



HARDER ECONOMIC TIMES CAN LEAD SOME OF OUR CLIENTS INTO FINANCIAL DIFFICULTIES.

We can assist with advice on when a company can be wound up, what is the best method of dealing with creditors and when administration rather than liquidation is a possibility.

For those who are sole traders, personal bankruptcy sometimes looms large. We can advise on when an independent voluntary arrangement with creditors (IVA) is possible. For those on the receiving end of customers or clients with financial problems, sometimes there are rights

to enter premises to retrieve goods for which payment has not been made under so-called 'retention of title' clauses. These clauses also state that the goods do not become the property of the buyer until payment is made. If your current conditions of sale do not provide for this we can update them to protect you in the future.

Sometimes difficult financial situations lead to the necessity to recover money through the courts. Although we encourage clients to settle disputes by discussion and, if necessary formal mediation, we can also litigate where necessary. A difficult customer may just need a solicitor's letter or threat to wind them up to ensure that payment is then forthcoming.

However, in all cases it is important to assess whether the debtor has funds to pay. If not, there is no point in proceeding. Some clients end up factoring their debts and we can advise on any contractual and legal issues arising from this route. Others will offer their bank a personal guarantee. It is always important to take full legal advice on the legal implications of this. If you would like us to advise on any litigation matter or insolvency issue, please contact us for further information.

PRICE FIXING AND COMPETITION LAW

For the first time, The Office of Fair Trading, has charged three men with a criminal breach of the competition rules.

The men made their first appearance in an English court on 30th January in London. Until now, only fines have been imposed for infringement of UK competition law. Although the OFT's powers came into force in 2003 these are the first criminal charges.

The men are directors of Dunlop Oil & Marine Ltd and a consultant. Their arrests took place at Heathrow Airport as they returned from the US. The charge is that they dishonestly participated in a cartel to rig bids, fix prices and allocate markets and customers for the sale of marine hose in the UK. Last year, they were arrested in the US for a similar offence. The arrests followed 'dawn raids' carried out

by the US Department of Justice, the OFT and the European Commission. They appear to have 'plea-bargained' in the US, pleading guilty to US charges in exchange for being allowed to return to the UK to be prosecuted and sentenced for the UK related offences by a UK court.

There have been a number of recent cases where directors have sought to be prosecuted in the UK rather than the US, most notably the NatWest Three. There are at least two other current UK cases where competition law criminal prosecutions are being considered including the alleged Virgin/BA fuel surcharges cartel.

It is wise for clients to have a competition law compliance programme and regular

reminders to staff about what action is lawful in this field and what is not.

Typical questions from clients include, what amounts to price fixing, what form of recommended resale pricing is allowed, how companies in a dominant position must act (including in relation to pricing issues), internet selling, territorial restrictions and refusals to supply potential customers.

Some clients also have 'dawn raids' policies which tell staff what to do if officials from the OFT or European Commission arrive at premises for an inspection.

We can help you draft documents or update your existing compliance programme as well as providing full advice on UK and EU competition law.

MENTAL CAPACITY ACT



The Mental Capacity Act makes important changes which will affect many people including the elderly and those who may not be in a position to

manage their own affairs. In October 2007, it came fully into force and the new Lasting Power of Attorney was introduced (replacing Enduring Powers of Attorney for new such powers).

Under the Act there are five key points:

- Every adult has the right to make his or her own decisions and must be assumed to have capacity to make them unless it is proved otherwise.
- A person must be given all practicable help before anyone treats them as not being able to make their own decisions.
- Just because an individual makes what might be seen as an unwise decision, they should not be treated as lacking capacity to make that decision.

A number of businesses are moving to forms of electronic contracting, orders and invoicing such as SAP systems.

However, many companies do not check that their standard terms and conditions on orders and order acknowledgements remain part of the contracting process once the changes are made. Commercial lawyers are increasingly finding that systems do not ensure that the trading conditions are sent or received and there does need to be legal input into any new processes which are set up. In general, terms and conditions are unlikely to apply particularly if they exclude or limit liability if they are not sent to the other contracting party. The same issue applies with terms and conditions on web sites – if they are buried on a section of the site no one can find then they may well not be applicable where goods or services are bought from the web site.

Even those who use paper based contracting can find problems if they have no good systems in place to send new customers their standard terms and in particular reject the buyer's terms (or the supplier's where the company is the buyer) each time they are sent to them. Some companies who do a lot of business with one customer will instead negotiate a signed master agreement and individual

- Anything done or any decision made on behalf of a person who lacks capacity must be done in their best interests.
- Anything done for or on behalf of a person who lacks capacity should be the least restrictive of their basic rights and freedoms.

Many of our local clients are unaware of the provisions of the Mental Capacity Act. It is wise to enter into a lasting power of attorney so that your affairs can be handled by those you trust once you lose capacity. In addition, the Act includes a new criminal offence of neglect or ill-treatment of a person who lacks capacity. The act aims to ensure that decisions that are made on the person's behalf are in their best interests. It also provides a checklist of things that decision makers must use and it introduces a Code of Practice for people such as healthcare workers who support people who have lost the capacity to make their own decisions.

The Mental Capacity Act set up a new service, the Independent Mental Capacity Advocate (IMCA) service. This aims to help people make decisions about their lives when they are vulnerable such as those with dementia, Alzheimer's disease, brain injury or a very severe learning disability. It is for those who do not have any relatives or friends to determine matters for them or voice their views.

If you need any advice in this area, want to set up a lasting power of attorney or work with the elderly or vulnerable and need an update on the latest changes, please call us.

purchase orders will be awarded under and by express reference to this Agreement. This is another way to operate which also ensures the terms apply.

In cases where neither party has any terms in writing, then it will be the nature of the transaction that determines what the contract terms might be, either because of what was said or in emails, or because conditions are implied by law. For example, unless excluded by a contract term, contracts for the sale of goods in the UK contain an implied condition that the goods will be of satisfactory quality.

Those who are involved with public sector contracting should be aware that new EU thresholds above which contracts must be put out to tender, were issued with effect from the start of this year.

When did you last have your business' standard terms of sale or purchase, agency and distribution and licensing agreements updated?

If it was some time ago it might be wise to ask us to update your contracts to ensure they are fully compliant with all current laws and adequately protect your business from a commercial perspective.

ILLEGAL FOREIGN WORKERS – NEW EMPLOYMENT RULES & YET ANOTHER EMPLOYMENT BILL



ON 29TH FEBRUARY 2008, NEW RULES CAME INTO FORCE WHICH CRACK DOWN ON ILLEGAL FOREIGN WORKERS.

These include:

- new penalties for employers who hire illegal immigrant workers with fines of up to £10,000 per worker imposed on the employer
- a criminal offence of “knowingly using illegal migrant labour” which can lead to up to two years in prison and an unlimited fine
- continuing responsibility for employers to check that workers continue to be allowed to work in the UK.

There are provisions in the new law for what is called a ‘statutory excuse’. This can be done by doing document checking before recruitment and repeating this every 12 months for those employees with limited leave to enter or remain in the UK. It is always wise to take

legal advice on employment law on a regular basis. If you would like us to advise on these issues, or what protection you can include in contracts with recruitment agencies or bodies from whom you hire contractors in these areas, contact us for information. PRADO, on the Council of the European Union website, is a very useful resource for checking the authenticity of European documents, including those issued by the United Kingdom, see:

www.consilium.europa.eu/prado/EN/homeIndex.html

Another unrelated change is the new Employment Bill published this year. This abolishes the existing statutory dispute resolution procedure. The law will revert to how it was before October 2004 when this complex and unpopular procedure came in. Employers will *not* now (once the Bill is law) have to follow the fixed resolution procedure. Previously, if employers had failed to follow the procedure exactly, the dismissal was automatically deemed unfair. There will also be no requirement for employees to submit a formal grievance before submitting some tribunal claims.

The ACAS Code of Practice will be revised and tribunals will be able to add up to 25% to financial awards for employees where the employer unreasonably fails to comply with a Code of Practice and a right for awards to be reduced by 25% where employees fail to follow a Code of Practice. The likely timetable for this change however, is not until April 2009 so for now the current complex procedures must be followed.

If you do need to cut staff costs due to the current financial climate we can advise you on what consultation with employees is needed and how to make redundancies in lawful fashion.

CONSUMER CREDIT LAW

The Office of Fair Trading has published revised guidance on fitness and requirements for Consumer Credit licence holders and applicants, as well as a statement of policy on civil penalties for failure to comply with requirements.

This follows the revisions to the Consumer Credit Act, which came into force on 6 April 2008, and explains how the OFT will:

- work with Local Authority Trading Standards Services to check that licensees in high risk business activities have the skills and knowledge needed and relevant business practices in place to carry out the activities covered by the licence to a reasonable standard, and
- issue most standard licences on an indefinite basis, instead of every five years, but using the improved investigation and information-gathering powers to request information from traders at any time while they are licensed. In certain circumstances, the OFT can also obtain a search warrant to enter premises and seize documents.

It is always worth businesses keeping an eye out for developments in the consumer credit field where their business does offer any kind of credit to consumers.

If you need any advice on whether consumer credit legislation applies to your business, please contact us for advice.

We can advise you on when you might require a consumer credit licence and the implications of implementation of the new Consumer Credit Act.

CONSTRUCTION REGULATIONS

It is all change for rules in the construction sector. The new Construction (Design and Management) (CDM) Regulations 2007's transitional period expired in April 2008. All those involved in the construction sector need some understanding of the regulations. Some contracts may need to be altered and many already have been to take account of the changes and to clarify the obligations of the various parties involved in the transaction.

Clients under the regulations are obliged to check the competence of independent designers and contractors in the construction field. Some projects are what are known as ‘Notifiable’ to the Health and Safety Executive and for those a CDM coordinator must be appointed before any important design work is done.

In addition, there must be a detailed Pre-Construction Information Pack put together during the design stage. CDM coordinators must assist the client in carrying out competence checks and try to ensure good communications between client, designers and contractors at all times. There was a 12 month transitional period for existing projects, but this expired on 6th April 2008. New projects started from 6th April 2007 have already come within the new regime.

If you would like advice on how the CDM regulations affect you or what you should include in contract terms about the respective responsibilities of the parties in the area of this kind of work, then call us now for advice.

LANDLORD AND TENANT – A ROLLS ROYCE OF A DISPUTE

In a recent case, *Cameron v Rolls-Royce*, Rolls Royce was negotiating new leases and those negotiations were not completed when the existing leases expired.

In due course, the parties agreed the terms for new 'contracted out' leases (leases without the long term protection of the Landlord and Tenant Act 1954) as the existing leases had been. However, there was a period before they took effect when Rolls-Royce had remained in occupation so the parties also negotiated a 'licence agreement' for that time. A licence is a permission to stay which is not as formal as a lease and of course, the law has much protection to ensure landlords do not call tenancies licences in an attempt to avoid protection for the tenants.

In this case, Rolls-Royce then said it would not sign the new leases and that the licence where it had

remained at the property amounted to a tenancy protected under the 1954 Act. The court ordered Rolls-Royce to proceed with the new lease. The lease was treated as one outside the protection of the LTA, as the parties had intended, and as the surrounding circumstances had made clear. The temporary licence between the two leases did not give the company additional protection by the back door.

This is an interesting case and shows the pitfalls which can arise in taking and granting business leases.

It is wise to take proper legal advice at the time of acquisition of a leasehold commercial interest (or indeed on a private flat or house in many cases) and before termination to ensure the lease and any protection and security of tenure is clear.

BANKRUPTCY AND DIVORCE

In a recent case - *Hains v Hill*, the Court of Appeal looked at claims by creditors where a property has been sold at an undervalue.

In this case, a man in financial difficulties gave his wife, whom he was divorcing, all the proceeds of sale of the marital home. The high court said the creditors could make claims on the money which caused lots of concerns amongst those who had divorced and subsequently their spouse had gone bankrupt, but the Court of Appeal has reversed this decision.

Those on the brink of divorce and bankruptcy may want to structure orders to ensure that pension assets which are outside the bankruptcy estate remain with the one in financial difficulties and capital from the house goes to the other spouse. The court made very clear however, that a collusive agreement between spouses that gives all the capital to one to avoid creditors of the other, could still be struck down but this may be quite hard to prove.

DAMAGES FOR REPETITIVE STRAIN INJURY

In one of many recent cases in the personal injury field, a factory worker in Wales has secured £17,000 compensation when she had to be retired on health grounds because of repetitive strain injury arising from her work.

In her job, this lady put accessories into a bag which came with a DVD player such as a remote control, battery pack and cables. She would pack about 4,500 bags each day. She claimed she was not given enough job rotation or breaks and so suffered repetitive strain injuries and had to be medically retired.

She has had surgery but the problems continue.

If you as an employee or employer have personal injury legal issues, please contact us for information on how to protect your position.

EMPLOYMENT LAW UPDATE – PART TIME WORKERS & FOREIGN TUPE TRANSFERS

Employment law is one area where changes are very frequent. All clients would be wise to ensure their employment contracts, staff handbooks and directors' service contracts are regularly updated. Also it is wise to take legal advice before sacking an employee as the law can be a minefield in this area.

Recent changes include:

(a) a recent European Court of Justice case (*Voss v Land Berlin*) which held that a part timer who often worked unpaid overtime and received less pay than a full timer was subject to 'detrimental treatment' compared with full timers and was entitled to equal pay. The case means part timers who work unpaid overtime who earn therefore less

pro rata for the same hours as full timers can bring a claim. It appears that part timers should be paid in full until they have done enough overtime to amount to the normal working hours of full time workers. (b) In a UK case (*Holis Metal*) the court held that the 2006 TUPE regulations apply where a worker is transferred on a business sale from a UK to a non-EU business. TUPE provides that where a business is transferred workers obtain some employment protection. Anyone not prepared to move from Tamworth to Israel was to be made redundant. The workers made a claim based on lack of consultation with them under TUPE. The Employment Appeal Tribunal held that TUPE could apply to foreign transfers but remitted this case back to the original tribunal for a decision.