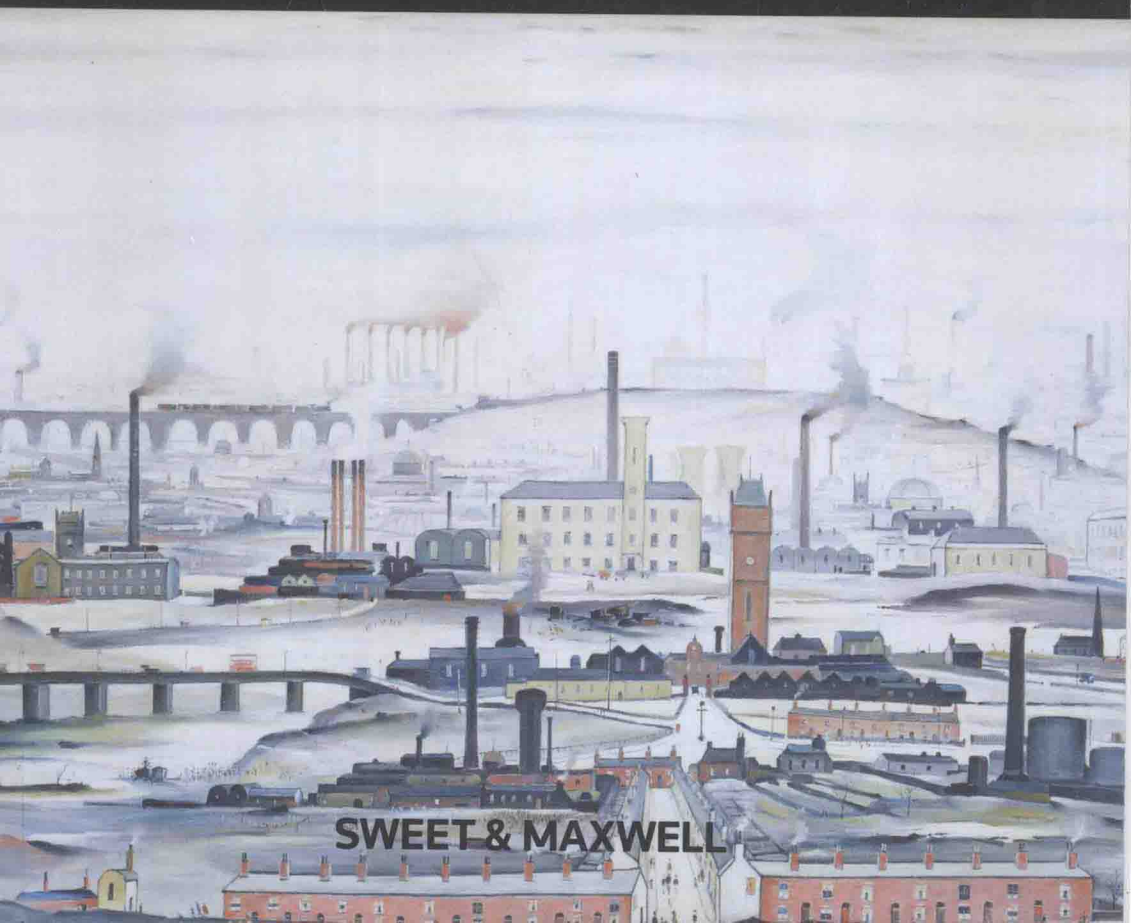


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COMPANY LAW**

NINTH EDITION

PAUL L. DAVIES AND SARAH WORTHINGTON



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GOWER AND DAVIES'
PRINCIPLES OF
MODERN COMPANY LAW

NINTH EDITION

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PREFACE

In some ways the writing of this, the Ninth, edition of the book has occurred in the lull to be found in the eye of a hurricane. One part of the storm has passed beyond us. This was represented by the Companies Act 2006, a massive legislative endeavour. At the time of the previous edition (2008), it was possible to deal with that Act in substantial detail, but not all of it was in force. Full implementation was achieved only in late 2009. Consequently, the previous edition displayed a certain awkwardness in relation to that Act, such as assuming draft implementing secondary legislation would be adopted as proposed or assuming particular parts of the Act were in force even though no implementation legislation was available, even in draft. In this edition we have been able fully to embed the Act and its secondary legislation in the text.

Counting rather against the hurricane metaphor is the fact that the operation in practice of the 2006 Act and its associated secondary legislation seems, so far, to have revealed no major flaws in the legislative design. Of course, the Act was not expected to set statutory company law in stone (although it was aimed to provide a long-term framework for the companies legislation). Community law has required some further reform of domestic company law, most of it rather minor, but including the potentially more significant Companies (Shareholders' Rights) Regulations 2009, implementing the Shareholders' Rights Directive 2007.

In its usual unpredictable way litigation has continued to throw up a number of difficult issues with which the courts have had to grapple—and the editors have had to grapple with the courts' decisions. Prominent among these cases have been *Progress Property v Moorgarth Group Ltd* (disguised distributions), *Stone & Rolls Ltd v Moore Stephens* (auditor liability), *Holland v Commissioners for HM*

Revenue (de facto directors) and *Sinclair Investments (UK) Ltd v Versailles Trade Finance* (proprietary remedies). None of the issues raised is novel. As ever, litigation has the uncanny quality of revealing how much uncertainty there is about basic concepts, in company law as elsewhere.

The part of the hurricane which is (largely) yet to come consists of the legislative fall-out from the financial crisis which began in 2007. One might wonder why what was essentially a problem connected with financial institutions should have ramifications for general company law. There are two aspects of the answer to this question. First, the financial crisis has triggered a comprehensive review at Community level of financial services legislation, some of which is highly relevant to the law dealt with in this book, especially in Part Six. The main Community directives in this area are under review. Indeed, the Prospectus Directive has already been reformed, though that was the result of a pre-crisis initiative. The Market Abuse, Transparency and Takeover Directives are all under review. Given the slowness of the Community legislative process its results are not yet clear and they will be a matter for the next edition of this book. What can be predicted, however, that the role of Community law will be enhanced (more Regulations and fewer Directives, for example) as will the role of Community institutions (especially, in our field, the European Securities and Markets Authority).

Even though the Community is now the lead legislator in the field of financial services law, domestic law is still important. At the time of writing a Financial Services Bill is before Parliament. Amongst other things it will replace the Financial Services Authority (an “integrated” regulator) by moving to a “twin peaks” model, so that the FSA is split into a Financial Conduct Authority (FCA) and a Prudential Regulatory Authority. Regulation of financial markets (notably responsibility for the Listing Rules and for enforcement of the prospectus, transparency and market abuse rules) will pass to the FCA. Fortunately, the substantive law the FCA has to administer will not change significantly as a result of this institutional change—though the Community level changes mentioned above will produce reform of the substantive rules in due course. Consequently, we have taken the decision to anticipate this institutional change and to refer to the domestic regulator as the FCA, except in those cases where we make an historical reference to something done by or a publication produced by the FSA.

The second aspect of the answer to the question of why the financial crisis has affected company law relates to corporate governance. Defects in the corporate governance of banks are widely thought to have contributed to the excessively risky policies which banks adopted prior to the crisis. What is much less clear, and is still hotly debated, is whether the corporate governance failures of banks, which are systemically highly leverage institutions, have much to

teach as about corporate governance reform of companies in general. Nevertheless, some “spill over” from banks to the corporate governance of companies in general has already occurred at domestic level. A major illustration concerns shareholder/board relations. The “Walker” Review of the corporate governance of banks and other financial institutions proposed in 2009 a Stewardship Code to promote the engagement of asset managers and institutional shareholders in the corporate governance of investee companies (whether financial institutions or not) and this led to the development by the Financial Reporting Council of a Stewardship Code, which we discuss in Chapter 15. It seems likely that this process of bank governance influencing general corporate governance is not at an end.

The structure of the book remains as it was in the previous edition. However, Chapter 31 on Debentures has been substantially revised and the status of the treatment of liquidation has been raised from an Appendix to a chapter (Chapter 33).

Once again, this edition has benefitted from the fact that Dr Eva Micheler retained responsibility for revising Chapter 27 (Transfer of Shares). Responsibility for the remaining chapters was shared between Paul Davies and Sarah Worthington (which the former is able to assert was a great relief to him). This was a continuation of cooperative work begun when each was at the London School of Economics and Political Science, so that the link which the book has always had with that institution is maintained, although neither editor is any longer formally attached to it.

We have aimed to state the law as it stood at the end of February 2012, but some later developments have been included.

PLD, SEW

June 2012

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