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and Jennifer Payne

Corporate Finance Law

*Principles
and Policy*



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• HART •
PUBLISHING

OXFORD AND PORTLAND, OREGON
2011

Published in the United Kingdom by Hart Publishing Ltd
16C Worcester Place, Oxford, OX1 2JW

Telephone: +44 (0)1865 517530

Fax: +44 (0)1865 510710

E-mail: mail@hartpub.co.uk

Website: <http://www.hartpub.co.uk>

Published in North America (US and Canada) by
Hart Publishing

c/o International Specialized Book Services

920 NE 58th Avenue, Suite 300

Portland, OR 97213-3786

USA

Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190

Fax: +1 503 280 8832

E-mail: orders@isbs.com

Website: <http://www.isbs.com>

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British Library Cataloguing in Publication Data

Data Available

ISBN: 978-1-84946-004-0

Typeset by Columns Design XML Ltd, Reading
Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall

CORPORATE FINANCE LAW

Corporate Finance is an area of law which is obviously of significant practical importance, but the academic analysis of this area of law has also been increasingly recognised. This book provides a discussion of the most interesting theoretical and policy issues in Corporate Finance law. It covers both the equity and debt sides of Corporate Finance law, and seeks, where possible, to compare the two, considering the desirability of each in various circumstances and pointing to areas of convergence and overlap. The topics covered include: an overview of the financing options available to companies; the relationship between debt and equity; legal capital; contractual protection for creditors; proprietary protection for creditors; single and multiple lenders; transferred debt; public offers of shares; the ongoing regulation of the capital market; the regulation of debt; takeovers; schemes of arrangement and private equity. Each chapter analyses the issues so as to enable the reader to understand the difficulties, risks and tensions inherent in this area of law, and the attempts made by the legislature and the courts, as well as the parties involved, to deal with them. This book discusses areas where the law is uncertain, including some difficult conceptual problems, and considers the present law critically, including options for possible reform. It will be of interest to practitioners, academics and students engaged in the practice and study of corporate finance law.

Preface and Acknowledgements

This book deals with UK Corporate Finance law, and aims to discuss both the substance of the law, and the policy issues underlying it. This book has arisen out of the Corporate Finance law course which we have taught in Oxford for the last few years. The shape and structure of this book have been formed by our experience in teaching the course. The process of creating an integrated course, and dealing with the debt and equity aspects of corporate finance, have been key in shaping this book. Many of the issues examined here were first raised and discussed around the seminar table and we would like to acknowledge and thank those alongside whom we have taught the course, and argued these points, namely John Armour, Paul Davies, Roy Goode, Roger McCormick, Dan Prentice and John Vella. Special thanks are also due to Chris Hale and Emma Watford who have taught the students (and us) about Private Equity. We would also like to thank the BCL/MJur students who have taken the course. In particular, we would like to acknowledge the students of 2008–09 and 2009–10 who saw draft chapters of this book and whose comments on various issues have helped to shape some of the discussions in the text.

This book aims to state the law and major policy developments as at 1 September 2010. However, no area of the law is static and inevitably in the period between finishing writing this book, and the proofs being finalised, the law on a number of issues has moved on. We note the following significant developments: the Alternative Investment Fund Managers directive (the text of which was finally voted through by the European Parliament in November 2010); the third Basel accord (Basel III) (agreed in outline in September 2010); two new papers in October 2010 dealing with the regulation of takeover bids, one produced by the Takeover Panel (*Review of certain Aspects of the Regulation of Takeover Bids* 2010/22) and one by the Government (BIS, *A long Term focus for Corporate Britain, A call for evidence*, URN 10/1225, 31–34) although this latter paper also raises issues of broader corporate importance; the public consultation launched by the EU in November 2010 on credit rating agencies; *Fearns v Anglo-Dutch Paint and Chemical Ltd* [2010] EWHC 2366 (Ch), which throws further doubt on the proposition (discussed in 5.2.4.3) that transaction set-off operates as a substantive defence; the decision by Briggs J in *Lomas v JRB Firth Rixson Inc* [2010] EWHC 3372 (Ch) that a ‘flawed asset’ type provision in the Master ISDA agreement did not contravene the anti-deprivation principle (this is the case mentioned in footnote 203 on page 176); the decision of the Court of Appeal in *Springwell Navigation Co v JP Morgan* [2010] EWCA Civ 1221, which confirms the points made about ‘no representation’ clauses in 7.4.4; the decision in *Habibson’s Bank Ltd v Standard Chartered Bank (Hong Kong) Ltd* [2010] EWHC 702 (Comm) confirming that consent to novation can be given effectively in advance; the decision in *Pearson v Lehman Brothers Finance SA* [2010] EWHC 2914 (Ch) which addresses the identification of property issue in relation to securities held in a fungible account; the draft amendments to the Financial Collateral Arrangements (No. 2) Regulations which were issued by HM Treasury on 22 December 2010 and which deal with many of the technical problems with the Regulations

mentioned in 3.3.1.2, 6.4.1.1 and 6.5.1.2; and the Supreme Court's decision in *Progress Property Co Ltd v Moorgarth Group Ltd* [2010] UKSC 55 which is interesting for the light it casts on the issue of distributions to shareholders.

In writing this book we have been assisted by a great many people. We are lucky enough to have friends and colleagues in Oxford and beyond with whom we have been able to discuss corporate law generally and the issues arising out of this book more particularly, and we would like to acknowledge their advice and assistance. Particular thanks are due to Hugh Beale, Michael Bridge, Roy Goode, Sandra Frisby and Niamh Moloney who have variously discussed points, answered queries and read and commented on draft chapters with unfailing patience, as well as providing more general (much appreciated) advice and support. Help on specific points has also been provided by Kate Sharp, Stephen Chait, Tim Cleary, Allen Jones, Woo-Jung Jon and Paul Lindsell. We have also been assisted by a number of excellent research assistants: Victoria Barns-Graham, Bernd Delahaye, Murray Cox and Emma Gullifer. Special thanks should go to Murray whose assistance with chapter 11, in particular, has been invaluable.

We would like to thank Hart Publishing, and in particular Richard Hart, for overseeing the production of this book through its various stages with great care and skill.

We would also like to thank our families for their unfailing patience and support during the writing of this book, and in particular to thank Robert and Nick (respectively) who have been sources of inspiration and encouragement and without whom this project could not have been completed. This book is dedicated to them.

Louise Gullifer and Jennifer Payne
Oxford, December 2010

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