Bulletin 165 **July 2014**

Butterworths Corporate Law Update

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RECENT DEVELOPMENTS

Queen's Speech 2014

Small Business, Enterprise and Employment Bill

As expected, the Queen's Speech 2014, delivered on 4 June 2014, included a Small Business, Enterprise and Employment Bill which will give effect to the plans already announced for, inter alia, a central public register of beneficial ownership of companies. The lengthy Bill received its first reading on 25 June 2014 with a second reading scheduled for later in the autumn. The main company law provisions are contained in Pts 7, 8 and 9 and Schs 3–7.

Measures included in Pt 7 (Companies: Transparency):

- provisions for a central registry of company beneficial ownership information;
- the prohibition of bearer shares; and
- limitations on the use of corporate directors.

Measures included in Pt 8 (Company Filing Requirements):

- allow companies flexibility to confirm that their basic company information is correct and complete at any point in a year instead of requiring an annual return to be completed at a set point during the year;
- allow companies to opt out of the requirement to keep certain company registers and, instead, keep the information on the public register;
- simplify filing requirements where directors are appointed, provide directors with information about their duties on appointment, and provide a new means of resolving disputes about directors' appointments;

- make it simpler to remove inaccurate registered office addresses from the public register; and
- reduce the strike-off period down from six months to three months.

Measures included in Pt 9 (Director Disqualification Regime):

- a redrafted Company Directors Disqualification Act 1986, Sch 1 allows a wide-ranging approach to the matters that a court must take into account when determining unfitness of a director;
- new provision to enable disqualification proceedings to be brought in the UK against persons convicted of company-related offences abroad;
- provisions to enable the disqualification of a person who controls a director and causes their misconduct;
- increasing the time limit for the Insolvency Service to take action against a director;
- new provision to allow a compensation order to be made against a director who has been disqualified to increase the likelihood of creditors who have suffered from director misconduct being compensated; and
- in (Pt 10) allowing insolvency practitioners to assign certain legal actions that currently only they may pursue to third parties, such as creditors.

As matters progress, the detail of the changes will be considered in detail in the Corporate Law Service.

The Bill is available at services.parliament.uk/bills/2014–15/smallbusinessenterpriseandemployment.html. Explanatory notes are available at www.publications.parliament.uk/pa/bills/cbill/2014–2015/0011/en/15011en.htm and further information about the Bill is available at https://www.gov.uk/government/collections/small-business-enterprise-and-employment-bill.

Review of pre-pack administrations

Graham report

Pre-pack administrations often attract criticisms from creditors faced with a (pre-pack) sale of a business to its former directors or owners immediately on entering into administration. The creditors' concerns typically relate to questions of transparency and the value obtained. For their part, administrators would argue that speed (of sale) is essential in order to retain such value as there is in the business as a going concern and that often the only available purchasers are the former directors or owners.

At the invitation of Secretary of State Vince Cable, an independent review of pre-pack administrations by Teresa Graham has been underway since July 2013 and her report has now been published. The report makes a small number of recommendations, all of which require action on the part of insolvency regulators and the insolvency profession rather than government as Graham does not support legislative action other than as a last resort. The Small Business, Enterprise and Employment Bill 2014, noted above, does give the Government power to legislate, however, in respect of sales in administrations (not just pre-pack sales) in the event that these voluntary measures prove ineffective.

Essentially, the Graham recommendations are that:

- On a voluntary basis, connected parties approach a 'pre-pack pool' before the sale and disclose details of the deal. The pool, a new concept, would be made up of experienced business people able to give independent scrutiny to a connected party pre-pack deal. The service will be administered by a small secretariat and the review will be done on a documents-only basis, by electronic means, and will require a pool member to spend a half day on each review. A fee will be payable upfront by the connected party which will cover the costs (a fixed fee) of the pool member and the secretariat. It is thought that 350 to 400 cases a year are connected party cases which could go to the pool. The review will result in a negative or positive statement by the reviewer, a negative one does not prevent the deal proceeding, but the statement (negative or positive) must be referred to in the Statement of Insolvency Practice 16 (SIP 16) which is required of the administrator in relation to a pre-pack sale and which is sent to all the company's creditors within seven days of the sale.
- On a voluntary basis, a connected party should complete a viability review on the new company stating how the new company will survive for at least 12 months from the date of the statement and this statement will be attached to the SIP 16 statement.
- The SIP 16 which sets out best practice in this area should be redrafted with additional measures to ensure, for example, that the marketing of a pre-pack complies with six principles of good marketing and that any deviation from these principles is brought to creditors' attention; and that valuations must be carried out by a valuer who holds professional indemnity insurance.
- The Insolvency Service should withdraw from monitoring SIP 16 statements which should instead be done by the Recognised Professional Bodies which regulate insolvency practitioners.

The Graham report and associated research is available at https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration.

Listed companies

Enhanced shareholder protection – Listing rule changes come into effect

The changes to the Listing Rules designed to enhance the protection afforded to investors in listed companies with a controlling shareholder came into effect on 16 May 2014. These measures were the subject of extensive consultation by the Financial Conduct Authority (FCA) and its predecessor, the Financial Services Authority, (see Update 162, noting CP12/25 and CP13/15 from the FCA), and extend protections for minority shareholders by:

- Placing requirements on the interaction between a premium listed company and a controlling shareholder, where one exists, via a mandatory agreement, and imposing enhanced oversight measures where a relevant agreement is not entered into or complied with.
- Providing additional voting power for minority shareholders when electing or re-electing independent directors for a premium listed company where a controlling shareholder is present.
- Enhancing voting power for the minority shareholders where a premium listed company with a controlling shareholder wishes to cancel or transfer its premium listing.

The FCA has issued a policy statement, PS14/8, which is its formal response to the consultation CP13/15, and which provides the background to these changes to the Listing Regime. It is available at www.fca.org.uk/news/ps14–08-enhancing-the-effectiveness-of-the-listing-regime.

AIM companies

New AIM Rules

Revised AIM Rules came into effect on 13 May 2014 following AIM Notice 39 issued by the London Stock Exchange, see www.londonstockexchange.com/companies-and-advisors/aim/advisers/aim-notices/aimnotice39.pdf. The changes to the AIM Rules are mainly of an administrative and clarificatory nature with a limited number of substantive changes, for example, requiring a company to include on the company's website details of the corporate governance code that the AIM company has decided to apply and setting out how the AIM company complies with that code, or if no code has been adopted, that fact should be stated together with details of the company's corporate governance arrangements (rule 26). The new rules are available at www.londonstockexchange.com/companies-and-advisors/aim/advisers/aim-notices/aimrulescompaniesmay2014.pdf.

The Companies (Striking Off) (Electronic Communications) Order 2014, SI 2004/1602

This Order, which came into force on 11 July 2014, enables the registrar of companies to send certain communications electronically, where previously these communications were required to be sent as letters by post.

This change means that communications in relation to the striking off of a company may be sent to the company, its officers, liquidator or the subscribers to its memorandum in electronic as well as in hard copy form. Equivalent changes are made in relation to limited liability partnerships.

CASES

Access to the register of members

Proper and improper purposes

The Court of Appeal has had the opportunity for the first time to consider the making of no-access orders (to the register of members) under Companies Act (CA) 2006, s 117. The first instance judgment in this case was considered in Update 158.

The appellant was a shareholder in the respondent companies. His request for access to the register of members of the companies was refused and the companies were granted a no-access order by the court under CA 2006, s 117(3) on the basis that the court was satisfied that the request had been made mainly for an improper purpose. The court did order that a letter be circulated to shareholders on a particular matter, but access to the register was refused. The appellant was ordered to pay the companies' costs on an indemnity basis.

On appeal, the Court of Appeal has dismissed the appeal in respect of the no-access order, but allowed it in respect of the indemnity costs order as the appellant's conduct had not reached the threshold of unreasonableness necessary for indemnity costs.

The court ruled:

(1) The words 'proper purpose' in CA 2006, s 117(3) should be given their ordinary, natural meaning. A proper purpose ought generally, in the case of a member, to relate to the member's interest in that capacity and/or to the exercise of shareholder rights.

(2) The court must find what the purpose of the request is, which will normally be found in the request itself, but the court is not restricted to the purpose as stated in that document.

(3) On a s 117(3) application, the onus is on the company to demonstrate to the court that the court should be satisfied that the request is for an improper purpose. 'Satisfied' means satisfied on a balance of probabilities. It followed that it is not enough that the purpose is capable of being, or might possibly be, an improper one if the court is not satisfied that it is in fact improper.

(4) The way the statutory provisions are framed reflect a strong presumption in favour of shareholder democracy and a policy of upholding principles of corporate transparency and good corporate governance. Those factors point in favour of the court exercising its discretion sparingly and with circumspection where requests are made by shareholders to communicate with fellow shareholders.

(5) It is not for the court to rule out access on discretionary grounds. The policy behind s 117(3) is that access be refused where a person is disqualified by his purpose.

(6) Where there is a mixture of purposes, some proper and some improper, the court must still make a no-access order, because the contrary conclusion would undermine the protection which the no-access provision was intended to give. A request for access for a proper purpose can still be accommodated, for example, by the court ordering the company to facilitate communication with the members by acting as a post-box for mail between the applicant and the members, as was ordered by the Court of Appeal in *Pelling v Families Need Fathers Ltd* [2002] BCLC 645 (applying a somewhat similar provision in the CA 1985). A *Pelling* type order can also be made under CA 2006, s 117 where there is a mix of proper and improper purposes.

(7) An application for a no-access order should, where possible, be heard summarily rather than after the delay and expense of a trial, not least because a long delay in obtaining a copy of the register of members might itself be destructive of the alleged proper purpose of the person seeking it.

The shareholder's appeal against the no-access order under s 117(3) was dismissed. His purpose in circulating shareholders with details of long past irregularities was not a proper one because that communication could not confer anything of value on fellow shareholders. A further investigation of those stale allegations could be of no benefit to the companies or their shareholders: *Burry & Knight Ltd v Knight* [2014] EWCA Civ 604, [2014] All ER (D) 120 (May).

Parent and subsidiary liability

Duty of care to employees of subsidiary

An employee who had been employed at various times by two subsidiary companies (which did not have insurance and were not worth suing) sought damages in negligence from the parent company of the group for his ill health consequent on his exposure during his employment to asbestos.

At first instance, the court allowed the claim finding a duty of care stemming from the parent company's appointment of a director to one of the employing companies.

Allowing an appeal, the Court of Appeal held that:

(1) In running the day-to-day operations of the subsidiary, the director appointed by the parent company had not been acting on behalf of the parent company. He had been acting pursuant to the fiduciary duty that he owed to the subsidiary company.

(2) The findings that the judge had made on the basis of the very limited evidence available had fallen far short of what was required for the imposition of a duty of care on the defendant parent company. There was no evidence that the parent company at any time had carried on any business at all apart from that of holding shares in other companies, let alone that it had carried on a business an integral part of which had been the handling of asbestos. The facts were far removed

> from those in *Chandler v Cape plc* [2012] 3 All ER 640 where the parent company was found to have assumed a duty of care to employees of a subsidiary company.

Under established principles, what one looked for, Tomlinson LJ said, was a situation in which the parent company was better placed, because of its superior knowledge or expertise, to protect the employees of subsidiary companies against the risk of injury and moreover where, because of that feature, it was fair to infer that the subsidiary would rely upon the parent deploying its superior knowledge in order to protect its employees from risk of injury.

There was no basis upon which it could have been asserted that the parent company in the instant case either had had or should have had any knowledge of that risk superior to that which the subsidiaries could have been expected to have.

The judge's findings on the intermingling of the businesses, the interchangeable use of depots and the shared use of resources amounted to no more than a finding that these companies were operating as a division of the group carrying on a single business, but that did not mean that the legal personality of the subsidiaries separate from that of their ultimate parent had not been retained and respected. The appeal was allowed: *Thompson v The Renwick Group plc* [2014] EWCA Civ 635, [2014] All ER (D) 98 (May) (CA).

Corporate personality

Whether freezing order extends to assets of companies controlled by defendant

The Court of Appeal has considered whether the standard form of wording of a freezing order extends to the assets of companies wholly owned or controlled by the respondent who is subject to the freezing order.

At first instance, Burton J had held that assets of companies controlled by a sole director and shareholder did fall within the terms of the freezing order directed to that individual, though on the very same day, Hildyard J in *Group Seven Ltd v Allied Investment Corpn Ltd* [2013] EWHC 1509, [2014] 1 WLR 735, reached the contrary view. Applying standard company law principles, Hildyard J noted that it is clear beyond argument that the assets of the company are not in law the assets of the shareholder, nor is the company by virtue of the shareholding, the agent of the shareholder. The Court of Appeal has now endorsed Hildyard J's approach and firmly rejected the approach adopted by Burton J while finding other grounds for upholding the actual order made by him.

The Court of Appeal held that:

- there was no basis upon which it could be asserted that the language of the standard form freezing order was either intended to have the effect or had the effect of bringing within the definition of a defendant's assets, the assets of a company which he controlled and such assets are not 'directly affected' by such an order;

- however, the assets of such a company would ordinarily be indirectly affected by the order because the respondent is prevented by the freezing order from diminishing the value of his assets which consist in part of his direct or indirect shareholding in the relevant company;
- it followed that the respondent was restrained from procuring the company to make a disposition likely to result in such a diminution in the value of his assets. For practical purposes, that is likely to mean that dispositions by such companies other than in the ordinary course of business are enjoined.

As the judge's order had also restrained the respondent from taking steps to diminish the value of his assets, the order could be upheld on that basis: *Lakatamia Shipping Co Ltd v Su* [2014] EWCA Civ 636, [2014] All ER (D) 122 (May).

Directors' duties to exercise powers for a proper purpose

Imposing restrictions on shares for inadequate disclosure of beneficial ownership

The Court of Appeal has considered two important issues arising from the use by directors of powers contained in the company's articles, similar to the powers of the court in CA 2006, Pt 22, to impose restrictions on voting and other rights of shareholders following an inadequate response to notices issued by the company to discover the beneficial owners of shares in the company.

It will be recalled that, once a register of beneficial ownership is introduced, the Government intends to extend Pt 22 to all companies.

On the facts of the case, having received responses to the relevant notices which the directors had reasonable cause to believe were false or materially incorrect, restrictions were imposed on shares held by shareholders holding 39% of the shares. As a consequence, the board was able to secure the passing of special resolutions at a general meeting authorising the directors to make market purchases of its shares, and disapplying the statutory pre-emption rights on the allotment of shares.

At first instance, see [2014] 1 BCLC 202, Mann J had ruled that the restrictions were ineffective because the directors had been motivated by an improper purpose namely, to thwart shareholders perceived to be corporate raiders rather than to secure the disclosure of information as to beneficial ownership of the shares.

The two main issues before the Court of Appeal concerned:

(1) the extent to which the exercise by the directors of these powers is subject to the general constraint on the exercise of fiduciary powers, as

expressed in CA 2006, s 171, namely that powers must be exercised for the purposes for which they are conferred;

(2) whether the beneficial owners of the relevant shares had standing to challenge the restrictions imposed, given that generally companies recognise only the registered owners of shares.

The Court of Appeal ruled that:

(1) the proper purpose doctrine, laid down in *Howard Smith v Ampol* [1974] 1 All ER 1126, has no application to the operation of CA 2006, Pt 22, or equivalent provisions in the articles, per Longmore LJ and Sir Robin Jacob; Briggs LJ dissenting. The whole point of the ability of the directors to restrict the voting rights of a shareholder is to prevent him being able to vote at a general meeting. The scenario which arose in this case is a very likely scenario, and the most probable timing for a disclosure notice is when some controversial resolutions are pending or likely to be so shortly. In that most likely of scenarios, it was also very likely that the board would not only like the recipients to be disenfranchised but have that as its predominant motive for acting. If the predominant motive test was to be applied, the provisions would be unlikely to have any or much application.

For the majority, the significant point is that a 'victim' of a restriction notice can readily prevent the restrictions by providing full and correct answers. A party who chooses not to answer the questions properly is a victim of his own choice, they said, not a victim of any improper use of a power by a board of directors. Any other construction of the statute or the articles would only be an encouragement to deceitful conduct and not something which English company law should countenance. The company's appeal on the improper purpose issue was allowed therefore and the restrictions had been imposed correctly.

There is a powerful dissenting judgment by Briggs LJ who does not accept that the fact that in many cases the defaulting shareholders may be said to have only themselves to blame is a principled reason for treating the exercise of a fiduciary power to be free from the proper purpose doctrine. The proper purpose doctrine derives from the fact that a power is fiduciary and that its exercise can have a draconian effect upon shareholders' rights and upon the constitutional balance between the powers of the shareholders and the powers of the board. He considered that it would do no service to the maintenance of constitutional corporate governance for the Court of Appeal to water down the healthy principle that directors' fiduciary powers must only be exercised for a proper purpose. To do so on the ground that the disenfranchised shareholders were controlled by raiders from whom the directors were understandably, and commendably, concerned to protect the company would, in his view, be to make bad law out of a hard case.

(2) On the question of standing, there was unanimous agreement in the Court of Appeal, endorsing the approach of the court below, that CA 2006, Pt 22 is an exception to the general principle that companies are only concerned with the legal owners of their shares.

The statutory powers enable the company to seek information from all persons interested in the broadest sense in its shares, and to seek from the court restrictions which, while bearing primarily upon the legal rights of the registered shareholder, plainly had, and were intended to have, important economic consequences for the wide class of those with interests in the shares.

The provisions in the articles of this company were designed to have much the same effect, and since restrictions might be imposed by the company's directors, without having to go to court, the company's ability to impose those economic consequences was even greater.

In those circumstances, where a genuine dispute arose as to the validity or regularity of steps taken under the CA 2006, Pt 22 regime or the regime under the articles, the law ought to afford the widest scope for persons economically affected by the taking of those steps to challenge them in court. The company's appeal against a finding that the beneficial owners had standing to bring the proceedings was dismissed: *JKX Oil & Gas plc v Eclairs Group Ltd* [2014] EWCA Civ 640, [2014] All ER (D) 117 (May).

Alteration of the articles – drag along clause

Whether alteration unfairly prejudicial

A held 8.91% of the shares in the defendant company which carried on a private equity business. In 2008 he retired from the business, but like other retirees retained his shares. Eventually, concerns arose that retirees held or would shortly hold a controlling interest in the company and it was considered that structure was unsustainable as a business model.

A scheme was put in place whereby a company (WSL), which was a vehicle for the active members of the management team, made an offer to acquire all shares in the company for £15.15m (the WSL offer) and this offer was accepted by all of the members of the company including all the retirees except A. It was a condition of the WSL offer, among others, that those who accepted it should vote in favour of an amendment to the articles, as duly happened. WSL proposed to exercise drag provisions in the articles of association in their amended form in order to acquire A's shares.

A brought a petition alleging conduct unfairly prejudicial to his interests, including in particular the amendment to the articles in order, he said, to expropriate his shares.

The court dismissed the petition.

The company's articles and a shareholders' agreement had always contained 'drag and tag' rights on a change of control so it was not a case of the articles being altered to add drag along or expropriation clauses where none existed before. Rather these provisions were part of the original commercial bargain between the founding members of which the petitioner had been one and the alteration to the articles merely allowed for amended provisions.

The WSL offer and consequent change in the articles of association had not been targeted purely at the petitioner and intended as an expropriation. All of the other relevant shareholders had agreed to the purchase of their shares on exactly the same terms. There was no evidence of bad faith or improper motive on the part of those voting to approve the alteration nor that the price paid for the shares was outside the range which was considered reasonable and it was a price which all the other shareholders were happy to accept.

The court considered that the alteration was one which shareholders could reasonably have considered to be in the interests of the company (it allowed long-term restructuring of the company so as to facilitate its future development by those still active in the management of the business). Even if the question was posed in terms of whether the alternation was for the benefit of the hypothetical member, the answer would be the same, for the same reasons.

The claim with respect to unfair prejudice was rejected: *Re Charterhouse Capital Ltd, Arbuthnott v Bonnyman* [2014] EWHC 1410, [2014] All ER (D) 76 (May) (Ch).

Breach of fiduciary duty

Whether sole director and shareholder can ratify own wrongdoing

A tour operator company (the company) had gone into liquidation and claims were brought against its sole director and 100% shareholder (A) for breach of fiduciary duty in misapplying company money and in diverting to himself commission on contracts entered into by the company with air carriers X and Y. Claims were also made against X and Y on the basis of dishonest assistance with A's breaches of duty.

The director had approached X and Y offering to sell to each of them 50% of his shares in the company – neither was aware of the offer to the other. As part of the complex arrangements for the sale of his shares, the director was paid a sum for his shares but the main consideration was paid by way of commission to a Seychelles company. It was accepted that payments to the Seychelles company were payments to the director.

The commission was supposedly payable because the Seychelles company brokered a deal between the company and X and Y whereby the company committed to buying a set number of seats from X and Y in future years.

To encourage their payment of the commission (£5m) to his Seychelles company, A had the company make payments to X and Y (£3.7m) which there was no legal obligation to make, and which were not in the interests of the company. A never did transfer his shares to X and Y and left the jurisdiction. The company then went into administration followed by liquidation.

The liquidators claimed against X and Y and individuals associated with them for dishonestly assisting A's breach of fiduciary duty. In an interesting and wide-ranging judgment, Mrs Justice Rose allowed the claim on the basis that:

- The payments to X and Y were a clear misapplication of the company's money (£3.7m) by the director in breach of his fiduciary duties to the company.
- The fact that A had been the sole director and shareholder of the company did not prevent his conduct from being a breach by him of his fiduciary duty. He could not ratify his own wrongdoing.
- As for the commission paid by X and Y, this was a breach of A's duty under CA 2006, s 175 in diverting to himself, via the Seychelles company, the opportunity for the company to obtain a commission from X and Y in return for the company's commitment to purchase a minimum numbers of seats on flights in future seasons.
- A's fraudulent conduct was not attributed to the company in order to allow the defendants to raise a defence of *ex turpi causa non oritur actio* to defeat the company's claim. The Court of Appeal established in *Bilta* (*UK*) *Ltd v Nazir* [2014] 1 All ER 168 that, while an *ex turpi causa* defence can be raised by third parties when sued by a company with respect to wrongdoing by a sole shareholder and director, it cannot be raised when the claim is by the company against its wrongdoing director and shareholder and those who dishonestly assist him.
- X and Y had dishonestly assisted A's breaches of fiduciary duty. The assistance given by X had, in fact, been given by certain individuals associated with X who could not distance themselves from the consequences of their actions by arguing that it was X only who gave the dishonest assistance and not them. They too were individually liable.
- The dishonesty on the part of X and Y and the associated individuals lay in entering into the sham brokerage agreements with the Seychelles company knowing that no brokerage service was being provided and that this method was adopted to facilitate payments to A for his shares. They knew the commitment as to the purchase of future seats was made by the company, but they contracted to pay the commission to the Seychelles company.
- The dishonest assistants were liable to pay equitable compensation to the company of the amount of the company's money which had been paid to them by A (£3.7m); alternatively, they were liable for the amount of commission (£5m) which should have been paid to the company but was instead paid to the Seychelles company: *Goldtrail Travel Ltd v Aydin* [2014] EWHC 1587, [2014] All ER (D) 205 (May) (Ch).

Cross-border mergers

Whether cross-border merger if consideration waived

In this case, the proceedings raised an important legal issue concerning the construction of the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974 and Council Directive (EC) 2005/56 (on cross-border mergers of limited liability companies) (the Directive) on a point which the court was told was of general market interest.

On one reading, the Regulations contemplated that, in a cross-border merger by absorption (other than a merger by absorption of a wholly-owned subsidiary), shareholders in the transferor company would actually receive, as consideration for the merger, 'shares or other securities representing the capital of the transferee company'. However, all the companies concerned in this case were wholly owned by the same ultimate holding company, Olympus Corpn, and the draft terms of merger provided that the shareholders in the applicant transferor companies would not receive any consideration from the transferee companies.

The court held that a proposed cross-border merger would be compliant with, and effective under, the 2007 Regulations and Council Directive (EC) 2005/56 in circumstances where the shareholders in the transferor company had agreed not to receive shares or other securities in the transferee.

All that was required by the Directive was that the rights of members of the transferor company, in the case of a merger by absorption, to be offered shares in exchange should be recognised, even if those rights were simultaneously declined by all the members. The requirement in the Directive that the consideration was to be 'receivable by members of the transferor company' while open to different interpretations did appear to Hildyard J to be capable of enabling a waiver of the right to consideration without compromising the characteristic of the transaction as a cross-border merger. The same flexibility might be read into regs 2(2)(f) and 2(4)(c) of the 2007 Regulations which gave effect to the Directive. An alternative interpretation would be a triumph of form over substance requiring the receipt of token consideration to bring a transaction within the definition of a cross-border merger.

The proposed operations did constitute cross-border mergers within the meaning of the Regulations and the Directive, therefore, notwithstanding the provisions for the shareholders of the transferor companies to waive their entitlement to any shares or cash in exchange.

But the court wanted to emphasise that this interpretation was limited to the circumstances of this case where all the companies were wholly-owned subsidiaries within a group structure.

Directions would be made accordingly for meetings to approve the cross-border merger: *Re Olympus UK Ltd* [2014] EWHC 1350, [2014] All ER (D) 12 (May) (Ch).

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Published by LexisNexis (www.lexisnexis.co.uk)

ISBN 978-1-4057-8356-9
9 781405 783569