

**10 Points on Share Buybacks**  
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1. Why does compliance with the statutory procedure on share buybacks matter?
  - a. Consequences of flawed buyback – transfer void and criminal offence: s. 658(2) CA 2006.
  - b. Can prove headache in, e.g., context of sale of the company.
2. Need for authorisation
  - a. Requirement for power to undertake buyback in articles for purchases under CA 1985 (s. 159(1) CA 1985).
  - b. No such requirement for purchases under CA 2006, but check articles for any restriction or prohibition on buybacks (s. 690(1) CA 2006).
3. Do you need a separate contract?
  - a. Better/safer view is that you do need a separate contract (s. 696(2) CA 2006; cf. *Dashfield v. Davison* [2008] B.C.C. 222)
  - b. Where articles contain right for company to purchase shares in certain circumstances (e.g. good/bad leaver provisions), best to prepare short form buyback agreement for approval by members rather than relying upon the articles as the buyback agreement (see *Re Vision Express v. Wilson (No. 2)* [1998] B.C.C. 173).
4. Lack of formal approval by members
  - a. Doubt as to the extent to which lack of formal approval can be cured by the *Duomatic* principle (see *Re RW Peak (King's Lynn) Ltd* [1998] B.C.C. 596).
  - b. If the purpose of the relevant provision is simply the protection of shareholders, the court inclines to the view that a failure to comply with the formalities of that provision can be cured by *Duomatic* principle (see *Atlas Wright (Europe) Ltd. v. Wright & anor.* [1999] B.C.C. 163 (CA)).
  - c. If provision serves some wider purpose (e.g. protection of creditors), then the *Duomatic* principle does not apply.
5. Failure to produce proposed contract to members
  - a. Provision is designed solely for the benefit of shareholders, with the result that the *Duomatic* rule can apply (see *Kinlan v. Crimmin* [2007] B.C.C. 106).
6. How do you fund the buy-back?
  - a. Public or private companies: out of distributable profits or the proceeds of a fresh issue of shares (s. 692(2) CA 2006).
  - b. Private companies: '*de minimis*' exception (s. 692(1ZA) CA 2006) or out of capital in accordance with Chapter 5 of Part 18 CA 2006 (s. 692(1) CA 2006).
7. What kind of consideration and when do you pay it?
  - a. Deferred consideration not permissible (*Kinlan v. Crimmin* [2007] B.C.C. 106).
  - b. 'Loan backs' not permissible, save (possibly) where the loan is a genuine and separate transaction on commercial terms and money actually moves from the selling shareholder to the company (*Dickinson v. NAL Realisations (Staffordshire) Ltd.* [2018] B.C.C. 506 (first instance); [2020] 1 W.L.R. 1122 (C.A.)).
  - c. Genuine "set-offs" permissible (*Spargo's Case* (1873) 8 Ch App 407) but "non-cash" consideration unlikely to be permissible (cf. *BDG Roof-Bond v. Douglas* [2000] B.C.C. 777)
  - d. Payment by cheque should be fine provided that the parties did not intend or know that the cheque would bounce on presentation.
  - e. Whether payment to an escrow account will be permissible will depend on the terms of the escrow arrangements – best to avoid.

- f. “Anti-embarrassment” provisions not permissible.
8. Filing and stamping
- a. Failure to file resolution/SH03 at Companies House is a criminal offence: ss. 707-8 CA 2006
  - b. Failure to comply with filing requirements unlikely to affect validity of transaction, however (see, e.g., *Re NL Electrical Limited* [1994] 1 B.C.L.C. 22, at 29f-g)
  - c. Stock transfer form likely to be needed
9. Addressing defects
- a. Two options: repeat the buyback or reduction of capital
10. Remedies for selling shareholder
- a. Plainly cannot enforce a void transaction
  - b. Note too the limited remedies available to selling shareholder under s. 735 – often overlooked.
  - c. Might have a restitutionary defence to company’s claim for repayment of the purchase price (see *Kinlan v. Crimmin* [2007] B.C.C. 106).

#### **Appendix: Responses to audience questions**

***If a company does not have sufficient distributable reserves (even after a reduction of capital) and cannot issue new shares to raise the amount (no willing subscribers), is a buyback out of capital the only other route available?***

Yes.

***If a shareholders agreement contains buy back provisions for leavers, could that agreement itself constitute "the contract" even though it does not relate to a specific known transaction (e.g. X shares of Y seller).***

There is no clear requirement that a contingent or unconditional buy-back contract be in a separate agreement. However, we would recommend that a freestanding agreement be entered into. The Shareholders’ Agreement can set out the terms of what would later form the subject-matter of the contract. This can then be subject to the required approval in advance – s.694 CA 2006.

***I would understand any advance payment for a share buyback to be contrary to s.691(2). Where a company has made such an advance payment but has not yet completed the buyback to which it relates, is there any neat way of remedying the position so that the buyback can continue (eg. reducing the buyback price by the amount that was already received)?***

***In repeating a buy-back to cure a defect first time round (but where payment was made for shares first time round) does the share payment have to be put in a circle or can it be retained by vendor + treated as pre-paid under the second attempt?***

If a company has made an advance payment, the best option is to ensure that the money is repaid so that the transaction can be re-executed from the beginning.

It may be possible to have the shareholder enter into a deed of acknowledgement of an obligation to repay the purchase price which is then released by way of set-off against payment of the purchase price on completion of the transaction.

***On a buy back can one build in a completion accounts adjustment to the price?***

It is possible to have a formula for the establishment of the purchase price. However, the purchase price must always be paid on completion. You cannot therefore have a subsequent adjustment.

***Is there a risk that, if the company provides additional consideration eg releasing seller from a shareholders' agreement, the shares won't have been wholly bought in for cash?***

Yes.

***If the buyback is void because of a failure to pay the purchase price on purchase, is it possible to vary the contract (with shareholder approval) to change the completion date to make the payment on purchase?***

If the buyback is void because of a failure by the company to pay the purchase price on purchasing the shares, then it is void and cannot be resuscitated by retrospectively amending its terms. In that scenario, you would either need to repeat the buyback or effect a reduction in capital in order to remedy the defective buyback.

That having been said, if before the date of completion under the buyback it becomes apparent that the company will be unable to pay the purchase price on completion, then it is open to the parties to vary the terms of the buyback (subject to compliance with the requirements on variations in s.697 CA 2006).

***If there is a void buyback, is the vendor entitled to dividends for the period after the void buyback? You mentioned that with a void buyback, resolutions passed since the date of the buyback would probably be valid if the 'seller' was removed from the register of members. Does the same logic apply to dividends that have been paid since the date of the buyback?***

Even if the buyback is void, the vendor's name will likely have been removed from the company's register of members as a consequence of the company acting in ignorance of the fact that the buyback is void. If that is the case, the vendor will not have been a 'member' of the company within the meaning of s.112 CA 2006 at the time of the relevant resolutions and dividend payments and accordingly (subject to the articles) not entitled to vote on any resolutions which were passed or to a share of any dividends paid in the period since their name was removed from the register.

The danger, however, is that the vendor applies to have their name restored to the register of members pursuant to s.125 CA 2006 with retrospective effect (i.e. their name is added with effect from the date of the void buyback). In that scenario, the vendor might seek to challenge the validity of the resolutions and dividends which took place in the aftermath of the void buyback on the grounds that they are to be treated as having been a member of the company at the relevant time.

In practice, these sorts of issues are likely to be ironed out as part of the process of remedying the defective buyback. The court is unlikely to be particularly sympathetic to a vendor who seeks to run such an argument if they had otherwise got what they bargained for under the void buyback (e.g. the purchase price for their shares) and/or where the rights of third parties would be prejudiced.

***How effective would a reduction in capital be in defeating a vendor's claim for a share of a later sale of shares.***

If a court-approved reduction of capital is undertaken to remedy a defective buyback (and the requirements of such reductions are fully complied with), it ought to provide a complete response to any claim by a vendor under the defective buyback.

In particular, after they have registered the court's order and company's new statement of capital, the registrar of companies will issue a certificate which is conclusive evidence that the requirements of CA 2006 with respect to the reduction of share capital have been complied with and that the company's share capital is as stated in the statement of capital (s.649(6) CA 2006).

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This is one of the main advantages to undertaking a court-approved reduction of capital as opposed to using the solvency statement procedure for a reduction of capital under ss.642-4 CA 2006 which does not contain a similar provision as to effect.