

## Company Must Follow Rules

When a company is in financial difficulties, the details of its internal regulations tend to be near the bottom of the list of considerations when directors are making decisions. Regrettably, company law does not make allowances for this, which led to a recent case in which the validity of the appointment of an administrator was challenged.

The decision to appoint the administrator was supported by a majority of the directors, but no board meeting had been convened and no notice had been given to the members of the board. The appointment was challenged by a director who had not been present when the decision was made.

The first question the court dealt with was 'Can a majority of the board of directors ratify a decision which was not taken in accordance with the

company's articles of association?'

The second question was 'Can the company dispense with issuing notices to "concerned persons" regarding the intention to appoint an administrator?'

The High Court ruled that the answer to both questions was 'no' and therefore the appointment of the administrator was invalidated by each of the failures.

Failing to abide by the internal regulations of the company, or to comply with company law in general, can cause far more problems than one might think.

**We can advise you on your company law obligations and assist you if you have internal problems or other legal difficulties.**

## Construction Act Changes

On 1 October 2011, changes to the Housing Grants, Construction and Regeneration Act 1996 (normally called the Construction Act) came into force. These apply to all relevant contracts entered into from that date.

The changes include:

- The removal of the requirement that construction contracts covered by the Act must be in writing;
- The abolition of clauses which require the party putting a matter to adjudication to meet the costs of the adjudication – any such agreement will be ineffective unless it is in writing and has been made after the giving of notice of intention to refer the dispute to adjudication;
- The abolition of 'pay when certified' clauses. These effectively pass the debt risk of the contractor 'down the chain' to subcontractors, who are not entitled to payment until the contractor is entitled to be paid;
- The requirement that a mechanism for raising payment notices be included in the contract. This must state whether the notices are to be issued by the payer or payee. Each notice must set out the



sum due (even if nil) and how it has been calculated; and

- The permitting of partial suspension of work under a contract while disputes are negotiated. Previously, suspension was an 'all or nothing' remedy.

The changes are significant and raise the possibility that disputes may increase because verbal contracts or variations of contracts are alleged to have been made. For contractors, the abolition of 'pay when certified' clauses may lead to significant financial issues. In addition, standard documentation will need to be revised.

**For advice on compliance with the changes, please contact us.**

## Vacant Possession Means What It Says

**W**hen does a commercial property become vacant under a lease agreement? This was the question considered in a recent hearing in the Court of Appeal.

The appeal was brought by haulage and storage firm NYK Logistics (UK) Ltd., a former tenant of Netherlands property owner Ibrend Estates BV. On 3 April 2008, NYK had signed a two-year continuation of an existing lease with Ibrend, on a warehouse property with offices and secure yard space, at a yearly rent of £278,000 for some 80,000 square feet in total. The schedule to the lease included a tenant break clause, allowing NYK to terminate the lease on 3 April 2009, provided six months' notice was given, all rent was paid up to that date and NYK delivered vacant possession on that date. The dispute arose as to whether or not vacant possession had been given on the date specified under the lease agreement.

It was agreed that on 26 September 2008 NYK had given valid notice to end the term of the lease on 3 April 2009. In January 2009, surveyors for Ibrend were instructed to prepare a schedule of dilapidations on the premises. The resulting schedule was not passed to NYK until 11 March. NYK proceeded with repairs and requested a site meeting to review the progress of the works. The meeting did not take place until 1 April 2009, two days before the lease was due to end.

At the meeting, it was agreed that most of the repairs had been completed, but there were still outstanding defects. The County Court found that it was clear that the outstanding matters could not have been completed by 3 April but could have been completed shortly thereafter.

Following the meeting, NYK proposed that it should extend security at the premises for a further week and continue with the repairs but without further payment of rent. Despite various attempts to obtain a response from Ibrend's representatives, no agreement was reached regarding NYK's briefly extended presence on the site. On 9 April, the work having been completed and attempts made to return the keys to the premises, a solicitor's letter from Ibrend notified NYK that it had breached the vacant possession clause in the lease agreement.

NYK expressed outrage at the letter and won some sympathy from Sheffield County Court. The Court ruled in favour of



Ibrend, however, on the grounds that although NYK had remained on site purely to effect the agreed repairs, they should have handed over the keys on 3 April. Had they done so, the fact that some repairs would have been left undone would not have breached any term of the lease.

At appeal, it was argued that NYK's continued presence on the site for a few days after the 3 April deadline was minimal and did not hinder Ibrend's access to the site. It was held, however, that in order to satisfy the vacant possession condition in the break option, NYK had to give such possession to Ibrend by midnight on 3 April and not a minute later. At the moment that vacant possession is required to be given, the property must be empty of people and the rightful occupier must be able to assume and enjoy immediate and exclusive possession, occupation and control of it. In so stating, the Court of Appeal dismissed the appeal. NYK must therefore pay rent for the period of rental from 3 April until the next available termination date of 25 December 2009.

**The Court ruled that the tenant should not have relied on anything other than a written agreement to waive the vacant possession date. 'Understandings' are dangerous things. To make sure you avoid property law traps, contact us.**

## Unclear Lease Terms Cost Subtenant

**I**n a recent case, the Court of Appeal had to decide the appropriate rent when a lease between a tenant and subtenant that was unclear came up for review. The issue arose because rental values had risen then fallen after the

subtenancy was granted. The tenant had an 'upward only' rent clause, so was paying above the market rent when the rent review fell due. The Court ruled that the subtenant had to pay the same rent as the tenant paid the landlord.

## Are Your Website Images Legal?

The Forum of Private Business (FPB) has reported a noticeable increase in calls to its helpline from businesses that have inadvertently included on their websites images that are protected by copyright and subsequently received demands for payment from the copyright owners.

FPB Chief Executive Phil Orford said, "I think the digital age has blurred the boundaries of image copyright in many people's minds and some business owners mistakenly think that because an image is freely available on the Internet, it can be reused without permission.

"Additionally, many smaller businesses entrust web design companies with the whole process of registering and creating their website, and presume that their web design

company will only use images they are entitled to use. However, this isn't always the case, so I would urge business owners to check they are legally entitled to use each and every image on their websites."

Software exists which enables copyright holders to scan the Internet to identify any use of their pictures, so anyone who uses images without a valid licence to do so runs the risk of claims from companies such as Getty Images, which has a policy of actively pursuing infringements of its copyright.

**Contact us for advice on protecting your intellectual assets and staying within the laws governing intellectual property.**

## Salary Sacrifice – VAT Changes

HM Revenue and Customs (HMRC) have announced that, from 1 January 2012, supplies made by employers under salary sacrifice schemes (schemes whereby an employee accepts a lower salary in return for receiving certain benefits) will be treated as taxable supplies made by the employer and that output VAT

will have to be accounted for as appropriate.

The revision follows a recent decision of the European Court of Justice that retail vouchers supplied to employees under a salary sacrifice scheme were taxable supplies. HMRC have indicated that they will regard all such supplies (not

just retail vouchers) as taxable at the appropriate rate of VAT.

**Businesses using such schemes are advised to consider the impact that the change in practice will have on them, not only in tax terms but in terms of variations to employee contracts.**

## Contract Terms Defeat Farmers When Rocket Fails to Fire

Although strong consumer protection law exists with regard to retail sales and sales which have long-term implications (mainly insurance contracts and 'doorstep' sales), in business, when a product doesn't come up to expectations, your right of redress usually depends on what your contract says.

A recent agricultural case illustrates the importance of reading and understanding the contract terms in full.

A group of four farmers sued the supplier of semen from a bull known as 'Tamhorn Rocket' when the expected number of calvings did not occur. Buried in the small print of the contract was a clause that absolved the supplier in these circumstances. Two of the farmers had not seen the contract. The other two had and were regular customers of the supplier.

The two farmers who had seen the contract were ruled to have accepted it on the basis of their course of dealing with the supplier. They were ordered to pay £50,000 each

towards the supplier's legal fees. The other two farmers won their claims and were awarded almost £71,000 in damages and 80 per cent of their legal costs.

**If you are considering entering into any contract, contact us for advice on the legal issues arising before you are committed.**



## Director Pays Price for Private Arrangement with Customer

The law relating to the fiduciary duties of directors is stricter than many company directors might think, as a recent case illustrates.

The director of a company was given the loan of a second-hand excavator and dumper for his personal use, by a customer of the company, from 2003 until 2008. The equipment was used by him in renovating a house he owned. The director considered it to be a private arrangement of negligible value to him, but the company took the view that he had received the loan as a result of his being a director of the company and that he should therefore account to it for the value received. He left the company's employment before the case came to court.

The court ordered him to pay the sum of £5,200 plus interest to his former company. He appealed.

The Court of Appeal ruled that, on the facts of the case, the director's duties of strict loyalty to the company and avoidance of potential conflicts of interest were breached. The fact that the company had neither availed itself of the opportunity nor suffered any loss as a result of the arrangement was not relevant.

The duties of directors are set out in detail in the Companies Act 2006. Directors would be well advised to ensure that they are aware of the rights and responsibilities attached to the



role. Directors are legally bound not to accept benefits from third parties that arise from their position as a director.

It is also worth pointing out that a person who receives a benefit from a third party by virtue of their employment normally receives a taxable benefit in kind, which must be declared to HM Revenue and Customs on form P11 or P11D so that any tax due can be assessed. A penalty of up to £3,000 may be levied for an incorrectly submitted declaration.

**We can advise directors and companies on the applicable law if there are any circumstances in which a breach of a director's duty has happened or could happen.**



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