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Company dissolution: welcome withdrawal of BVC17 guidelines

In our experience, it has been a common misconception among companies and even some of their professional advisers that a company, intending to repay share capital before applying for strike off, need only reduce its capital to £4,000; also that any capital below the £4,000 threshold can be paid back to members without any further formality.

So the recent announcement by the Bona Vacantia Division of the Treasury Solicitor's Department regarding the withdrawal of Guidelines BVC17 (Distribution of Company Share Capital) was a welcome one.

"Hopefully, the withdrawal of the BVC17 guidelines will serve to clarify the situation" commented Helen Goose, Head of Jordans Corporate Legal Services unit.

It was considered by the Treasury Solicitor that the concession was no longer necessary. All repayments of capital, however small, need to be properly authorised in accordance with the procedures set out in the Companies Act 2006.

"The Companies Act 2006 makes ample provision for this – namely a reduction of capital by means of the solvency statement procedure – making it easier to reduce or pay back share capital," continued Helen.



Helen Goose, Head of Jordans Corporate Legal Services unit

Jordans can, of course, assist with documenting a reduction of capital under section 642 of the 2006 Act (reduction supported by directors' solvency statement) as well as a range of other corporate legal procedures.

For further information, contact Helen Goose by email to helen_goose@jordans.co.uk or call 0117 918 1322.

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The Bribery Act 2010: implications for offshore jurisdictions

While the Bribery Act 2010 (the Act), which came into force on 1 July 2011, is a piece of UK legislation its reach extends beyond the UK's borders. It is this jurisdictional reach that results in implications for offshore centres and it is upon these implications that this article concentrates.

First all it is useful to briefly set out the five offences under the Act:

- The offence under section 1 of bribing another person.
- The section 2 offence of being bribed.
- Bribery of a Foreign Public Official under section 6.
- The corporate offence of failing to prevent bribery under section 7.
- The section 14 offence of a senior officer conniving in or consenting to the company bribing or receiving a bribe.

For offshore centres, the Act has implications for persons who have a "close connection" with the UK and also for overseas companies, which carry out their business or part of their business in the UK. These two issues, personal and corporate liability in relation to offshore jurisdictions, will be looked at in turn.

CLOSE CONNECTION?

Personal liability

The first important extra-territorial feature of the Act is that persons who have a "close connection" with the UK can be prosecuted for offences committed anywhere in the world under sections 1, 2 and 6.

Under these offences of bribing someone, being bribed and bribing an FPO an offence will be committed:

- if any element of the offence has been committed in the UK; or
- no element of the offence has been committed in the UK but the offender has a "close connection" with the UK. Examples of who would have this "close connection" are:
 - o British citizens
 - o UK companies
 - o British overseas territories citizens
 - o British overseas citizens
 - o UK residents

As many offshore territories are located in British overseas territories, the people working there are likely to have the "close connection" with the UK by reason of being either British citizens or British overseas territories citizens. For example,



Philip Jacques is the Senior Legal Adviser and Compliance Manager of Jordans International

a BVI company could have a BVI resident director who is implicated in bribery outside the UK. That BVI director could be liable under the Act if he is a connected person.

Corporate liability

Firstly, a company can have liability under sections 1, 2 or 6 if the act of bribery occurs:

- within the UK; or
- the company carries on business or part of its business in the UK.

An offshore company does not, of itself, have the "close connection" which would bring it under 1, 2 or 6 by reason of it being in a British overseas territory.

Secondly, the offence under section 7, the failure to prevent bribery offence, is committed by a company if:

- the organisation is incorporated in the UK; or
- the organisation carries out some of its business in the UK; and
- the offence is committed by an associated person, irrespective of whether the relevant acts or omissions are committed in or outside of the UK.

It is likely that the Serious Fraud Office, which is responsible for bringing prosecutions under the Act, will view the definition of carrying on business widely. For example, it is arguable that a website pointed to the UK and generating UK revenue is caught by the definition.

So the implications of section 7 for offshore companies depend upon the relationship between the offshore company and the UK. Three examples of structures are given by way of illustration:

The Bribery Act 2010: implications for offshore jurisdictions *continued*

An offshore company that has UK activities:

The offshore company will be caught under section 7 in this situation because it is trading in the UK. So the offshore company should consider putting anti-bribery procedures in place so that it has an adequate procedures defence and possibly insulating the UK operation by incorporating a UK company.

An offshore company that has a UK subsidiary:

The Government's guidance stresses that an equity investment alone is insufficient for the subsidiary to be considered an associated person (although this may be tested in court by the Serious Fraud Office which does not view the guidance as definitive). However, if the subsidiary is performing services on behalf of the offshore parent company it may be prudent for

the offshore company to adopt anti-bribery policies as a precaution.

An offshore company with UK subsidiaries but also subsidiaries in other high risk jurisdictions:

In this situation, if the subsidiary in a high risk territory such as Nigeria paid a bribe in Nigeria, the offshore company could be liable under the Act if a service is being provided to the offshore company by the Nigerian company.

Most of the time no service will be offered to the offshore company but to counter this risk the offshore company should ensure that the Nigerian company is operationally and financially independent of the offshore company. It may also be prudent for the offshore company to put in place anti-bribery policies for itself or across the group as a precaution in order to ensure that it has an adequate procedures defence.

To see how Jordans can help you to comply with the Bribery Act visit www.thebriberyact2010.com

What company structure?

Getting it right from the start

Kathleen O'Reilly, our Head of Internal Legal Services highlights the importance of getting the right corporate structure from the outset.

Clients often ask if it's possible to change from a guarantee company to a company limited by shares and vice versa. Unfortunately it is not and this highlights the importance of getting the right company structure for your needs from the start.

Whether your company structure is shares or guarantee is an irreversible decision once the company is incorporated.

"I think people sometimes get confused about this issue because it is possible to play around with share companies to a considerable extent – private companies can become public and vice versa. Also, private limited companies can become unlimited," commented Kathleen "so it's easy to see how this might be seen as a straightforward change too. Unfortunately, company law does not see it that way!"

If you realise your company should have been limited by guarantee e.g.

- it is not being set up to make a profit
- it is being set up to regularise arrangements e.g. it is a rugby club or golf club and as such the company needs to have the ability to remove members if necessary
- membership is intended to be personal and not easily transferable

but the company was set up as limited by shares



then there is sometimes little you can do but start again.

If that is the case, the organisation would have to set up another company (this time limited by guarantee), transfer the business from the company limited by shares across to the guarantee company and then set up the register of members etc.

"Sometimes, it may simply be a question of speaking to our experts to see if anything can be done in terms of changing the share rights in the limited company. If the company is one set up to make a profit then it really should be set up limited by shares. It might be that solutions to a problem could be achieved by providing enhanced voting rights for some members compared to others."

Visit www.jordans.co.uk/companyformation for more information on company types.

**SHARES OR
GUARANTEE?**

LLPs – get it in writing!

A recent case - Eaton v Caulfield, Chancery Division, Companies Court - highlights the importance of ensuring that those involved in a limited liability partnership put the terms upon which it is going to operate in writing.

In this case, Eaton and Caulfield, together with one other person, worked as recruitment consultants. For a number of years they traded as a partnership. In 2007 they decided to become an LLP. The LLP was incorporated but no LLP agreement, setting out how they would operate, was entered into.

Eaton and Caulfield fell out. Caulfield expelled Eaton from the business on the basis that he was the boss and that by reference to a document called Business Rules and Guidelines (signed well before the LLP was incorporated) he had the power to do so. Eaton contested this. He claimed that his expulsion was not lawful and that it was unfairly prejudicial as well. The court decided, as there was no written agreement between the parties and nothing to suggest any other form of agreement (whether by correspondence or evidence of discussions) that the default rules applied.

The court held:

- There was no justification for the expulsion
- There had not been a reasonable offer to purchase Eaton's share
- Eaton had suffered unfair prejudice as a result

- There was a complete breakdown in the relationship; and
- The LLP should be wound up.

An LLP agreement is not required by statute in order for an LLP to operate. However, the warning in this case is clear. An LLP agreement is essential in order to prevent the default rules applying. The default rules for LLPs are set by the Limited Liability Partnerships Regulations 2001 (as amended but they provide for only a few situations.

The case illustrates the importance of getting an LLP agreement in place from the outset. Failure to do so means that if relations between the parties to an LLP break down, they could be in the hands of the courts which can be costly, stressful and time-consuming for the parties concerned.

A good LLP agreement should include:

- Termination and rights between the parties in such an event
- Profit shares
- Voting rights
- Decision making
- Capital provisions
- Work to be performed, etc

For more information on our services in relation to LLP agreements please [visit our website](#) or call Helen Goose on 0117 918 1322.

Practically speaking – a seminar for corporate professionals Belfast

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Eoin O'Shea

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Agency Worker Regulations 2010

The Agency Worker Regulations 2010 (AWR) came into force on 1 October 2011.

They have significant implications for employers as they provide agency workers with some of the basic rights given to full time employees. Some of these rights are given to the agency worker after 12 weeks and broadly speaking concern equal treatment –rights to overtime, shift allowances, maternity rights and holiday pay, etc. Agency workers will still not be able to enjoy benefits such as redundancy pay, sick pay and health insurance.

There are also day 1 rights. These include access to canteens, child-care facilities and transport services as well as information on vacancies (as made available to the full time permanent workers).

Broadly speaking, the AWR apply to situations where workers are contracted by a business from an agency providing temporary workers. However, in a number of cases the AWR will not apply as the circumstances are such that the legal nature of the relationship is not covered by the AWR.

For businesses the options in relation to this are:

- comply with the new legislative requirements for any workers affected by the AWR; and
- consider alternative methods of getting extra work completed, e.g. providing more overtime, hiring casual workers and contractors.

A contractor may be able to show that he is a contractor rather than agency worker by meeting a number of legal conditions that combined together indicate that the contractor is in business on his own account. Such factors include that the contractor has set up his own company under which he operates. He provides his services as a worker to his company. The company contracts with other businesses where there is a need for his services.

For more information on the AWR please see www.direct.gov.uk/en/Employment

Kathleen O'Reilly

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