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Insights

UK CORPORATE BRIEFING DECEMBER 2023

Dec 05, 2023

SUMMARY

Welcome to the Corporate Briefing, where we review the latest developments in UK corporate law that you need to know about. In this month's issue, we discuss:

Estimated timeline for the changes to the Listing regime

- The Regulatory Initiatives Grid has been updated and reflects the timeline for the new Listing Rules and the next steps for the changes to the UK prospectus regime.

Market Watch Issue No.75

- The FCA has published its latest edition of Market Watch focusing on market soundings and recent observations.

Government response to the Payment Practices and Performance amendments

- After consultation, the government has decided to take forward several amendments to the Reporting on Payment Practices and Performance Regulations 2017.

Revised QCA Corporate Governance Code

- The Quoted Companies Alliance has published a revised corporate governance code. The Code is still based around 10 Principles but has been updated to keep pace with evolving investor expectations, particularly around topics like ESG.

Glass Lewis 2024 UK Policy Guidelines

- Glass Lewis has published its annual voting policy guidelines ahead of the 2024 AGM season.

FRC UK Corporate Governance Code consultation update

- The FRC has provided a policy update on their recent consultation on the UK Corporate Governance Code together with proposals to engage with stakeholders on the UK Stewardship

Code.

FRC Review of Corporate Governance Reporting

- A look at the FRC's annual review of corporate governance reporting together with some of its recommendations for good reporting.

Financial promotion exemption for high-net-worth individuals and sophisticated investors

- The Government has published draft legislation which will amend the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 and reform various exemptions from the financial promotion restriction. The Order is expected to come into force on 31 January 2024.

Written resolutions must be circulated by the board

- This case is a good reminder that shareholder written resolutions must be circulated by the board; shareholders don't have the right to circulate them themselves.

MAC ruling overturned – and warranty notice defective

- The Court of Appeal has overturned a MAC ruling on the basis that the judge used the wrong comparators - and also ruled that the buyer's warranty claim notice didn't comply with the SPA.

No general duty of good faith in a long-term collaborative contract

- Increasingly, the courts seem reluctant to imply duties of good faith – even in relational style contracts; and if an express duty of good faith has been included, an implied one may be even less likely.

Deed signed by non-directors in the wrong place was still effective

- A court has held that a deed entered into by a company was effective despite being signed by persons that weren't directors.

Section 69 can prevent use of pre-existing company name

- This court decision clarifies that s69 Companies Act 2006 can prevent the future use of a company name which was registered before s69 came into force.

Legal assignment had to be signed by the assignor, not his attorney

- The high court has held that signature by an attorney on behalf of the assignor was not sufficient for a legal assignment; the assignment had to be signed by the assignor himself.

ESTIMATED TIMELINE FOR THE CHANGES TO THE LISTING REGIME

The Financial Services Regulatory Initiatives forum has recently updated its Regulatory Initiatives Grid which provides timelines for initiatives led by one or more forum members including the Financial Conduct Authority, the Bank of England and His Majesty's Treasury. Of note is further details on the timing for the new single segment listing regime. As planned, we can expect a further consultation paper by the end of this year with the aim of having final rules by June 2024.

On the reforms to the UK Prospectus Regime, we currently have draft legislation and the FCA is hoping to consult on changes to the FCA rules in summer 2024. It is unlikely that any changes will come into effect before 2025.

The Grid also confirms that the government has accepted all of the recommendations in the Secondary Capital Raising Review and is currently considering how to take these forward. Some of these have already been implemented eg. the changes to the Pre-Emption Group Statement of Principles.

MARKET WATCH ISSUE NO.75

The Financial Conduct Authority ("FCA") has published its latest newsletter on market conduct and transaction reporting issues. This edition of Market Watch (Issue No. 75) focuses on market soundings and recent FCAs observations of cases where market sounding recipients ("MSRs") have received an initial communication from disclosing market recipients ("DMP") seeking their consent to receive the sounding/inside information and subsequently trade in the relevant shares before the DMP discloses the inside information. Even though the DMPs did not, during the initial communication, disclose the identity of the shares or the nature of the proposed transaction, the MSRs were able to identify those details using other available information. This commonly occurred where there was a delay between DMPs requesting consent and the MSR giving it.

To minimise the risks of insider dealing and unlawful disclosure, the FCA recommends that:

- DMPs should take particular care when making a market sounding if a financial instrument has few actors and where potential external information the MSRs hold could reasonably be used to identify the relevant financial instrument;
- DMPs should consider whether the information provided initially is essential for the MSR to assess whether to receive the information and should consider and assess the standardised information they use making it clear at the start of any market sounding that the communication is a market sounding providing the MSR with an opportunity to decline;
- Many MSRs appoint gatekeepers in compliance or front-office teams as a first point of contact who will decide whether to accept a market sounding and how it will operate in practice. The

FCA support these types of arrangements but MSRs should ensure staff in these positions are properly trained in relevant internal procedures and on the UK Market Abuse regime.

The FCA will intervene when they have reason to suspect behaviour detrimental to confidence in, and the fairness of, UK markets.

GOVERNMENT RESPONSE TO THE PAYMENT PRACTICES AND PERFORMANCE AMENDMENTS

Under the Reporting on Payment Practices and Performance Regulations 2017 large UK companies and LLPs have to report, twice a year, on their payment practices, policies and performance which includes statistics on (i) the average number of days taken to make payments in the reporting period; (ii) the percentage of payments made within the reporting period which were paid in 30 days or fewer, between 31 and 60 days, and in 61 days or longer; and (iii) the percentage of payments due within the reporting period which were not paid within the agreed payment period. The report must be published on the web-based service provided by the government within 30 days after the reporting period.

Companies in scope are those which meet at least two out of three of the following criteria:

- £36 million annual turnover
- £18 million balance sheet total
- 250 employees

After consultation, the government has decided to amend the Regulations so that:

- the Regulations will be extended beyond the current sunset clause date of 6th of April 2024 for up to seven years, with a review to take place after five;
- qualifying businesses will be required to report the total value of payments due in the reporting period that have not been paid within agreed terms, alongside existing requirements to report on the total volume of payments due;
- the Regulations will include an effective method of reporting the proportion of disputed invoices whilst still including them as late payments in overall payment time data;
- the payment dates to be reported when supply chain finance is used will be made clearer;
- where relevant, reporting must include information on standard retention payment terms and retention payment performance statistics for qualifying construction contracts; and

- businesses will need to include sector identification in their payment reporting in response to stakeholder requests.

REVISED QCA CORPORATE GOVERNANCE CODE

The Quoted Companies Alliance ("QCA") has published a revised corporate governance code ("Code"). The Code is still based around 10 Principles but has been updated to keep pace with evolving investor expectations, particularly around topics like ESG.

The revised version takes into greater consideration those inside and outside of the company as well as the make-up of the boardroom. The new Code will apply for financial years beginning on or after 1 April 2024 with the first disclosures against the new Code expected in 2025. There will also be a transitional period of 12 months to allow companies time to adopt the revised Principles.

The Code is widely applied by quoted companies not on the Premium List with approximately 93% of companies on AIM applying the Code and three-quarters of companies quoted on the Aquis Stock Exchange, a substantial increase over the last 5 years. Companies need to apply the 10 Principles and publish certain related disclosures that describe the company's own position and why they have chosen it.

See our insight, "Revised QCA Corporate Governance Code".

GLASS LEWIS 2024 UK POLICY GUIDELINES

Glass Lewis has published its annual voting policy guidelines ahead of the 2024 AGM season. As best practice in the UK is heavily influenced by the Investment Association ("IA"), Glass Lewis will review a company's adherence to the IA's principles alongside those of the UK Corporate Governance Code and the applicable Listing Rules.

KEY CHANGES INCLUDE:

Director attendance – Glass Lewis typically recommend voting against re-election of directors that have failed to attend either (i) at least 75% of board meetings; or (ii) an aggregate of 75% of board and applicable committee meetings, subject to exceptions for directors in their first year of service or if mitigating circumstances have been disclosed.

Director accountability for climate-related issues – for companies with material exposure to climate risk from their own operations, Glass Lewis believe they should provide thorough climate-related disclosures in line with the recommendations of the Task Force on Climate-related Financial Disclosures ("TCFD"). They will assess whether companies have disclosed explicit and clearly defined board-level oversight responsibilities for climate-related issues. Where either or both of these disclosures are absent or significantly lacking, they may recommend a vote against responsible directors.

Cyber risk oversight – it is Glass Lewis' belief that where a company has been materially impacted by a cyber-attack, shareholders can reasonably expect periodic updates communicating the company's ongoing process towards resolving and remediating the impact of the attack. Where the board's oversight, response or disclosures are insufficient or lacking, they may recommend a vote against appropriate directors.

Executive shareholding requirements – companies should generally adopt minimum executive share ownership requirements that apply for the duration of an executive's tenure and for a period post-employment (typically two years).

Remuneration relative to ownership structure – where a significant equity award is made to an executive with a significant shareholding, the company should include challenging targets attached to a diverse set of performance metrics together with meaningful disclosure on the company's engagement with shareholders or a policy that the shareholder will not vote on the award.

Remuneration relative to peers – companies should set remuneration levels relative to peers (based on relevant stock market indices, market cap, industry and/or liquidity) and provide supporting disclosure where key elements of the executive pay plan deviate from market practice.

FRC UK CORPORATE GOVERNANCE CODE CONSULTATION UPDATE

After considering extensive feedback and aligning with their objectives, the Financial Reporting Council ("FRC") has decided to implement only a few of the originally proposed 18 revisions regarding the UK Corporate Governance Code ("Code"). Notably, they will focus on streamlining and reducing duplication within the Code, with significant revisions concerning internal controls. Over half of the original proposals, including those relating to audit committees, ESG, diversity provisions, over-boarding and Committee Chairs' engagement with shareholders, will not proceed. The FRC plans to publish the updated Code in January 2024. Also in January 2024, the Stakeholder Insight Group will play an expanded role in advising the FRC on improving guidance associated with the Code.

The FRC has acknowledged concerns raised on the UK Stewardship Code and plans to review the Stewardship Code in 2024. It will engage with stakeholders on how best to review the Stewardship Code and what changes should be made going forward so that it remains fit for purpose.

FRC REVIEW OF CORPORATE GOVERNANCE REPORTING

The Financial Reporting Council ("FRC") has published its annual review of corporate governance reporting which showcases examples of high-quality and insightful reporting by many companies. However, their findings show that there are still too many examples of unconvincing boilerplate reporting which fails to meet stakeholder expectations.

FRC'S FINDINGS AND RECOMMENDATIONS INCLUDE:

Compliance with the Provisions

A majority of companies either clearly state full compliance or set out what Provision(s) they depart from. However, some companies are still not offering clear reporting on compliance using vague statements such as “the company has complied with all the Provisions of the UK Corporate Governance Code except as specifically identified in this report”. The FRC finds this unhelpful as it is not always clear which Provisions the company has not complied with.

Recommendation: companies should clearly set out which Provisions they haven’t complied with and why they deviate from them, as well as if/ when they intend to bring their governance practices into line with the UK Corporate Governance Code (“Code”).

Risk

The Code asks the Board to report on its review of the effectiveness of risk management and internal control systems. To avoid confusion and ambiguity, companies should avoid using general language such as “The board (or a relevant committee) reviews the effectiveness of risk management and internal control systems” which does not provide the reader with certainty that the board has discharged this responsibility.

Recommendation: good reporting on the process carried out for the review should include details of how the board, or the relevant committee(s) on its behalf, have undertaken the review, who was consulted, what reports, or evidence was received and what areas were covered by the review.

Stakeholder and workforce engagement

Stakeholder engagement continues to improve. A designated NED responsible for workforce engagement continues to be the most frequently used engagement mechanism, with 58% of companies this year choosing to adopt this method.

Recommendation: the FRC would still like to see companies reflect on the feedback received and its impact on board decisions. Companies should also explain why they consider their engagement mechanisms to be effecti*ve*.

Environment and TCFD

Since 1 January 2021 Task Force on Climate-related Financial Disclosures (“TCFD”) reporting became mandatory for premium listed companies and companies in the FRC’s sample had taken steps to improve their reporting and strengthen their governance of climate-related issues.

Recommendation: the FRC would like to remind companies that a good statement should clearly explain a company’s level of consistency with the TCFD recommendations, stating any areas where they are not yet compliant, and avoiding vague statements.

Diversity

Overall, companies have improved in disclosing certain aspects of diversity reporting within their annual reports.

Recommendation: more can be done to ensure there is a link between company and diversity strategy.

Cyber and Information Technology

Although the Code does not specifically ask for reporting in this area, most companies in the sample outline the risks, opportunities and medium to long-term importance of cyber security to their business and market.

Recommendation: boards should consider the potential of AI as well as risks – including risks to people and wider society. This requires boards to increase their knowledge on AI, whether it be through training or tapping into management and external expertise.

FINANCIAL PROMOTION EXEMPTION FOR HIGH-NET-WORTH INDIVIDUALS AND SOPHISTICATED INVESTORS

A financial promotion is a communication that contains an invitation or inducement to engage in a financial product or service. The communication of financial promotions is subject to regulatory safeguards, which seek to ensure that consumers are appropriately protected so that they are able to make informed and appropriate decisions. The Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 ("FPO") includes a number of exemptions from the financial promotion restriction which enable unauthorised individuals or businesses to communicate financial promotions without requiring the approval of an authorised firm. The consultation focused on three specific exemptions in the FPO:

- High net worth individuals (Article 48)
- Sophisticated investors (Article 50)
- Self-certified sophisticated investors (Article 50A)

After consultation, the government is making the following changes to these exemptions:

- High net worth individual - increasing the financial thresholds to be eligible for the high net worth individual exemption to (i) income of at least £170,000 (from £100,000) in the last financial year; or (ii) net assets of at least £430,000 (previously £250,000 or more) throughout the last financial year;

- Self-certified sophisticated investor - amending the criteria to be eligible for this exemption by:

  - Removing the criterion of having made more than one investment in an unlisted company in the previous two years as it is no longer a suitable indicator of investor sophistication; and

  - Increasing the company turnover required to satisfy the 'company director' criterion to £1.6m (previously £1m). The government considers that being a director of a company with £1.6 million annual revenue is a sufficiently high bar to demonstrate business success and sophistication, and that this will exclude less experienced directors. The government does not intend to rename the self-certified sophisticated investor exemption; and

- Updating the high net worth individual and self-certified sophisticated investor statements by simplifying the language, updating the format and requiring greater engagement to ensure investors do not incorrectly certify themselves and/or not understand the regulatory protections they are giving up when receiving promotions subject to the exemptions.

The high net worth individual and self-certified sophisticated investor exemptions only apply to a restricted set of investment types, principally being shares in unlisted companies (or collective investment schemes investing in unlisted companies). It was hoped that this list would be expanded. However, the government confirmed that it does not intend to expand the list of eligible investments at this time.

Businesses that are currently making use of these exemptions should ensure they are ready to comply with the rule changes for new promotions after implementation and only make use of the updated forms of certification.

WRITTEN RESOLUTIONS MUST BE CIRCULATED BY THE BOARD

Kamenetskiy v Zolotarev [2023] EWHC 2619 (Ch)

This case is a good reminder that shareholder written resolutions must be circulated by the board (or the sole director, if there is only one).

Following disagreements about further funding, certain shareholders had sent resolutions (to appoint further directors) to the sole director for circulation, copying the other shareholders. Moments later, they then sent signed copies of the resolutions (before they had been circulated) – and proceeded on the basis that the resolutions had been passed.

But the judge held that the resolutions had not been validly passed. There had been no valid decision of the board to circulate them - and there is no 'self-help' mechanism to enable shareholders to circulate resolutions themselves (although shareholders can require the company to circulate a written resolution if they hold the requisite percentage of shares - being 5% or such lower amount as the articles of association may specify, see s292 Companies Act 2006). Also, the resolutions weren't saved by s293(7) Companies Act 2006. It provides that the validity of a resolution is not affected by failure to comply with 'this section'; but the requirement for the board to circulate the resolution was contained in another section. Finally, although the sole director had subsequently circulated the proposed resolutions, they were not signed (by any shareholder) and those shareholders that had signed the earlier resolutions were not 'pre-approving' the later resolutions – they were approving the earlier resolutions (which they considered to have been passed as a result). In fact, the judge queried whether pre-approval/pre-signing was ever appropriate – noting that "pre-agreement is not contemplated by the Companies Act and would completely cut across the circulation requirements".

MAC RULING OVERTURNED – AND WARRANTY NOTICE DEFECTIVE

Decision Inc Holdings Proprietary Limited v Garbett [2023] EWCA Civ 1284

The Court of Appeal has overturned a High Court ruling that a warranty relating to a 'material adverse change' had been breached. The Court of Appeal held that the judge had used the wrong comparators when it came to assessing the amount of the change; it also held that the original notice of claim hadn't complied with the SPA content requirements and so the issues couldn't be retried.

The warranty stated that "since the Accounts Date there has been no material adverse change in the… prospects of the Company". The High Court judge had provided some potentially noteworthy guidance as to what 'material' meant in the context of M&A MACs (suggesting that a change was material if it would cause a reasonable person – with the aims and objectives of the buyer – to withdraw from the transaction or renegotiate its terms). But the Court of Appeal noted that he had used the wrong comparators: in particular, instead of comparing the prospects of the Company as at the accounts date with its prospects as at the date of the agreement, the judge had compared the prospects of the Company as at the date of the agreement with the "expectation which a reasonable buyer would have had" of its prospects at that time.

What's more, the Court of Appeal held that the Buyer's notice of warranty claim was defective, so the claim failed anyway and the issues couldn't be re-tried. The SPA provided that the Sellers would not be liable for a Claim unless given notice in writing "summarising the nature of the Claim (in so far as it is known to the Buyer) and, as far as is reasonably practicable, the amount claimed". The court held that this required the Buyer to provide an individual estimate of the amount claimed in respect of each breach of warranty – and not simply an aggregate amount (which is what the Buyer had done). The court rejected the notion that that wasn't possible, stating that "while the damages sought might have overlapped with those claimed for other alleged breaches of warranty, there was surely no bar to assessing what the damages would be if no other breach of warranty were alleged or made out".

NO GENERAL DUTY OF GOOD FAITH IN A LONG-TERM COLLABORATIVE CONTRACT

Phone 4U Limited (in administration) v EE Limited and others [2023] EWHC 2826

Increasingly, the courts seem reluctant to imply a duty of good faith – even when a contract displays features of a 'relational contract'. And if a contract already contains an express duty of good faith in relation to certain obligations, it may be even less likely that a duty of good faith will be implied in relation to other obligations.

Phones 4U – after it had gone into administration - brought claims for breach of good faith against EE. It claimed that EE had notified one year in advance that it would be terminating their distribution agreement to force Phones 4U into administration and avoid further revenue sharing.

However, the court declined to imply a general duty of good faith. Even though the distribution agreement was long-term, collaborative and exclusive, it was not a relational contract because EE and Phones 4U were competitors. Also, in any event, it was not necessary to imply a duty of good faith because the terms of the agreement were detailed and the parties had included an express duty of good faith where that was what they had wanted. Finally, even if a general duty of good faith had applied, it would not have been breached. EE was entitled to prioritise its own interests and its decision to notify termination when it did would not be regarded as commercially unacceptable by reasonable and honest people.

DEED SIGNED BY NON-DIRECTORS IN THE WRONG PLACE WAS STILL EFFECTIVE

Lendlease Construction (Europe) Ltd v Aecom Ltd [2023] EWHC 2620 (TCC) (01 November 2023)

One special feature of a deed is that the limitation period for bringing claims is 12 years (compared with 6 years for normal contracts). And one requirement of a deed is that it be 'executed'. The court's approach in this case shows that, though execution requirements are taken very seriously, the courts are reluctant to allow a party to avoid an obligation by relying on its own failure to comply.

Lendlease bought a claim against Aecom for breach of a consultancy contract in relation to the building of a new oncology centre at a hospital in Leeds. The document was described as being a deed – and it was important that it was a deed, as otherwise Lendlease's claim was most likely out of time. But Aecom disputed that it had been properly executed. The ways in which a company can execute are set out in s44 Companies Act 2006: by a director signing in the presence of a witness (who also must sign, to 'attest'); by two directors – or a director and the company secretary – signing; or by the company's seal being affixed. Neither of Aecom's signatories were actually directors – and they had both signed in the wrong place.

The court held that the contract was still effective as a deed. The judge noted that “where a person is held out as being in a particular position or as having particular authority on behalf of a company an estoppel can arise preventing the company from denying that such a person has the authority normally associated with that position. There must be a holding out and reliance upon it but it is clear that both will be readily inferred.” Here, Aecom’s signatories had intended to execute the contract as a deed and had been held out as having the authority to do so. In addition, it didn’t matter that they had signed in an execution block that referred to them witnessing the affixation of the company seal (which had not been affixed): to have intended to sign as witnesses to an affixing that had not occurred would have been improper conduct – and so the conclusion was that they had signed in the wrong place in error.

SECTION 69 CAN PREVENT USE OF PRE-EXISTING COMPANY NAME

Lidl Logistics Ltd v Lidl Stiftung and Co KG [2023] EWHC 2760

Under s69 Companies Act 2006, a person can apply to have another company’s name changed if it is sufficiently similar to a name in which the applicant has goodwill and its use would be likely to mislead by suggesting a connection between them. This case clarifies that, whilst it does not act retrospectively, the section can prevent the continued use of a name registered before s69 came into force.

Lidl applied to have the name of Lidl Logistics Limited changed, after discovering it during a company name search. Lidl claimed that their name held significant reputation and goodwill and Lidl Logistics’ use of it would suggest that they were connected. But Lidl Logistics argued that they had registered the name before s69 had come into force – and the section did not operate retrospectively.

The High Court – upholding the earlier decision of the Company Names Tribunal - clarified that, whilst s69 does not operate retrospectively (and so does not impose liability for the past use of the name), it did regulate the future use of the name. The presumption that new legislation should not unfairly interfere with vested rights did not apply – as it only applied to legislation that was unclear – but even if it did apply it was difficult to see what vested rights there were as Lidl Logistics had never traded.

Lidl Logistics also sought to argue that its registration of the name did not harm Lidl’s interests, as it had no intention to use the company and it had made no attempts to sell the name to Lidl. However, the court inferred from the determination to keep the name that some use must be contemplated, perhaps the sale of the name to a third party, which could adversely affect Lidl’s interests.

LEGAL ASSIGNMENT HAD TO BE SIGNED BY THE ASSIGNOR, NOT HIS ATTORNEY

Frischmann v Vaxeal Holdings SA [2023] EWHC 2698 (Ch)

The requirements of a legal assignment – sometimes called a statutory assignment – are set out in s136 Law of Property Act 1925. One requirement is that the assignment must be in writing “under the hand of the assignor”. In this case, the judge held that signature by an attorney on behalf of the assignor was not sufficient; to be a valid legal assignment, the assignment had to be signed by the assignor himself.

Mr Frischmann sought summary judgment in relation to amounts due under certain loans that had been assigned to him. However, he had signed the assignments as attorney for the assignor (his father). The court held that the assignments were not legal assignments as they had not been signed by the assignor himself (but they did take effect as ‘equitable assignments’: an equitable assignment does not have the same requirements as a legal assignment, but it does not have the same benefits either; only a legal assignment allows the assignee to enforce the assigned rights in their own name).

Some previous cases had suggested that an ordinary agent could not sign a legal assignment on behalf of the assignor (largely on the basis that signature by an agent was expressly permitted in relation to other provisions of the Law of Property Act and so, in the absence of a reference here, it was considered to be insufficient). However, it has come as surprise to many that signature by an attorney is not sufficient, having regard to the authority granted to an attorney under s7(1) Powers of Attorney Act 1971, which provides that:

"If the donee of a power of attorney is an individual, he may, if he thinks fit – (a) execute any instrument with his own signature, and (b) do any other thing in his own name, by the authority of the donor of the power; and any instrument executed or thing done in that manner shall … be as effective as if executed by the donee in any manner which would constitute due execution of that instrument by the donor or, as the case may be, as if done by the donee in the name of the donor".

The decision in this case may be able to be distinguished in future cases, having regard to a different fact pattern – for example if the assignor is a company (having regard to s47 Companies Act 2006 – which permits a company to empower a person as its attorney to execute deeds and other documents on its behalf – and the fact that a company always relies on human agents in order to act). In any event, as it is only a High Court decision it is not binding authority anyway. However, for the time being, where practicable, it would be prudent to avoid having an attorney sign a legal assignment, especially if the assignor is an individual.

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