

Conditional Transactions with Related Parties

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The High Court in London has held that conditional agreements entered into between a company and one of its directors (and, indirectly, their spouse) relating to that company's acquisition of shares in a target should have been pre-approved by the members of that company and that, because member approval was not sought and granted, the conditional agreements for the acquisition of the shares in the target could be voided.

Section 190 of the Companies Act 2006 (the "Act") provides that a company may not enter into an arrangement under which:

1. a director (or any person connected to that director) acquires or is to acquire from the company; or
2. the company acquires or is to acquire from a director (or any person connected to that director);

a substantial non-cash asset (which meets or exceeds the value thresholds in section 191 of the Act) unless the arrangement has been approved by a resolution of the members of the company or is conditional on such approval being obtained.

In this case, the court held that the conditional nature of both a share purchase agreement (the "SPA") and an option agreement (the "Option"), each entered into between a company and one of its directors (and, indirectly, their spouse) and relating to the proposed acquisition of shares in the target, did not mean that the arrangements fell outside the scope of section 190 of the Act and that as the SPA and the Option were not contingent on member approval, the requirements of section 190 of the Act had not been met. The court also held that, for the purposes of determining whether the value threshold in section 191 of the Act was met, the SPA and the Option comprised one composite arrangement – i.e. the value of both taken together should be used to make a determination of the value of the arrangements, notwithstanding their individual value. Accordingly, the acquisition by the company of the shares in the target pursuant to the terms of the SPA and the Option could be voided.

Related party transactions are common for new-to-market public companies, private companies preparing to go public, and companies seeking to acquire or refinance assets in an asset-backed or high-yield debt offer, and this case is a stark reminder of the potential consequences of overlooking the requirements of section 190 of the Act. Failure to observe the requirements of section 190 of the Act can create significant personal liability for the director involved, the related person involved and/or the other directors who approved the arrangements, but it could further create significant difficulty for the company (and other transaction parties) who may be required to unwind a transaction which was not correctly approved by the company's members. Additionally, a transaction voided for failure to comply with section 190 of the Act could create significant issues also for related transactions, such as any debt facility put in place to fund an acquisition of a target where the acquisition itself was able to be voided.

The UK Capital Markets team at Haynes Boone represents UK and foreign issuers, underwriters, trustees and other service providers in a full range of public and private debt and equity capital markets transactions.

Case: MetalNRG plc v BritENERGY Holdings LLP and others [2022] EWHC 2528 (Ch)