SIMON BURN
SOLICITORS

Spring 2012

Commercial Law UPDATE

When it is Time for the Young Ones to Take Over

In any family business, when the owners wish to retire and pass the business on to the next generation, as opposed to selling it, there are many aspects to consider.

In general, planning for this eventuality cannot start soon enough as the earlier such planning starts, the more options may be available.

The factors that will be most relevant for tax purposes are likely to be the availability or not of entrepreneur's relief, which, where it is available, will reduce the effective rate of Capital Gains Tax (CGT) on the increase in value of the business to a maximum of 10 per cent. One advantage of this is that the business is passed on at its 'full value', which means that a subsequent sale will be based on that value, not a discounted 'tax value'.

However, if there is a need to make the transfer without a tax liability, the business may be able to be transferred making a claim for business asset hold-over relief. The practical effect of this is that the new owner takes the business at the original owner's CGT base cost – which will normally leave a considerable potential gain.

A third possibility is to retain ownership of the business and pass it on in your will. A transfer to your spouse or civil partner will not normally be chargeable to Inheritance Tax (IHT), and specific reliefs for IHT exist for business asset transfers.

More elaborate solutions might involve the granting of share options, piecemeal transfers or the use of trusts.

As always, there is a need to balance what might be most effective for tax purposes with what is practical.

All forms of business tax planning need to be carried out with great care as there are many pitfalls, and compliance with the regulations set down for each relief is essential.

If you are considering how to retire from your business, contact us for advice.

ACAS Guidance for Employers on the Olympic Games

With only a short time to go before the London 2012 Olympic Games commence on 27 July 2012, the Advisory, Conciliation and Arbitration Service (ACAS) has issued guidance for employers on some of the issues that might arise. For example, an employee may wish to take time off work to attend or may have been selected as one of the volunteer helpers or 'games makers' at the Olympic or Paralympic Games. Others may wish to work flexibly in order to watch specific events.

It is important for employers to have a clear policy in place to handle likely requests for time off work and to communicate this to staff to avoid potential misunderstandings and unfairness.

The Olympic Games end on 12 August and the Paralympic Games are being held between 29 August and 9 September. As well as the usual annual sporting events, the finals of the UEFA European Football Championship, which takes place every four years, are being hosted by Poland and Ukraine between 8 June and 1 July, so it is set to be a busy summer for sports fans!

For more information, see the ACAS website at www.acas.org.uk/.

Discrimination Law Trumps Religious Convictions

The Court of Appeal has upheld the decision of the High Court that a Christian couple who refused to allow a homosexual couple to share a bed at their hotel had unlawfully discriminated against them.

The hotel owners refused double-bedded accommodation to unmarried couples on religious grounds. When the homosexual couple, who are civil partners, sought a room for the night, they were also refused.

The Court confirmed that if a person wishes to run a business, it must be run in accordance with the law, no matter what their individual personal beliefs may be.

Partner or Employee?

The concept of 'partnership' is, in theory, simple. A partnership is an undertaking carried on with a view to profit in which the partners share profits and losses.

Regrettably, in reality, things are often not so straightforward and the existence of arrangements such as the 'salaried partnership' means that disputes about whether someone is a 'real' partner or not are legion.

A recent case heard in the Court of Appeal shows the sort of problems that can arise. It involved a solicitor who had entered into a partnership agreement in a law firm. The firm converted to a Limited Liability Partnership (LLP), under which the partners became members of the LLP. He signed the members' agreement and contributed capital to the firm. He also had some involvement in the decision-making of the firm and part of his remuneration was based on a profit share.

It was clear, it would seem, that he was a partner. In the event, he was unable to build a big enough client base and left the firm. He then argued that his relationship with the firm was not one of partnership and that he was in fact an employee. His argument was based on the grounds that he was not involved in the management of the firm and his profit share was minuscule.

He sued for breach of contract and unfair dismissal and claimed statutory redundancy pay.

The success of his claim turned on whether he was an employee or a partner. The Employment Appeal Tribunal concluded that his arrangement with the firm was not consistent with an employer/employee relationship. In addition, neither the size of his profit share nor the degree of his participation in the firm's management was relevant.

The Court of Appeal upheld the decision.

Whether a person is an employee or a partner is ultimately a matter of fact. Having agreements in place that make the position unarguable is a wise precaution for firms that wish to avoid the potential for later disputes.

Contact us for advice on your contracts of employment or any employment dispute.

Fraud and the Director

With the economy still struggling, dubious business practices can be expected to be more common than normal, as is evidenced by the expulsion from the Institute of Chartered Accountants in England and Wales of two members who have each recently been convicted of a fraud involving more than £1 million.

Directors who suspect that the activities of fellow directors or managers may have crossed the line of illegality may be facing a dilemma as to what their course of action should be.

In such circumstances, it is important to understand one's obligations. Fraudulent trading is an offence under the Companies Act 2006, carrying a maximum sentence of ten years' imprisonment. It occurs when a person is knowingly party to the carrying on of a company's business with intent to defraud creditors or for any other fraudulent purpose.

It is important to note that the offence does not just occur when the intent is to defraud creditors: it is the intent to defraud anyone that is in point. 'Shutting your eyes' to the fraudulent activity of others or failing to make enquiries if the reason for not investigating is that you are fearful that the outcome will be the discovery of fraudulent activity is unlikely to be an adequate defence.

In principle, a single fraudulent act may be sufficient to justify a charge of fraudulent trading.

If you are a director and are concerned about the possibility of fraudulent trading in your company, it is important to take advice as soon as your suspicions are aroused. We can advise you as to your rights and responsibilities and the appropriate action to take.

'I Didn't Know What I Was Signing' is a Valid Defence

A company director who was misled into signing a guarantee over a lease, when he thought he was merely witnessing his fellow director's signature, has escaped liability under the guarantee.

Joshua Yardley signed the guarantee, over a 35-year lease on a property in Nottingham, after being asked by a fellow director to 'pop in for five minutes'. He was shown the last page of the document, which had been signed by the other director, and was asked to sign it.

When the company failed, the landlords sought payment of the rent of £32,500 per year. Mr Yardley claimed that he had no idea that the document was a lease and that by signing it he was ostensibly guaranteeing payment of the rent.

The landlords argued that even if Mr Yardley did not know that it was a guarantee, he should still be bound by it because they had no way of knowing whether or not he was unaware of the nature of the document he had signed.

The court was unimpressed with the landlords' reasoning. They knew the company was in difficulties (hence requesting the guarantees by the directors) and had failed to take steps to satisfy themselves that Mr Yardley had acknowledged that he had guaranteed performance of the lease.

Mr Yardley was therefore ruled to have no obligation under the purported guarantee.

The lesson to be learned is that it is important to make sure that when documents are executed, there is a clear paper trail showing that all signatories are clearly aware of the commitments they are making.

Contact us for advice on any aspect of contract law.

Accident Reporting Changes

As of 6 April 2012, the requirements under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (RIDDOR) have changed, which should reduce substantially the number of reportable incidents.

A reportable incident is now one which causes incapacity of seven days or more, instead of three days as under the previous rules. In the context of RIDDOR, incapacity means absence or the inability to do work that a person would be reasonably expected to do as part of their normal work. For injuries

that involve shorter absences, a record in the accident book is sufficient.

In addition, the previous requirement that a reportable incident must be notified within seven days has been eased: the reporting deadline is now 15 days after the incident.

Guidance on the new requirements can be found on the website of the Health and Safety Executive at www.hse.gov.uk/.

For advice or assistance concerning your legal requirement to provide a safe working environment and the implications for contracts of employment and the like, contact us.

Undemanded Liability Scuppers Break

A recent dispute involving the validity of a break notice given by a tenant should sound warning bells for anyone considering exercising a break clause in a lease.

The tenant had a history of occasional late payment of rent. The landlord had not made anything of this and, in particular, had only sought interest to which it was entitled due to the late payment on two occasions. In both cases, the interest was paid.

The lease required that for a valid break notice to be given, all outstanding charges had to have been paid up to date as of the break date. When the tenant decided to exercise its right to break the lease, it paid the six months' rent due. This was paid the day before the break date. In the view of the tenant, all charges had therefore been settled and there were no sums outstanding.

The landlord argued that interest on prior late payments was due (and was therefore an outstanding charge), despite the interest not having been demanded.

The break notice was held to be ineffective. The lease did not specify that the landlord had to issue a demand for interest for it to be due. The tenant could have easily calculated the interest due, but did not. The interest was due and had not been paid.

In another recent case on the validity of break notices, the court ruled that non-payment of a sum demanded by the landlord that related to a period after the tenant would have vacated the premises did not invalidate the tenant's break notice.

For advice on all landlord and tenant matters, contact us.

Insolvency and TUPE

Whilst the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) operate to protect the employment rights of employees when there is a relevant transfer of a business or part of a business, Regulation 8(7) provides that where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings that have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner, the transfer provisions of TUPE do not apply. In such circumstances, employees do not automatically transfer to the new owner and any dismissals are not automatically unfair.

In an important decision on this issue, the Court of Appeal has ruled *(Key2Law (Surrey) LLP v De´Antiquis)* that this exception does not apply to administration proceedings under Schedule B1 of the Insolvency Act 1986.

Ms De'Antiquis was made redundant from her job as a solicitor a few days before the firm she worked for went into administration. The administrators subsequently entered into a management contract with Key2Law (Surrey) LLP under which the part of the business in which Ms De'Antiquis had worked was transferred to it. Ms De'Antiquis brought a claim for unfair dismissal against Key2Law on the ground that there had been a transfer of liabilities under TUPE. Key2Law argued, however, that the facts of the case meant that the exception should apply. As her former employer was in administration, it was subject to 'analogous insolvency proceedings' instituted with a view to the liquidation of its assets, within the meaning of Regulation 8(7).

The Court of Appeal held that an administration is not outside the TUPE rules because it cannot be said to have been 'instituted with a view to liquidation' of the company's assets. The primary statutory objective of an administrator when appointed is to rescue the company as a going concern, even though this may subsequently prove to be impossible. Accordingly, the Court held that a transfer of liabilities under TUPE will take place where a company is placed into administration and the business is subsequently transferred. The Court accepted that a fact-based approach, whereby the decision as to whether the TUPE provisions apply will depend on the intention of the administrator regarding the transfer of the insolvent business, is inappropriate in such circumstances. What is required is an 'absolute' approach to the provisions. Such an approach has the merit of achieving legal certainty, since all those involved will know where they stand.

Subject to any appeal, this decision means that the employment rights of employees will be protected when a company is sold following a 'pre-pack' administration. If you are contemplating buying or selling a business, we can advise you to ensure that your decision is made after consideration of all the relevant factors.

SIMON BURN
SOLICITORS

123 PROMENADE, CHELTENHAM, GLOUCESTER, GL50 1NW
TELEPHONE: +44 (0)1242 228 444 FAX +44 (0)1242 516 888 DX 7404 CHELTENHAM

ASPECT COURT, 4 TEMPLE ROW, BIRMINGHAM, B2 5HG
TELEPHONE: +44 (0)121 371 0301 FAX +44 (0)121 371 0302

E-MAIL: SIMON.BURN@SIMONBURN.COM

PRINCIPAL: SIMON L. BURN LLB. THIS FIRM IS AUTHORISED AND REGULATED BY THE SOLICITORS REGULATION AUTHORITY.