

Spearing | Waite

Good Company

January 2009

Newsletter



The New Year sees us welcome a new face to the Corporate & Business Services team

Martin Smith joined the firm at the beginning of the month as a Partner having re-located from Leeds. Martin arrives from national firm Watson Burton where he was a Partner in their Corporate Finance team. He also spent five years with Hammonds.

Martin's particular expertise covers mergers and acquisitions, private equity and public company transactions, corporate fundraisings, investments and reorganisations, stock market listings and joint ventures. He has just been named as a "leader in his field" for corporate finance work in the Chambers 2009 directory of UK lawyers.

Martin has relocated to Leicestershire with his wife Katie and their two young daughters, Evie and Alice. In Martin's spare time he enjoys spending time with his family, playing golf, cycling and running, having recently completed the Great North Run. He would also very much like to see Leicester City playing in the Championship again next season!

Martin commented on his move "I am delighted to have arrived at Spearing Waite and am looking forward to working in the dynamic, client facing and dedicated corporate team. The firm provides genuine strength in depth across the full spectrum of legal disciplines which is absolutely essential to delivering high quality corporate advice. Spearing Waite has a very strong reputation for providing a professional, personable and passionate approach to legal services which is clearly highly appreciated by all of its clients and contacts."

Kate Blank, Head of Corporate & Business Services, further commented: "We are extremely

lucky to have Martin join us and his experience and expertise will further strengthen the firms reputation in the corporate market".

Avoiding Conflicts of Interest and Breaches of Fiduciary Duty

On 1st October 2008 Section 175 of the Companies Act 2006 came into force putting directors duties to avoid conflicts of interest and act in the Company's financial interests on a statutory footing for the first time.

Where a conflict arose before 1st October 2008, a director could satisfy his common law duty by declaring the interest, absenting himself from discussions or in extreme cases stepping down from the Board. The recent case of PNC Telecom PLC v Thomas and Others (No 2) highlights the personal liability to which a director may be subject should he breach his statutory duties. Mr Thomas was ordered to pay £330,000 to his Company in damages for approving, at a Board meeting, the incorporation of a provision dealing with change of control and compensation into a new directors contract upon the sale of his own shares to that new director.

There are numerous and wide ranging situations in which conflicts may arise e.g, a director is also a shareholder or director of two or more Companies which deal with each other or joint venture companies where directors may also be directors of a joint venture partner.

Section 175 is more onerous than the common law duty as directors must not allow a conflict to arise in the first place meaning directors must be pre-emptive.

Directors can avoid breaching Section 175 by obtaining prior board authorisation of the conflict provided:

- the company's articles of association allow board authorisation to be given; or
- the shareholders have passed a special resolution allowing conflicts to be authorised at director level.

The authorisation required can only be given by directors without an interest in the matter causing the conflict who must consider all their duties under the Act and in particular the duty to promote the success of the Company for the benefit of the members as a whole.

Although directors actions can be ratified by a shareholders resolution this will hinder the effective running of boardroom business and Companies must look to update their constitution to include these new conflict of interest provisions. This will have the added bonus of providing reassurance to shareholders who can see that any abuse of power will be prevented.

We would recommend all companies to consider putting in place the necessary authorisations to avoid a breach of this new statutory provision. Please contact Kate, Martin or David for further advice on this issue to ensure compliance by your company and all its officers.

Good News for Brands

From 1st October 2008 new provisions came into force introducing another line of attack for brand owners to challenge the registration by others of their Company name. The introduction of Section 69 of the Companies Act 2006 recognises that as with "cyber-squatting" on domain names; opportunistic registration of another's Company name is a practice used by those hoping to cash in on the goodwill of a Company name. Under the new provisions a brand owner can object to a Company Names Adjudicator (CNA) indicating that there has been an infringement of their goodwill (which is defined as "reputation of any kind") and a CNA may, if it finds a case to answer, order a respondent Company to change its name. This avoids expensive court proceedings and involves a lower evidential burden.

There are 5 legitimate defences which can be summarised as: -

- a) pre-existing registration;
- b) respondent Company is or has operated and incurred costs in so doing;
- c) the Company was an off the shelf formation;
- d) the name was adopted in good faith; and
- e) the applicants interest are not adversely affected.

In the first three cases the defence is not absolute and if an applicant can show the name was

registered either to obtain money from it or to prevent the Company from registering the name itself; the CAN's order will stand.

Charitable Incorporated Organisations (CIO's)

The Charities Act 2006 has introduced the concept of the CIO. This new type of corporate structure, designed specifically for charities, is meant to provide distinct advantages when compared with existing charitable companies.

CIO's, when compared with charitable companies, will have vastly reduced administrative burdens placed upon them;

- A CIO will only need to register with the Charity Commission. Charitable companies however are subject to dual regulation, and as such must register both with the Charity Commission and with the Registrar of Companies.
- A CIO need only submit an annual return under charity law. A charitable company on the other hand must prepare an annual return under company law, and, where its annual income totals more than £10,000, another annual return under charity law.
- Unlike Companies House, which charges for the incorporation of a charitable company, the Charity Commission will not impose a fee for the registration of the company and subsequent filing of information.
- Various other changes have been introduced, and more information on these changes can be found on the Charity Commission's website (<http://www.charity-commission.gov.uk/index.asp>).

Crucially, existing charitable companies may convert into CIO's. CIO's would seem to be a step forward in simplifying the legal requirements imposed upon charities, but, unfortunately, are still in the consultation phase (as of 1 December 2008), and are unlikely to become available until late 2009 as a result of the time needed to finalise associated regulations and model constitutions. Existing charitable companies should bear the introduction of CIO's in mind, and contact any member of the Corporate and Commercial department for further information.

For any queries on any of the above contact Kate, Martin or David who will be more than happy to assist:

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