

## PROVISION OF ASSISTANCE FOR PURCHASE OF SHARES - POINTS TO PONDER

**“It is a burden which should not be discharged lightly and professional advice is recommended before such transactions are carried out.”**

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The provision of assistance by a company for the purchase of its shares has long been a difficult area of law. The practice was prohibited until the 1981 Companies Act came into force, when a ‘whitewash’ procedure was introduced which allowed private

companies to give financial assistance for the purchase of their shares provided that a number of requirements were met.

The problem with the provision by a company of financial assistance (e.g. a loan) for the purchase of its shares has rested in the possibility that this can, when used without sufficient scruples, undermine the interests of other shareholders and even creditors of the company.

The downside of the equation is that the prevention of such assistance sometimes makes it difficult for shares to be issued and this could be to the detriment of the company. For example, it might be considered to be in the company’s interests to offer shares to an executive as an incentive, but the person concerned might be unable to raise the money to buy them. Without setting up a rather complex (and sometimes expensive and/or inappropriate) mechanism, the company’s wish to have the executive obtain an interest in its shares might be frustrated.

Relief is now to hand in the form of the Companies Act 2006 which, from October 2008, will allow a private company to

provide financial assistance for the purchase of its shares. Public companies are still prohibited from so doing.

The right is not unlimited, however. Protection for shareholders and creditors also now depends on the requirement that the company’s directors consider whether the proposed share transaction is consistent with their duty to promote the success of the company for the benefit of the shareholders as a whole. If the proposed share transaction does not achieve that end, the directors cannot authorise it. Their duty also extends to the protection of the creditors – for example, where financial assistance is given for the acquisition of shares in a company which is insolvent, the directors could be found personally liable for any losses to creditors which may result.

Says Graham Nunn, “The relaxation of the rules does give private companies increased flexibility in dealing with their shares. However, it places the ultimate responsibility for any decision to give assistance for the acquisition of shares in the company on the directors who authorised the transaction. It is a burden which should not be discharged lightly and professional advice is recommended before such transactions are carried out. It is also likely that in cases where there is significant bank borrowing, the bank may require extra comfort to ensure its position is protected.”

## WHEN IS A LEASE CREATED?

Tenants have significant rights compared with occupiers of premises whose occupation is by virtue of a licence, so it is sometimes important to be sure of the basis of occupation and to be aware of the fact that tenants' rights can be created in some circumstances when a formal lease has not been signed.

This is because the Law of Property Act 1954 (Section 54) provides that a lease can come into being without the need for the preparation of a written lease. There are certain conditions which apply in such circumstances, which are, in simplified terms, that:

- the lease cannot exceed three years;
- the term starts when the lease is put into effect (i.e. not later); and
- the rent is the market rent for the premises.

Recently, an appeal was heard from tenants who were occupying premises paying a rent of approximately one third of the market rate under a one-page agreement which was not properly executed as a lease, but

which they claimed was sufficient to constitute a lease under Section 54. They claimed that as a result they had security of tenure when a new purchaser of the freehold of the unit they let sought to evict them from the premises.

The case went to the Court of Appeal, which concluded that the tenants did not have a lease under Section 54 as the requirement that the rent payable was equivalent to a market rent was not met. Accordingly, the arrangement could be terminated on demand.

“Had the rent payable been close to the market rent, the decision may well have been different,” says James Hayward. “A landlord who had driven a harder bargain to start with might have found himself with a property that had a sitting tenant and was therefore more difficult to sell as a result. It makes sense in cases in which premises are occupied on an informal basis to put the arrangements in proper form so that questions such as this can be dealt with speedily.”

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JAMES HAYWARD



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## SEMINARS

### "DON'T BE STRESSED BY STRESS CLAIMS" and "IMMIGRATION LAW FOR EMPLOYERS"

Every employer wants to get the best from their employees but, when does the pressure to perform translate into stress? What happens when stress and competence become entangled, as they so often are? Did the stress cause the incompetence, or was incompetence the cause of the stress? **Colin Adamson**, our Employment Law Partner will address these issues and more.

**Bushra Elzubeir**, our Immigration Law expert, will present a seminar on "Immigration Law for Employers". He will bring you up to date with vetting procedures and give some practical advice on recruiting from abroad.



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These seminars will be held in our boardroom at 3.00pm on 19<sup>th</sup> November. Attendance is limited, so book your place early. A nominal fee of £20.00 plus VAT will be payable in advance. Please contact Colin Adamson on 01473 213311 or [cpa@kerseys-law.co.uk](mailto:cpa@kerseys-law.co.uk)

## EMPLOYEE LIABLE FOR EMPLOYER'S LOSSES

**“Accordingly, he was liable for the losses.”**

**BUSHRA ELZUBEIR**



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Employees who breach their duty of good faith to their employer can be held to account for any resultant losses to the employer, even if the employee has not benefited personally from the breach.

A recent High Court case involved an insurance broker who backdated insurance cover notes, which allowed claims to be made by the firm's clients who would otherwise have been uninsured. Following an investigation by the insurance company involved, the firm that employed the broker accepted that backdated cover notes had been issued and reached a settlement with the insurer, which involved paying them compensation.

The firm dismissed the broker and sued him for its losses, which were the payment made to the insurance company plus the increase in the cost of its professional indemnity insurance and other costs which had arisen by virtue of the broker's breach of his duty of good faith.

The Court accepted that the accusations made against the broker were very serious and that the more serious these were, the higher the standard of proof had to be, especially in the absence of any evidence of any personal gain resulting from the backdating of the cover notes.

Despite the broker's excellent past track record, the judge ruled that the evidence was compelling that he had backdated the cover notes and that this had caused each of the losses for which his ex-employer claimed. Accordingly, he was liable for the losses.

**If you find yourself in a similar position, contact Bushra Elzubeir for advice.**

## CONSTRUCTION COMPANIES IN PRICE RIGGING ROW

Following one of the largest ever investigations under the Competition Act 1998, the Office of Fair Trading (OFT) has issued a Statement of Objections (SO) against 112 firms in the construction sector in England that it alleges have engaged in bid rigging activities and, in particular, in 'cover pricing'.

Cover pricing occurs when one or more of the parties bidding for a contract collude with a competitor during the tender process in order to obtain a price or prices which are intended to be too high to win the contract. The tendering authority, for example a local council or other customer, is left with a false impression of the level of competition and this may result in it paying inflated prices.

In addition, the SO formally alleges that a minority of the construction companies have entered into one or more arrangements whereby the successful tenderer would pay an agreed sum of money (known as a 'compensation payment') to the unsuccessful tenderer. This more serious form of bid rigging is usually facilitated by the issuing of false invoices.

The allegations cover a range of projects, including tenders for schools, universities and hospitals.

The 112 parties concerned now have the opportunity to make written and oral representations in response to the case set out by the OFT. These will be taken into account before a final decision is reached as to whether competition law has been broken and as to the appropriate amount of any penalties the OFT may decide to impose on each of the firms concerned.

Under the Enterprise Act 2002 it is a criminal offence for an individual to dishonestly engage in cartel agreements. Recently, three businessmen were sent to prison after the first ever criminal prosecution for price rigging.

## WAGE DISCRIMINATION—YOUNG WORKERS

The Employment Equality (Age) Regulations 2006 make direct and indirect age discrimination illegal in an employment context, unless the treatment can be objectively justified. The legislation applies to discrimination against young as well as older workers.

Recently, a woman who claimed that she was dismissed for being ‘too young’ won her claim of age discrimination (*Wilkinson v Springwell Engineering Limited*).

Leanne Wilkinson was 18 years old when she began working for Springwell Engineering Limited, in Newcastle upon Tyne, as an office administrator. She was dismissed without notice during a three-month probationary period and was asked to leave the premises immediately.

Miss Wilkinson claimed that her employer told her that it needed an older, more experienced person to do the job. Springwell Engineering claimed that she was dismissed on grounds of capability.

The Employment Tribunal upheld Miss Wilkinson’s claim. The company had relied on a ‘stereotypical’ assumption that capability equals experience and experience equals older age. There was also a lack of any ‘orthodox proce-

dures’ when recruiting Miss Wilkinson and when her employment was terminated.

Miss Wilkinson was awarded £5,000 for injury to feelings, approximately £5,000 for loss of earnings and two weeks’ pay because the company had failed to provide her with full written particulars of her employment. The award was increased by 50 per cent because the employer had failed to follow statutory procedures. In addition, the company was ordered to provide any prospective employers with a truthful reference stating that Miss Wilkinson’s dismissal was due to a breach of the age discrimination regulations, not that she was dismissed on capability grounds.

Employers are reminded that employees do not have to have worked for a specified period before they are entitled to bring a claim for discrimination. Equal opportunities training should be given so that stereotypical views linking age with competence do not go unchecked, leaving you open to a claim.

**Contact Colin Adamson for advice on any employment law matter.**

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**COLIN ADAMSON**



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### **New Consumer Protection Laws – A Reminder**

Businesses are reminded that the Consumer Protection from Unfair Trading Regulations (CPRs) came into force on 26 May 2008.

The CPRs apply to all businesses that trade directly with consumers and prohibit a wide range of unfair practices. They specifically ban outright 31 types of unfair sales and marketing practices, including bogus ‘closing down’ sales, prize draw scams, aggressive doorstep selling, falsely claiming membership of a trade organisation, faking goods, using ‘advertorial’ which is not identified as such and many sharp practices in advertising, such as luring customers with a non-existent product or falsely claiming that a product will only be available for a limited time. They will also, for the first time, establish a catch-all duty not to trade unfairly, closing loopholes that rogue traders have previously been able to exploit. Essentially, for a practice to be prohibited it must be of an unacceptable standard as well as there being an effect (or the likelihood of such) on the economic behaviour of the typical consumer – for example leading the typical consumer to buy a product that they would not otherwise have bought.

The legislation significantly increases the powers available to the authorities to crack down on offenders. Enforcement agency officers will be allowed to enter business premises without having to obtain a warrant and to seize goods and documents. In addition, an authorised officer will have the right to break open containers of any type (e.g. a locked filing cabinet) to examine goods or documents where there is a reasonable suspicion that a breach of the CPRs has been committed.

Breaches of the law can lead to substantial fines and/or imprisonment.