NELLEN NEWS

Winter 2007-08

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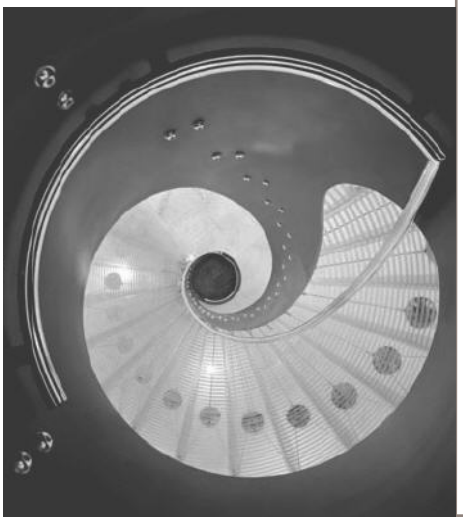

"O"Day approaches - The Companies Act 2006

The Companies Act 2006, the longest piece of legislation ever enacted and running to 1,200 clauses, was enacted on 7 November 2006 and is being implemented in stages between January 2007 and October 2008.

The next implementation date is 1 October 2007 when provisions will be introduced providing a more flexible regime for the passing of shareholder written resolutions, the abolition of the requirement for private companies to hold AGMs and the shorter period of notices for company meetings. The duties of directors will also, for the first time, be codified in legislation and the financial assistance restrictions for private companies will be abolished.

On page 2 of this Newsletter we summarise the key sections that will be enacted on 1 October. However, as some of the provisions will be subject to a company's existing articles of association, companies may need to update their articles of association if they wish to take full advantage of the new regime.

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Recent Transactions

NELLEN has recently advised:

- **Stephen Webster Limited,** the luxury jeweller, on its sale to the holding company of Garrard.
- **Howard Holdings plc,** on its acquisition from Laing O'Rourke plc of a 50% stake in Rushden Park & Lakes Development Company Limited and on the refinancing and restructuring of the development joint venture.
- **Lightstate Limited,** a leading UK internet leads generation company on its sale to Perfiliate Limited, the internet affiliate marketing company.
- **OneClick HR plc,** the AIM listed HR software developer, on the disposal of its payroll and employee intranet divisions.
- **Lulu Guinness Holdings Limited,** on the demerger of Cath Kidston Limited.
- **Evaluate Energy Limited,** an online financial database company in the energy sector, on its purchase of a Canadian oil and gas information business.
- **Icax Limited,** a renewable energy company, on its fundraising.
- A number of companies on the introduction of EMI share schemes including **The Food Doctor Limited**, **Cash Management Limited** and **Stephen Webster Limited.**

"O"Day approaches - The Companies Act 2006 *(continued)*

The key provisions of the Companies Act 2006 which will come into force on 1 October 2007 are:-

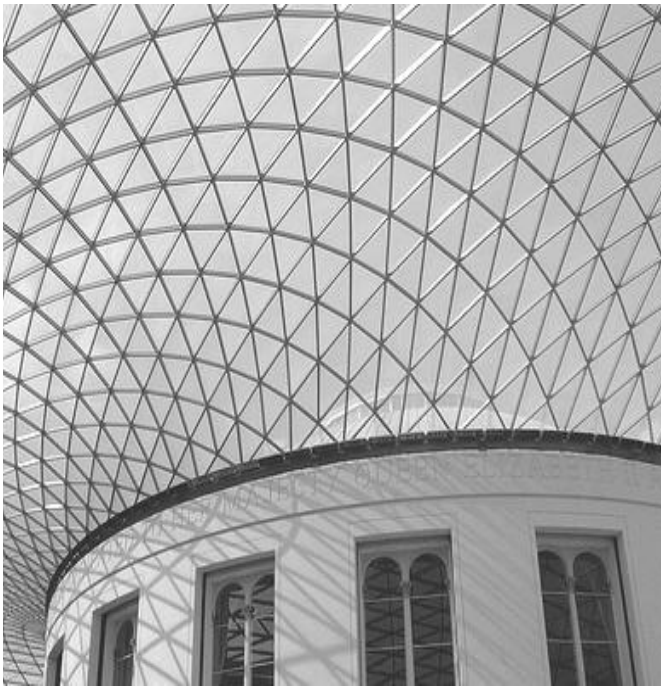
- **Written resolutions:** The new regime (available only for private companies) for the passing of written resolutions will track the majorities required for the passing of the actual resolutions and will no longer require the approval of all members. In future, only the approval of more than 50% of the total voting rights of eligible members will be necessary in the case of an ordinary resolution or the approval of not less than 75% of the total voting rights of eligible members in the case of a special resolution. Written resolutions have to be circulated with a statement informing members how to signify agreement and the date by which the resolution must be passed. It is therefore likely that most decisions by smaller private companies which require the approval of members (such as amending their articles of association) will be made by written resolutions.

- **Notice of general meetings:** The Act introduces a shorter period of notice for convening general meetings. All meetings in the case of both private companies and public companies will now only require 14 days notice, except in the case of AGMs of public companies which will still require at least 21 days notice. This is subject to a company's articles of association which may require a longer period of notice though of course meetings can always be called at shorter notice with the approval of the members (see below).

- **Consent to short notice:** A company wishing to hold a meeting at short notice continues to require the approval of a majority in number of the members, but the requisite percentage of the nominal value of the shares held by such majority is reduced from 95% to 90% in the case of private companies. The consent threshold remains at 95% in the case of public companies.

- **Requirement to hold AGMs:** Private companies will no longer be required to hold AGMs unless their Articles require them to do so. Public companies will be required to hold them within 6 months of their financial year end.

"Bridge of Aspiration" - Wilkinson Eyre Architects



The Great Court - Foster and Partners

- **Codification of directors' duties:** The Act introduces provisions which, for the first time, codify in statutory form the general duties of directors. A director, in the language of the Act, must "act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole…" and it sets out a number of matters which the director must have regard to. Further details of directors' duties can be found in our briefing note on the Companies Act 2006 available on www.nellen.co.uk.

- **Transactions with directors requiring the approval of members:** The new provisions abolish the prohibition on loans, quasi-loans etc to directors and replaces them with the requirement for member approval. There are, however, a number of exceptions such as for small loans not exceeding £10,000.

- **Compensation for loss of office:** The Act contains a requirement for member approval for the payment to a director of compensation for loss of office or employment.

- **Derivative claims:** The Act codifies new provisions which relate to derivative claims ie actions brought by a member to enforce a right vested not in himself but in the Company. This usually arises where a minority shareholder seeks to enforce a breach committed by a director or directors but the board is reluctant to take action because the board is controlled by the director or directors. Such actions are usually accompanied by claims for "unfair prejudice", the provisions relating to which will also be brought in on 1 October.

Client Profile: Rayner & Keeler Limited

Rayner & Keeler Limited is a private UK company with an international reach. Established for almost 100 years, the business now has 900 employees and a turnover of £40m.

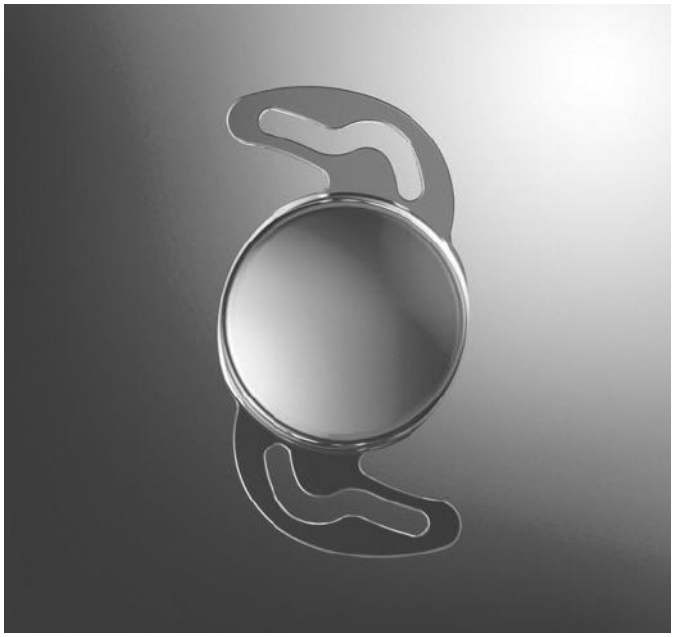
Rayner operates a UK wide national retail optical business with some 150 outlets under a variety of regional brand names supported by optical manufacturing laboratories and wholesale warehouses in Leeds, Derby and Tonbridge. Its subsidiary, Rayner Intraocular Lenses Limited based in Hove, East Sussex, is the only British manufacturer of intraocular lenses (IOLs) which are implantable lenses used to replace the natural lens following ophthalmic surgery for cataract. These are exported to over 50 countries including China and Russia.

IOL Pioneer

Rayner pioneered IOLs in the 1940s when the ophthalmic surgeon Harold Ridley of St Thomas's Hospital and Moorfields Eye Hospital consulted Rayner's senior optical specialist about designing and manufacturing an implantable lens. Ridley implanted the world's first intraocular lens, designed and made by Rayner, at St Thomas's Hospital in November 1949. In February 2000 Ridley was belatedly knighted for his work.

Research and Development

Since this first operation, Rayner has been at the forefront of the research, development and manufacture of IOLs working with leading ophthalmic surgeons, universities and research centres throughout the world. Continued research and development of innovative new lenses and lens delivery systems remains a priority of the company. In the last five years it has introduced a number of new products and earlier this year received pre-market approval for its C-*flex*™ injectable lens from the US Food and Drug Administration.



Rayner & Keeler C-*flex*™ injectable lens

Retail Optical Business

Rayner's mainstream business remains that of retail opticians. During the last ten years it has doubled the number of outlets and continues to extend its network of stores, mainly through acquisition of established businesses. The business differentiates itself from its competitors by concentrating on the provision of professional customer care and the supply of top-quality eyewear within a comfortable and welcoming environment.

Employees' Contributions

Rayner places great value on the contribution of its staff at every level and has invested heavily in staff training and development programmes. It has its own training facility in Derby where a team of professional trainers provide structured courses geared to ensure that the businesses delivers the best possible care to every customer on every visit.

A majority of the shares in the company is still held by descendants associated with the early stages of the company's development. Three years ago it began to widen employee participation in its share capital by introducing an Enterprise Management Incentive share scheme for its staff on which NELLEN advised.

Transfers of businesses - Duty to inform and consult

When selling a business, there is an obligation under The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) on the employer of employees who might be affected by the transfer, to "inform and consult" their elected representative. This should be "long enough" before a relevant transfer takes place to allow the procedures to be followed.

"Long enough" is not defined but means in good time and will depend on the impact of the transfer on employees.

Failure to comply exposes the buyer and seller (who are jointly and severally liable) to a claim from each of the affected employees of up to 13 weeks pay per employee. It is usual practice for a business transfer agreement to attempt to shift the liability for any breach of this obligation onto the seller.

The employer has to inform the representative of the measures which he, or which he anticipates the transferee, will take and their implications such as anticipated redundancies or the relocation of the business.

If measures are envisaged, he must consult with a view to seeking their agreement to the intended measures. This means the employer must negotiate in good faith over the proposals and not simply present the representative with a *fait accompi*. In the heat of trying to close a deal, this obligation is often difficult to fulfil.

Even if special circumstances apply which do not make it reasonably practical to comply with the requirements (eg if the transfer is price sensitive or commercially confidential), this get-out is interpreted narrowly and the employer must still take all reasonable steps. In some cases it might even be necessary to consider exchanging contracts and delaying completion until discussions have been held.

New Consultant

We are delighted that Tessa Mayhew BA (Oxon) Solicitor has joined us as a consultant. Tessa is a former litigation partner at Herbert Smith and has extensive experience in renewable energy and environmental issues.

She left the City after 15 years practice to live in Cornwall where she was involved in the financing and setting up of The Cornwall Light & Power Company Limited, which developed and operated Goonhilly Downs Windfarm, one of the earliest UK windfarms. Tessa was managing director and a shareholder of the company until it was sold in 2005. (NELLEN with Ernst & Young LLP advised on the deal.) She has also worked in-house for National Wind Power Limited (subsequently RWE Npower Plc).

Staircase - Eva Jiricna Architects

EMI share options -Treasury survey

The Treasury is conducting a survey of companies who have granted EMI options to gauge whether the policy objectives of the tax favoured EMI schemes are being achieved. One of the objectives stated in 2000 by the then Chancellor, Gordon Brown, was to help smaller companies attract skilled staff who might otherwise opt for more secure and better paid jobs with larger companies. Another was to help such companies retain staff.

In the last few years there has been a significant increase in the numbers of companies granting EMI options (currently about 10,000 companies have EMI schemes). As the gains made on the exercise of options have increased, the Treasury is beginning to be concerned at the size of the tax and NIC "loss".

This notional "loss" mainly arises from the unique feature of EMI options which treat the capital gains tax taper relief clock as running from the date of grant of the options and not from the date of their exercise. The outcome is that most gains are taxed at only 10% even though exercise and sale usually takes place almost simultaneously.