

CORPORATE UPDATE

Corporate News from Flint Bishop

Issue 1 February 2009

The economic down turn last year signified the start of what looks to be a turbulent year for many businesses, both large and small.

Notwithstanding the uncertain economic climate, our corporate team continues to work closely with businesses of all sizes: whether it is a sale, acquisition, restructuring, refinancing or general corporate advice we are here to discuss all possible options with our clients.

Here at Flint Bishop we have recently restructured the corporate department and are pleased to have recruited Paul Greatbatch as a partner and Jenai Nissim as a solicitor. Our team is ready to assist you in meeting the challenges facing all of us in the year ahead.

We hope you enjoy this first edition of our newsletter and we would like to take this opportunity to wish all of our clients, referrers and friends a successful 2009.

DIRECTORS

Duties

On 1 October 2008 further sections of the Companies Act 2006 relating to directors duties came into force. Directors are under a duty to avoid a situation in which they have or can have a direct or indirect interest which conflicts with the interests of the company. Directors must not to accept a benefit from a third party that has been conferred upon them by reason of their directorship. They must also declare the nature and extent of any interest they have (howsoever arising) in a proposed transaction or arrangement with the company.

“ We are working with businesses to help them meet the challenges facing all of us in 2009. ”

Ran Oren
Head of corporate



In addition to these duties, directors are also required to declare any interests they may have in existing transactions or arrangements that have been entered into by the company. This places on directors further obligations to ensure they consider a wide range of factors prior to making any decisions on behalf of the company.

Age

With effect from 1 October 2008 the minimum age of a director was changed to 16 years for directors of any company, whether public or private. With effect from this date, any director under the age of 16 automatically ceased to be a director. Despite the fact that a person under the age of 16 cannot legally be a director, he can still be liable under any of the provisions of the Companies Acts 1985 and 2006 if he acts as a director or shadow director of a company.

As a result of this change, it is important that a company ensures that it still has the requisite number of directors to ensure it remains compliant with both statute and any provisions in its articles of association.

At the other end of the age scale, it should also be noted that as of 6 April 2007 there is no longer an upper age limit by which directors of public companies or private companies which are subsidiaries of public companies will have to vacate office.

Directors: are you a natural person?

All companies must now have at least one director who is a natural person (i.e. an individual, rather than a company). Unlike the change to the minimum age in directors, there is an exception to this rule for companies that did not have a natural person as a director on 8 November 2006. Companies that fall into this category will have a period of grace until 30 September 2010 in which to appoint a natural person as director. This grace period only applies to companies in existence on 8 November 2006; any companies incorporated after this date are required to have at least one natural person as a director.

OBJECTION TO COMPANY NAMES

New provisions came into effect on 1 October 2008 allowing a person the right to object to a company name that has been registered opportunistically and is the same as a name in which the person holds goodwill, or is sufficiently similar to such a name so as to be misleading. Once an objection has been made, the respondent has the opportunity to show that the name was legitimately adopted. However, if the applicant can show the name was registered to obtain money from him or prevent him from registering the name, the respondent will find it difficult to resist the objection.

REDUCING A COMPANY'S CAPITAL

The share capital of a company represents an identifiable reserve available for its members and creditors. The protection of share capital is a fundamental principle of company law. However, it might be desirable for a company to reduce its capital: to make available reserves for the payment of dividends or to facilitate a share buyback, for example. Until recently, if a company wanted to reduce its share capital, it would have to follow a time-consuming, costly and technical court application process.

Following changes brought about under the Companies Act 2006, a company may now reduce its capital by adopting a simplified procedure that does not require court approval. In order to reduce the capital of a private limited company under the new procedure, each director must make a statement of solvency, the shareholders must pass a special resolution and the company must prepare a memorandum stating the new capital. Each of these documents must be filed at Companies House together with a statement of compliance.

It should be noted that it is not possible to reduce the share capital of a company so as to leave it with no share capital or with only redeemable shares in issue. Furthermore, whilst the procedure is undoubtedly streamlined in comparison to the court route, there are potentially severe penalties for failing to follow the correct procedure. Accordingly, a company and its directors must take careful legal and financial advice when considering a reduction in capital.

FINANCIAL ASSISTANCE

On 1 October 2008, the prohibition against a private company giving financial assistance in connection with the purchase of its own shares was repealed. The prohibition for public companies and their subsidiaries remains in force.

Whilst the removal of the prohibition will streamline corporate transactions for private companies, as they will no longer have to carry out the 'whitewash' procedure, directors will still be required to have regard to matters such as their legal duties and the solvency of the company when entering into transactions involving financial assistance.

Directors could face claims for breach of duty if they fail properly to consider the consequences of entering into a transaction involving financial assistance and as a result the company subsequently suffers financial harm. The shareholders of a company, with the consent of the court, will be able to bring actions against the directors who may be held to be personally liable to reimburse the company for the resulting financial loss.

Directors of companies considering entering into a transaction that involves financial assistance should take legal advice to avoid the pitfalls. Here are some key points to consider:

Directors' duties: Board minutes should set out clearly that the directors have considered whether or not entering into the transaction would promote the success of the company and be in the best interest of its members.

Solvency: Directors should still consider the cash flow, management accounts and net asset position of the company to ensure that there are no solvency issues. Directors should also consider their obligations under the Insolvency Act 1986 with regards to wrongful trading and transactions at an undervalue.

Capacity and authority: Directors will still need to ensure that the company has the requisite authority in the articles of association to give financial assistance. The fact that the directors have checked this and the company is so authorised should be recorded clearly in the board minutes.

Capital maintenance: Care should be taken to record that the transaction does not constitute an unlawful reduction of capital. This would be the case if the net assets of the Company are reduced as a result of the giving of financial assistance and if there are insufficient distributable profits to cover such reduction in the net assets.

FLINT BISHOP ADVISE ON DISPOSAL OF WEIGHING BUSINESS

The Corporate Department has advised H & H Services Limited on the sale of the trade and assets of its industrial weighing division (Division) to Greenbank Materials Handling Limited (Greenbank), a subsidiary of the Greenbank Group UK Limited. Corporate partner Paul Greatbatch led the team.

The Division specialises in industrial weighing and control equipment for materials and bulk handling systems. The addition of continuous weighing solutions to Greenbank's core activities will enable the company to offer full turnkey materials handling solutions.

The new business will trade under the name of H & H Services, a division of Greenbank, and all key personnel have been transferred to Greenbank. The original H & H business has changed its name to H & H Process Limited to reflect the acquisition and will continue to supply process equipment including sampling, level and flow detection, vibration and blending products.

Commenting on the transaction, Paul Greatbatch said, "There is a clear synergy between the businesses of the buyer and seller, and the acquisition will provide Greenbank with the opportunity to build on its existing customer base and develop new opportunities. There was a strong desire to complete the transaction as quickly and smoothly as possible; all parties worked well together to achieve that goal. I wish H & H and Greenbank the best of luck in what I am sure will be a prosperous future."

PLEASE NOTE: This newsletter is intended as information and guidance only. Professional advice should always be obtained before acting on any information contained in it.

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