

Finance Update
June 2010

OLSWANG



General Finance

General Finance News

Corporate Governance

The Financial Reporting Council (FRC) has published a new edition of the **UK Corporate Governance Code** which will apply to all companies with a Premium Listing of shares (irrespective of whether they are incorporated in the UK or not) for accounting periods beginning on or after 29 June 2010.

The main changes introduced include:

- new provisions as to the leadership of the chairman, the responsibilities of non-executive directors and the time commitment expected from all directors;
- a new provision that all directors of FTSE 350 companies should be subject to annual re-election;
- new principles as to the composition and selection of the board, including the necessity of the board to have an appropriate balance of skills, experience and knowledge of the company and the need for consideration to be given to diversity of board members; and
- a new provision to ensure that performance-related remuneration is linked to the company's long-term interests and its risk policies.

Dormant Bank and Building Society Accounts Act 2008

The **Dormant Bank and Building Society Accounts Act 2008** has come into force. The Act introduces a dormant account scheme, the purpose of which is to enable recovery of unclaimed funds in dormant bank and building society accounts. Any funds collected under this scheme are transferred to a central reclaim fund and distributed in accordance with the provisions of the Act. The Act does not compel the banking sector to participate in the scheme.

European Commission (EC)

On June 2, the EC launched a **consultation paper** on corporate governance in financial institutions. The paper looks at, among other things: various methods to improve the composition and function of boards in financial institutions to ensure that senior management are adequately supervising the institutions' activities; to encourage greater shareholder involvement in corporate governance matters; and to reform remuneration practices to discourage risk taking.

Financial Services Authority (FSA)

On 10 June, the FSA published its **annual report** for the year 2009/2010. The Report sets out the progress the FSA has made against its Strategic Plan and it also contains the FSA response to the Complaints Commissioner.

On 16 June the Chancellor delivered a speech, during which he announced the Government's proposals to abolish the tripartite financial services regulation system. The proposals include putting the Bank of England in charge of regulation (partially disbanding the FSA) by establishing: a new financial policy committee within the bank and the creation of two new regulators, both of which will be accountable to Parliament; a new prudential regulator as a subsidiary of the Bank of England; and a new Consumer Protection and Markets Authority (CPMA).

G-20 Finance

G-20 Finance Ministers and Central Bankers met on 4 and 5 June in Busan in the Republic of Korea. The **communiqué** issued following this meeting emphasised the need to improve fiscal soundness in light of the recent European debt crisis. It was noted that the global economy was recovering faster than anticipated, although the pace of recovery varies between countries and regions and it was acknowledged that international co-operation was key in sustaining and improving recovery.

It was agreed that the next meeting would be on 22 and 23 October in Gyeongju in the Republic of Korea ahead of the November 2010 Seoul Summit.

Institute for International Finance (IIF)

On 24 May, the IIF published two reports entitled '**A Global Approach to Resolving Failing Financial Firms: An Industry Perspective**' and '**Systemic Risk and Systemically Important Firms: An Integrated Approach**'.

The first of these reports sets out proposals for a new international resolution regime to address the issue of failing financial institutions which are seen as 'too big to fail' and which as a result have required taxpayer funding. The second report looks at the proposals which have been made to break-up large financial institutions, restrict their activities or impose additional taxation requirements upon them. This report goes on to highlight the benefits of large global financial services firms and concludes that current proposals may be "ill conceived" and that more focus should be put upon internal supervision within these firms and the reduction of risk.

Loan Market Association (LMA)

The LMA has published a guidance note on the use of release and reliance letters in leveraged acquisition finance transactions. The guidance note also contains templates of each of these letters.

The LMA have revised their versions of the Coordination Committee Letters and the new versions are now available on their website.

Organisation for Economic Co-operation and Development (OECD)

On 26 May, the OECD published its twice yearly **Economic Outlook**. This report states that growth is picking up within the OECD area, at different rates across different regions, but on the whole faster than previously forecast. In particular emerging market growth has been strong; however risks still remain going forward. The report also raises the OECD's growth forecast for the global economy and the editorial section of the report states 'the overall economic environment is relatively auspicious'.

Office of Fair Trading (OFT)

On 25 May, the OFT launched a review into factors which may restrict new banks being set up, in order to encourage competitiveness in the banking industry. The review aims to establish whether the FSA rules have an impact on banks looking to start up and it will also look at any other laws and regulations which may hinder this process.

Subsidiaries

The Supreme Court has granted Enviroco leave to appeal the Court of Appeal's decision in **Enviroco v Farstad Supply A/A [2009] EWCA Civ 1399**. The Court of Appeal held that where a parent company provided shares in its subsidiary as security for a loan and the shares were registered in the name of the lender, the subsidiary would no longer be a subsidiary within the meaning of sections 736 and 736A of the Companies Act 1985, for more information see the **March 2010 Finance Update**.

Withholding Tax

On 1 June 2010, HMRC announced 'The DT Treaty Passport scheme', which has been designed to improve the procedure for obtaining treaty relief from UK withholding tax on interest which is payable on loans from overseas corporate lenders to UK borrowers.

In summary, a corporate lender resident in a country that has a double taxation treaty with the UK may apply to HMRC for a "passport" under the scheme. If granted, a passport will be valid for an initial period of 5 years (subject to renewal) and entered into an HMRC online public register with a unique number, which UK borrowers can use to verify a lender's status.

The scheme, which is a welcome development, will make it quicker and simpler for a UK borrower to obtain HMRC approval to apply withholding tax on interest payable on a "passported" loan from an overseas lender at the agreed treaty rate, rather than the standard UK rate of 20%.

The scheme will begin on 1 September 2010, although lenders may register for a passport now.

Interest Rates

On 10 June, the Bank of England announced that interest rates would again be held at 0.5% and that it would continue with the £200 billion programme of asset purchases financed by the issuance of central bank reserves (seven members of the Monetary Policy Committee voted for these proposals, with one dissenting voter, who voted to increase interest rates by 0.25%).

On 10 June, the European Central Bank held interest rates at 1% across the euro zone.

World markets

World stock markets continued to be fairly volatile amid concern over European sovereign debt. Concerns arose in relation to both Spain and Hungary, as well as Greece, during the course of the month. Following the Spanish central bank taking control of a small troubled savings bank the yield on Spanish government bonds rose, making it more expensive for the government to borrow. In light of this the euro fell against most major currencies and European interbank lending rates have diverged to their widest levels since

their launch in December 1998. Some analysts are now predicting a 'double dip' recession as a result of recent events.

In the UK, sales figures for April were higher than expected but consumer borrowing remains fairly low, with most consumers still focusing on repaying debt rather than borrowing. The Purchasing Managers' Index (PMI) surveys have reported more optimistic data, with the manufacturing PMI survey giving a result of 58 (any figure over 50 points to expansion), which is the highest figure for 15 years. However, the unemployment rate for the three months to April 2010 was 7.9%, an increase of 0.1% on the previous quarter, which amounts to an extra 23,000 unemployed people.

General Finance

General Finance Cases

Guarantees

In the case of *Investec Bank (UK) Ltd v (1) Arnold Zulman (2) David Zulman* [2010] EWCA Civ 536 the Court of Appeal agreed with the decision at first instance, that a guarantee not signed by the guarantors was unenforceable.

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

Decision: The appeal was dismissed. In this case it was clear that the variation letter to the guarantee had to be signed before the guarantors were bound because it contained a statement to the effect that the guarantors had to obtain legal advice before they signed it. This would be meaningless if the parties could be bound by the terms of an oral agreement because on receiving legal advice they may be advised not to sign the variation letter. It was also argued that the guarantee would be unenforceable under section 4 of the Statute of Frauds Act 1677 as it was not in writing. The courts did not comment upon this argument as the appeal had already been dismissed on other grounds.

Real Estate Finance

Real Estate Finance News

Home Information Packs (HIPs)

The government suspended the use of HIPs from midnight on 21 May and legislation to abolish their use entirely is expected later this year.

Real Estate Finance News

According to figures from the Investment Management Association, property fund inflows declined in April to £258m, down from £329m in March. Figures from IPD also showed that the pace of capital value growth for UK commercial property fell in May to 0.5%, down from growth of 0.8% recorded in April. The number of planning applications submitted for commercial property developments fell by 15%, year on year, according to figures released by law firm EMW Picton Howell at the start of June. However, the amount of money loaned to the commercial property sector rose by more than £700m in the first quarter of this year, the first quarterly increase for a year, according to NB Real Estate.

According to the Royal Institution of Chartered Surveyors' latest UK Housing Market Survey, the abolition of HIPs has increased the supply of residential properties on the market and buyer interest has continued to increase in May. According to figures from the Halifax, property prices fell in May by 0.4%, but figures from Nationwide showed that house prices increased by 0.5% in May. According to the British Bankers' Association, the number of new loans approved for house purchases in April rose by 685 to 35,729, however these figures are still 22% lower than the recent high in December 2009.

Restructuring and Insolvency

Restructuring and insolvency cases

Winding-up

In the matter of Metrocab Ltd [2010] EWHC 1317 (Ch) the court refused to exercise its discretion to rescind winding-up orders made against two companies where the circumstances were not materially different from those at the time when the winding-up orders were made.

Facts: Both companies, M and F, were run by a sole director and majority shareholder, S. Winding-up orders in relation to both companies were made in June 2009. The appellants argued that various contracts had been concluded since the date of the winding-up orders and they could now pay off their undisputed debts as they fell due, therefore the winding-up orders should be rescinded. The creditors of both M and F opposed this application.

Decision: The power to rescind a winding-up order is discretionary and the appellant would be required to show the court that the case in question was appropriate for the exercise of this discretion. This did not appear to be an exceptional case in which the circumstances were materially different from those before the courts making the original orders and no evidence of the new contracts was presented to the court. It seemed that all that had altered was a change of mind on the part of S to provide financial support to M and F to enable them to meet their debts. The court was also not satisfied that there was adequate provision made to meet the costs of the liquidators or that M and F would be able to meet their debts as they fell due if they continued trading. Therefore, the applications were dismissed.

Wrongful trading

In the case of *Surjit Singla v (1) Thomas Hedman (2) Gone to Hell Ltd (3) Stonewood Communications BV [2010] EWHC 902 (Ch)* it was held that a director of a company which entered into an agreement knowing that his company had insufficient funding to discharge its obligations under the agreement, had known or should have known that there was no reasonable prospect of the company avoiding insolvent liquidation and, therefore, was guilty of wrongful trading under the Insolvency Act 1986 s214.

Facts: H was sole director and shareholder of NMD, which carried on the business of motion picture and video production. In January 2006, X granted NMD rights to produce a film in Namibia. NMD signed a production services agreement with OSB in March 2006, under which OSB was to provide services for the filming of this film in Namibia. When the agreement was signed NMD did not have the finance or other resources to honour its obligations under the agreement. Production began on 30 March and terminated the following day, mainly for the reasons that the main actor refused to take part in filming and NMD's inability to finance the film making costs. OSB claimed under its agreement with NMD and following arbitration in South Africa an order was made for damages and interest to be paid by NMD. This award was registered in England but NMD failed to make any payments. Therefore OSB presented a winding-up petition which led to a winding-up order being made against NMD. The liquidator of NMD sought an order for wrongful trading against the appellants.

Decision: H entered into an agreement which he should have known would place obligations on NMD which NMD would be unable to honour. It was not appropriate for a director of a company to act in this manner without regard to the company's creditors and the solvency of the company. Therefore, the liquidator's claim under s214 of the Insolvency Act 1986 was made out.

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.

Olswang is committed to being a responsible business and has developed Corporate Responsibility programmes that allow us to actively manage the social and economical impact of the Firm's activities. For example, through our Green initiative we recycle almost 90% of our waste and on the 1 May 2009 Olswang achieved CarbonNeutral® accreditation. As part of our Corporate Responsibility strategy we also encourage every member of staff to engage in lasting and meaningful pro bono and volunteering activities, both legal and non legal.

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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