

Fines for Breaches of the Data Protection Principles

The Criminal Justice and Immigration Act 2008 provides the power to impose civil monetary penalties for serious breaches of one or more of the eight principles in the Data Protection Act 1998 (DPA). These principles provide that personal information must be:

1. processed fairly and lawfully;
2. processed only for specified, lawful purposes;
3. adequate, relevant and not excessive;
4. accurate and kept up to date;
5. not kept for longer than is necessary;
6. processed in accordance with the rights of data subjects under the DPA;
7. kept secure from unauthorised or unlawful processing, loss or damage; and
8. not transferred to countries outside the European Economic Area unless adequate safeguards are in place.



Currently, however, the Information Commissioner's Office (ICO) only has limited powers at its disposal to punish those who contravene the DPA. Whilst the issuing of an enforcement notice is appropriate when a data controller commits a minor breach of the principles, the ICO has long sought the power to impose substantial penalties on those guilty of a more serious breach.

The Government has now published a proposal to give the ICO the power to levy fines up to a maximum penalty of

£500,000. Following consultation, a report on its findings will be issued.

Fines will be levied only if the ICO is convinced that the breach was deliberate or if the data controller knew, or ought to have known, that there was a risk of contravention of the principles which would be likely to cause substantial damage or distress and the data controller failed to take preventive action.

Draft guidance showing the criteria the ICO intends to use, and the circumstances it will take into account when issuing civil monetary penalties, is available at <http://www.ico.gov.uk>.

We can advise you on developing and enforcing data handling policies which fully comply with the DPA.

HMRC Can See Accountants' Tax Advice to Clients

HM Revenue and Customs (HMRC) recently won a significant victory in a tax case when the court ruled that tax advice given by an accounting firm to its client is not privileged. In other words, HMRC can force accountants to divulge advice given to their clients on tax law matters.

The case involved insurance

giant Prudential, but the ruling will be applicable to taxpayers large and small who engage accounting firms for tax advice.

The Special Commissioners ruled that where correspondence with accountants would add to the relevant facts determining tax liability, the issue of a notice

requiring disclosure of tax planning advice was valid, and that legal professional privilege did not apply.

Correspondence between solicitors and their clients in which legal advice is given is subject to privilege and will not be disclosed to HMRC.

Selling Your Business – Tax Considerations

With many companies suffering from the effects of the recession, business owners looking for an exit are thick on the ground. One problem those in this situation face is that if their business is in a fairly weak financial position, it is difficult to take a tough stance when negotiating over the structure of the sale.

Purchasers will normally prefer to buy the assets of a company rather than its shares. Most vendors will prefer a share sale rather than an asset sale because of the availability of entrepreneur's relief for Capital Gains Tax (CGT) purposes and the problems with extracting the cash from a company tax-efficiently if the assets of the company are sold. In practice, entrepreneur's relief often means a maximum rate of CGT of 10 per cent is paid. Extracting funds by way of dividend means that the Income Tax dividend rate of 32.5 per cent is applicable.

One possibility is to put the company into liquidation when the assets have been reduced to cash. If this is done, the distributions will be treated as distributions of capital and taxed under the CGT rules. However, a formal liquidation can be expensive.



A second possibility is to dissolve the company informally. HM Revenue and Customs will by concession treat distributions in an informal dissolution as capital distributions. However, this approach is not without problems. A creditor of the company has 20 years from the date of an informal dissolution to make a claim against the company (in a formal liquidation, the period is two years) – a long time to live with any uncertainty.

In the event that a capital distribution is made, this will qualify for entrepreneur's relief, provided certain conditions have been met for the 12 months prior to the distribution. These are that the person claiming the relief must have been an employee or director of the company, must own more than five per cent of the shares and the company must be a trading company. Any such capital distribution must be made within three years of the cessation of trade.

Your business may well be the most valuable asset you own. It is essential that you plan your exit strategy carefully and preferably early. High quality professional advice is crucial to maximising the benefit to you and your family.

Contact us if you would like advice on selling or planning your exit from your business.

Companies Act Model Articles – Think Before You Leap

The Companies Act 2006 came into effect fully on 1 October 2009.

One of the advantages of the Act is that it has made the incorporation of a company easier by creating a new and simplified set of model articles of incorporation.

However, before you rush off and buy an 'off the shelf' company, pause to

consider this – it is usually much more sensible to start with the right articles than to amend 'standard' articles to say what you mean later.

Articles tend to be of little importance to directors and shareholders until the company has 'grown up' a bit – by which time vested interests can be strong and changes to the internal regulations, such as alteration of share capital rights and so on, can be

difficult and full of hidden pitfalls. These sorts of issues can prove a disaster when there are discussions ongoing relating to the retirement of director-shareholders or a proposed purchase of the business or of a shareholding in it.

We can advise you on all matters relating to setting up in business and company law.

Guidance on Preventing Workplace Harassment and Violence

New guidance giving practical advice to businesses and employees on preventing workplace harassment and violence has been published following European level agreement between employer and trade union organisations on the necessity of raising awareness of this issue. The guidance has been produced after collaboration between the Government and employers, trade unions and other relevant agencies. As well as raising awareness

of the issues, it provides employers, workers and their representatives with ways of identifying, preventing and managing problems of harassment and all forms of violence at work.

The guidance can be found at <http://www.workplaceharassment.org.uk>.

Landlord Pays Price for Failing to Inform Tenant

If a landlord has concealed or misrepresented facts, it can be ordered to pay a departing commercial tenant compensation for any damages or loss sustained by the tenant that arise as a result of having to quit the premises.

The legislation bringing this into effect is relatively new and the first case in which it has been put to the test was only decided recently. It involved a landlord which gave notice to its tenant that it wished to refurbish the premises and that it was necessary for the landlord to obtain vacant possession of the premises to carry out the proposed works. This is one of the reasons for which a landlord can oppose the grant of a new lease to a tenant.

The tenant's lease was scheduled to come to an end in January 2007 and the landlord's notice was served in August 2006. The tenant offered to increase the rent payable to the landlord in exchange for a new lease, but the offer was refused by the landlord.

The landlord then changed its mind about the redevelopment and, in October 2006, it instructed agents to market the premises for let. The tenant was not informed of this and signed a lease on new premises in November 2006, vacating the old premises the following month.

When the tenant became aware of the fact that the landlord no longer intended to carry out the refurbishment of the premises, it sought compensation. The court took the view that the landlord had correctly stated its intentions at the time and had no obligation to inform the tenant of its change of mind. Accordingly, the tenant lost. The tenant then appealed the decision to the Court of Appeal.

The Court of Appeal considered that a landlord's conduct could give rise to a misrepresentation or concealment. The landlord's notice had referred to the statutory process whereby a tenant is required to vacate premises at the end of a lease because of the

landlord's formal opposition to the renewal of the lease. Accordingly, the representation made was either a continuing one or one which became false and thus created a duty to inform the tenant of the changed circumstances.



This case is important for landlords as, in similar circumstances, failing to notify a tenant of a change in intention after the tenant has been informed that its application for a new lease will be opposed may lead to a claim.

We can help you ensure you comply with your obligations as a landlord or tenant.

Good Faith and Errors in Documents

If you enter into a business contract in good faith and it subsequently transpires that the contract was incorrectly authorised or otherwise invalid from the perspective of the other party's internal regulations, where do you stand?

Two recent cases provide guidance on this contentious area.

In the first, a loan was advanced to a company by way of debenture, which is normal practice. When the lender wished to enforce the debenture, the company challenged its validity on the basis that the loan was authorised without the company's internal regulations being followed. Necessary notices convening the board meetings at which the loan was authorised were not given and the board meetings were not held in the Netherlands, as

was required by the articles of the company giving the debenture.

The company argued that the board resolutions authorising the debenture were not properly passed and could not therefore bind the company. In the view of the court, the lender had acted in good faith and it was thus protected by legislation that will bind a company 'free of any limitation under the company's constitution'. The debenture was therefore enforceable against the company.

In the second case, a bank found itself exposed under a debenture and cross-guarantee because only one director had signed the documentation. Two signatures were required and the director had counterfeited his co-director's signature, this being usual practice

for them when matters were agreed. However, on this occasion, there had been no agreement and the second director was unaware of the document. When the bank sought to appoint an administrator, after the company defaulted on its loan, the second director went to court to have the appointment set aside on the ground that the documentation for the loan had been forged.

Again, the court decided that the bank had acted in good faith. The forged document was enforceable against the company because the director who placed both 'signatures' on it had the ostensible authority of the other director to do so.

We can advise you on any aspect of contract law.

Workplace Car Parks – Transient Hazardous Conditions

The Health and Safety Executive reports that nearly 11,000 workers suffered serious injury as a result of a slip or trip in the last year. A recent case in the Scottish Court of Session examined the extent of an employer's liability after an employee slipped and was injured as a result of ice in the workplace car park (*Munro v Aberdeen City Council*).

Ms Munro based her claim on Regulation 5(1) of the Workplace (Health, Safety and Welfare) Regulations 1992, which provides that the workplace 'shall be maintained (including cleaned as appropriate) in an efficient state, in efficient working order and in good repair'. It was accepted that the duty imposed by Regulation 5(1) is strict. Were it to apply in this case, Ms Munro would be entitled to compensation without having to prove negligence on the part of the Council and there would be no 'reasonable practicability' defence open to her employer.

Aberdeen City Council argued that Regulation 5(1) did not apply but that Regulation 12(3) was relevant in this case. This provides that, 'so far as is reasonably practicable, every floor in a workplace and the surface of every traffic route in a workplace shall be kept free from obstructions and from any article or substance which may cause a person to slip, trip or fall'.



Ms Munro lost her case. The Court of Session drew a distinction between absolute duties for longer-term dangers and qualified duties for more transient hazards

and in so doing found itself in agreement with the reasoning of Lord Emslie in *McEwan v Lothian Buses*, which was that if the absolute duty presented under Regulation 5 were to be given a wholly unrestricted meaning, then many of the other Regulations would become 'otiose' and the 'qualification of reasonable practicability in particular defined situations (for example under Regulation 12(3)) might as well not be there at all'.

Whilst employers will be relieved to know that the law recognises it is not always reasonably practicable to eliminate transient risks, it is advisable to identify any areas of the premises that are likely to be affected by ice and assess the risks to employees and to members of the public. Have in place a procedure to prevent ice from forming whenever freezing temperatures are forecast.



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

43 TEMPLE ROW, BIRMINGHAM, B2 5LS
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 REGULATED BY THE SOLICITORS REGULATION AUTHORITY.

The information contained in this newsletter is intended for general guidance only. It provides useful information in a concise form and is not a substitute for obtaining legal advice. If you would like advice specific to your circumstances, please contact us.