

ONE STOP
Company Secretary

Sixth edition

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Preface

Each year, in presenting around 80 seminars, I have the pleasure of speaking to and with around a thousand directors and/or company secretaries. These executives are representative of their colleagues in the many organisations on whom the wealth and success of the nation depends. Their prime roles are to maintain the success (and expansion) of their companies, in the process creating employment and making profits which are taxed by the Government to fund the demands and needs of society. They operate within an increasingly complex legislative regime perpetrated by law-makers, some of whom seem unable to understand business in general and the operation of limited liability companies in particular. Indeed the vast majority of those responsible for this legislative minefield have never run a business, operated at a senior level in one, or even have any personal first-hand experience of business – merely an often out-of-date or erroneous perception of one. Yet they expect those who do have that experience not only to run their organisations but also to comply with around 3,000 additional new laws each year, creating, in passing, a legislative morass so complex that it is doubtful if any of those responsible for their business could honestly state that it is and they are entirely legally compliant. Ignorance of the law is no excuse, and someone in each organisation needs to be responsible for this compliance facet of company existence.

The person who should try to keep the company legal (and its directors legally compliant) is usually the company secretary, whose position as ‘keeper of the company’s conscience’, legal interpreter and adviser and board’s confidant, is vital. Quite a task, given the legal scenario set out above, to which task is added at present the need to deal with the considerable challenges in the Companies Act 2006 (CA06), which will be not be fully in force until October 2009 – a large tranche having been postponed for a year to give Companies House (CH) time to complete their own preparations. This means that the Act has undergone a gestation period of 11 years, during which period many millions of words were spoken and written (and reinterpreted and rewritten) about it. What has been eventually created is a monster – CA06 is the largest single piece of legislation ever passed by the UK Parliament, although along the way it seems to have lost much of the ‘original thought’ that it was stated would be incorporated when the consultation process was launched in 1998.

During that process, some uninitiated person dreamed up the idea of companies being able to operate without a company secretary, thereby removing the person who is:

- the focal point for legal matters and interpretation;
- someone to whom the board have every right to look for guidance on matters legal (literally to keep them legally compliant and enable them to avoid falling foul of legislative requirements);
- the logical point of contact for third parties with the legal persona that is a limited liability company;
- the custodian of the board's confidential data or 'secrets' (from which the word 'secretary' is derived);
- the logical person to construct the legally required written record of board meetings (i.e. the minutes, which may assume an even greater importance as a result of the right to launch derivative claims given to shareholders under CA06);

and

- in essence, the keeper of the company's conscience.

Many of those involved in the consultation process pointed out (as just one example of the downside) this concept of 'doing away' with the company secretary would mean an LTD with a sole director could be left with just one officer, whereas deeds etc., require two signatures. The response was to allow a sole director to appoint someone as a witness. When it was pointed out that a third party would not know the status of this witness (as they do a company secretary since the latter's details are lodged at CH), it was proposed that details of authorised signatories should be lodged at CH. Since, if the position of company secretary was left untouched, you would not need such a ramshackle concept of 'authorised signatories', common sense prevailed at the last minute and the 'abolition' of LTDs' company secretaries was itself abolished and the position is now optional for LTDs.

Abolitionists might have been wise to have considered the New Zealand experience. Nine years after companies were given the option of not having a company secretary, only just over five per cent of New Zealand companies have done so! This is entirely understandable, since if there is no company secretary, the duties normally and properly undertaken by such a person must still be fulfilled – ideally by a director, even though the two jobs have entirely different parameters and pressures.

When I was studying for the ICSA examinations many years ago, I sought unsuccessfully to find a practical guide to enhance the theory of the course studies and to help me understand (and to carry out) the myriad practical day-to-day requirements of a company secretary. This title (now in its sixth, fully revised, extended and completely updated edition) is the result of many years' hands-on experience of actually doing the job for a variety of companies (both in-house and for clients of my consultancy), and is very much the title I sought all those years ago. It is aimed at those seeking practical hands-on guidance and is designed for those who undertake the role of company secretary as add-on responsibilities to other administrative duties,

and yet lack any formal training (in this area) to help them cope with these challenges.

The book is written in ordinary, everyday English, and is arranged in the expanded index format, so that a reader should instantly be able to find user-friendly guidance to specific subjects. This 'subject-holistic approach' leads inevitably to some duplication. As a plain guide to both traditional and new requirements such content should suffice in over 90 per cent of the cases where guidance is required. In the other areas it would be wise to seek specific legal advice – in which case the book should enable the reader to ask the right question, without which there is little hope of ever obtaining the right answer. I hope it is helpful in undertaking a fascinating role.

David M Martin
Buddenbrook Consultancy
June 2009

Using this book

- 1** To provide immediate access to the topic, each subject is dealt with comprehensively within its own section, cross-referencing to other sections where appropriate (effected by setting the name of the referral section in upper case e.g. 'see AGENDA').
- 2** Throughout a public limited company is referred to as a 'PLC', a private limited company as an 'LTD', Companies House as CH, SAIL for the Single Alternative Inspection Location, where registers can be kept, and the various Companies Acts as 'CA' followed by the last two digits of the year they were enacted, thus the Companies Act 2006 becomes 'CA06'.
- 3** This edition assumes CA06 is fully in force and, to aid ease of use/reference, sections under CA06 have been cross-referenced (where applicable) to the corresponding sections in CA85.
- 4** Traditionally the forms for information required to be filed at CH have been given numbers corresponding to sections in the most recent CA. For CA06, however, all the forms have been redesigned (and reclassified) losing the direct link in the format of their presentation with sections in the Act – although the appropriate section is referred to on each. In this book the new reference letters and numbers are given with the previous form number under CA85 as well as the appropriate section of CA06. The new forms cannot be used until October 2009 although they can be downloaded via the CH website.
- 5** CA06 allows optional dilutions (e.g. LTDs are not obliged to appoint a company secretary, do not need to hold an AGM, only need give 14 days' notice of special resolutions, etc.). However a company's articles of association are its constitution and rules. Such dilutions can only be used providing the articles are silent about them or do not prohibit them. Thus if the articles refer to an LTD holding an AGM each year then it must (unless and until it changes its articles) continue to do so. In short, CA06 does not overrule a company's articles as far as these dilutions are concerned.
- 6** CA06 will be fully in force on 1 October 2009, and companies formed after that date (in fact it may not be possible to form a company between 1 and 4 October, as CH is closed) will be completely subject to the new Act. This may pose a challenge to those administering existing companies when they set up a new company unless they

bring the articles of the existing companies into a similar format and content of the company formed under CA06.

- 7** Traditionally, any meeting other than a company's AGM has been called an extraordinary general meeting (EGM). CA06 specifies that meetings other than the AGM are simply called general meetings. However, companies registered under Acts prior to CA06 may have articles based on drafts accompanying previous Companies Acts – e.g. Table A of CA85. Such articles refer to EGMs. CA06 does not override the articles and thus unless (and until) the articles of those existing companies are changed, requirements regarding EGMs continue to apply.
- 8** Since 1856 each company's constitution has been comprised of a memorandum and articles. A company formed under CA06 will have a memorandum (which cannot subsequently be altered), consisting only of its address, and details of the promoters. If such a company wishes to adopt 'objects clauses' they must be set out in the articles (which will henceforth be referred to as the company's 'constitution'). If an existing company does not change its articles, the objects clauses of that company will be deemed to be part of its articles. Existing companies changing their articles will be required to incorporate their objects clauses in the revised articles.
- 9** The current definitions of 'companies' sizes' are:
Small: Does not exceed two of the following criteria:
 - turnover: £6.5 million net;
 - balance sheet aggregate: £3.26 million;
 - 50 employees.Medium-sized: a company that exceeds the above parameters for a small company but does not exceed two of the following criteria:
 - turnover £25.9 million net;
 - balance sheet aggregate £12.9 million net;
 - 250 employees.Large: exceeds the medium-sized parameters.
- 10** All references to companies (other than in case studies) are for example only and not representative of any real company.
- 11** Use of the masculine includes the feminine.
- 12** Brief case studies have been included to demonstrate the effect of points just referred to in the text. Such studies also demonstrate the law in action. Courts cannot change the law but if, in promulgating a decision, they change our understanding of what the law means, that has virtually the same effect.
- 13** Opinions expressed in this book are those of the author, not of ICSA Information & Training.

Interests in shares

INTRODUCTION

The fact that someone holds (or adds to or disposes of a holding of) shares (particularly if it is a substantial number or percentage) in a listed PLC can sometimes have a marked effect on the market value of such shares, as well as being of considerable interest to those dealing with the company or preparing to buy or sell such shares. In the interests of creating a *'level playing field'* of knowledge for all investors, those whose share interests exceed certain levels are required to advise the company which must, having recorded the information, then advise the Stock Exchange. Obviously changes in shareholdings of directors of the company can have an even greater impact on the perceived values of a company's shares.

Major interests

Members whose shareholding reaches or exceeds 3 per cent of the issued shares of a listed or quoted PLC must, as part of the Listing Agreement requirements, notify the company of the total of their interest. In addition, whenever their holding above this level increases or decreases so that a whole percentage point is altered (that is it goes from (say) 3 per cent to 4 per cent or 5 per cent, or down from (say) 7 per cent to 6 per cent), that change must also be notified, as must any development which takes their interest below 3 per cent. All such notifications must take place within two days.

In addition, the company is legally required within three days of receipt of such information to record in its Register of Substantial Interests in Shares, the date, the name of the shareholder and the data itself – and, under the Listing Agreement, to inform the Stock Exchange.

Non-material holdings

Non-material holdings of 10 per cent or more must also be notified. A non-material interest exists where the named holder acts (for example as a trustee) and has no personal interest in the shares. If both material and non-material holdings are in existence then it is necessary to disclose the aggregate if this reaches or exceeds 10 per cent, even though the constituent

parts separately need not be declared. For example, if the material interest was less than 3 per cent and the non-material interest was just over 7 per cent, but their total is less than 10 per cent, there is no obligation to disclose either interest under the individual notification requirements. However, if in aggregate they exceed 10 per cent both interests must be disclosed. This situation needs to be watched carefully since if (in the above example) there was an increase in the non-material holding this could push the total of the two interests over the 10 per cent disclosure threshold. The effect of a sudden disclosure of an interest of 10 per cent when none was formerly recorded could have a material effect on the share price – even though there may have been very little actual change in the overall share ownership.

There is now an additional requirement to notify non-material interests at a 5 per cent level but not at the intervening percentage points between this level and the original 10 per cent level.

Discovering the true ownership

Companies who believe that the owner of the shares (by the name notified) is not the actual owner are permitted to serve a notice on the disclosed owner (who it suspects is a nominee) requiring disclosure of the person who has beneficial ownership. The notice, permitted under s. 793 CA06 (formerly s. 212 CA85) is required to be complied with within two days of being served. It is not unusual to find one nominee holds it for another nominee and so on, and to find that the true owner is not disclosed until after several notices have been served in respect of the same holding.

Failure to provide adequate answers to such questions or even to obtain a reply to the request can lead to the company having the right to disenfranchise the shares, although the Stock Exchange requires a ‘cooling off’ period for further negotiations before this can be implemented since it prefers not to have franchised and disenfranchised shares circulating simultaneously in the market.

Example	<i>Section 793 notice (based on a draft of a notice under the former s. 212 of CA85 and made available by BERR (formerly the DTI))</i>			
	Name of Company			
	Address	Date	Reference	Person dealing
	Name of shareholder			
	Address			
				→

Example	Section 793 notice (based on a draft of a notice under the former s. 212 of CA85 and made available by BERR (formerly the DTI) – continued
<p>Companies Act 2006, s. 793.</p> <p>(Description of type, classification, etc. of shares)</p> <p>We have registered a holding of (number and description) of our shares in your name. As authorised by section 793 of the Companies Act 2006, we require you, within two days by letter, fax or telex, to provide us with the answers to the following questions:</p> <ol style="list-style-type: none"> 1 In how many shares of the above description do you currently have an interest? 2 What is your interest in such shares? 3 If you have disposed of the shares, on which date(s) was your interest disposed of, and, if you are aware, who now has that interest? 4 Please state the full details of any agreement or arrangement of which you are aware regarding the exercise of any voting rights in respect of such shares <p>Yours, etc.</p>	

Directors' holdings

Having been informed of a director's interest in the shares of the company (or of any change) details should be placed in the register of directors' share interests within three days (this is no longer necessary for directors of LTDs). For a listed PLC, the holdings (and any changes thereto) of directors in their company's shares must also be advised to the Stock Exchange within five days of the transaction. There is also a requirement that for a period (usually two months) before the announcement by the company of what could be 'price-sensitive' information (e.g. the announcement of results) that directors should not trade in their company's shares.

Should a director of a listed PLC use his shares as security for a loan or similar then that fact must also be advised to the company (and he should gain clearance for his action from the board prior to implementation). The company must then disclose the fact to the Stock Exchange. This

is a requirement under the rules of the Financial Services Authority (FSA) and in compliance with the Disclosure and Transparency Rules.

However, following the case in late 2008 of David Ross (former deputy chairman of Carphones Warehouse), who used shares in that company as security for a large loan, the FSA admitted that although its rules regarding disclosure were as set out above, there was no sanction should a director fail to comply! The fallout from this high-profile breach prompted the FSA to announce a two-week amnesty in January 2009 for companies that had failed to disclose such actions by their directors. Many were somewhat surprised that during the amnesty, over 50 companies *'came clean'* and made such a disclosure.

The FSA has now clarified the rules and as a result, directors must now disclose to the company if and when they pledged shares for a loan. Such disclosure must be made within four days of the event, and the company must then inform the Stock Exchange. Failure to do so renders both company and director to an unlimited fine.

Memorandum of association

INTRODUCTION

Disclosure of information (to the public in general and their creditors in particular) is the price that limited liability companies pay for the restriction of the liability of their shareholders to the amount of their shareholding. An important part of this disclosure has involved the company stating to everyone interested or involved in or with the company, the nature of the business it wishes to conduct (i.e. the objects for which it is formed), what share capital has been invested and who promoted (formed) the company. These items, required for over 150 years, have been set out in a company's memorandum of association. For a company formed under CA06, although there is still an obligation for it to have a memorandum, it is reduced to just a few lines – and virtually duplicates the content of the certificate of incorporation.

Content

For a company formed under CA06, its memorandum must state:

- 1 Who promoted the company (the subscriber(s)), although once INCORPORATION is completed this is of purely academic interest. Formerly at least two members were needed to sign the memorandum, although the memorandum of a SINGLE MEMBER COMPANY needed only to be signed by one person. Under CA06 a single person can form any type of company.
- 2 For a company limited by shares, the number of shares taken by each subscriber, although this is of interest only on formation since thereafter additional shares can be issued. In the memorandum of a company limited by guarantee, the maximum amount of the guarantee(s) must be stated.
- 3 The name of the country (England and Wales, Scotland or Northern Ireland) in which the REGISTERED OFFICE is to be situated. Pending the implementation of current EU proposals to relax this restriction, a company registered in England and Wales, or in Scotland or in Northern Ireland can have its registered office only in its country of registration. Although the actual address (within the country of registration) of the registered office need not be stated in the memorandum, under s. 9 CA06, on INCORPORATION a note of this address

must be filed with CH using form IN01. Any alteration in the address of the registered office of the company must be filed with the Registrar on form AD01 (in accordance with s. 87 CA06, formerly form 287). On the change of a registered office, a 14-day period is allowed during which both old and new offices are valid for the service of notices.

For a company formed under CA06 its memorandum is unalterable, however this is of little import considering the minimum amount of information included – all of which is historical.

Former contents

Memorandums of companies formed under Acts prior to CA06 were also required to contain:

- A statement of the total number of shares (and their various categories if applicable) that the company was authorised to issue. Whilst this is valuable information to creditors, since (at least in theory) it shows some of the funds available as security for their debts, the amount and type of share capital has always been subject to alteration. If the company is to be formed as (or re-registered as) a PLC, the share issued capital must be at least £50,000 of which 25 per cent (i.e. at least £12,500) must be paid up. A company formed under CA06 does not need to state its 'authorised share capital' since it will be permitted to have the share capital its directors from time to time determine, possibly governed by the shareholders by limitations inserted in the articles.
- The objects of the company. These, often extremely numerous, clauses are a public statement of the business the company was formed to undertake, and effectively act as a limitation on its directors' authority to conduct business and as a contract between the company and the outside world. Under CA89, companies were instead permitted to have a short form 'objects clause', e.g. *'the company will be a general commercial company'*. Effectively this would mean that it would be very unlikely that the company could ever act beyond its powers. Such a clause was rarely used mainly since it was criticised by the banking profession which is averse to lending money to a company if the aims or objects of the company are unrestricted. Such concerns over using an abbreviated objects clause reflect the original purpose of stating the objects – to protect those dealing with the company by confirming the nature of its business. It may be feasible to use the abbreviated clause for a subsidiary, or joint venture company where lenders' concerns could be overcome by the parent(s) giving guarantees. Section 39 CA06 states that (other than for charitable companies) the validity of an act done by a company cannot be questioned on grounds of 'lack

of capacity'. Companies that wish to (or must, if they are charities) preserve their objects clauses will need to recite them as part of the articles. The objects clauses of existing companies that do not change or rewrite their articles, will be deemed to be part of the company's articles (then referred to as its constitution).