding of the acquisition by Murgitroyd & Company Limited, part of Murgitroyd Group plc, the European Patent and Trade Mark Attorney practice, of Raworth, Moss and Cook.
- Advising the funder of a major Scottish PPP Project in respect of the transfer of the majority shareholding in the project company.
- Advising the lender in respect of an acquisition of a company which owns and operates a care home.
- Advising Glasgow-based property investment venture HKIP Motherwell LLP in relation to the £3m funding from Barclays Bank plc required for the purchase of New Lanarkshire House at Strathclyde Business Park from Royal Liver Assurance Limited for £4m. The property is currently let to Scottish Enterprise.
- Acting for a number of banks in relation to the refinancing of significant loan facilities provided to a large Scottish company.
- Providing Scots law advice to a Lender in relation to a review of facilities provided to a multi-national organisation.
- Acting for the lender in its provision of funding to an Isle of Man based Company in connection with the purchase of the leasehold of a property in Scotland.
- Acting for The Royal Bank of Scotland plc in relation to its provision of facilities to Hart Builders (Edinburgh) Limited in relation to the development of a site at Westfield, Edinburgh.

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