

# PRACTICE DIRECTION – APPLICATIONS UNDER THE COMPANIES ACT 1985 AND OTHER LEGISLATION RELATING TO COMPANIES

THIS PRACTICE DIRECTION SUPPLEMENTS CPR PART 49 AND REPLACES, WITH MODIFICATIONS, RSC ORDER 102 AND CCR ORDER 49 RULE 3

## GENERAL

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1. (1) In this practice direction -
  - 'the Act' means the Companies Act 1985 and includes the Act as applied to limited liability partnerships by the Limited Liability Partnerships Regulations 2001;
  - 'the CJP Act' means the Criminal Justice and Police Act 2001;
  - 'the companies court registrar' means any officer of the High Court who is a registrar within the meaning of any rules for the time being in force relating to the winding-up of companies;
  - 'the court' includes the companies court registrar;
  - 'the EC Regulation' means Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE);
  - 'the ICA' means the Insurance Companies Act 1982;
  - 'Part VII FISMA' means Part VII of the Financial Services and Markets Act 2000;
  - 'the Rules' means the Civil Procedure Rules 1998;
  - 'SE' means a European public limited-liability company (Societas Europaea) within the meaning of Article 1 of the EC Regulation.
- (2) Applications under the Act may be made in the county court if the county court would have jurisdiction to wind up the company in question (see the definition of 'the court' in section 744 of the Act). A company can be wound up in the county court if its paid-up capital is not more than £120,000 (s.117(2) Insolvency Act 1986).
- (3) Every claim form or petition by which an application under the Act, Part VII FISMA or the ICA is begun and all affidavits, witness statements, notices and other documents in those proceedings must be entitled in the matter of the company in question and in the matter of the Act, Part VII FISMA or the ICA as the case may be.

## COMMENCEMENT OF PROCEEDINGS

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2. (1) Except in the case of the applications mentioned in sub-paragraph (4) below –
  - (a) every application under the Act, whether made in the High Court or in the county court;

- (b) every application under Part VII FISMA;
- (c) every application under Articles 25 and 26 of the EC Regulation; and
- (d) every application under section 59 of the CJPA,

must be made by the issue of a claim form and the use of the procedure set out in CPR Part 8, subject to any modification of that procedure under this practice direction or any other practice direction relating to applications under the Act.

- (2) Notice of an application under section 721 of the Act need not be given to the respondent and the claim form need not be served on him.
  - (3) A claim form issued under this paragraph must, in the High Court, be issued out of the office of the companies court registrar or a chancery district registry or, in the county court, out of a county court office.
  - (4) This paragraph does not apply to applications under sections 459 or 460 of the Act or to any of the applications specified in paragraph 4(1) of this practice direction.
3. All High Court applications to which this practice direction applies shall be assigned to the Chancery Division.

### Applications under Part VII FISMA

- 3A. (1) From 1st December 2001 applications to sanction insurance business transfer schemes or banking business transfer schemes must be made under Part VII FISMA. Schedule 2C of the ICA, subject to minor modifications, will continue to apply to applications to sanction or approve transfers of insurance business which are made up to and including 30th November 2001 (see the Financial Services and Markets Act 2000 (Transitional Provisions and Savings) (Business Transfers) Order 2001).
- (2) Any application under Part VII FISMA must comply with the requirements of the Control of Business Transfers (Requirements on Applicants) Regulations 2001.
- (3) In relation to insurance business transfer schemes, the Supervision Manual of the Financial Services Authority ("FSA"), available on the FSA's website (<http://www.fsa.gov.uk>), contains rules and guidance with regard to the operation of Part VII FISMA and the FSA's role thereunder which should be referred to before any application under Part VII FISMA is made.
- (4) Paragraphs 10 to 13 of this practice direction apply to applications under Part VII FISMA.

### Applications under the EC Regulation

- 3B (1) An application for a certificate under Article 25(2) of the EC Regulation must –
- (a) be issued in the Chancery Division of the High Court;

- (b) identify the pre-merger acts and formalities applicable to the applicant company, and be accompanied by evidence that those acts and formalities have been completed;
- (c) be accompanied by copies of:
  - (i) the draft terms of merger as provided for in Article 20 of the EC Regulation;
  - (ii) the entry in the Gazette containing the particulars specified in Article 21 of the EC Regulation;
  - (iii) a report drawn up and adopted by the directors of the applicant company containing the same information as would be required by paragraph 4 of Schedule 15B to the Act if there were to be a scheme of arrangement under sections 425 and 427A of the Act;
  - (vi) the experts report to the members of the applicant company drawn up in accordance with paragraph 5 of Schedule 15B to the Act or Article 22 of the EC Regulation; and
  - (v) the resolution of the applicant company approving the draft terms of merger in accordance with Article 23 of the EC Regulation.
- (2) Attention is drawn to Article 26(2) of the EC Regulation. Where it is proposed that the registered office of an SE should be in England or Wales, each of the merging companies is required, within 6 months after a certificate is issued in respect of that company under Article 25(2), to submit the certificate to the High Court in order that it may scrutinise the legality of the merger.
- (3) Where a merging company is required to submit a certificate to the High Court under Article 26(2) of the EC Regulation, if no other merging company has commenced proceedings under Article 26, that company shall commence such proceedings by issuing a claim form in the Chancery Division.
- (4) The claim form must –
  - (a) identify the SE and all of the merging companies;
  - (b) be accompanied by the documents referred to in paragraph 3B(6); and
  - (c) be served on each of the other merging companies.
- (5) Where a merging company is required to submit a certificate to the High Court under Article 26(2) of the EC Regulation and proceedings under Article 26 have already been commenced, that company shall –
  - (a) file an acknowledgment of service not more than 14 days after service of the claim form, and serve the acknowledgment of service on each of the other merging companies; and
  - (b) file the documents referred to in paragraph 3B(6) within the time limit specified in Article 26(2), and serve copies of those documents on each of the other merging companies.

- (6) Each merging company must file and serve the following documents in proceedings under Article 26 of the EC Regulation –
  - (a) the certificate issued under Article 25(2) in respect of that company;
  - (b) a copy of the draft terms of merger approved by that company;
  - (c) evidence that arrangements for employee involvement have been determined by that company pursuant to Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees; and
  - (d) evidence that the SE has been formed in accordance with the requirements of Article 26(4) of the EC Regulation.
- (7) Proceedings under Article 25 and Article 26 of the EC Regulation will be heard by a High Court judge.
- (8) Paragraphs 10 to 13 of this practice direction apply to proceedings under Article 25 and 26 of the EC Regulation.

## **APPLICATIONS MADE BY PETITION**

- 4. (1) The following applications under the Act in addition to applications under sections 459 and 460 of the Act and applications under the ICA must be made by petition, namely, applications:
  - (a) under section 5 to cancel the alteration of a company's objects,
  - (b) under section 17 to cancel the alteration of a condition contained in a company's memorandum,
  - (c) under section 130 to confirm a reduction of the share premium account of a company,
  - (d) under section 136 to confirm a reduction of the share capital of a company,
  - (e) under section 127 to cancel any variation or abrogation of the rights attached to any class of shares in a company,
  - (f) under section 425 to sanction a compromise or arrangement between a company and its creditors or any class of them or between a company and its members or any class of them,
  - (g) under section 653 for an order restoring the name of a company to the register, where the application is made in conjunction with an application for the winding up of the company,
  - (h) under section 690 to cancel the alteration of the form of a company's constitution,
  - (i) under section 727 for relief from liability of an officer of a company or a person employed by a company as auditor,
  - (j) under section 54(1) to cancel a special resolution to which that section applies,

- (k) under sections 157(2) or 176(1) to cancel a special resolution to which either of those sections applies, and
  - (l) under section 170 in relation to the reduction of capital redemption reserve.
- (2) Paragraphs 5 to 14 of this practice direction apply to the applications specified in sub-paragraph (1).
- 5. (1) After the presentation of a petition by which any application mentioned in paragraph 4 is made, the petitioner, except where his application is one of those mentioned in sub-paragraph (2), must apply for directions by filing an application notice.
- (2) The exceptions referred to in sub-paragraph (1) are:
  - (a) an application under section 425 of the Act to sanction a compromise or arrangement unless there is included in the petition for such sanction an application for an order under section 427 of the Act,
  - (b) an application under section 653 of the Act for an order restoring the name of a company to the register,
  - (c) an application under section 54(1) of the Act for an order cancelling a special resolution to which that section applies, and
  - (d) an application under section 157(2) or 176(1) of the Act for an order cancelling a special resolution to which those sections apply.
- (3) At the directions hearing the court may by order give such directions for the hearing of the application as it thinks fit including, in particular, directions for the publication of notices and the making of any inquiry.
- (4) Where the application made by the petition is to confirm a reduction of the share capital, the share premium account, or the capital redemption reserve, of a company the Court may give directions:
  - (a) for an inquiry to be made as to the debts of, and claims against, the company or as to any class or classes of such debts or claims,
  - (b) as to the proceedings to be taken for settling the list of creditors entitled to object to the reduction and fixing the date by reference to which the list is to be made,

and the power of the court under section 136(6) of the Act to direct that section 136(3) to (5) thereof shall not apply as regards any class of creditors may be exercised at any directions hearing.

## **REDUCTION OF CAPITAL AND SCHEMES OF ARRANGEMENT**

- 6. (1) The consent of a creditor to such reduction as is mentioned in paragraph 5(4) may be proved in such manner as the Court thinks sufficient.

- (2) The evidence in support of a petition to confirm a reduction of capital need not show as regards any issue of shares made since 1900 for a consideration other than cash that the statutory requirements as to registration were complied with. It is sufficient to state in the petition the extent to which any issued shares (other than shares issued otherwise than for cash before 1901) are or are deemed to be paid up.
  - (3) The existing practice will remain unaltered in respect of issues of shares otherwise than for cash made before 1901 whilst s.25 of the Companies Act 1867 remained in operation.
7. (1) This paragraph applies to:
- (a) schemes of arrangement under sections 425 to 427A of the Companies Act 1985, whether made with creditors or members,
  - (b) schemes for the transfer of the whole or part of the long-term business of an insurance company to which schedule 2C to the ICA applies, and
  - (c) reductions of capital, share premium account or capital redemption reserve.

References in this and subsequent paragraphs to 'schemes' are to schemes falling within (a) or (b) above, and references to 'reductions' are to reductions falling within (c) above.

- (2) Petitions to sanction schemes will be heard by the Companies Court Judge.
- (3) Petitions to confirm reductions will be heard by the Companies Court Registrar unless otherwise ordered. The Registrar will hear petitions to confirm reductions in open court on a Wednesday each week after completion of the list of winding up petitions.

## **SCHEMES AND REDUCTIONS IN THE LONG VACATION**

- 8. (1) The following requirements must be satisfied for a hearing to be fixed to sanction a scheme and/or confirm a reduction in the Long Vacation:
  - (a) The application is one in which for financial, commercial or economic reasons a hearing before the end of the Long Vacation is desirable. This category will include cases of mergers and takeovers which arise in the summer and are likely to be affected by market fluctuations.
  - (b) The application is one which could not with reasonable diligence have been made and prosecuted in time to be heard before the Long Vacation begins.
- (2) An informal application in chambers, to the Court Manager, accompanied by an advocate's certificate that requirements (a) and (b) are satisfied, must be made as soon as possible so that a suitable timetable may be settled, including a date for hearing.

- (3) In the case of reductions to be heard by the Registrar, certain applications which do not fall within the above categories will be heard provided (i) that there is an urgent need for a hearing or (ii) that there is sufficient time available after the Registrar has disposed of the urgent applications.
  - (4) Applications to the Registrar in chambers for orders convening meetings to consider schemes and for directions on reduction applications will continue to be heard during the Long Vacation. Provided notice is given to the court before the Long Vacation begins, a timetable will be fixed which will enable any necessary documents to be settled in chambers and enable the Registrar to hear the application.
  - (5) The Vacation Judge will be available to hear petitions to sanction schemes and any petitions to confirm reductions which require to be heard by a judge on one Wednesday in August and two Wednesdays in September on dates to be arranged and subsequently notified in the Long Vacation Notice which is printed in the Daily Cause List.
  - (6) The Vacation Judge may also hear petitions to sanction schemes or confirm reductions on other days if he thinks fit.
9. (1) Attention is drawn to the undesirability of asking as a matter of course for a winding up order as an alternative to an order under s.459 Companies Act 1985. The petition should not ask for a winding up order unless that is the relief which the petitioner prefers or it is thought that it may be the only relief to which the petitioner is entitled.
- (2) Whenever a winding up order is asked for in a contributory's petition, the petition must state whether the petitioner consents or objects to an order under s.127 of the Act in the standard form. If he objects, the written evidence in support must contain a short statement of his reasons.
  - (3) If the petitioner objects to a s.127 order in the standard form but consents to such an order in a modified form, the petition must set out the form of order to which he consents, and the written evidence in support must contain a short statement of his reasons for seeking the modification.
  - (4) If the petition contains a statement that the petitioner consents to a s.127 order, whether in the standard or a modified form, but the petitioner changes his mind before the first hearing of the petition, he must notify the respondents and may apply on notice to a Judge for an order directing that no s.127 order or a modified order only (as the case may be) shall be made by the Registrar, but validating dispositions made without notice of the order made by the Judge.
  - (5) If the petition contains a statement that the petitioner consents to a s.127 order, whether in the standard or a modified form, the Registrar shall without further enquiry make an order in such form at the first hearing unless an order to the contrary has been made by the Judge in the meantime.
  - (6) If the petition contains a statement that the petitioner objects to a s.127 order in the standard form, the company may apply (in the case of urgency, without notice) to the Judge for an order.
  - (7) Section 127 Order – Standard Form:  
(Title etc.)



ORDER that notwithstanding the presentation of the said Petition

- (1) payments made into or out of the bank accounts of the Company in the ordinary course of the business of the Company and
- (2) dispositions of the property of the Company made in the ordinary course of its business for proper value between the date of presentation of the Petition and the date of judgment on the Petition or further order in the meantime

shall not be void by virtue of the provisions of section 127 of the Insolvency Act 1986 in the event of an Order for the winding up of the Company being made on the said Petition Provided that (the relevant bank) shall be under no obligation to verify for itself whether any transaction through the company's bank accounts is in the ordinary course of business, or that it represents full market value for the relevant transaction.

This form of Order may be departed from where the circumstances of the case require.

## CASE MANAGEMENT

10. Every application to which this practice direction applies shall be allocated to the multi-track and the CPR relating to allocation questionnaires and track allocation will not apply.

## SERVICE

11. Service of documents in proceedings in the High Court to which this practice direction applies will be the responsibility of the parties and will not be undertaken by the court. Subject to that CPR Part 6 applies.

## FILING OF DOCUMENTS

12.
  - (1) Where an application to which this practice direction relates is proceeding in any Chancery district registry, all affidavits and witness statements made in connection with the application must be filed in that registry.
  - (2) Where an application to which this practice direction relates is proceeding in any county court, all affidavits and witness statements made in connection with the application must be filed in the office of that county court.

## DRAWING UP OF ORDERS

13. The court will draw up all orders with the following exceptions:
  - (a) orders by the Registrar on the application of the Official Receiver or for which the Treasury Solicitor is responsible under the existing practice,
  - (b) orders by the court in relation to reductions or schemes.



## APPLICATIONS UNDER SECTION 59 OF THE CJPA

- 14 (1) This paragraph applies to applications under section 59 of the CJPA in respect of property seized in the exercise of the power conferred by section 448(3) of the Act (including any additional powers of seizure conferred by section 50 of the CJPA which are exercisable by reference to that power).
- (2) An application to which this paragraph applies should be made to a judge of the Chancery Division.
- (3) The defendant to an application under section 59(2) or 59(5)(c) of the CJPA shall be the person for the time being having possession of the property to which the application relates.
- (4) On an application under section 59(2) or 59(5)(c) of the CJPA, the claim form and the claimant's evidence must be served on –
  - (a) the person for the time being having possession of the property to which the application relates;
  - (b) in the case of an application under section 59(2) for the return of seized property, the person specified as the person to whom notice of such an application should be given by any notice served under section 52 of the CJPA when the property was seized;
  - (c) in the case of an application under section 59(5)(c), the person from whom the property was seized (if not the claimant); and
  - (d) in all cases, any other person appearing to have a relevant interest in the property within the meaning of section 59(11) of the CJPA.
- (5) An application under section 59(2) or 59(5)(c) of the CJPA must be supported by evidence –
  - (a) that the claimant has a relevant interest in the property to which the application relates within the meaning of section 59(11) of the CJPA; and
  - (b) in the case of an application under section 59(2), that one or more of the grounds set out in section 59(3) of the CJPA is satisfied in relation to the property.
- (6) The defendants to an application under section 59(5)(b) of the CJPA by a person for the time being in possession of seized property shall be –
  - (a) the person from whom the property was seized; and
  - (b) any other person appearing to have a relevant interest in the property to which the application relates within the meaning of section 59(11) of the CJPA.
- (7) If an application to which this paragraph applies would not otherwise be served on the person who seized the property, and the identity of that person is known to the applicant, notice of the application shall be given to the person who seized the property.
- (8) In all applications to which this paragraph applies, when the court issues the claim form it will fix a date for the hearing.

