

Corporate Finance update

When is a “subsidiary” not a “subsidiary”?

According to the Court of Appeal in a recent decision - when the “holding company” is not properly registered in the statutory share registers of the company books.

Many practitioners and advisors often dismiss or question the importance of the maintenance and updating of a company’s statutory books (and even fail to supply these on incorporation of a company).

However the Court of Appeal has reiterated their importance and, critically, the legal position (often overlooked) that entry into the Register of Members is the act that vests legal title to shares in a company (and not, for example, completion of a stock transfer form, issue of a share certificate or similar). It remains a criminal offence to tamper with or amend a company’s statutory share registers without due authority or correct procedures having been followed.

In the case before the Court of Appeal of *Enviroco Ltd v Farstad Supply A/S* [2009] the holding company had charged/pledged its shares in its subsidiary company to the bank. Bank’s often seek to take such security through their ‘all assets’ security debentures. However (and somewhat unusually), in this case the Bank had actually been entered into the Register of Members of the statutory books for the company.

Overtaking the High Court’s decision, the Court of Appeal said that this therefore ‘broke’ the holding/subsidiary company relationship and effectively disbanded the group.

This finding potentially has all kinds of ‘unintended consequences’ where the legal definition of what is a ‘subsidiary’ and where a ‘group’ of companies exists is relevant, including upsetting provisions or assumptions in:

- contractual documents and agreements;
- interpretation of company law; and
- tax law consequences and tax planning.

The basic principle also highlights the importance of the statutory books for ownership/title purposes.

Though the act of entering a lender into the Register of Members where shares are charged is probably less common - there are implications for other arrangements where for one reason or another, shares in a group company are held by a ‘nominee’ or a trustee (since company law does not recognise the beneficial interests behind a trust relationship).

The decision therefore emphasises the importance for ensuring statutory books are properly kept, maintained and reviewed in a number of contexts (whether for lending and security, investment, acquisition or disposals or basic confirmation of ownership).

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