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Insights

UK CORPORATE BRIEFING SEPTEMBER 2024

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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:

FCA consultation on changes to National Storage Mechanism filing requirements

- The FCA has published a consultation paper proposing changes to the data requirements for regulated information on the National Storage Mechanism.

Wates Principles report on quality of reporting

- The FRC's latest report on the application of the Wates Corporate Governance Principles has found that approximately 30% of in-scope large private companies applied the principles in 2021/22.

Register of members was determinative despite a transfer made by forgery or without authority

- This case highlights how crucial the register of members is in determining who the members of the company are – and, in turn, the validity of shareholder resolutions.

Restrictive covenants must be reasonable

- This High Court judgement is a good reminder that, to be enforceable, restrictive covenants must be reasonable – in terms of their length, the scope of the restricted business activity and their geographical extent.

FCA CONSULTATION ON CHANGES TO NATIONAL STORAGE MECHANISM FILING REQUIREMENTS

The FCA has published a consultation paper (CP24/17) proposing changes to the data requirements for regulated information on the National Storage Mechanism ("NSM"), an online archive of disclosed regulated company information. The paper outlines plans to improve the NSM by introducing more comprehensive metadata requirements which will make it easier for users to find regulated information.

The consultation closes on 27 September 2024, with final rules expected by the end of 2024. The new requirements are proposed to come into force in the second half of 2025.

WATES PRINCIPLES REPORT ON QUALITY OF REPORTING

The FRC has published a second report on the quality of reporting from private companies who have chosen to follow the Wates Corporate Governance Principles. Of the 1,815 in-scope companies*, 547 (30%) chose to apply the Wates Principles in 2021/22.

The findings show slight improvements in reporting including more companies reporting on how their purpose aligned with their business practices and on the connection between their strategy and purpose/culture. However, the report highlights a need for companies to reduce their use of boilerplate disclosures and foster a disclosure approach which explicitly links a company's purpose, strategy, culture, and values to its board's activities and the context in which it operates.

Key takeaways:

- Companies should provide company-specific disclosures that reflect the unique aspects of each company's governance practices.
- Companies to enhance transparency, particularly in areas such as board independence, director responsibilities, and stakeholder engagement.
- Companies should move towards providing practical examples of how governance principles are applied in real situations, linking governance disclosures to actual business outcomes.
- Companies should connect governance practices with long term strategy and value creation, moving beyond short-term performance metrics.

Overall, the report emphasises that large private companies still have significant room for improvement in their corporate governance disclosures, especially in making them more transparent, detailed and aligned with the Wates Principles.

*In-scope companies are large private companies which satisfy one or bother of the following criteria: (i) more than 2000 employees; and/or (ii) a turnover of more than £200 million and a balance sheet of more than £2 billion.

REGISTER OF MEMBERS WAS DETERMINATIVE DESPITE A TRANSFER MADE BY FORGERY OR WITHOUT AUTHORITY

Bland and Another v Keegan [2024] EWCA Civ 934

This case highlights how crucial the register of members is in determining who the members of the company are – and, in turn, the validity of shareholder resolutions.

Jeanette Keegan was the sole director and subscriber of a company which was run by her son, Darren. Later, 50% of her shares were transferred to Darren's wife, Julie, who also became a director. When Darren and Julie's relationship with his mother, Jeanette, broke down, Julie signed a stock transfer form purporting to transfer the remaining 50% of the shares to herself (which she said Darren gave her to sign on the basis that it was 'an internal document to end the disagreement with Jeannette' – and which she said she signed in her own name). Later, Julie passed a written resolution to appoint liquidators. The issue to be determined in this case was whether that appointment was valid.

The Court of Appeal held that the liquidators were validly appointed – because the identity of the members for the purposes of determining the validity of the written resolution was to be determined by the register of members at the relevant time, even if the stock transfer form was a forgery (or was simply signed without authority). This followed the fundamental principle of English company law that, except where express provision is made to the contrary, the person on the register of members is the member to the exclusion of any other person, unless and until the register is rectified. And, whilst the Companies Act 2006 provides that the register is (only) "prima facie" evidence of any matters which are directed or authorised to be inserted in it (section 127) – i.e. a first impression and not conclusive – that necessarily followed from the definition of member as being a company's subscriber and any person who agrees to become a member of company and whose name is entered in the register of members (section 113). That is, the register isn't necessarily conclusive because, by definition, a person may be a member even though they are not entered on the register of members (if they are a subscriber) and may not be a member even if they are entered on the register (if they are not a subscriber and did not agree to be a member).

Some interesting features of the case are worth a mention: the register of members itself was never presented and the case was decided on the basis that the register reflected the filings that had been made at Companies House; it was not necessary to determine whether the transfer was a forgery or simply made without authority as the decision would be the same in either case; and, although an order for rectification might have been obtained – which could, at the discretion of the Court, have been made with retrospective effect – a separate claim for rectification had been compromised by the parties and their final agreement referred to a re-transfer of Jeanettes' shares but did not address rectification itself.

However, the main takeaway is simply to take great care to keep the register of members accurate and secure.

RESTRICTIVE COVENANTS MUST BE REASONABLE

Literacy Capital Plc v Webb [2024] EWHC 2026 (KB)

This High Court judgement is a good reminder that, to be enforceable, restrictive covenants must be reasonable – in terms of their length, the scope of the restricted business activity and their geographical extent.

The restrictive covenants in this case were given by the founder of a business providing medical services to sexual assault referral centres (SARC services). Having built up the business, in October 2021 the founder sold her shares for around £7 million for a mixture of cash and loan notes. In addition to a 12 month non-compete restriction in her service agreement, the sale agreement included non-compete and non-solicitation restrictions that lasted for so long as she held loan notes and for 12 months thereafter.

In December of the same year she formed a new company. It originally traded in unconnected fields, but - after the end of the 12 month non-compete in her service agreement - it started to build up an SARC services capability and in July 2024 it won a contract with South Wales Police. The buyer then promptly sought a declaration from the High Court that the restrictive covenants had been breached (which would mean that the interest under the loan notes – of £500,000 per year – ceased to be payable), an injunction prohibiting breaches and costs.

The High Court declined on the basis that the covenants clearly breached the doctrine of 'restraint of trade' – the principle that, to be enforceable, restraints on trade must be reasonable - both in the interests of the contracting parties and in the interests of the public – because:

- the covenants were too long, as, being tied to the redemption of the loan notes, they could last for as long as 10 years (which was both unreasonable as between the parties – as it went far beyond what was reasonable to protect the goodwill of the business the buyer had bought – and unreasonable to the public, as it deprived them of the founder's services for effectively the rest of her working life);
- the geographical extent was too great, covering all of the UK and the Channel Islands (when there was no evidence of the business extending this far); and
- the restricted business was too broad, extending beyond those services in which the founder had experience (into areas like software consultancy services).

The case is a good reminder to keep restrictive covenants reasonable – and, in particular, on an exit, to be wary of tying their duration to something that may cause them to become too long (like, in this case, the redemption of the loan notes). It is also a reminder to draft restrictive covenants in a way that means that they are 'severable' - so that the unenforceable elements may be 'severed' (i.e. effectively removed by the Court), leaving a reduced but enforceable covenant.

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