



Heckford Norton

## **BRIEFCASE: LEGAL UPDATE FOR BUSINESS CLIENTS**

**Autumn 2009**

### ***Company/Commercial Update***

The Companies Act has now come into force in its entirety and the final tranche which came into force on 1<sup>st</sup> October 2009 changes many of the procedures which you will be used to so careful note should be taken of the following:

#### **nominal capital**

The concept of a nominal or authorised share capital is abolished, with shares only defined by their nominal value rather than by how many such shares there are. Instead, when making changes to share capital, a new document called Statement of Capital must also be filed which gives a snap-shot of the number of shares in issue and (if appropriate) their class and/or any special rights attaching to them;

#### **issued capital**

The existing form 88(2) is replaced by a new form SH01 which obviates the need to file the names of persons to whom those shares are issued as you only state the number and nominal value of shares issued. This makes it all the more important that the company properly updates its Register of members.

#### **the memorandum of association**

This will no longer be a statement of powers and objects but a historic document containing details of original subscribers, in effect, it has been done away with. Now all companies will be able to carry on any lawful activity unless otherwise restricted in their Articles of Association.

#### **directors' service address**

A natural director no longer has to file a residential address for service for inspection on the public record. Whilst the home address is still submitted to the Registrar this can be kept private and only in certain circumstances can certain bodies gain access to this information.

#### **company forms**

All of the existing forms are being replaced with new forms. For example the old form 288a is being replaced with a new form AP01 (for natural directors) or AP02 (for corporate directors) or AP03 (for natural secretaries) or AP04 (for corporate secretaries). (Of course, as you may already know companies do not have to

have a company secretary at all now and a sole director can execute any document on behalf of the company as long as their signature is properly witnessed, an important development for especially property transactions).

#### **Directors' duty of care update**

It should be remembered that non-executive directors have a positive duty to involve themselves in the affairs of the company. Mere inaction on the part of the non-exec can constitute a breach of duty as a recent Court of Appeal case shows.

The directors in this case (which involved the misappropriation of substantial funds) had known that the executive director had previous criminal convictions for dishonesty. They ought to have known that certain transactions shown in the accounts needed to be explained and should have been on their guard in relation to any attempt to explain, which would have certainly failed to satisfy them that the transactions were genuine. They should then have sought advice and informed the auditors and any other directors of the position. Accordingly, all directors must be proactive and vigilant in performing their duties and this is particularly important where there is a 'dominant' member who resists such enquiries.

#### **DIY contract drafting**

We sometimes come across business people who, quite understandably in a recession, seek to draft their own contracts in the belief it will save money. Unfortunately the results can be (and usually are) disastrous and very costly in the long run if there is a problem and one party then seeks to enforce an agreement which may well be unenforceable as a result of a defect. The probability of there being a fundamental problem with the agreement is high in all such cases as it actually takes many years of experience to fully grasp the pitfalls in contractual drafting, for example:

- obligations should be expressed as clear obligations the other side “must do x” or “will do x”. “May” is permissive and is likely to be construed as giving the other side a power to do something, and therefore choice as to whether or not to do it;
- you need to be careful about reasonable/best endeavours clauses which can imply vagueness and an evidential difficulty if the other side does not perform and you have to sue;
- the other side may want to be let off its obligations if it cannot perform because of circumstances beyond its apparent control: a carefully worded *force majeure* clause would be needed and care taken not to allow this if the other party is unable to perform because of its own action or inaction.

These are just three examples of some of the pitfalls which need to be traversed if, in the worst case scenario, expensive litigation is to be avoided. So it is always worth having your contracts professionally reviewed and drafted to secure peace of mind and for a tiny fraction of such potential litigation costs.

On a related theme, do check out if your commercial contracts have retention of title clauses as these enable you to recover goods if a buyer goes out of business, as without such a clause the ownership of the goods passes to the buyer on delivery not payment. They require careful drafting to avoid them becoming a ‘charge’ which is unenforceable and void (as it is not registered at Companies House) if they extend to finished products rather than goods supplied. It can be wise to have an ‘all monies clause’ and to take legal advice on what will be needed to prove ownership to a liquidator or administrator.

In drafting such clauses the following rules should be followed:

- (1)ensure the written terms apply and are compliant with case law on retention of title so that if a customer goes bust the seller can walk into their premises and take the goods back
- (2)give the seller a right of entry to buyer’s premises if payment is not made
- (3)require the buyer to mark the goods as the property of the supplier
- (4)keep full records of which goods have been paid for and which have not.

(5)retain title to intellectual property where this is supplied under the contract until payment is made

(6)do not retain title over goods once they are fixed to or mixed with other goods as a registrable charge is inadvertently created

(7)most importantly, ensure the terms containing the RoT clause apply and that this can be proved by a paper trail to a liquidator.

(8)terms on invoices are usually too late to be valid and unless purchase order terms are rejected, the supplier often finds their own terms of purchase were rejected by the buyer and do not apply.

We can check your retention of title clauses for you and help enforce them if a customer goes out of business.

*For more information and advice on corporate and commercial matters please contact Mike Crilly Tel: 01438 363363  
mpc@heckfordnorton.co.uk*

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### **Property Snippets...**

The recent decision in *Heronlea v Kwik-Fit Properties* shows the importance for landlords, when granting leases, of expressly reserving all the rights of entry that they might need to exercise during the term.

H had reserved the right to enter the premises for the purposes of “inspecting the premises for any purpose of making surveys or drawings of the premises”. K refused access when H wanted to undertake an environmental survey which would have involved drilling boreholes of up to 20 metres in depth on the basis that the reserved right did not cover such activities.

The court agreed with K that such activity went beyond the meaning of the word “survey” as argued by H, and it further interfered with the quiet enjoyment covenant.

Extreme care should also be taken by tenants in relation to break notices to avoid pitfalls as recently demonstrated by the Court of Appeal in *Orchard Developments v Reuters*.

In this case the tenant tried to terminate the lease by serving notice 6 months before the permitted break date at 5 years (“the formal notice”). Unfortunately the notice was posted in the wrong letterbox although a copy was also faxed to the landlord (“the informal notice”) but the landlord did not

acknowledge receipt of the informal notice until some ten months after the break date. The landlord disputed that the break had taken effect and the court agreed so the lease continued as once the break date had passed without acknowledgement of the informal notice it was too late for it to be retrospectively validated.

*For more information and advice contact Michelle Troupe Tel: 01438 363368 mt@heckfordnorton.co.uk*

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### **Employment Law Update**

To what extent can an employer use length of service as a criterion when selecting for redundancy? The concern, of course, is that it might be age discrimination (because younger employees tend to have less service). As a result of the recent Court of Appeal decision in a case involving Rolls-Royce and the union Unite has been confirmed that length of service can be taken into account as long as it is only one of several selection criteria. However, it seems that length of service alone ('last in, first out') will probably be discriminatory.

There has long been confusion as to whether an individual who is a controlling shareholder of a company can also be an employee. This could be important in the event of an insolvency because an employee can claim the following (albeit capped) benefits from the National Insurance fund:

- arrear of pay for up to eight weeks;
- statutory notice pay;
- up to six weeks' unpaid holiday pay in the 12 months before insolvency;
- any basic award for unfair dismissal or statutory redundancy;
- unpaid pension contributions

The Court of Appeal has recently decided that the controlling shareholders in two insolvent companies were indeed employees and so this is likely to be the rule going forward.

An employee attending a disciplinary or grievance hearing has a statutory right to be accompanied by a work colleague or by a trade union official but there is no statutory right to legal representation. However, it is now clear that potentially regard must be had to Human Rights legislation.

In one case a teacher was held to be entitled to legal representation but only because if found guilty of the allegation he might not have been able to work with children again in the future. In another case a doctor was entitled to legal representation in relation to an allegation of inappropriate touching as a finding against him of this kind of conduct could have resulted in him being unable to practice his profession. In both cases such rights were held to be applicable under Article 6 of Human Rights legislation.

In a recent decision, *Stringer v HMRC*, the European Court of Justice has confirmed that employees can accrue their statutory holiday entitlement throughout their sick leave and that their entitlement can be rolled over to another holiday year. They are also entitled to be paid for any unused holiday if they are dismissed. Most employers already do this but it is wise to take note of this clarification.

An unfair dismissal claim must be brought within 3 months of the Effective date of Termination (EDT). If summary dismissal is communicated by letter then the EDT will be the date when the employee reads or first has the opportunity to read the letter and this is usually be deemed to be two working days after the letter was sent, if sent first class.

A recent case, however, challenges this position. A dismissal letter was delivered to the employee on 30 November. However, the employee was away and did not read it until she returned on 4 December. It was held that the EDT was 4 December so the 3 month time limit ran from that date only. This is an unwelcome development for employers as there could be an uncertainty resulting in tactical and financial advantage for the employee. Therefore, consider communicating the decision to dismiss orally as well (as time starts running then) and consider sending letters by recorded delivery with proof of time of receipt.

*For more information and advice contact David Pidgeon on 01438 363369 dmp@heckfordnorton.co.uk or Mike Crilly (contact details above)*

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