



Outside the Box

SUMMER
2009



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Commercial



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Pre-Packs In Administration

Article by Wendy Beach



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A 'pre-pack' is when an insolvent company is put into administration. Then, almost immediately, its business or any remaining assets are sold to a buyer. The process can be very controversial. Often the first occasion a creditor, who has supplied goods to the company, finds out that he will not be paid is after the sale. When, as often happens, the business or assets are sold to the owners of the insolvent company who acquire them debt free, the unpaid creditor can understandably feel very aggrieved.

with these guidelines will assist creditors to mount a legal claim against the administrator in misfeasance.

The Insolvency Service now also has a pre-pack complaints hotline. Administrators could face regulatory or disciplinary action if they fail to comply with the guidelines.

An administrator does not need the consent of unsecured creditors or the approval of the Court before agreeing a pre-pack.

Often however the best way for creditors to protect themselves against a pre-pack administration is to have their goods excluded from the pre-pack. This can be done by incorporating in the contract for the supply of the goods, as a standard term, a clause providing that ownership of the goods would not pass until the goods are fully paid for. This 'retention of title' clause means that the administrator will not have good title to the goods and therefore cannot sell them as part of the pre-pack.

In January 2009, the Insolvency Service issued new guidelines on pre-packs in response to creditors' concerns. The administrator now has to disclose the details about the sale, including how the price of the business or assets was calculated. Although not legally binding, a failure by an administrator to comply



NEWS

London Marathon 2009

"Fantastic!" "Loved every single minute!" "The sun shone, the crowd was electric, I didn't hit any 'walls' and I got over the finishing line!" are the words of Jane Winfield, Partner and head of the Property Department, following her successful completion of the London Marathon.



Unfortunately, Jane suffered a training injury leading up to the big day and was unsure whether or not

she would be able to run the marathon. Mentally, she knew she could "do the distance" but had no idea whether she would be able to run all or even part of the way as she simply had not been able to do enough training. Luckily, on the day everything came together perfectly. After walking a little in the initial few miles to take the pressure off her injury, she realised that there was a real possibility that she might get to the finish line and so decided to go for it and run! Jane was extremely pleased, therefore, to finish in a time of 4:49:14, which as a first marathon was obviously a personal best! Jane has raised approximately £1,500 for the Spinal Injuries Association. "I would just like to say a huge thank you to all the people who sponsored me and to all others for their support and kind wishes – along with a fair bit of work on the part of my legs they certainly helped carry me over that finishing line on the day!"

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Empty Property Rates Relief - One Year On

Article by Aaron Cane

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The Government overhauled the rating regime on vacant non-domestic properties on 1 April last year.

Prior to 1 April 2008 commercial properties were entitled to 100% relief for the first three months from the date they fell vacant after which time empty office and retail properties were entitled to 50% relief until reoccupied with empty industrial properties enjoying 100% rates relief until reoccupation.

As of 1 April 2008 industrial properties only receive full rates relief for 6 months with office and retail properties receiving just 3 months relief after which time rates are payable in full.

The timing of the legislation could barely have come at a worse time for commercial landlords. With the current economic downturn many landlords are experiencing insolvent tenants leaving them to deal

with not only the loss of income stream but picking up the rates liability.

The Government have however recently gone some way to ease pressure on commercial landlords. Prior to 1 April 2009 only properties with a rateable value of below £2,200 were exempt from the rating regime but from 1 April 2009 the Government increased that threshold to £15,000 for the financial year 2009/10 and it is estimated that this will result in up to 70% of empty commercial properties being exempt from business rates.

If you have an empty commercial property which has a rateable value in excess of £15,000 and are interested in ways you might mitigate your rates liability please contact a member of our property team.

Agents and Principals - Do Not Get Caught Out!

Article by Sue Dowman

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Does your business use agents to negotiate or conclude the sale and purchase of goods with customers on behalf of the business? Are you self-employed and do you have the authority to negotiate such contracts on behalf of a business? If the answer to either of these questions is yes, it is likely that there is a relationship of principal and agent and the Commercial Agents Regulations may apply.

Under the Regulations, a commercial agent has a right to a lump-sum payment on the termination of his agency. 'Termination' means both termination by notice and expiry of the agreed period. This payment can take the form of either an 'indemnity' or 'compensation'.

The indemnity payment limits the sum an agent can receive as it is capped at one year's commission based on the average commission earned by the agent over the previous five years. An indemnity is due if an agent has attracted new customers or has significantly increased the principal's business with existing customers.

The compensation entitlement is more complex. It is calculated by ascertaining the value of the agency business at the time of termination, including the value of the goodwill. There is no upper limit to the amount of compensation that can be awarded.

Except where the agreement provides otherwise, an agent will be entitled to compensation rather than an indemnity. From a principal's viewpoint, it is therefore vital to have a clear and effective agency agreement in place in order to minimise risk and potential cost.

The decision as to which termination payment to include in the agreement will have financial implications both for a principal and an agent. The decision will depend on a number of factors including: the success of the business, the goodwill associated with the agent and the agent's scope to grow the business. It is therefore advisable to seek legal advice.

Holiday Pay - Use It or Lose It No Longer...

Article by Sarah Stanier

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The House of Lords has now confirmed that workers on sick leave who are denied holiday pay can claim for unauthorised deduction from wages. The claim can be made to the Employment Tribunal under the Employment Rights Act 1996.

This decision follows a ruling by the European Court of Justice earlier this year. The court ruled that workers are entitled to the statutory minimum of four weeks holiday pay for each year they are on sick leave.

A worker on sick leave can be prevented from taking holiday if their terms of employment allow them to

carry over annual leave to a subsequent leave year.

However holiday continues to accrue for the duration of this sick leave and they must be allowed to take it upon their return to work.

Therefore if a worker's employment terminates while on sick leave they are entitled to a lump sum payment in lieu of accrued holiday not taken, regardless of the fact that they have been on sick leave. This will be in addition to any redundancy or termination payment.



NEWS

Brentwood School's Career Evening

On Thursday 19 March, Warren Hawkings, Miz Choudhury and Lori Spencer attended Brentwood School's Career Evening to offer students advice about careers in the legal profession. Numerous Universities, voluntary organisations and other businesses were involved in what proved to be a thoroughly successful evening.



We are pleased to support this event for a fourth consecutive year. If any of our contacts or clients have similar events in which they would like our help please let us know.

St Francis Hospice Quiz Night

We swotted up on our general knowledge to take a very respectable second place at a fundraising quiz organised by Bennetts Funeral Directors last month. Team "Midsomer" comprised litigation Partner Michael Callaghan and his wife Rebecca, wills and probate solicitor Andrew Spearman and his wife Jenny, and litigation solicitor Andrew Dashwood-Begg. The event was held at the Priory Church of St Laurence in Blackmore and raised approximately £750 for St Francis Hospice.

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Lasting Powers of Attorney - One Year On

Article by Warren Hawkings



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It has been possible to create a Lasting Power of Attorney ("LPA") since 1 October 2007. Before that date the equivalent document was an Enduring Power of Attorney.

Now that over a year has passed and we have all become accustomed to the new format, it is possible to review the usefulness of LPAs as a planning tool for, amongst others, businessmen and those who are putting their affairs in order following retirement.

LPAs can be created by anyone and are a sensible precaution against future accidents, illnesses and injuries that can incapacitate a person at any age. Notwithstanding such uses, the principal uptake is among the over 70's.

To be valid, the deed must be in the prescribed form. The donor of an LPA can confer on his or her attorney, or attorneys, a general authority to act in relation to all his or her property and affairs, or in relation to specific property and affairs, in the event that he or she becomes incapacitated or too frail to look after their own affairs. The authority can be made subject to conditions and restrictions.

There are two different types of LPA and it is possible to opt for both or just one. They are:

- (a) **A Personal Welfare LPA.** This allows the attorney to make decisions on behalf of the donor about their personal welfare, including whether to give or refuse consent to medical or life sustaining treatment on behalf of the donor and deciding where the donor is to live. Such decisions can only be taken on behalf of the donor when they lack capacity to make them themselves, for example if they are ill, unconscious or because of the onset of a condition such as dementia. It does not allow the attorney to make decisions about property and affairs.
- (b) **A Property and Affairs LPA.** This allows an attorney to make decisions on behalf of the donor about property and affairs. This might include:
 - dealing with business interests (see below);
 - opening, closing or operating a bank account;
 - claiming and receiving on behalf of the donor pensions, benefits, allowances, services, financial contributions, repayments etc;
 - making Tax Returns and adjusting and settling any claim for tax;
 - paying household expenses;
 - buying, leasing, selling and otherwise dealing with an interest in property of any kind or description;
 - paying for private medical care and residential care costs;
 - making gifts on your behalf subject to any restrictions;
 - implementing tax planning or similar arrangements

(this may need an application to the Court of Protection).

(This list is merely by way of example and is not intended to be exhaustive.)

Although a donor cannot delegate any powers that he may have as a director, an LPA could be used by an attorney of a majority shareholder to appoint him or herself or another as a director subject to the provisions of a Shareholder Agreement and the Articles of Association. An attorney could also carry on the business of a sole trader.

What are the safeguards?

An LPA is very powerful legal document and it is important to remember that once registered, a person appointed as attorney, unless restrictions have been included, can have the same control over the donor's money, savings, investments and property as they would have had themselves. When choosing an attorney, it is therefore imperative that the donor is one hundred per cent confident that the attorney knows precisely the donor's needs and will make the right decisions. There are certain safeguards built in to an LPA and these include:

- The requirement that the LPA must be registered before its use.
- A certificate provider confirming the donor understands the purpose of the LPA and the scope of the powers given to the attorney.
- Certain persons chosen by the donor and called "named persons" are notified before the document is registered.
- The right of specific people (the donor, the attorney and the named persons) to object to registration of the LPA.
- The attorney must have regard to the Code of Practice which provides guidance on the Mental Capacity Act 2005. This Code makes it clear that attorneys must always act in the best interests of the donor.
- The ability to revoke the document should you wish to change attorneys.

Optional safeguards include:

- restrictions and conditions in the LPA which the attorney must follow, eg that the attorney keeps accounts and that they submit the accounts to a person of the donor's choice such as a family member or professional; and
- giving guidance in the LPA which the attorney should take into account when making decisions on behalf of the donor.

There is no doubt that LPAs are, and will continue to be, an essential tool to enable your affairs to be dealt with should the need arise, whether expected or unexpected. They cannot be commended too highly.



NEWS

Farleigh Hospice's Walk for Life

On Sunday 10 May, Sue Dowman, Leslie Adler, Angela Thompson, Miz Choudhury, Lori Spencer and Lucy Folley and her family, were nine of the 1,828 walkers who turned up to put their best foot forward for Farleigh Hospice.

Those of the team who took part in the longer route of 19km started from the Heybridge Basin and ended up at Wharf Road in Chelmsford; with those who took part in the shorter 8km route joining them at Paper Mill Lock in Little Baddow.

It was great to see so many local people coming together to do their bit to support such a worthwhile cause. A good deal of fun and laughter was had by all on route, and more importantly a total of £170,000 was pledged in sponsorship. Needless to say there were a few with sore feet at the end of the 19km!

Sprint Triathlon

On 4 July, Lucy Folley, Partner and head of the Corporate Commercial Department, will be taking part in a Sprint Triathlon in order to raise money for a breast cancer charity.

We are fully behind her every step (or rather stroke, pedal and stride!) of the way. If you would like to join Lucy in supporting this cause please follow the link:

www.justgiving.com/lucy-folley.

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Employment Mountains and Molehills

Article by Christopher Everett

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An employment tribunal hearing in Stratford does not compare to drama in the Himalayas, but for an employer the risks of an avalanche of employment claims can be severe. Employers should be wary of these claims as the Employment Tribunal can order employers to pay damages in excess of £60,000.

To avoid the employer's equivalent of exposure, frost bite and hypothermia, an employer must ensure they are well-equipped. Employer's should provide employees with a written statement of their terms of employment and a copy of an employee handbook setting out key information and procedures, in particular, the employer's disciplinary and grievance procedures should be included. Without these in place, dealing with an employment claim would be like climbing Everest in stilettos and a mini skirt.

The risks of falling into a gaping employment law crevasse can be radically reduced if fair procedures are implemented and carried out when dealing with grievances, disciplinary matters and redundancy. In particular for disciplinary matters an employer should not give an aggrieved employee the cold shoulder but follow procedures and provide certain information.

Failure to do so would be like climbing K2 without crampons and an ice axe and the Employment Tribunal will hold that an employer has unfairly dismissed its employee. The employer could be left staring into the abyss.

Landlords' Liability Under Deemed Contracts with Gas and Electricity Suppliers

Article by John Southan

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Landlords should take note of their potential liability to gas and electricity suppliers under deemed contracts after their tenants vacate premises. Suppliers benefit from statutory provisions which mean if they supply vacant premises with gas and electricity and the previous tenant's contract with the supplier has ended the supplier may have a deemed contract with the landlord.

When a tenancy ends a landlord will want to discover: Who makes the supply? What are the termination provisions of the tenant's contract with the supplier? When does the supplier consider it has a deemed contract with the landlord?

A landlord should take steps to prepare for this before the event. Know who your tenants' suppliers are,

on what terms, and whether or not the contract includes enhanced capacity. Talk to tenants prior to the end of a tenancy to discover what arrangements they have made to terminate the supply or contract.

After a tenancy ends contact the suppliers. If there is a deemed contract then ask for a copy of the terms so you know your potential liability as landlord. Consider removing extras under the supply contract, changing suppliers or disconnection and the costs and notice periods of doing so.

Preparation and information gathering is, as with other aspects of property management, preferable to surprise bills and arguing the matter after the event.

And Finally... News About Our Clients



We would like to congratulate Jane Bennett, of Bennetts Funerals (with offices in Brentwood and Billericay), on the successful completion of her first London marathon. Jane completed the grueling 26.2 mile route in a time of 5:25:53. We were pleased to sponsor Jane, and monies go to her chosen charity of St Francis Hospice. Jane is continuing her sterling fundraising efforts with a parachute jump, and, during October, will be trekking in the Himalayas to the Everest Base Camp. If you would like to sponsor Jane please visit her webpage at: www.justgiving.com/janeybennett.

Mark Pinnock who is involved in a number of businesses, including Prima Services Limited, Savills Catering Limited and Absolute Gold LLP, is part of a team of eight, currently climbing 20,320ft to the summit of Denali, close to the Arctic Circle, arguably the coldest mountain on earth! All sponsorship money raised will go to a children's orphanage in India. If you would like to support Mark on his quest and for this worthy cause, please let us know. We wish Mark and his team the best of luck.



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