

Pictons Commercial

Welcome to the Spring edition of Pictons Commercial, the legal briefing produced by Pictons' Commercial Department to provide information to its clients, contacts and businesses generally in the northern home counties. If you have any questions, please feel free to contact the individuals listed in this newsletter or your usual contact within Pictons.

New Addition to the Team

As part of Pictons' plans to expand its Commercial Team, we are pleased to announce the addition of Funke Abimbola as an assistant solicitor to the team. Funke arrives from Campbell Hooper, a well-established corporate firm in London and is 5 years qualified with broad-ranging expertise of company/commercial and corporate finance matters. Her experience includes advising businesses on mergers and acquisitions, joint ventures and commercial contracts/agreements (including distribution, agency and franchising) and she has particular experience of company listings on the Alternative Investment Market (AIM). Her sector expertise includes IT, media, leisure, financial services and property. Prior to Campbell Hooper, Funke was with niche corporate finance London firm Memery Crystal.

THE CORPORATE VEIL

One of the most important principles of company law (illustrated by the leading case of *Saloman v A Saloman And Co Ltd*) is that a company is a "body corporate", a legal person distinct from its shareholders, directors and secretary which enjoys corporate personality. This means that a company is able to, amongst other things, own its own property, be liable for its own debts and sue its debtors. The courts will very rarely "lift the veil of incorporation" by looking behind the legal "veil" which separates a company from its shareholders and officers but a recent case illustrates the courts' determination to do so where bogus identities are involved in the attempt by a nation state to defraud creditors.

In *Kensington International Ltd v Congo* (2005), Kensington and the Republic of Congo had entered into a number of loan and credit agreements. Kensington was owed money under these agreements and obtained judgements against the Congolese State for the monies due. When the monies were not forthcoming, Kensington sought to enforce the judgements by way of interim third party debt orders intercepting the sum of US\$39m payable by a company called Glencore in relation to a cargo of Congolese oil.

By way of explanation, the president of Congo had effectively set up a complex "web" of companies, all of which were ultimately controlled by him and one of which (a company called Sphynx) was to supply oil to Glencore. Kensington effectively argued that the various transactions involved were a sham and were mere "paper transactions". The companies were all run in such a way that the Republic of Congo was effectively selling the oil to Glencore and was receiving the US\$39m purchase price for the oil. Glencore's debt to Sphynx was in fact owed to the *Republic of Congo*. Kensington succeeded in being granted final third party debt orders in respect of the purchase price of the oil and was able to enforce its judgements against the Republic of Congo directly.

In addition, the Congolese State was unable to benefit from state immunity, which does not apply to commercial transactions such as this.

This important case shows that the courts will go to great lengths to reveal the true nature of commercial transactions – it matters not that these matters involve a nation state rather than an individual. The various companies involved in *Kensington* were all, effectively, part of the Congolese State and therefore could not benefit from corporate personality.

The Burning Question

Do you own a commercial unit? Do you have a fire certificate? Do you know that it will not be valid from 1st October 2006?

The Regulatory Reform (Fire Safety) Order 2005 comes into effect on the 1st October 2006 and will apply to most commercial premises.

The focus of the new regime is on risk assessment. It adds to the Fire Precautions (Workplace) Regulations 1997 under which an employer is required to comply with regulations in respect of any workplace under his control.

Compliance with the Order is the duty of a 'responsible person'. So who is a 'responsible person'?

- Employers with the workplace under their control; or
- The person who has control of the premises for trade or business, including a person with obligations under a lease or agreement for maintenance or safety of the building, such as Managing Agents.

The responsible person will be required to carry out an assessment and remove or reduce fire safety risks. The responsible person may be assisted by a 'competent person' and must ensure that the competent person has adequate training and time to assist him in his duties.

If more than five people are employed at the premises the findings of the risk assessment must be recorded.

What will be assessed during the risk assessment?

- Effective means of escape
- Fire fighting equipment
- Fire detection and warnings
- Installing emergency procedures in the event of a fire
- Storage of hazardous substances
- Work process including use of plant and machinery.

This is not a comprehensive list but provides an indication as to the amount of detail and time that will be required when carrying out the risk assessment.

The Order provides comprehensive provisions for risk assessment and the arrangements, so far as reasonably practicable, the responsible person must put in place to comply with the Order.

The provisions extend to employees who are under a duty to take reasonable care of themselves and their colleagues when performing their duties. This extends to a duty to notify their employer of any risks of which they become aware.

The duties of the responsible person are owed not only to employees but also to anyone lawfully on the premises or those in the immediate vicinity ('relevant persons'). This is an important consideration for the responsible person in respect of all aspects of the risk assessment from means of escape through to the storage of hazardous substances.

The risk assessment must be kept under constant review especially in circumstances where there is reason to suspect that it is no longer valid. This is particularly important when there have been changes to the premises or the work processes at the premises.

The Order has the effect of placing the responsibility for fire safety on owners, occupiers and employers instead of the Fire Authority. As of the 1st October 2006 fire certificates will no longer exist or be of any value, as they will not hold legal status.

The local fire authority will have wide enforcement powers in relation to these provisions, failure to comply will result in fines and/or imprisonment.

So if this applies to you keep on the look out for future directives and do not get your fingers burnt.

For further information regarding this or any other commercial property issues, contact **Gerard Sampson**.

Tupe Update

The Transfer of Undertakings (Protection of Employment) Regulations (TUPE) aim to protect employees when either the business employing them is sold or the service on which the employees work is contracted in or out. TUPE is an employment law minefield and, where it applies, its main effects are that:

- There is an automatic transfer of employees' contracts when an employing business is sold/transferred (on the same terms and conditions except for certain occupational pension rights). The new employer cannot pick and choose which employees to take on;
- All the former employer's liabilities to such an employee arising from the employment pass to the new employer (except criminal liabilities). In view of this, it is common practice for the new employer to require the former employer to indemnify him against any losses from such pre-transfer breaches of contract or employment law;
- Any such employee dismissed for a reason related to the transfer is automatically treated as unfairly dismissed and is eligible for compensation;
- Any existing collective agreements or trade union recognition also transfers; and
- Both the former and new employers must inform and consult representatives of their employees who may be either affected by the transfer or measures taken in connection with the transfer. These representatives have certain rights and protections to enable them to carry out their role properly.

A new TUPE came into force on 6th April 2006 aimed at clarifying this complex aspect of employment legislation. The key changes introduced are as follows:

- TUPE now covers cases where services are outsourced, insourced or assigned by a client to a new contractor (the "Service provision changes"). Although the effect of this is to significantly widen the scope of TUPE, this new change does not cover "one off" (as opposed to long term/ ongoing) relationships or situations mainly involving the supply of goods for the client's use. Unfortunately, there is now concern that, by removing the professional services exemption, companies who have whole teams dedicated to providing a service to them (within, for example, a firm of accountants or solicitors)

could come under pressure to instruct the same team at a different firm when deciding to switch advisers! It remains to be seen if the new changes will actually have this effect;

- There is a new duty on the old employer to provide "employee liability information" to the new employer (i.e. information about the transferring employees). Whilst the new employer will now have a much clearer picture of its obligations, this new duty is likely to become a significant additional burden upon the former employer, especially where a large number of employees are transferring, not only in terms of the time spent collating the information but also the financial consequences of not providing the information in the first place. Extensive details must now be provided, including the identity and ages of the transferring employees, their terms of employment, court or tribunal proceedings brought by employees in the two years prior to the transfer and any such claims the old employer reasonably believes may be brought. The information must generally be supplied at least two weeks before completion of the transfer and there is no entitlement to contract out of this duty. Failure to provide this information can incur a liability for the former employer of £500 per employee;
- To assist with the rescue of insolvent businesses, these can now be more easily transferred to new employers. For example, there is an increased ability to vary contracts of employment in order to ensure the preservation of jobs in the first place and, by implication, the likelihood that the transfer can go ahead;
- Employers and employees have more general clarity as to how far they can agree to vary employment contracts where TUPE applies;
- Employers also have greater clarity with regards unfair dismissal of employees for reasons related to the relevant transfer; and
- Compensation for a failure to inform and consult about the transfer with affected employees may now be awarded on a joint or severable liability basis between the old and the new employer.

For further information regarding corporate personality, the new TUPE update and other company/commercial matters, contact **Funke Abimbola**.

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