WATSON FARLEY
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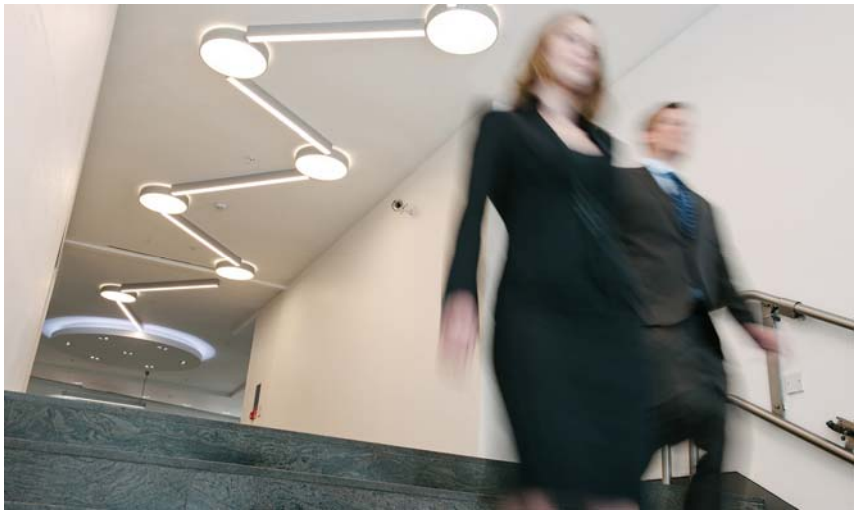
BRIEFING

UK: CORPORATE

OCTOBER 2015

- THE SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT ACT 2015
- NEW ANNUAL SLAVERY STATEMENT FOR LARGE COMMERCIAL ORGANISATIONS
- NEW REPORTING REQUIREMENTS FOR MINING AND OIL & GAS COMPANIES
- PROPOSALS FOR REFORM OF LIMITED PARTNERSHIPS
- BEWARE OF SIGNING A CONTRACT ON BEHALF OF A COMPANY THAT IS NOT YET INCORPORATED



NOTE FROM THE EDITOR

The next few months will see a number of new company law changes take effect and those companies affected will need to ensure that they are ready to comply. Provisions brought into force in October 2015 will see the introduction of a suite of revised Companies House forms, and certain companies and organisations will also be subject to new reporting requirements in relation to slavery in their supply chains and businesses and payments made to governments worldwide. In addition to an outline of those developments, we have included a summary of current proposals for reform of private fund limited partnerships as well as a caution about persons signing contracts on behalf of another company in light of a recent case.

We would like to welcome Andy Savage, new Corporate partner to the London Corporate team. His practice focusses on cross-border work in the infrastructure, energy and telecommunications sectors. His experience includes private equity in emerging markets, particularly in Africa. Andy also advises on private company M&A, joint ventures, public company takeovers and equity capital markets work.

We would also like to welcome Jeremy Robinson, new Competition/Regulatory Partner, to the London Corporate team. Jeremy is a Chambers and Partners-ranked senior competition and regulatory lawyer with deep sector experience, particularly and most recently in aviation, as well as transport, energy and related sectors.

Nick Fothergill
Partner, London Corporate Group

THE SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT ACT 2015 (SBEE)

All companies will be affected by the company law changes being made by SBEE, although the introduction of some much publicised measures has been delayed. Certain changes are coming into force on 10 October 2015. As a result, new Companies House forms will be published which must be used from that date. Companies may also wish to review their articles of association in light of recent bearer share changes made by SBEE, and described below.

The changes to company law introduced by SBEE are to be implemented in stages.

Bearer shares

The first key implementation date for SBEE was 26 May 2015 when the prohibition on issuing new share warrants to bearer (known as "bearer shares") came into force. The prohibition applies even if a company's articles of association permit the issue of bearer shares. Any existing bearer shares should be surrendered within nine months of that date in accordance with a specified statutory process.

"SBEE PERMITS A COMPANY TO AMEND ITS ARTICLES TO REMOVE SUCH A PROVISION WITHOUT HAVING TO PASS A SPECIAL RESOLUTION OF THE SHAREHOLDERS..."

Whilst, historically, few companies have issued bearer shares, a number of companies (including listed and AIM companies) will have provisions in their articles of association which authorise the issue of bearer shares (although neither Table A nor the model articles for private limited companies contain such provisions). SBEE permits a company to amend its articles to remove such a provision without having to pass a special resolution of the shareholders, but a copy of the amended articles will still need to be filed with Companies House. For clarity, it will be helpful for companies to remove any such provisions contained in individual sets of articles of association, but companies may consider it more practical to do this at some point in the future in conjunction with making other amendments to, or updating, their articles. In that case, a special resolution will be required in the usual way.

October 2015

The second key implementation date is 10 October 2015, when the following changes will take effect:

- The day element of the date of birth of a director will no longer appear on the public register at Companies House. This is to guard against fraud or identity theft. This will not apply where the information was provided to Companies House before that date. Companies will, however, still be obliged to send the Registrar of Companies full details of the dates of birth of their directors and this information will remain available for inspection on the company's own registers.

- A new "consent to act" procedure will apply when notifying Companies House of the appointment of a new director or company secretary. Instead of the relevant appointment and incorporation forms (paper and electronic) requiring a signature or personal authentication from the appointee by way of consent to act in that capacity, they will just contain a statement from the company that the appointee has consented to act. As part of this new process, Companies House will write to all newly appointed directors to make them aware that their appointment has been filed on the public register and to explain their statutory general duties.

- The time it takes to strike companies off the register of companies will be reduced where procedures are initiated after 10 October 2015. The process for the Registrar of Companies to strike off, at its instigation, a company not carrying on business or in operation will reduce from approximately six to four months. The process for voluntary strike off by a company will also be shortened, as the notice period – the period following publication of a notice of proposed strike off in the Gazette and before strike off can take place – will reduce from three to two months.

"AS THE CHANGES CONSTITUTE A SUBSTANTIAL AMENDMENT TO THE LAW, COMPANIES HOUSE HAS INDICATED THAT IT WILL NOT ACCEPT ANY OLD VERSIONS OF THE UPDATED FORMS THAT IT RECEIVES AFTER 10 OCTOBER."

A number of revised company forms are being produced by Companies House to reflect the first two changes outlined above (e.g. the Annual Return (AR01) and various appointment and incorporation-related forms such as AP01, AP03, CH01 and IN01). Various LLP and overseas companies forms are also being updated to reflect similar changes. As the changes constitute a substantial amendment to the law, Companies House has indicated that it will not accept any old versions of the updated forms that it receives after 10 October. It will be essential, therefore, that companies check carefully that they are using the correct versions of any Companies House forms that they file after 10 October, which will be particularly critical where filing time limits apply.

December 2015 and beyond

Implementation of other key SBEE provisions has been delayed. Measures relating to registered office and director disputes are now expected to come into force in December 2015. The requirements relating to keeping a register of persons with significant control are expected to commence in April 2016, although the requirement to file information with Companies House will only begin in June 2016. Changes to the statement of capital, the new confirmation statement replacing the annual return, the option for private companies to keep information in their registers on the public register at Companies House and provisions updating the disqualified directors regime are also scheduled to come into force in June 2016. The prohibition on appointing corporate directors, originally scheduled to apply from October 2015, will not now come into force before October 2016.

NEW ANNUAL SLAVERY STATEMENT FOR LARGE COMMERCIAL ORGANISATIONS

Large commercial organisations are to be required to prepare a slavery and human trafficking statement for each financial year and this requirement is expected to take effect in October 2015.

"STATUTORY GUIDANCE WILL ALSO BE PUBLISHED WHICH WILL SET OUT THE KINDS OF INFORMATION THAT MIGHT BE INCLUDED IN A DISCLOSURE."

The Modern Slavery Act 2015, in section 54, requires commercial organisations (a body corporate or a partnership) which supply goods or services and have a minimum annual worldwide turnover of £36 million to prepare a slavery and human trafficking statement for each financial year and publish this on their website (if they have one). This will set out what steps they have taken to ensure that there is no modern slavery in their supply chains or own business (or state that they have taken no such steps). Section 54 is expected to come into force in October 2015, but transitional provisions will apply. Statutory guidance will also be published which will set out the kinds of information that might be included in a disclosure. However, the Government has emphasised that this will only be guidance and it fully expects slavery and human trafficking statements to differ from business to business.

Our Employment Team has prepared a briefing which sets out in more detail what type of organisation is caught by the new requirements and what the main obligations are: http://www.wfw.com/wp-content/uploads/2015/09/WFW-EmploymentInsight-September2015.pdf

Whilst the obvious impact of section 54 is on those commercial organisations whose global turnover is £36 million or greater, there will also be far-reaching consequences on the organisation's whole supply chain, including commercial organisations whose turnover falls below this amount.

"A COMMERCIAL ORGANISATION WHICH PUBLISHES A SLAVERY AND HUMAN TRAFFICKING STATEMENT WILL NEED TO UNDERTAKE AN AUDIT OF ITS BUSINESS AND ITS SUPPLY CHAIN TO DETERMINE THE EXPOSURE TO POTENTIAL SLAVERY AND HUMAN TRAFFICKING. FURTHER, IT WILL NEED TO ESTABLISH PROCUREMENT POLICIES AND CODES OF CONDUCT REGARDING SLAVERY WITHIN ITS BUSINESS, AND REQUIRE EACH SUPPLIER IN ITS SUPPLY CHAIN TO ADHERE TO SUCH POLICIES."

A commercial organisation which publishes a slavery and human trafficking statement will (unless it states it is taking no steps) need to undertake an audit of its business and its supply chain to determine the exposure to potential slavery and human trafficking. Further, it will need to establish procurement policies and codes of conduct regarding slavery within its business, and require each supplier in its supply chain to adhere to such policies. It should also establish a staff training programme about slavery and human trafficking, and carefully review its supply agreements and procurement policies. Supply agreements will, going forward, undoubtedly require the supplier to give warranties regarding its past practice and provide undertakings to the customer regarding future practices such that it will not, and will ensure that none of its own suppliers or sub-contractors will, engage in slavery and human trafficking. The customer should also subject the supplier to on-going reporting obligations regarding risks of slavery and human trafficking, and demand the right to audit the supplier regarding such matters.

A commercial organisation which forms any part of the supply chain will, as a matter of good practice, be audited and have enquiries made of its own supply chain practices by its customers (or by a third party monitor on behalf of the customer). This audit is required in order for any commercial organisation to be able to illustrate that it has taken steps to ensure that modern slavery is not taking place in its own business or any of its supply chains when publishing its slavery and human trafficking statement. It will be good practice for those entities involved in a supply chain (even those commercial organisations not subject to the obligation to publish a statement) to make investigations of their own suppliers in respect of slavery and human trafficking, in advance of any pressure from its customers to do so. Where a supplier supplies more than one customer, it is possible that each customer will wish to impose its own requirements on the supplier. The supplier would therefore need to comply with the most onerous standard in order to comply with the requirements of each customer.

NEW REPORTING REQUIREMENTS FOR MINING AND OIL & GAS COMPANIES

Large mining and oil & gas companies will need to start preparing for new reporting obligations relating to payments made to governments globally.

The Reports on Payments to Governments Regulations 2014 (Regulations) have come into effect. These require English companies in the extractive and logging industries to publish a report disclosing details of payments which they make to governments worldwide. The Regulations apply to those companies which are 'large undertakings' – those matching two of the following three characteristics: balance sheet exceeding £18 million, turnover exceeding £36 million and more than 250

employees – and apply in respect of financial years ending on or after 31 December 2015. The report, which must be delivered to Companies House (and so will be available to the public), must detail those payments in excess of £86,000 made in respect of relevant extractive activities undertaken by the company within the financial year. Additionally, amendments have been made to the Disclosure and Transparency Rules (DTRs) to incorporate a similar requirement to that of the Regulations.

"THE REPORT MUST DETAIL THOSE PAYMENTS IN EXCESS OF £86,000 MADE IN RESPECT OF EXTRACTIVE ACTIVITIES."

The Department for Business Innovation & Skills previously published for consultation draft guidance to help companies meet the requirements of the Regulations, and is now considering the responses received. We will report further on this matter once final guidance has been published but those companies subject to the Regulations and/or the DTRs should consider implementing processes to collate the information which they will need in order to produce the report.

PROPOSALS FOR REFORM OF LIMITED PARTNERSHIPS

HM Treasury has announced changes to limited partnership law aimed at ensuring that UK limited partnerships (LPs) remain the market standard structure for European private equity and venture capital funds and other types of private fund.

Background

The UK LP is the most commonly used structure for European private equity and venture capital funds, as well as various other types of private fund. The main benefits of the LP structure are its flexibility, its transparency for UK tax purposes and the limited liability protection that it offers to investors.

"IN JULY 2015, HM TREASURY PUBLISHED A CONSULTATION PAPER SETTING OUT PROPOSED AMENDMENTS TO THE LIMITED PARTNERSHIPS ACT 1907. THESE ARE AIMED AT EXPANDING INVESTOR CHOICE WHILE MAINTAINING STRONG INVESTOR PROTECTION AND THE INTEGRITY OF THE REGULATORY REGIME."

Whereas UK LP legislation has remained largely unchanged for much of the Twentieth Century, other jurisdictions have made, or are in the process of making, changes to enhance flexibility and efficiency. In 2013, the Government announced a package of measures to improve the UK's competitiveness to reinforce the UK's position as a global centre for fund management. This included a commitment to consult on technical changes to the LP legislation as it applied to funds, with a view to removing unnecessary legal complexity and administrative burdens. In July 2015, HM Treasury published a consultation paper setting out proposed amendments to the Limited Partnerships Act 1907. These are aimed at expanding investor choice while maintaining strong investor protection and the integrity of the regulatory regime. The consultation closes on 5 October 2015.

Proposed changes

The proposed amendments will apply to a UK LP that is a "collective investment scheme" (as defined in the Financial Services and Markets Act 2000) but is not a scheme authorised by the Financial Conduct Authority. This will restrict application only to those LPs formed as part of a private fund structure. These structures may include a number of entities that use LPs including the main fund vehicle, a parallel fund, a feeder fund, a co-investment vehicle and a carried interest vehicle.

The proposed changes cover registration issues and on-going filing and notification requirements; the role, function and rights of limited partners; and obligations of, and restrictions on, limited partners in respect of capital. Key proposals include:

- A new process for the designation on the LP register of those LPs which are private fund vehicles at the point of registration and an option for existing LPs to become designated as such within 12 months of the changes coming into effect. This will enable those LPs to which the new regime applies to be identified.

- A new power for the Registrar of Companies to remove LPs from the register on application by the LP or where the LP is no longer operating (similar to that for companies) – there is currently no procedure for removing an LP from the register.

- The introduction of a non-exhaustive list of activities that a limited partner in a private fund LP may undertake without being considered to take part in the management of the business, and therefore without losing its limited liability. Currently there is no such list. Such a list is intended to provide greater certainty and allow an investor to monitor its investments without risk of losing its limited liability. Comments are invited on the proposed list of permitted activities. These include taking part in decisions to vary the partnership agreement, change the partnership business or allow types of or particular investments, taking part in decisions on whether a person should cease to be a partner, whether the LP should be dissolved and whether the business should dispose of its business or acquire another business.

- The removal of the requirement for limited partners in private funds to make a capital contribution (no matter how nominal) and removal of the liability of limited partners in private funds for capital contributions that have been withdrawn. This is intended to provide more flexibility for investors.

- To allow the partners in a private fund to agree among themselves who should wind up the limited partnership without having to obtain a court order. This will reduce the delays and administrative burdens currently associated with getting a court order.

"THE GOVERNMENT HAS ALSO CONFIRMED THAT IT IS STILL INTENDING TO EXPLORE THE POSSIBILITY OF ALLOWING FUNDS IN THE UK TO ELECT TO HAVE SEPARATE LEGAL PERSONALITY..."

- Simplification of the registration process by removing some of the details that must be specified in an application for registration and be notified when they change (e.g. the amount of capital contributed, the general nature of the LP's business and the term of the LP). This is in part to reduce administrative burden and in part to protect investors' privacy.

- Exempting limited partners from certain duties contained in LP legislation which apply to both general and limited partners (i.e. the duties to render accounts and information and to account for profits made in competing businesses). This is because such duties appear inconsistent with the position of a largely passive investor who may have investments in a number of funds, some of which may fund competing businesses.

Separate legal personality

The Government has also confirmed that it is still intending to explore the possibility of allowing funds in the UK (outside Scotland) to elect to have separate legal personality, but this will not be looked at in tandem with these proposed changes.

BEWARE OF SIGNING A CONTRACT ON BEHALF OF A COMPANY THAT IS NOT YET INCORPORATED

Royal Mail Estates Limited v Maple Teesdale Borzou Chaharsough Shirazi [2015] EWHC 1890 (Ch)

Unwanted liability may arise if a party signs a contract on behalf of a company that has not been incorporated.

"THAT MEANS PERSONALLY LIABLE FOR THE OBLIGATIONS AND LIABILITIES THAT ARISE UNDER THE CONTRACT, BUT ALSO ABLE TO ENFORCE THE BENEFIT OF THE CONTRACT."

Under English company law (under the Companies Act 2006 and also under its predecessor statute), a contract or deed that purports to be made by or on behalf of a company at a time when the company has not been formed has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the company or as agent for it, and that person will be personally liable for the contract. That means personally liable for the obligations and liabilities that arise under the contract, but also able to enforce the benefit of the contract.

In the recent *Royal Mail Estates* case, the defendants (a firm of solicitors) signed a contract for the sale and purchase of a property as agent "for and on behalf of the buyer", but unaware that the buyer had not yet been incorporated. The defendants tried to argue that the assignment clause in the contract (which stated that the benefit of the contract was personal to the buyer) amounted to a "contrary agreement" and so they were not liable on the contract. The judge dismissed their claim, holding that there is only a contrary agreement if there is found to be an agreement between the parties by which they intend to exclude the effect of the relevant statutory provision. On the facts this was not so – in particular, as neither party was aware that the company had not been incorporated.

The case serves as an important reminder for all those who may sign contracts as agent for another corporate party to ensure that appropriate checks are carried out before the contract is signed to confirm that the company has indeed been properly incorporated and continues its corporate existence. If not, the risk of unintended personal liability sits with the agent. The judgement indicates that, in order to rely on the "contrary agreement" carve-out, it will be necessary for the parties to have turned their minds specifically to excluding the application and effect of the relevant statutory provision. This will be difficult in practice where none of the signatories to the contract are aware that the company does not yet exist.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.

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