

Finance Update

August 2009

OLSWANG



General Finance News

Association of Corporate Treasurers (ACT)

In response to the LMA updates to its primary documents made in July (see the [July 2009 Finance Update](#)), the ACT have updated their guide to these documents by way of [a finance briefing](#) considering the changes made.

Companies Act 2006

A variety of legislation and guidance has been published in relation to the Companies Act 2006, including the following:

- the [Overseas Companies Regulations 2009](#) were published on 14 July. These regulations impose certain registration and filing requirements on companies incorporated outside the UK that open an establishment (place of business or a branch) in the UK. These regulations come into force on 1 October 2009;
- the [Limited Liability Partnerships \(Application of Companies Act 2006\) Regulations 2009](#) and the [Limited Liability Partnerships \(Amendment\) Regulations 2009](#) were published on 14 July. These regulations modify and apply the provisions of the Companies Act 2006 to limited liability partnerships and will come into force on 1 October 2009. Companies House will publish non-statutory guidance on these regulations on its website and the Department for Business Innovations and Skills (BIS) will publish responses to a number of frequently asked questions;
- the [Overseas Companies \(Execution of Documents and Registration of Charges\) Regulations 2009](#) were published on 21 July 2009. These regulations cover formalities for doing business in England, Wales and Northern Ireland for overseas companies and the registration of charges created by overseas companies with registered particulars at Companies House under s1046 of the Companies Act 2006. These regulations will come into force on 1 October 2009;
- the [Companies Act 2006 \(Consequential Amendments, Transitional Provisions and Savings\) Order 2009](#) was published on 29 July. This order makes consequential amendments to UK legislation (e.g. the Insolvency Act 1986) to take account of the provisions of the Companies Act 2006 which will come into force on 1 October 2009;
- on 5 August, BIS published draft [non-statutory guidance](#) on the changes to companies' constitutional documents coming into force on 1 October 2009. The guidance compares the model articles under the Companies Act 1985 and those under the Companies Act 2006 and provides suggestions for companies to follow once these new changes come into effect;
- on 7 August, Companies House wrote to all companies to give advice about the provisions of the Companies Act 2006 coming into force on 1 October 2009. [The letter and guide](#) summarise the changes which have already been implemented and give an overview of the main provisions being introduced in October; and

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- the **Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009** were published on 12 August. These regulations set out the fees payable to the registrar of companies for registration of documents, inspection or copying of documents kept by him and the disclosure of information protected under the Companies Act 2006. These regulations will come into force on 1 October 2009.

Companies (Model Articles) Regulations 2008

On 1 October 2009, the Companies (Model Articles) Regulations 2008 (SI 2008/3229) will replace Table A as the default set of articles of association for a company incorporated under the Companies Act 2006. The model articles are available [here](#).

For a company incorporated before 1 October 2009, the Companies Act 2006 (Commencement No. 8, Transitional Provisions and Savings) Order 2008 (SI 2008/2860) provides guidance on the effect of the Companies Act 2006 on its existing memorandum and articles of association.

HM Revenue and Customs (HMRC)

HMRC announced on 29 July that a new minimum interest rate on tax repayments of 0.5% will be put in place so that interest will still be payable even when the Bank of England base rate falls below 1.5%.

HM Treasury

On 8 July, HM Treasury published a white paper entitled '**Reforming Financial Markets**'. This white paper sets out the Government's analysis of the causes of the current financial crisis, summarises the actions taken so far to try to restore financial stability and considers what additional reforms may be needed to stop future crises occurring.

International Swaps and Derivatives Association (ISDA)

ISDA have launched a website to bring together information, data and statistics in relation to the credit default swaps business (see [here](#)).

Limited Partnerships

The Legislative Reform (Limited Partnerships) Order 2009 (SI 2009/1940) has been published and comes into force on 1 October 2009. It will implement some of the recommendations made by the Law Commission in their 2003 report on partnership law by making it clear that a limited partnership comes into existence when the Registrar registers it, and that the certificate the Registrar issues on registration is conclusive evidence of its formation. It will also require new limited partnerships to include in their name an indication of their status. The Order is [here](#) and the explanatory memorandum is [here](#).

Office of Fair Trading (OFT)

On 22 July, the OFT published '**Second charge lending – OFT guidance for lenders and brokers**'. Second charge lending is where a customer, who already has a mortgage secured against their home, takes out a further loan secured against it. This guidance sets out what the OFT expects in order for second charge lenders to be licensed.

On 30 July, the OFT launched a consultation entitled '**Irresponsible lending – OFT guidance for creditors**'. This guidance sets minimum standards which businesses engaged in lending should meet in order to avoid OFT enforcement action against them.

Walker Review

The **Walker Review of Corporate Governance in UK Banks and other Financial Institutions** (BOFIs) was published on 16 July. It placed particular focus on boosting the role of non executive directors (NEDs) in both risk and remuneration processes. The review investigated 5 key areas and made 39 recommendations, including:

- board size, composition and qualifications: BOFIs should ensure they have a complete and knowledgeable group of independent NEDs capable of challenging the decisions of executives i.e. via ongoing training and development;
- functioning of the board and evaluation of performance: both chairmen and NEDs are highlighted in ensuring board effectiveness. The board's performance should be subject to annual evaluation with external evaluation every 2-3 years;
- role of institutional shareholders: institutional shareholders and fund managers are encouraged to engage more with their investee companies to support long term improvement and to improve communication between institutional shareholders and boards;
- governance of risk: BOFIs should establish a board risk committee together with a chief risk officer. The committee should perform due diligence and have the power to scrutinise and block potential risky transactions; and
- remuneration: the remuneration committee should place particular focus on highly paid executives below board level. Various policies should be in place for variable remuneration, including annual bonuses to be paid out over a period of three years, with no more than one third in the first year.

Interest Rates

On 9 July, the Bank of England announced that interest rates would again be held at 0.5% and that it would continue with the £125bn programme of asset purchases financed by the issuance of central bank reserves (both of these proposals were unanimously agreed by the Monetary Policy Committee). On 6 August, the Bank of England announced that interest rates would again be held at 0.5% and that it would continue with the programme of asset purchases, but that this would be increased by £50 billion to £175 billion.

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On 6 August, the European Central Bank held interest rates at 1.00% across the euro-zone and on 24 June, the US Federal Reserve announced that interest rates would remain on hold at their current rate of between 0% and 0.25%. It also said it would continue its present level of purchases of long-term government debt, aimed at increasing lending and money supply.

World Markets

In July, the International Monetary Fund (IMF) praised the UK authorities' response to the financial crisis and stated that although recent reports have indicated that UK economic activity has begun to stabilise, the economic outlook remains uncertain. This has been backed up by Deloitte's last quarterly review which predicts that UK recovery will be long and protracted and which also forecasts that unemployment will peak at 3.25 million and interest rates will remain at 0.5% until 2011. The Bank of England has also forecast that the UK economy will take several years to recover from this recession and that inflation is likely to fall below 1% later this year. The IMF has also stated that US recession was deeper than first thought and that although the contraction appears to be ending, recovery will be slow.

Government data showed that 2.4m people in the UK were out of work in June. The number of people out of work rose by 271,000 in the three months to June, the largest quarterly increase since records began in 1971. Earnings also grew by only 2.5% in the three months to June, the lowest rate since records began in 2001.

In contrast the FTSE 100 index of leading companies surged at the end of July, following a bull run over the previous two weeks, to almost reach its January 2009 peak. This followed a wave of better than expected corporate results, such as those from Barclays and HSBC, and rising consumer confidence.

However, as some banks were reporting better than expected results, others, such as Lloyds Banking Group, revealed higher than expected bad debts. Lloyds Banking Group stated that 80% of these bad debts were as a result of the rescue of HBOS at the end of last year. These results have led to some banks with government debt having certain parts of their debt downgraded by Standard & Poor's. Tier two debt of Northern Rock was downgraded to B-minus (junk grade) from BBB-plus and tier two debt of Lloyds banking Group was downgraded by three notches.

General Finance Cases

Guarantees

In the case of *Investec Bank (UK) Ltd v (1) Arnold Zulman (2) David Zulman* [2009] EWHC 1590 (Comm) the defendants had granted a limited guarantee in favour of a bank for a third party debt. At a later stage the debt owed to the third party was varied and an amendment to the facility agreement was entered into. At the same time a new guarantee was negotiated and agreed between the defendants and the bank but it was not signed. The third party went into administration and the bank tried to claim under the varied guarantee.

It was held that it was the bank's fault that the varied guarantee, which had been negotiated and agreed, had not been executed. Therefore, the guarantors were not estopped from relying on the terms of the original, limited guarantee.

Undertakings

In the case of *Clark and another v Lucas Solicitors LLP* a claim for specific performance of an undertaking given by the defendant was considered.

Facts: G owned an entire site of properties which he was in the process of developing and C contracted to purchase Plot 3. C had paid an initial deposit, with a further deposit due on exchange of contracts. Two charges were in place over the whole site in favour of N and K. N's charge had priority over K's and it was a term of N's charge that it could set off the whole or any part of G's indebtedness against any credit balance G held with N. L were acting for G and in response to Requisitions on Title, provided an undertaking that they would redeem or discharge the mortgages over the site.

On 1 May completion occurred and the purchase price was sent to L and remitted to G's account with N. On 18 June N demanded immediate repayment from G of the balance owing to it. On 26 June L sent notice of discharge of N's charge to C's solicitors, no notice of discharge was received in relation to K's charge. On 17 July a fixed charge receiver was appointed over the site (excluding the Plot 3). As no notice of discharge has been received in relation to K's charge, C was unable to register title to Plot 3 and therefore could not sell it or raise a mortgage on it. K subsequently refused to release his charge due to sums still outstanding from G.

Issues: L contended that it would not resist an order to compensate C but that performance of their undertaking was impossible and therefore could not be ordered. C argued that L could put an end to K's rights by way of payment (a sum stated to be more than double the value of Plot 3) and therefore there was no bar to the award of specific performance.

Decision: As performance of the undertaking was not impossible summary judgment was granted against L and they had to perform the undertaking they had given. It was noted that the situation could have been avoided if a redemption figure had been agreed and agreement reached before the undertaking was given.

Comment: This case illustrates the binding nature of solicitors' undertakings and the importance of ensuring that the undertaking can be performed and is within in the solicitor's control before it is given.

Real Estate Finance

Real Estate Finance News

Land Registry

The Land Registry has issued **guidance on amending deeds that effect dispositions of registered land**. The guidance looks at scenarios where, for example, a transfer of land or an easement contains a mistake that needs to be corrected, or the deed otherwise needs to be amended. The Land Registry guidance considers the process for the amendment of such a deed where it has been executed (and delivered) but has yet to be registered and also considers how to go about amending deeds where they are in the course of registration or have already been registered at the Land Registry.

On 3 August, the Land Registry changed the process for registering a discharge of a seller's mortgage (known as 'early completion') (see the **May 2009 Finance Update**). The Law Society has published a practice note and series of FAQs in relation to the new early completion policy to help answer practitioners' questions (see **here**).

On 24 July, the **Land Registration (Amendment) Rules 2009** were published. These rules amend the Land Registration Rules 2003 in relation to the registration of charges created by overseas companies, in line with the relevant provisions of the Companies Act 2006 coming into force in October and make amendments due to the coming into force of the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009 (see above).

Real Estate Finance Market

According to figures from the CB Richard Ellis Monthly Index, commercial property values increased by 0.2% in July with total returns up by 0.8%. Listed global commercial property markets also rose in the second quarter of this year with Standard & Poor's Global Property Index increasing by 37.9% and the Emerging Property Market Index rising 56.2%. A report by the Royal Institution of Chartered Surveyors (RICS) also showed signs of optimism with the decline in tenant demand for offices and shops beginning to slow down during the second quarter.

According to RICS, residential house prices are no longer expected to fall by 10% (as predicted at the start of 2009) and look like they may end the year higher than at the start. The number of newly agreed sales has risen to an average of 12.7 per branch for the three months to June (up from an average of 11.7 per branch for the three months to May). Nationwide reported a rise in house prices, for the third month in a row, of 1.3% in July. However, according to the Land Registry house prices rose, for the first time since January 2008, by 0.1% in June. According to figures from the Bank of England, the number of mortgage approvals for new house purchases rose by 7.7% in June and according to figures from the British Bankers' Association, mortgage approvals have doubled between the end of last year and June this year. However, RICS has reported that almost one in ten home sales are still collapsing due to lack of finance.

Restructuring and Insolvency

Restructuring and Insolvency Cases

Contractual subordination and priority arrangements

In the case of *Perpetual Trustee Co Ltd v (1) BNY Corporate Trustee Services Ltd (2) Lehman Brothers Special Financing Inc: Belmont Park Investments Pty Ltd & Ors v (1) BNY Corporate Trustee Services Ltd (2) Lehman Brothers Special Financing Inc* [2009] EWHC 1912 (Ch) the issue of whether contractual subordination and priority arrangements were binding was considered.

Facts: P held credit-linked notes issued by Lehman and its affiliates (L). The documentation, which was governed by English law, in relation to the notes reversed the order of priority of payments if L (as swap counterparty) defaulted under the swap documentation, to allow P to be paid in priority to L. When L filed for protection under Chapter 11 in the US, an event of default occurred under the swap documentation and the security for the notes became enforceable.

Issues: Under English law is it possible to contract out of the mandatory provisions of insolvency law? As a matter of public policy do these arrangements go against the principle of anti-deprivation i.e. would the creditors of L be prejudiced by the switch of priority as it may reduce the assets available for distribution to them?

Decision: It was held that the contractual arrangements set out in the note documentation were effective under English law. As a matter of policy, courts should be careful of interpreting contractual arrangements so as to invalidate them. However, leave to appeal against this decision has been granted. Whether the arrangement will be upheld by the US courts is a matter of on-going litigation.

Comment: This is an important decision as contractual subordination/priority arrangements are common in structured finance transactions and are considered and assumed to be effective.

Pre-pack sales – transfer of employees

In the case of *R Oakland v Wellswood (Yorkshire) Ltd* 30/07/09 O appealed against the decision of the Employment Appeal Tribunal that he did not have sufficient continuity of service to bring an action for unfair dismissal.

Facts: See the [February 2009 Finance Update](#).

Decision: It was held that the transfer of the business from C to W by way of a pre-pack administration did not break O's continuity of employment under s218 of the Employment Rights Act 2008. Therefore, O did have sufficient continuity of service to bring a claim of unfair dismissal against W. The Court of Appeal unhelpfully did not give any guidance on the applicability of Regulation 8(7) TUPE to administration proceedings and accordingly the question remains open as to whether administration can be considered a relevant "bankruptcy" process for the purpose of the transfer of employees' contracts of employment.

Restructuring and Insolvency

Transactions at an undervalue

In the case of (1) *Dornoch Ltd (on its own account & on behalf of all other underwriting members of syndicate 1209 for the 2007 year of account)* (2) *Royal & Sun Alliance Insurance Plc* (3) *Aspen Insurance UK Ltd & Ors v (1) Westminster International BV (2) Koninklijke Boskalis Westminster NV (3) Boskalis Westminster Ltd (4) Nigerian Westminster Dredging & Marine Ltd* [2009] EWHC 1782 (Admlty) it was held that s423 of the Insolvency Act 1986 is not subject to territorial limitation although the court does need to ensure that there is sufficient connection to England and Wales.

Facts: A ship owned by W was involved in a collision and wrecked. W sold the wreck to another member of its group for €1,000 without consulting the insurers of the ship. W was not insolvent at the time of the sale but the purpose of the sale was to prevent the insurers from selling the wreck themselves.

Decision: The price paid for the wreck was clearly an undervalue and the insurers were the victims of the transaction as the purpose of it was to prevent them taking control of the wreck and selling it on the open market. An order was made under s423 to transfer the wreck to the insurers so they could sell it and maximise their recovery.

Comment: A transaction can be set aside as a transaction at an undervalue even if the party entering into it is not insolvent: the other party just needs to prove that the transaction was for the purpose of putting assets beyond its reach. s423 can also be used even where the assets are outside of England and Wales (Thailand in this case) as long as a sufficient connection to England and Wales can be shown (in this case the insurance policy was subject to English law and the exclusive jurisdiction of the English courts). This case also shows that insured companies cannot dispose of assets to related companies without accounting to their insurers for their residual value.

The information in this update is intended as a general overview only of the subjects covered. Detailed specialist advice should always be taken before taking or refraining from taking any action. For more guidance on the changes and their application, please get in touch with your usual Olswang contact.

About Olswang

Olswang is a leading business law firm with a distinctive approach. Our pioneering and problem-solving ethos has established a commanding reputation in the technology, media and real estate sectors, as well as a wide range of other industries.

Founded in 1981, our Firm has grown to a team of over 650, including more than 100 partners, across four European offices. In addition, Olswang has a long-established best friends' network of leading independent law firms throughout the world.

Our Firm continues to be acknowledged as a leading practice in many of our core areas: Olswang was voted TMT Team of the Year 2009 for the second year running at the annual Legal Business Awards; Olswang's Corporate Group won M&A Law Firm of the Year at the M&A Awards 2008 in conjunction with M&A Magazine, and was named Corporate Team of the Year – Mid markets at The Lawyer Awards 2008.

Resourceful drive and a climate of shared knowledge and empowerment are the hallmarks of our meritocratic, unstuffy culture. For the last five years Olswang has been ranked in The Sunday Times 100 Best Companies to Work For and our strong management team is dedicated to the personal and professional development of our people.

We are committed to encouraging every member of staff to engage in lasting and meaningful pro bono and volunteering activities, both legal and non legal. The time invested by our people through the Firm's HELP Programme to assist those in need is a positive contribution to the community which is reflected in the values and culture of Olswang.

We recruit personalities with a genuine fascination and notable reputation in the sectors they focus on, which is reflected in the quality of our advice. We also understand the importance of achieving our clients' goals and ensure that our advice is, above all else, practical.

From world-class businesses to entrepreneurial startups, the rich diversity of our client base ensures a broader perspective and, as a result, deeper commercial insight. Transactional work is the most obvious feature of the role we perform. However, ongoing non-transactional support is an integral part of our business, and we focus on creating long-term relationships with our clients. We employ a range of proactive initiatives such as client care programmes, secondments, client training and feedback sessions to ensure our client relationships are strong.

At Olswang the passion of our lawyers, the confidence of our approach and the commercial edge to our advice provide a unique and compelling service.

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