BusinessUpdate

WALL JAMES CHAPPELL SOLICITORS

**Summer** 2010

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# Challenges ahead

The past two years has unquestionably been a period of difficult trading conditions for many of our business clients. Even so the firm has found ourselves advising on a number of business start-ups and corporate transactions.

There has inevitably been a certain amount of distressed business sales and acquisitions. However, we have continued to experience reasonable levels of 'standard' commercial instructions such as contract drafting, reviewing terms of business, shareholder agreements and succession planning.

As expected, our employment department has advised on a number of contentious matters and our commercial property solicitors remain optimistic for the property market in 2010.

Our support for local manufacturing through our founder membership of the Made In The Midlands campaign has been well received both by clients and the business community.

We have also forged relationships with organisations able to offer finance through grants and loans to help clients grow their businesses.

The team is keeping a close eye on the planned business measures of the new Conservative/Liberal Democrat government. Most notably the increase in the Employers' National Insurance thresholds, taxing of non-business capital gains and the detail behind George Osbourne's emergency June budget .

# Bribery Act 2010: implications for business

The Bribery Act 2010 was introduced to strengthen the existing bribery and corruption laws in the UK.

The legislation introduces four offences: bribing another person; being bribed; bribing a foreign public official; and failure of a commercial organisation to prevent bribery. All of the offences are punishable (on indictment) by an unlimited fine and the first three offences are punishable by up to ten years' imprisonment. The Act is expected to come into force in stages between June and October 2010.

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# Preparing to pre-pack!

Recent changes to the Insolvency Rules 1986 have altered the way in which an administrator's remuneration and expenses are dealt with.

A pre-pack is the name given to an arrangement under which the sale of all or part of a company's business or assets is "negotiated with a purchaser before the appointment of an administrator".

The sale is completed by the administrator shortly after their appointment. This reverses the standard process, where the administrators start marketing the business after they have been appointed. The purchaser may be a competitor or, as is often the case, the existing management team because of their existing knowledge of the business and assets.

Costs and expenses incurred by insolvency practitioners in the run up to the administration of a company will now become recoverable from the assets realised in the administration. It seems likely that the changes will enable administrators to recover the costs incurred in negotiating a pre-pack sale of the company's business and assets from the sales proceeds before distributing the proceeds.

The main advantage to both business owners and creditors is the speed with which it can be concluded. Often there is no other option and the alternative would be liquidation and the immediate cessation of the company's business.

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# Employment: Getting the recovery right

Following on from the General Election and with a more stable economy expected, Wall James Chappell's Employment Partner, Simon Beddow, looks at what to expect in the coming year and beyond.

The Conservative approach is to simplify employment law with the aim to make recruitment easier. A review of both existing and proposed employment law for potential adverse effects on business is to be carried out.

Working with the Liberal Democrats would be expected to ultimately lead to compromise. However, similar policies are in both manifestos to bring in a system of 'pay audits' to help equality in the work force. As would be expected the Liberals push harder on this policy, but it is yet to be seen who will win that argument in cabinet.

Aside from the election, as of 6 April regulations are in force to aid new parents for babies born on or after 3 April 2011. "Employees will then be able to take up to 26 weeks' paternity leave, should the mother return to work early". It is your responsibility as an employer to ensure your policies are expected to provide for the regulations.

With businesses starting to look to the future after the recession, bringing in new employees or restoring capacity, the importance of good advice is as vital as ever. A recent Employment Appeal Tribunal shows the value of having good, updated procedures and documentation in your HR department.

A well known supermarket had as part of its staff handbook *"the right to review, revise, amend or replace the contents of this handbook, and introduce new policies from time to time reflecting the changed needs of the business"*. As they consulted with employees on changing pay structures, several thousand refused an agreement, with the supermarket left to rely on the staff handbook to force the change through.

The employees brought a case through the tribunal for unauthorised deductions from wages which was dismissed. The tribunal held that the employees were clearly informed by the staff handbook that changes could be made if necessary without their consent.

The employer was not given free reign to make whatever changes they like. The more unfavourable the change, the closer the tribunal will look at it. What is clear however is that with good advice on your HR documentation and procedures, a stable workforce to drive your company can be built.

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# What happens if a tenant goes into administration?

Administration is the procedure which aims to give breathing space to a company in financial difficulty with a view to its rescue.

If an Administration Order is made pursuant to the provisions of the Insolvency Act 1986, an Administrator is appointed by the Court to manage the affairs of the company with the object of:

1. rescuing the company as a going concern; or
2. achieving better results for the company's creditors as a whole than would be achieved in liquidation; or
3. realising property in order to make a distribution to one or more secured or preferential creditors (if options 1 and 2 are unrealistic).

Without the leave of the Court or consent of the Administrator, a Landlord cannot:

1. take any steps to enforce security over the Tenant's property;
2. exercise forfeiture, either by peaceable re-entry or legal proceedings;
3. distrain against any of the Tenant's goods;
commence legal proceedings against the Tenant.

The reasoning behind these restrictions is to "allow the Administrator time to concentrate on producing a rescue plan" for the business with a view to possibly selling the business as a going concern. Similarly, an Administrator has no right to disclaim a lease.

Often, the first a Landlord knows of the Administration is when he receives formal notice of it, which must be sent within 6 weeks of commencement of the Administration.

It is now established law that where an Administrator uses the Tenant's premises during the Administration period, for example, for trading and storing purposes, rent for that period is treated as an expense of the Administration and as such ranks the Landlord ahead of unsecured creditors. Once the premises fall vacant, the Administrator has no obligation to pay rent and the Landlord simply becomes an unsecured creditor.

It is worth considering putting an Administrator on notice that an application for permission to forfeit will be made unless the rent is paid or the Administrator consents to the forfeiture or surrender of the Lease if you are looking to re-let the premises out as soon as possible.

However, if it is likely that the premises are difficult to re-let, "consideration needs to be given to the Landlord's liability for future business rates" because as soon as the Landlord takes the premises back the Landlord will be responsible for the Business Rates. Empty Rates Relief now only lasts 3 months for office and retail premises and 6 months for industrial properties.

Pre-Administration arrears of rent are usually left outstanding and dealt with in the usual course of the Administration as an unsecured creditor. There may be nothing left at the end of the Administration for unsecured creditors. However, if there is a Guarantor provided for in the Lease, you can take action against the Guarantor unless the Guarantor is also in Administration. In addition, if you have a Rent Deposit which is secured by way of a charge which has been correctly registered at Companies House, it is generally considered that Administrators will, if requested, allow for drawing on the Rent Deposit, although this area is still uncertain.

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# Green leases: The way forward

Commercial property is estimated to contribute around a fifth of the UK's carbon emissions. Both domestic and European law are driving factors towards improving properties' environmental performance and reducing their carbon footprint.

In the future, further penalties or taxes may be introduced to encourage energy efficient use of properties

The property industry is looking to minimise the impact a building has on the environment by designing energy efficient buildings, introducing energy saving schemes and reducing water consumption.

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If a landlord is looking to become more green the starting point would be to publish an environmental policy for managing the building. The next step, would be getting existing tenants to agree to and sign a Memorandum of Understanding.

A "Memorandum of Understanding is a simple agreement" between the landlord and occupiers of the building to work together to improve the environmental performance of the building. It is generally not legally binding, although the parties agree to work together in good faith, say for a period of 12 months. It is likely to include an agreement to:-

1. Cooperate to reduce consumption through the development of joint targets and the undertaking of energy audits.
2. Share data relating to energy consumption.
3. Develop waste management strategy including recycling targets
4. Reduce water consumption, for example, through the installation of water saving schemes
5. Identify costs of green initiatives in the service charge accounts
6. Produce a travel plan, for example, to encourage public transport and the provision of bicycle storage racks.

The next step would be to grant Green Leases to all new occupiers and on lease renewals.

A Green Lease generally contains a clause encouraging the parties to cooperate via the Memorandum of Understanding to ensure that the building is run in a manner which is energy efficient. It is also likely to:-

1. Restrict alterations if they would have an adverse impact on energy efficiency and not require reinstatement of any alteration which has improved energy efficiency.
2. Require the tenant to use waste and cleaning services provided by the landlord which are to be operated at maximum energy efficiency.
3. Give the right for the landlord to modify the building in order to increase energy efficiency
4. Oblige the landlord to provide services energy efficiently and to consider altering the service charge percentage contributions to reflect the energy efficiency of individual tenants.

The climate change and "green agenda is here to stay" and in the future Green Leases will become more common. Many businesses are looking to project a corporate social responsibility image and more landlords and tenants are looking to associate themselves with energy efficiency. Adopting a Green Lease may until they become more common set you aside from other landlords and might attract tenants sharing the same environmentally friendly values.

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# Protecting your assets from property fraud

A couple of years ago an MP discovered that he no longer owned his nice investment property in Brighton, as it had been mortgaged without his knowledge by a third party, who then defaulted on the mortgage.

How did this come about? Is there a risk of it happening to you?

When the Land Registration Act, 1925 was brought into force, the register of properties and their owner (the Registered Proprietor - RP) was confidential. Until relatively recently it was necessary to obtain the RP's permission to see the entries in HM Land Registry. After the Land Registration Act 2003, the situation has now changed. "Anybody can obtain full details of who owns what, the price they paid, and whether there is a mortgage".

When the title to land is dealt with, the Land Registry communicates with the Solicitor or Licensed Conveyancer who lodged the application, or with the RP direct at the address for the RP recorded on the register (the Registered Address – RA). This may be different from the property address for the RP of rented or vacant properties, as letters to non-resident RPs might not be received.

The fraudsters had notified the Land Registry of a new (fictitious) RA for the MP, so they received his mail. Having ascertained that he did not have a mortgage, they forged his signature on a deed transferring the property to them in a fictitious name, then mortgaged the premises using forged identity documentation (this would have been much harder if there had been an existing mortgage to pay off, as a lender will send funds only to a Conveyancer, who must ensure that any previous charge is removed).

The Land Registry has now changed its procedures and will write to the existing RA to check that any instructions for change to a new RA are genuine.
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It is important that RPs do their part by checking that the RA is up-to-date. It is possible to give up to three addresses, including an e-mail or overseas one. This is particularly important when there is no mortgage.

Landlords may care also to check the identity of prospective tenants, who may be fraudsters waiting to intercept mail to the RP at the property address. Anyone moving out but not selling a property should also consider changing the RA.

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# The benefits of town planning advice for business

The planning system can seem like Pandora's box, but in reality the correct legal and town planning advice can help your planning application through the system. By appointing a planning adviser as early as possible in your application, you give yourself a better chance to find solutions to problems you may face.

Whilst many applications are made without specific legal or planning advice, the case of "*Francis v First Secretary of State [2008] EWCA Civ 890* demonstrates the value of practical expertise", especially if your application is likely to head to appeal. Expert knowledge can make the difference between your application being viewed as potentially acceptable, or currently unacceptable. A seemingly fine margin maybe, but it is one that the system itself makes all the wider. In the hearing system the Planning Inspector is not appointed to get to the bottom of the facts; merely to assess those placed in front of him.

The case dealt with an application to use premises for the preparation of hot food, with the owner of the premises starting such activities prior to the application. The application was rejected and on appeal the inspector, on the facts of the case before him, rejected the application. When the shop owner complained about the nature of the Inspectors conduct, the courts held that the inspector was to look at the information in front of him and need not go any further. As it happened a simple extractor scheme could have obviated the problem, thereby making the application more likely to be accepted by the inspector.

By taking on more advice at an initial stage it is possible to look at planning policy and find practical solutions to where your project falls foul of the rules. Having town planners as well as legal expertise in the area, Wall James Chappell is perfectly placed to help you find solutions. Senior Town Planner Elizabeth Mitchell has amassed a number of years experience in the industry giving her the foresight needed to navigate her way through planning policy. Whether you are developing your real property, or changing how you use those assets, forewarned is forearmed.

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