

Company MATTERS

Corporate Manslaughter: the new law

Under recent law it has been exceptionally difficult for a company to be convicted of corporate manslaughter. The first successful conviction was in 1994, following the Lyme Regis disaster, in which four students were drowned during a canoeing trip. To date only six further organisations have been successfully convicted.

Memorable disasters which have resulted in acquittal include the Herald of Free Enterprise, the Kings Cross fire, Piper Alpha and the more recent train crashes at Hatfield, Paddington and Potters Bar.

The main problem with the recent law has been the requirement of a 'controlling mind' which linked a company's guilt to the guilt of the people running it. The majority of prosecutions have failed because it was almost impossible to find an individual who 'embodied' the mind of the company.

As a result, the Corporate Manslaughter and Corporate Homicide Act 2007 has been passed and has now come into force with effect from 6 April 2008.

Who will the Act apply to?

The Act will apply to a large range of organisations, including, for the first time, Crown bodies, police forces and government departments. The Act has also been extended to include partnerships, trade unions and employers' associations who act as employers. Incorporated organisations including UK and overseas incorporated companies and limited liability partnerships are also covered by the Act.

There is no new offence for individuals and prosecutions can only be brought against the organisation. In the case of partnerships, the prosecution will be against the name of the partnership and any fine will come out of partnership funds.

The offence

An organisation will be guilty of corporate manslaughter if the way in which it organises and manages its activities:

- causes death and
- amounts to a gross breach of a relevant duty of care;

and a substantial part of the failure has occurred at senior management level.

The management failure need not be the sole cause of the death and the relevant test is whether, "but for" the management failure, death would not have occurred.

The Act is intended to focus on the way an organisation is actually run 'on the ground' and not just on the procedures in place on paper. In analysing how activities are organised and managed, a wide range of factors must be considered including systems of work, level of training offered, adequacy of equipment and immediate supervision.

Senior management is defined as those people who play a significant role in organising, managing or running the organisation. This will clearly include directors and managers but could extend to branch managers and persons in control of certain areas, such as health and safety.

The Act specifies a list of relevant duties, including towards employees, as occupier of premises and as provider of goods and services and other commercial activities. The breach must be gross, which means that the conduct of the organisation must fall far below what can be reasonably expected in the circumstances.

There is a direct link between establishing a gross breach and health and safety law. In determining whether there has been a gross breach, the jury must look specifically at whether the organisation has failed to comply with health and safety law, how serious that failure was and whether it posed a risk of death.

Penalties

At present the only penalty in place is a fine. Publicity Orders, which 'name and shame' the organisation, and Remedial Orders, which require the organisation to rectify its systems, are to be introduced towards the end of 2008.

It is anticipated that fines will start at 5% of annual turnover and will range from 2.5 to 10% after consideration of the seriousness of the offence and any mitigating factors. The Act is intended to lie alongside current health and safety law. Organisations are advised to review their compliance and it is anticipated that, if an organisation complies with its duties under health and safety law, it should not be in danger of prosecution under the Act.

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Consumer Credit Act 2006: major changes

The Consumer Credit Act 2006 ("2006 Act") makes significant changes to the Consumer Credit Act 1974 ("1974 Act"), which governs the licensing of credit, hire and ancillary credit businesses and the advertising form, content and signing of regulated agreements. These changes have come into effect from 6 April 2008.

Individual

The debtor/hirer under a consumer credit/hire agreement must be an "individual". Under the new law a partnership or unincorporated association of more than three persons, even if all partners are natural persons, will not be an "individual", and a partnership or unincorporated association of three persons or less will be an "individual" if at least one is a natural person.

Unfair relationship test

The Court can now intervene in relation to consumer credit/hire agreements where the relationship between the debtor/hirer and the creditor is "unfair". This broader test has replaced the "extortionate credit bargain" test under the 1974 Act. The new unfair relationship test applies to all consumer credit/hire agreements even if exempt under the High Net Worth or Business exemptions.

The Court will be able to consider any one of the following:

- whether the terms of the agreement are unfair
- the way in which the agreement is operated
- any other act or omission of the creditor/owner before or after the agreement was made.

The Court has a broad range of remedies to deal with the unfairness. These include requiring repayment of any payment made by a debtor/hirer under the agreement and altering the terms of the agreement.

Removal of overall £25,000 limit

The general credit/hire limit of £25,000 is removed so that all consumer credit/hire agreements are regulated regardless of the amount of the credit/hire payments, unless specifically exempted.

High Net Worth exemption

The new High Net Worth exemption applies if all the following criteria are satisfied:

- the debtor or hirer is a natural person
- the agreement includes the required form of declaration by the debtor/hirer
- a statement of high net worth has been made in relation to the debtor/hirer and
- the statement is current and a copy has been provided to the creditor/owner before the agreement was made.

The statement of high net worth must be made by an accountant or authorised person and relate to the income received or to the net assets held during the previous financial year (ending 31 March). Under the current rules an individual will be of high net worth if he/she received a net income totalling not less than £150,000 and/or held net assets totalling not less than £500,000 in each case during the previous financial year. The value of the debtor/hirer's principal private residence is disregarded.

Business exemption

The new Business exemption applies if:-

- the credit or hire payments under the credit/hire agreement exceed £25,000 and
- the agreement is entered into wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the debtor/hirer.

In addition if the agreement includes a declaration by the debtor/hirer in the required form, he/she is presumed to have entered into it wholly or predominantly for business purposes. In contrast to the High Net Worth exemption, the inclusion of the statutory declaration only creates a presumption and is not mandatory.

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Material and Adverse Change Clauses

In uncertain times, those looking to enter into a transaction often wish to have the right to pull back from the brink at the last minute. One significant way in which this can be done is by the inclusion of what is termed a "material adverse change" ("MAC") clause into an agreement. Basically this gives a party, normally the one bearing the risk, the right to terminate the agreement in question if, since the agreement was entered into, an event or circumstance has arisen which has inflicted a material or adverse change on the business which is the subject of the transaction.

While widely found, MAC clauses are particularly significant in relation to acquisitions and, separately, in relation to banking documentation.

Recent discussions concerning MAC clauses have tended to concentrate upon changes in market circumstance, from the point of view of the acquirer. However, in current market conditions, the wider impact of MAC clauses on all relevant documentation now needs to be considered, including in relation to banking facilities.

In the case of acquisitions, MAC clauses are found where there is a gap between exchange and completion. A seller is often unwilling to repeat the warranties given at exchange (because it then bears the risk of any change in circumstance, even if that change is outside its own control). Consequently a MAC clause may well be inserted into a private company acquisition giving the purchaser the right to terminate the transaction if there has been such an event.

In public company acquisitions (governed by the Take Over Code in the UK) the position is less favourable as far as the acquirer is concerned. For example, the main finding by the Take Over Panel (set out in WPP/Tempus) determined that a material adverse change clause could not apply to the market prevailing after the September 11 attacks in the United States.

In private company acquisitions the normal principles of contract law apply which means that the rights of the parties are determined by what they agree between themselves, so that a standard clause would include MAC however

defined. Normally the seller will seek to exclude events arising from general market conditions but may have to accept that market conditions would give the right to terminate if the matter in question has a disproportionate effect on the target entity.

The objective definitions in relation to MAC clauses, required by public company acquisitions in the UK and generally found in private company acquisitions, are very different from those found in banking documentation. In banking it is quite usual to find that one of the "Events of Default" contained in either the loan facility or the right to draw down on facilities is "any material adverse change which occurs in relation to the business or affairs which in the opinion of the bank would adversely affect the ability of the party in question to meet obligations to the bank". This is a subjective right: so far as the bank is concerned, it can exercise its discretion.

Particularly in the light of current credit problems, it is essential to ensure that a purchaser which is relying on bank funding is able to exercise its own MAC clause in all the circumstances where the loan facility or other banking documentation can be terminated, otherwise it could find itself being obliged to complete a transaction (or face an action for breach) without the necessary loan facilities.

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TUPE and Share Sales

Alarm bells have been ringing since many observers interpreted a recent case as attaching the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") to share sales. By way of background, TUPE safeguards employment rights on business asset transfers and service provision changes (but not share sales) by introducing the right for an employee not to be dismissed for a reason connected with the transfer,

to be provided with prescribed information and consulted about the transfer and not to be subjected to detrimental changes to terms and conditions of employment. These rights surpass those applying to employees of businesses which are subject to a share sale, where there is no change in actual employer, even if there is a change in the share ownership.

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...TUPE and Share Sales continued

Fear not. The particular facts of Millam -v- Print Factory (London) 1991 Ltd distinguish this case from the normal run of the mill share sale in that the day-to-day running and control of the business was integrated into the parent company following the acquisition more than is normally the case following a share transfer. In circumstances where the parent company assumed control over the newly acquired subsidiary and took over high level activities including the making of key decisions in relation to workload, the management of employees, participation in the negotiation of contractual changes and finally putting the subsidiary into administration, it was held that its control exceeded that which a shareholder or a parent company would normally assume following a simple share acquisition.

TUPE was held to apply despite there having been no transfer of assets or employees, neither of which is a necessary feature of a TUPE transfer. The determining factor in this case was that, within the legal structure of a share

sale which did not in itself fall under TUPE, the management and control of the business was subsequently incorporated by, and transferred to, the parent company.

This case is authority that a share acquisition falling outside TUPE will not preclude the application of TUPE to a subsequent transfer of a business from one company to another which results in an effective change of employer. As well as introducing the employment protection referred to above, TUPE brings potentially considerable sanctions for failure to comply with collective consultation obligations where there is a sizeable workforce. The moral of the story is to ensure continued employment of key directors or to import directors into the newly acquired business, rather than to absorb its operations into the acquiring company.

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Companies Act 2006: who's in the Chair?

The concept of a chairman's casting vote in the event of a tied shareholder vote is well established, and is provided for in regulation 50 of the Companies Act 1985 model Table A articles. It is potentially a useful provision in that its inclusion prevents the inconvenience of having to convene a further shareholder meeting to reconsider a tied issue and also may prevent the delay or even lost business opportunity caused by a delay in a company committing to a particular course of action. Conversely, the removal of a chairman's casting vote, by the exclusion of regulation 50, may be and often is appropriate in cases where deadlock is required, for example in a joint venture company.

Whether intentional or not, the effect of Section 282 of the Companies Act 2006, which provides that an ordinary resolution requires the agreement of a simple majority of shareholders entitled to vote, and Section 284, which provides that a shareholder has one vote for each share held, is that a chairman's casting vote is effectively overridden.

After lobbying from interested groups, a provision has been included in the Companies Act 2006 Commencement No 5 Order, which states that any company whose articles provided for a casting vote before 1 October 2007 may continue to rely on it, and also that any such company which on or after

1 October 2007 then amended its articles to remove the casting vote may reinstate it and rely on it. However, any other company, including one incorporated on or after 1 October 2007, cannot rely on any article which provides for a casting vote.

This of course only partially addresses the issue, and it seems unsatisfactory that companies incorporated on or after 1 October 2007 cannot benefit from the Order.

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