Linklaters

Insurance Update.

Directors' duties under the Companies Act 2006

Many of the provisions of the Companies Act 2006 affecting company directors will come into force from 1 October 2007. Click here to view a summary of these changes in our briefing note on directors' duties.

The Act codifies and updates directors' duties. It requires them, among other things, to have regard to "enlightened shareholder value" factors. These include the interests of employees, the need to act fairly between members and the impact of the company's operations on the environment. Apart from these points the new duties largely reflect rules already applying to directors exercising "controlled functions" within firms regulated under the Financial Services and Markets Act 2000. The 2006 Act does not, however, apply to mutuals, including incorporated friendly societies.

The risk of litigation against directors may be increased by a new civil court procedure. This allows shareholders to sue on behalf of a company in the case of any negligence, default, breach of duty or breach of trust on the part of a director. Shareholders can sue whether the behaviour complained of has already occurred or is likely to occur. The shareholder is not required to prove lack of good faith, but any amount recovered will be for the benefit of the company and not the shareholders (except in the rare cases where the claimant can establish that the director is under a personal duty to him apart from the Act).

HM Court Service is currently consulting on the details of this procedure. It requires the permission of a judge to be obtained before the action is brought. This may allow some claims without merit to be rejected at an early stage. The grant of permission to sue, however, may often be seen to be an early tactical victory, as where the court grants permission for a judicial review challenge to the acts of a government department.

The Act will doubtless have its impact on the market for directors and officers' insurance. It may also lead to the adoption of enhanced risk management policies, although these can sometimes be counter-productive where the policy is not sensibly implemented.

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New standards on fair practices?

The aim of the Unfair Commercial Practices Directive ("UCPD") is to establish community-wide standards to promote the fair treatment of consumers. It was due to be implemented by member states on 12 June 2007. The Department of Trade and Industry, however, has only just consulted on draft implementing regulations. These will presumably not come into force until after the consultation closes in August this year.

DTI Consultation

The DTI consultation paper proposes two sets of regulations. The first set will apply to transactions between businesses and consumers. It will require businesses to refrain from "misleading" and "aggressive" practices. A full list of these is contained in the regulations. They include, for instance, "omitting or hiding material information" and making unreasonable demands for information or documents in support of an insurance claim.

The second set of regulations implements the Misleading and Comparative Advertising Directive ("MCAD"). It applies to business to business transactions and replaces and tightens up standards in the Trade Descriptions Act 1968 and section 29 of the Weights and Measures Act 1985.

Both sets of regulations impose criminal penalties and provide for enforcement by regulatory authorities under the Enterprise Act 2002. Enforcement powers include injunctions and compensation orders, but the consumer or business which is the victim of the offending conduct will not be able to sue for damages or an injunction in its own right.

Application to financial services, including insurance

The Financial Services Authority has taken the view that the standards contained in the UCPD are already applied within its regime, which therefore does not need to be adjusted to transpose it. The same probably applies to the MCAD. Nonetheless the regulations will apply equally to regulated and unregulated firms. It is possible that there may cases where the a prosecution is brought under the regulations against a regulated firm in relation to particularly serious misconduct. The FSA occasionally brings prosecutions for criminal market abuse where its power to impose civil penalties is not considered adequate. The Consultation does not, however, propose that the FSA should have enforcement powers under the DTI regulations.

Breaches of the regulations may, nonetheless, trigger reporting obligations under the Proceeds of Crime Act 2002, whereas breaches of FSA rules, being civil rather than criminal, do not.

Regulators might, furthermore, perhaps sometimes consider enforcing the UCPD standards against, for instance, unregulated businesses selling either (i) insurance under the "connected contracts exemption" in Article 1(2) of the

Insurance Mediation Directive, or (ii) extended warranties which are regulated under the Supply of Extended Warranties on Domestic Goods Order 2005.

In any event the Courts may be influenced by the directive standards (and indeed for that matter FSA rules) when interpreting contractual obligations or resolving other civil disputes.

AXA to sell life and non-life operations in Netherlands for €1.75 billion

On 3 June 2007 AXA, advised by Linklaters, entered into a memorandum of understanding (MOU) with SNS Reaal. It was publicly announced by both parties the following day. The purpose of the MOU was to finalise discussions and negotiations on the sale of AXA's Dutch insurance operations. Those operations comprise 100% of AXA Nederland B.V., Winterthur Verzekeringen Holding B.V. and DBV Holding N.V. They also include each of those companies' direct and indirect subsidiaries. The total cash consideration is €1.75 billion.

The transaction is subject to (i) obtaining advice from the various works' councils; (ii) a declaration of non-objection from the Dutch Central Bank and/or the Ministry of Finance; and (iii) approval from the Dutch competition authority. Signing of the sale and purchase agreement is expected in early August and closing is expected in September.

Groupama UK acquires majority stake in The Bollington Group

Linklaters recently acted for leading insurance group, Groupama UK who have acquired a majority shareholding in The Bollington Group Limited for an undisclosed sum.

Bollington is the holding company of a dynamic UK group of insurance broking companies that generates revenues in excess of £75 million.

Insurance broking covers insurance mediation activities which are now regulated by the FSA and FSA consent to the change of control was obtained prior to signing. Signing and completion took place simultaneously.

For further information see the deal announcement on the Groupama website.

Case Review – the Financial Ombudsman Service

The Financial Ombudsman's jurisdiction

The Financial Ombudsman Service (FOS) resolves complaints by consumers and small businesses against regulated firms, including insurance companies and intermediaries. Its monetary jurisdiction is limited to £100,000, although its approach is often followed by regulated firms in complaints involving larger sums.

Section 228 of the Financial Services and Markets Act 2000 requires FOS to arrive at a "fair and reasonable" outcome to claims. Rules 3.8.1 of the FSA's Dispute Resolution Sourcebook provides for FOS to have regard to the law, regulators' rules and guidance and standards. It is not, however, bound to follow them. There is no right of appeal against FOS's determinations. The regulated firm is bound by it. The complainant may reject it and make a second claim in the courts, although this seems rarely happens in practice.

FOS regularly publishes details in its monthly newsletter of how it deals with specific cases. In the retail financial services sector these cases may be as important as the judgments of the courts in predicting how future disputes will be resolved.

Recent FOS determinations in non-disclosure cases

FOS reported in the April/May issue of its newsletter on its approach to issues of non-disclosure by people taking out insurance. We summarise two of the six cases covered in the newsletter below. This is an area of particular interest, since the Law Commission proposals for reform in this area (on which we reported in our January issue) are strongly influenced by the FOS approach. Law Commission proposals in turn often influence the approach of the courts in applying existing law even before reform is implemented.

In one FOS determination relating to critical illness cover, the complainant, Mr. F, had failed to answer correctly questions about back problems. FOS accepted that his failure was inadvertent and not deliberate or reckless. So when he made a claim 5 months later arising out of a heart attack FOS took the view that the insurer was not justified in rejecting the claim. FOS commented:

> "In the circumstances, the insurer needed to make a proportionate response. In other words, it should rewrite the policy on the terms it would have offered Mr F if it had known the full facts at the outset. In this particular instance, it would have excluded spinal conditions from the disability benefits provided under the policy. It would not have excluded heart attacks or refused to cover Mr F at all".

By contrast in a claim on a life assurance policy a woman completed a proposal for life assurance in 2002 and died a few years later. FOS held that she had been entitled to answer "No" to the question "Do you consume

alcoholic drinks?" when she had recently stopped drinking and had started attending Alcoholics Anonymous meetings.

FOS did not accept, however, that she had been entitled to answer "No" to the questions "Are you currently receiving any medical treatment or attention?" and "Have you ever sought or been given medical advice to reduce the level of your drinking?" The lawyers representing her estate had sought to justify these answers on the basis that her doctor did not consider that her drinking problem was medical and that she had been advised not to reduce her drinking, but to stop altogether.

FOS therefore concluded that the insurers' refusal to pay on the life assurance had been justified.

Payment protection insurance

The June/July issue of FOS's Newsletter contains details of its approach to complaints in relation to payment protection insurance, another area which is problematic in regulatory terms.

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