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Keep it in the family?

Property transactions with directors.

Shareholders' approval is needed for certain transactions involving company directors, under [section 190 Companies Act 2006](#). The case law (*re Duckwari plc (No 2)*¹ and *Demite v Protec Health*²) highlights the importance of this section, and the immense potential difficulties if it is not complied with. Property professionals, directors and lawyers should always be alert to section 190 problems when dealing with transactions involving directors and their companies.

Section 190 applies to an arrangement under which:

- a director or other relevant person acquires a substantial non-cash asset from the company or
- the company acquires a substantial non-cash asset from a director or other relevant person.

The grant of a lease involves the acquisition of an asset, so it is included if the value of the leasehold interest is sufficient.

The value of the asset must be at least £5,000 and exceed 10% of the company's asset value or, if less, £100,000. Multiple assets in the same arrangement, or a series of arrangements, are aggregated. So, for example, shareholder approval is needed where shown by a tick in the table:

¹ [1999] Ch 268

² [1998] BCC 638 – sale by a receiver is within the section

Value of transferred asset(s)	Company Asset Value		
	(£100,000) or £10,000	£100,000	£2m
£1,500	●	●	●
£7,500	✓	●	●
£15,000	✓	✓	●
£150,000	✓	✓	✓

A company's "asset value" is the value of the company's net assets according to its most recent statutory accounts, or if no statutory accounts have been prepared, the amount of the company's called-up share capital.

The section applies if the person acquiring or transferring the asset is:

- a director of the company transferring or acquiring the asset
- a director of its holding company
- a person connected with a director of the company or of its holding company.

If the director or connected person is a director of the company's holding company or a person connected with a director, the arrangement must also be approved by a resolution of the shareholders of the holding company, or be conditional upon approval. Connected persons include spouse, minor or adult children, associated companies and trusts.

The acquisition can be direct or indirect, eg via a third party, if it forms part of one arrangement.

If the section applies, the arrangement may not be implemented unless it is first approved by a resolution of shareholders of the company and, where applicable, its holding company. The approval can be given before the arrangement is entered into, or the arrangement can be made conditional upon approval. An ordinary resolution is sufficient, and it does not have to be filed at Companies House.

This section does not require approval:

- by shareholders of a company which is a wholly-owned subsidiary (but it may still require approval by shareholders of a holding company)
- of transfers of assets within a group of companies (so long as all relevant companies are wholly-owned group members)
- of arrangements by companies in insolvent liquidation or administration
- by shareholders of a holding company in insolvent liquidation or administration
- by shareholders of a holding company which is not a UK company
- of transactions with members as such (eg dividends in specie)
- to transactions on a recognised stock exchange through an independent broker.

The section does apply to sales of assets by liquidators of companies in members' voluntary (solvent) liquidation, and by receivers.

The effect of failure to comply is:

- the arrangement, and any transaction entered into in pursuance of it, is voidable by the company, unless for various reasons restitution is no longer possible, or the transaction is affirmed by shareholders; resolution within a reasonable period; and
- the director involved, any connected person involved and any other directors who authorised the arrangement or transaction are each liable to account to the company for any gain which they have personally made, and jointly and severally liable to indemnify the company for any loss or damage resulting from the arrangement or transaction, even if the arrangement is later affirmed by the shareholders.

In the series of cases of *re Duckwari plc* it was held that the indemnity for loss and damage is not limited to losses arising from the transaction itself (eg a sale at undervalue) but also extends to any subsequent loss flowing from the transaction, such as a reduction in value of the asset it acquired. It follows that if the company, without shareholder approval, buys an asset from a director which goes up in value, it keeps the profit, but if the asset value goes down, the company can either avoid the transaction or claim its loss from the directors.

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