

A NEW UK COMPANIES ACT



The new UK Companies Act, 2006 comprises 1,300 sections and is said to be the single largest piece of UK legislation. Some eight years in the making, the new Act received Royal Assent on November 8, 2006 and is expected to be fully implemented by October 2008. However, some provisions like those facilitating electronic communication to shareholders were already implemented in January of this year.

The new Act is a comprehensive code of company law which is described as “the long awaited legislative reform needed to streamline the law governing companies”. The Secretary of State of the Department of Trade and Industry in the UK is quoted as predicting that:

“This Act will help ensure Britain remains one of the best places in the world to set up and run business. It makes sure the regulatory burden on business is “light touch”, promotes share-holders engagement and will help encourage a long-term investment culture in the UK”.

What can we learn from some of the provisions of this modern piece of legislation that is designed to achieve these lofty goals in the UK that we may successfully apply here in Jamaica?

The drive of the reform process was to simplify how companies are formed, managed and wound up. As of January 2007, the formation of a company involves the filing of a “memorandum”, which is not a memorandum of association as we knew it and which we have also in fact discarded, but which is an agreement to form a company made between the persons forming the company. That, together with Articles of Association, which have been modernized and standardized to suit small private companies, is all that are required. The clear intention of the UK legislators is to encourage the formation of private companies by providing model articles which are easy to

understand and apply. We could examine this approach given that in forming a company under our own new Companies Act, one is now required to file more rather than fewer documents since the repeal of the old Act. In fact, the articles scheduled to our Act have not yet been modernized or standardized to reflect the new provisions of the 2004 Act.

UK companies are now "...capable of exercising all the powers of an incorporated company". Thus the UK Act has effectively abolished the "*ultra vires rules* ' that could limit the activities of a company to its stated objects. An important dissimilarity in approach with our Companies Act which conferred the rights, privileges and power of an individual on a company has been created here, because the drafters of the new UK Act recognize the practical impossibility of a company being able to act in every manner as an individual, and, respects the fact that a company may do things that an individual cannot legally do, for example, like being an investment manager and a trust administrator of a superannuation pension fund, or, carrying on a banking or an insurance business.

Directors of UK companies have the benefit of codification duties which centers on the directors' duty to promote the success of the company. However, the directors may become somewhat conflicted because while they are obliged to consider the success of the company as their primary objective they must also have regard for the likely consequence of any decision in the long run; the interest of employees of the company; the need to foster the company's business relationship with suppliers customer and others and the impact of the company's operations in the communities and on the environment;

Inherent in the codification is the peril of competing responsibilities owed to a variety of persons, including, not least of all, the shareholders. The balancing act in board rooms may lead to cautious and timid decisions against the background where the new Act also facilitates shareholders bringing actions against directors for negligence, breach of duty, default or breach of trust.

However, the codification of directors' duties may introduce certainty as to the role of directors and that may be of comfort for some directors who grapple with the boundaries of the duty of what is "in the best interest of the company" so vaguely statutorily prescribed by our Act and variedly interpreted by our case law.

Some examples of the practical and simple approach of the UK Act is that private companies are not obliged to appoint a secretary or hold annual general meetings; a written or 'round robin' resolution may be carried by a simple majority or by 75% of the votes. These changes are intended not only to simplify the carrying on of business through the vehicle of a private company but to make it less expensive. However, though the theme for private companies is deregulation, the effect on public listed companies is increased regulatory control.

For listed companies, the requirement for a business review is an obligation to disclose to shareholders the main trends and factors likely to affect the company's future development, performance and position; to give information about the environmental impact of the operations of the business; to report on the conditions of employees and the social and community policies, and to give details on contractual relationships that are essential to the business of the company, which latter requirement, has turned out to be a very controversial issue as it may involve disclosing sensitive trading information. This is enhanced by better access to information for shareholders at annual general meetings.

There is much in the seeds of the requirements of the UK business review that is worthy of consideration for Jamaica to give shareholders of public listed companies more information which in turn may build confidence in our market and encourage long term investments in equity. As regards the changes made in the law to simplify formation and the internal management of private companies described above as the 'light touch regime' – it may well be what is needed at this time.

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