

Corporate Focus

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Public company

The dilemma of the dissenting director

Heidi Watson and Hannah Doherty

Board meetings benefit from healthy debate amongst directors, but decisions are usually made by way of majority vote. What is a dissenting director to do?

Keep turning up

- The UK Corporate Governance Code (the **Code**) recommends that directors should raise their concerns at board meetings and, where their concerns cannot be resolved, they should ensure that they are recorded in the board minutes
- A director cannot absolve themselves from liability incurred during their term of office simply by resigning
- Continued attendance at board meetings will help demonstrate that the director is exercising reasonable care, skill and diligence in the performance of their duties

Get help

- Directors who feel that their position has become untenable should seek advice in light of the specific issues which they face and the company's position, including its financial situation
- The Code recommends that the board should ensure that directors have access to independent professional advice at the company's expense where they judge it necessary to discharge their responsibilities as directors

Phone a friend

- If the company's whistleblowing policy applies to director employees and non-executive directors, it should be followed before the director considers going public

Seek protection

- Directors who are also employees will be entitled to protection against unfair dismissal if they are removed by their fellow directors
- A new cap in compensation for unfair dismissal claims will come into force this summer. It will cap compensation at the lower of £72,400 and 52 week's pay. It won't apply if a director has raised a "qualifying disclosure" under the whistleblowing rules or a dismissal has a discriminatory element
- We expect more employees to try to use whistleblowing to lift the cap on compensation. Where they do so, we expect to see employers relying on the "no public interest" defence
- The "public interest" concept is new in the employment field. We consider the litigation risk to be high whilst the meaning is fleshed out. Whilst it will certainly prevent whistleblowers from making disclosures which are purely in their own interest, it remains to be seen whether it will discourage genuine whistleblowers from coming forward



A question of identity

It is open to a director/shareholder to vote differently in each capacity in relation to the removal of a director

Hannah Doherty

The Court of Appeal recently allowed two directors to remove a fellow director using powers under the Articles, even though they were prevented from doing so in their capacity as shareholders because of provisions in a shareholders' agreement. A director wishing to prevent his own removal from the Board may be thwarted unless all possible means by which he may be removed are addressed.

In *Dear v Jackson* ([2013] EWCA Civ 89), a shareholders' agreement between founder shareholders of a parent company provided that Mr Jackson would be appointed to the board of a subsidiary and then re-appointed at successive AGMs. Messrs Dear and Griffith were shareholders of the parent company and also directors of the subsidiary. The subsidiary's Articles of Association provided that a director could be removed from office if all the other directors so resolved.

Mr Jackson was duly re-appointed at the AGM in accordance with the shareholders' agreement. Messrs Dear and Griffith voted for his re-election in their capacity as shareholders, but then purported to remove him from office under the Articles. It was held at first instance that it was an implied term of the shareholders' agreement that Messrs Dear and Griffith were not entitled to vote as directors to remove Mr Jackson under the Articles.

However, earlier this year the Court of Appeal reversed the ruling on the grounds set out in the box below. It was held that it was not necessarily the case that the continued availability of the power of removal under the Articles contradicted what had been agreed in the shareholders' agreement.

Articles are sometimes treated as "standard form" documents, with shareholders' agreements being subject to closer negotiation. Care needs to be taken to ensure that the Articles are properly tailored to accord with the key elements of the shareholders' agreement. Inconsistent documentation can result in uncertainty within the business and costly litigation.

Grounds for refusal

- The Court questioned whether terms could be implied into an agreement made by the contracting parties in one capacity which resulted in fetters on their powers to act in another capacity
- New directors will not necessarily see a shareholders' agreement. They are entitled to take the Articles at face value and to take up office on the footing that, if the whole board votes to remove a director, that power will be effective
- It may have been the intention to limit the power of the parent company to remove a director of the subsidiary, but to conserve that power on the part of the subsidiary's directors as a whole, acting in the best interests of the subsidiary



A question of identity

How to decide whether someone is treated as employed or self-employed for tax purposes

Phil Norton

A frequent source of dispute in an employment context is as to how a worker is to be categorised for tax purposes. The recent First Tier Tribunal decision in *Yetis v HMRC* provides a useful reminder of the factors to be considered in determining whether someone is to be regarded as an employee or self-employed and what can go wrong.

Mr Yetis appealed against assessments issued by HMRC. The assessments had been issued on the basis that when Mr Yetis worked for Style Superior Windows & Conservatories (“Style”) he was self-employed. Mr Yetis argued that he was employed during the relevant period.

There was no written agreement between Mr Yetis and Style or other document setting out the terms on which Mr Yetis worked for Style. However, around the time that Mr Yetis started working for Style he had signed a statement saying that he was self-employed and confirming that he would be responsible for his tax and national insurance contributions.

Style had a number of employees and also a number of salesmen on a commission only basis that were accepted as self employed. It appeared that Mr Yetis fell into a third category and during the relevant period received £200 per week with a small commission.

Ultimately the First Tier Tribunal decided, on the grounds set out in the box below, that Mr Yetis was an employee and therefore the assessments were not validly issued. HMRC may now take action for the failure to deduct tax and national insurance.

The absence of a written agreement between Mr Yetis and Style was not helpful. However, even if one had existed, the facts would have prevailed.

Given that the risk in relation to a failure to deduct tax and national insurance lies with the employer it is important to consider the position carefully before concluding that there is no obligation to deduct.

Grounds for refusal

- The Tribunal looked at the usual tests including whether there was an obligation to provide personal service, whether Style was obligated to provide him work, whether Style exercised control and whether it could be said that Mr Yetis could be said to be in business on his own account
- The mere fact that the parties have provided in an agreement that their status is either as an employee or as an independent contractor is **not** determinative
- Factors to be considered in determining status may have different weight depending on the nature of the work being considered

Carrot and stick

EU encourages compliance whilst imposing record fine on cartel

John Milligan

A five year investigation has resulted in the EU Commission imposing its largest ever anti-trust fine. The perpetrators were all multinational companies but, separately, the EU Commission has been at pains to point out that small and medium-sized companies must take their competition law obligations seriously too.

Samsung and Philips were among several high profile electronics companies fined £1.2bn in December 2012 for cartel activities in relation to cathode ray tubes, which used to be an important component in television and computer screens. The technology is now virtually obsolete, but at their peak the tubes represented up to 70% of the price of a screen.

The Commission's investigation into the ten year long collusion started with unannounced inspections in November 2007. It found that top level managers met to structure the cartels. Their decisions were then implemented through lower level management meetings

with the purpose of fixing prices, sharing markets and customers and restricting their output.

The Commission found that the action was taken to address the decline of the cathode ray tube market but in a collusive way, to the detriment of consumers, and that the parties were well aware that they were breaking the law. There were even instructions to destroy documents after reading.

As well as fines up to 10 per cent of turnover, authorities in the UK have power to disqualify directors where their role in an infringement has been such as to render them unfit to be a director and to bring criminal prosecutions for cartel offences.

Competition checklist

In its publication "Compliance Matters: What companies can do better to respect EU competition rules", the EU Commission recommends that each company should ask itself:

- What are the areas in which we are most likely to run a risk of infringing competition rules?
- Is there a history of previous infringements in the sector in which we operate?
- How frequently do we interact with competitors, and at what level?
- Are we devoting resources which are appropriate to our size and the risks we face, to ensure we have a credible competition compliance programme?

Stop press... Mongolia Investment Summit – London

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On 16-18 April 2013 the Mongolia Investment Summit comes to London. This event brings together key European investment managers and major Mongolian market players.

Clyde & Co are pleased to be leading a workshop on "Navigating the foreign investment law and analysing the potential impact of the new securities white paper" on 16 April 2013. This workshop directly precedes a networking session with an opening address by UK State Minister for Trade and Investment Lord Stephen Green.

Being held in London, one of the world's most important financial centres with an appetite for natural resources and emerging markets, the event promises to be an opportunity not to be missed.

To register please [click here](#):



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