SIMON BURN SOLICITORS

Winter 2008

Commercial Law UPDATE

Directors' Duties Under the 2006 Companies Act

The Companies Act 2006 was designed to modernise British company law, making it 'fit for purpose' for the 21st Century. In particular, there are several changes which affect directors. As of 1 October 2007, the duties of directors are, for the first time, specifically defined. They are:

- (S 171) The duty to act within their powers (the duty to adhere to the company's constitution);
- (S 172) The duty to promote the success of the company. There are six things a director must consider here, including consideration of the company's employees, the long-term consequences of decisions, fairness to members (shareholders) and the impact of decisions on the community and environment;
- (S 173) The duty to exercise independent judgment. This is not as restrictive as it may seem, but means not being the 'yes man' of the person responsible for his or her appointment. It does not prevent having an interest in transactions nor relying on the opinion of an expert where appropriate;
- (S 174) The duty to exercise reasonable skill, care and diligence. This duty has particular implications for non-executive directors, who can no longer afford to take a 'hands-off' approach;
- (S175) The duty to avoid conflicts of interest. This includes conflicts involving connected persons such as family members;
- (S176) The duty not to accept benefits from third parties; and
- (S177) The duty to declare an interest in transactions or arrangements. This includes the duty to declare interests of persons connected with the director.

Directors of companies should ensure that they and their fellow directors are fully aware of the provisions of the Act relating to their duties and comply with them. Contact us for individual advice.

The provisions of the Companies Act are being introduced in stages. For a full implementation timetable, see http://www.berr.gov.uk/files/file42847.doc

Music While You Work

If you allow your staff to listen to music whilst working, the Performing Rights Society (PRS) has warned that you could be liable to pay a licence fee. They are currently seeking damages of £200,000 from a national auto-repair chain which they claim has violated musical copyright because it has not obtained the appropriate licences and its workers play the radio loudly enough for it to be heard by colleagues and customers.

PRS is a not-for-profit organisation that licenses the public performance of music on behalf of its composer, songwriter and music publisher members and pays them royalties.

According to PRS, a tariff for music in the workplace applies to 'the mechanical performance within the society's repertoire as a background to work, meals, stand-down times and breaks at work'.

The situation is complicated by the fact that you may also need a licence from Phonographic Performance Ltd. (PPL). PPL collects and distributes airplay and public performance royalties on behalf of record companies and performers.

The cost of a licence depends on how the music is used. For further information, see the PRS website at http://www.mcps-prs alliance.co.uk/ and the PPL website at http://www.ppluk.com/.

New Money Laundering Regime

Business owners are reminded that the new Money Laundering Regulations 2007 came into effect on 15 December 2007. These replaced the existing money laundering legislation. The aim of the new regime is to further restrict criminal access to the financial system, thereby deterring crime and terrorism. Failure to comply with the Regulations can lead to severe penalties.

Businesses that must be supervised for money laundering purposes are required to apply appropriate risk-based systems and controls when entering into transactions covered by the legislation. These include customer due diligence measures, to identify and verify not just the customer but the beneficial owner of the customer (such as a company or trust), and ongoing monitoring where necessary, throughout the client/customer relationship, to ensure that any transactions are consistent with the knowledge of the customer, his or her business and identified risk profile. Documents and information obtained in the course of applying these measures must be kept up-to-date and staff must be trained on the requirements of the new legislation.

The Regulations apply (with certain exceptions) to the following types of business:

- credit institutions;
- financial institutions;
- auditors, insolvency practitioners, external accountants and tax advisers;
- independent legal professionals;
- trust or company service providers;
- estate agents;
- high value dealers; and
- casinos.

It is the 'high value dealer' who is probably least likely to be aware of the impact of the new law. The legislation defines a high value dealer as 'a firm or sole trader who by way of business trades in goods (including an auctioneer dealing in goods), when he receives, in respect of any transaction, a payment or payments in cash of at least 15,000 Euros in total, whether the transaction is executed in a single operation or in several operations which appear to be linked'. Clearly, this definition will cover many businesses supplying high value goods where the customer wishes to pay in cash.

Contact us if you would like advice on how the new Money Laundering Regulations affect your business.

Company Road Safety – Police Get Tough

Employers who forget that their health and safety responsibilities extend to employees driving on company business should take note of a shift in the way police will investigate road accidents in future.

Research by the Health and Safety Executive shows that 20 people are killed and 250 are seriously injured each week in traffic accidents involving someone driving for business reasons. This has prompted the Metropolitan Police and several other forces to adopt a policy of investigating company road-safety procedures when an accident involving a work vehicle occurs.

Police will investigate whether the company has carried out basic checks, such as making sure employees using their own cars for business purposes have a valid driving licence, are insured to drive on business and have an MOT certificate for their vehicle. In addition, they intend to investigate the reasons for a vehicle involved in an accident being on the road.

Research by the Parliamentary Advisory Council for Transport Safety has found that employers often fail to consider the dangers posed by employees driving whilst tired. Practices such as expecting employees who drive on company business to work long hours or putting pressure on them to fulfil as many appointments as possible in a given period could be regarded as contributory factors by police investigating the reasons for an accident.

The Corporate Manslaughter Act, due to come into force in April 2008, will make it easier to bring cases against organisations when they are negligent in carrying out their health and safety obligations and this causes someone's death.

Contact us for advice on implementing a company road-safety policy.

Empty Properties – Rating Change Approaches

It has for some years been a bit of an oddity that with the economy buoyant, quite generous reliefs from business rates have been available where commercial premises are unoccupied.

Ironically, a change in the law reduces these reliefs just as the economy looks to be coming off the boil.

Vacant non-domestic properties are generally exempt from rates for three months. After that, rates are payable at 50 per cent until the property is again in occupation. Industrial properties and storage facilities enjoy 100 per cent rate relief until re-occupied. From 1 April 2008, subject to designated exemptions, the reliefs will disappear – after three months for non-domestic properties generally and after six months for industrial and storage premises.

Some classes of property will be zero rated if unoccupied. The exemption will apply to certain not-for-profit organisations, provided (it seems) that the property is likely next to be occupied by a not-for-profit tenant.

For landlords with property portfolios including commercial properties currently unlet, there is now a strong incentive to find tenants before the changes have an impact.

Contact us if you would like advice on any commercial property matter.

Is a Director an Employee?

When a company becomes insolvent, whether or not a shareholder and director is an employee, within the meaning of section 230 of the Employment Rights Act 1996 (ERA), for the purposes of a claim for statutory redundancy payment from the Secretary of State for Trade and Industry, can be difficult to ascertain. The Employment Appeal Tribunal (EAT) considered this issue in the case of *Nesbitt and Nesbitt v Secretary of State for Trade and Industry*.

Mr and Mrs Nesbitt were directors of APAC Computer Training Ltd. They managed the company on a day-to-day basis and between them owned 99.99 per cent of the shares. From the start, they had written contracts of employment with the company, in the same form as those of other company employees. They were paid salaries commensurate with their roles as the senior managers of the business but did not receive directors' fees or dividends.

In the course of 2006, the company became insolvent and on 3 July of that year the remaining employees, including Mr and Mrs Nesbitt, were made redundant by the liquidator. The couple applied to the Insolvency Service for redundancy payments under the insolvency provisions of the ERA. Their claims were rejected on the ground that they were not employees within the meaning of the Act.

The Employment Tribunal agreed with the Insolvency Service on the basis that the Nesbitts were in joint control of the company but the EAT overturned this decision on appeal. In its view, the fact of the Nesbitts' control over the company was not sufficient of itself to deprive them of employment status if they otherwise satisfied all the criteria for employment. In this case, apart from the level of control they had over the company, all the indications were that Mr and Mrs Nesbitt were employees. They had proper employment contracts (equivalent to those issued to other employees), they received all their remuneration by way of salary and they 'behaved like employees'.

One of the relevant factors to be taken into consideration in cases such as this is the contract of employment. We can assist you to ensure that your employment terms make sure you have the appropriate contractual relationship with your company.

Age Discrimination Cases on Hold

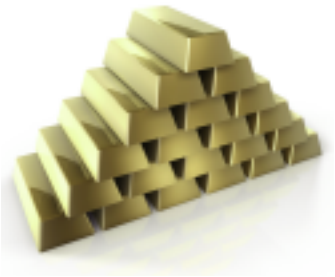
Following a Practice Direction handed down by the President of the Employment Tribunals, all age discrimination cases in England and Wales that relate to dismissal on the grounds of retirement arising under Regulation 30 of the Employment (Equality) Age Regulations 2006 (which provides for lawful retirement at or over age 65) are being stayed pending the ruling of the European Court of Justice on a challenge made by the Heyday organisation to the legality of UK retirement law. Heyday wants the legislation amended to give workers over 65 the same protection from discrimination as younger workers.

Retention of Title Can Include Commingled Goods

Retention of Title (ROT) clauses are often used in contracts for the supply of goods. The effect of the ROT clause is that the goods which have been supplied remain the property of the supplier until paid for in full by the purchaser. If the buyer goes broke or fails to pay for the items, the vendor has the right to recover its property.

For discrete items such clauses are relatively straightforward, as the items which are the subject of the ROT clause are easily identifiable. Problems arise, however, when the goods subject to the ROT clause are incorporated into something else. Clearly the vendor does not own the other goods, so is the ROT clause valid?

Normally, in such cases, if the goods subject to ROT have been converted into a new product or products, the ROT clause fails. However, a recent case showed an exception to the rule. It involved a company that supplied 217 tonnes of zinc in the form of ingots to another company. Zinc is normally supplied in ingot form. The company which purchased the zinc ingots melted them and mixed them in a tank with zinc from another supplier. There was a total of 265 tonnes of zinc in the tank.



The supplier claimed that 217 tonnes of the molten zinc in the tank belonged to it under the ROT clause. Despite the fact that the actual zinc it had supplied could not be distinguished from that supplied by others, the judge agreed. Crucially, the zinc in the tank was essentially the same material (though slightly less pure) than the material originally supplied. The zinc was still identifiable and thus the ROT clause held good.

When selling goods, ROT clauses are almost always worth including if there is a risk of non-payment and the goods themselves will be identifiable enough for the clause to be enforceable. If you supply goods, it might be worth checking that your current terms of trade incorporate best legal practice. We will be pleased to advise you.

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