SIMON BURN SOLICITORS

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Commercial Law UPDATE

BYOD – Data Controllers' Obligations

The Data Protection Act 1998 (DPA) requires data controllers to take appropriate technical and organisational measures to prevent unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

Where an employer allows workers to use their own personal devices, such as laptops, smartphones and tablet computers, this raises a number of data protection concerns. The trend, commonly known as 'bring your own device' or BYOD, can mean that workers' own devices are used to access and store corporate information, including personal data. It is therefore important for data controllers to remember that they have a duty to remain in control of the personal data for which they are responsible, regardless of who owns the device used to carry out the processing.

The Information Commissioner's Office has produced comprehensive guidance, entitled 'Bring your own device (BYOD)', to help data controllers comply with their duties in this respect. This recommends having a BYOD policy covering the types of personal data you are processing and the devices, including ownership, on which these will be held. The policy should be clearly understood by users connecting their own devices to your IT systems and regular checks should be carried out to ensure compliance. When drawing up the policy, the data controller will need to assess:

- what type of data is held;
- where data may be stored;
- how data is transferred;

- the potential for data leakage;
- blurring of personal and business use;
- the device's security capacities;
- what to do if the person who owns the device leaves your employment; and
- how to deal with the loss, theft, failure and support of a device.

The guidance gives tips on each of these areas, including the use of passwords, data encryption and other security measures that may be introduced, such as ensuring that access to the device is locked or data automatically deleted if an incorrect password is repeatedly input and the facility to locate devices remotely and to delete data on demand.

There is also a section on making sure the BYOD policy facilitates compliance with other aspects of the DPA.

We can guide you through the intricacies of data protection law.

Government to Review 'Pre-Pack' Administration

A pre-packaged administration (pre-pack) is one where the sale of an insolvent business and its assets is arranged prior to the onset of formal insolvency and takes place immediately, or very soon, after the administrator's appointment.

During 2011 (the latest year for which published figures are available), the Insolvency Service was notified of 723 pre-packs by insolvency practitioners. This represents approximately 25 per cent of all administrations during that year, and is broadly in line with the proportion of pre-packs undertaken in previous years.

Faced with calls for greater transparency, higher levels of compliance and a stricter regime of sanctions to prevent abuse of the process, the Government has announced an independent review into pre-pack administration. A timescale for this will be announced shortly.

Hazards of Signing Personal Guarantees Underlined

In a ruling which underlines the potential hazards of signing personal guarantees in respect of corporate debts, a businessman has been hit with a bill for more than £330,000 almost seven years after he resigned from the relevant company. The Court of Appeal ruled that he was liable under a personal guarantee even though a large proportion of the company's debts had been accrued following his departure.

The company, which supplied tools and materials to the building industry, had been provided with a substantial line of credit by National Merchant Buying Society Limited (NMBS), an industrial and provident society that bulk purchases goods at reduced rates on behalf of its members, of which the company was one.

The directors of the company had signed personal guarantees underwriting its debts to NMBS. At the time of the businessman's resignation as a director in 2006, the company owed NMBS £400,000. However, the debt was subsequently increased to £700,000 before the company became insolvent, went into creditors' voluntary liquidation and ceased to trade in 2008.

At first instance, the businessman and his former co-director were each held liable to pay NMBS £331,627.26 under the terms of their personal guarantees. He alone challenged that ruling on the basis that he had not consented to the increases to the company's credit limit subsequent to his resignation. It was submitted that those non-consensual increases amounted to variations of the contract between the company and NMBS, which had the effect of discharging his personal guarantee.

Dismissing the appeal, the Court ruled that the matter hinged on a straightforward interpretation of the wording of the guarantee. The businessman had undertaken to repay 'all sums which are now or may hereafter become owing' to NMBS. Had the parties intended to place any limit on that potential liability, the guarantee would have said so.

Personal guarantees must be approached with extreme care. Contact us for advice if you are asked to provide such a guarantee.

So Your Website Complies, But Do Your Apps?

A working party set up by the EU has concluded that many mobile 'apps' are failing to obtain the necessary consents from users to make sure they comply with EU data protection law. Among information being collected without 'informed consent' are pictures, location data and other personal details.

Breaches of data protection law can lead to substantial fines. Contact us for advice.

What Does Insolvency Mean?

The Supreme Court has issued a significant ruling which may have ramifications for companies that are technically insolvent and those that are seeking to rely on 'insolvency clauses' in agreements.

The case concerned a company that traded currencies. Due to movements between the relative values of the Euro, the US Dollar and Sterling, its balance sheet was technically insolvent. It did not, however, suffer from cash flow problems: some of its liabilities did not fall due until 2045.

Some of the organisations to which it owed money wished to precipitate a default by the company as they had priority of payment over other creditors. They sought to persuade the Court that the mere excess of liabilities over assets was sufficient to deem the company to be legally insolvent.

The Court of Appeal had previously concluded that a narrow, 'balance sheet' definition of insolvency was inadequate and that an ability to meet debts as they fell due (the 'cash flow test') was the critical factor.

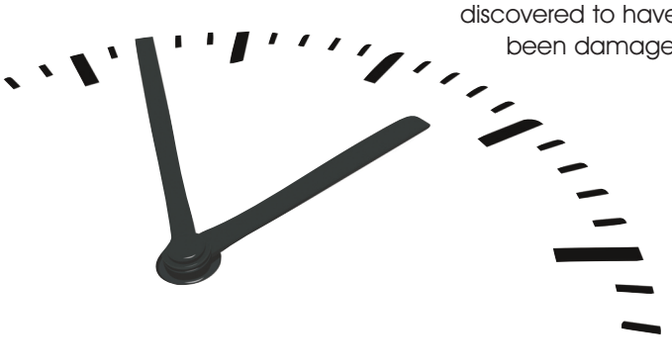
The Supreme Court dismissed the appeal and clarified the position. A company is not insolvent if, on the balance of probabilities, its assets will be sufficient to meet its liabilities (including contingent liabilities) in the 'reasonably near future'. The company was not, therefore, insolvent.

If your company is in financial difficulties and you are concerned about the potential effect of an insolvent position, contact us for advice.

Court Rejects Evidence Delivered Too Late

A recent case illustrates the importance of making sure that all the evidence which it is intended to rely on in legal proceedings is put before the court and made available to the other side in good time for them to evaluate it and prepare their response.

The case concerned pipes which were to be used in the construction of a waste disposal plant. These were discovered to have been damaged.



They had been manufactured in Romania and shipped to the UK. It was unclear whether they had been damaged in transit or on site in the UK and different insurers covered each possibility. When evidence was introduced at a very late stage in proceedings by one of the parties, the court refused to hear it, which resulted in an appeal.

The Court of Appeal gave the appeal short shrift, LJ Moses going so far as to comment, "I wish to underline the audacity, if not effrontery, with which the appellants have advanced this appeal." In its view, the finding of the lower court that the loss occurred in transit could not be criticised on the basis of the evidence available to the judge.

When conducting a legal dispute, it is important to collect and marshal your evidence promptly to ensure that your case can be argued as forcibly as possible. We can guide you to ensure your case is presented to give the best chance of success.

Lost Profits, Not Sales, Are Correct Measure of Loss

When copyright is infringed, the owner of the copyright material has the right to claim damages.

Often, the bulk of the argument in such cases is over the appropriate amount of the claim.

A recent case sheds light on how such claims are calculated. It involved several film studios, which sued the owner of an Internet file-sharing website that allowed the distribution of their films without authorisation.

The film studios claimed the gross receipts earned by the file-sharing site. The court could not accept that this was the correct measure. In its view, costs incurred must also be taken into account.

In UK law, the aim of such litigation is to restore the claimant to the position they would have been in had the unlawful activity not taken place and the restoration will be based on lost profits, not sales.

If another person or organisation is causing a loss to your business through improper business practice, contact us for advice.

Purchase of Own Shares – Simplification Proposed

The Government has taken a small step to simplify one difficult area of company law by proposing an easier system for companies to undertake a 'purchase of own shares' (POS).

POS is a very useful way of buying out minority shareholders and employee shareholders who realise their shares when they leave the company. However, company law requires that when the POS is carried out, the company must have sufficient 'available profits' or that it is financed by a new issue of shares or capital. Also, a special resolution of the company must be passed. The cost and complexity of these requirements mean that companies often avoid the use of POS where possible.

Under the new rules, companies will be able to buy back small shareholdings (up to the smaller of £15,000 or 5 per cent of the shares in issue) without first needing to check that distributable profits are sufficient to do so.

The means by which shareholders approve such transactions is also to be greatly simplified and the requirement that such shares are cancelled rather than being held 'in treasury' (which means being held by the company and available to be reissued) is being removed.

The proposals will undoubtedly be altered before the relevant law is passed and the above is a simplified version of the planned changes.

If your company needs to buy out minority shareholders or you wish to repurchase the shares of a departing employee, contact us for advice.

Unlawful Act Cannot Create Rights

A recent property case illustrated the general point that 'it is not for the claimants to take advantage of their own wrong'.

Tenants converted the upper part of the building they rented into a flat, in breach of a covenant on the property and without the landlord's consent. They subsequently let the flat on an assured tenancy. This was followed immediately by an application to acquire the freehold reversion of the property under the 'right to buy' legislation, which enables the long-term tenants of some properties to acquire the freeholds.

The dispute went all the way to the Court of Appeal, which concluded that the property was not a 'house, reasonably so called' and therefore was not eligible to be acquired under the right to buy legislation.

That decided the matter. However, the Court also considered the issue of whether or not alterations unlawfully made could justify a claim and ruled that the tenants 'could not enforce a right acquired by committing a wrong'.

Landlords will be thankful that the Court has adopted a commonsense approach in this case.

If someone you deal with is seeking to 'bend rules' in order to gain an advantage at your expense, contact us for advice on the appropriate steps to take.

Planning Relaxations to Help Struggling Traders

Recent amendments to planning law allow smaller High Street business premises to be used for different types of business activity without having to go through complex applications for change of use. New permitted development rights also allow offices to be converted into residential accommodation.

Subject to notification procedures, buildings that are classed for use as retail, financial services, restaurants, pubs and hot food takeaways, offices, leisure and assembly uses can be changed temporarily to another use class. They can be used for retail, financial services, restaurants and cafés and offices for a single period of up to two years.

Small agricultural buildings are allowed to be used for a number of other business purposes with permission.

There are a number of other changes, designed to provide the 'vital flexibility to enable the quick responses necessary to support business growth'.

We can advise you on any property law or planning matter.

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