

CorporateBites

Updating you on company and commercial issues



This month we're delighted to bring you the results of our survey looking at business confidence one year on from the collapse of Lehman Brothers. The results prove that it's not all doom and gloom for business and provide a useful summary of the practical steps that businesses have taken to minimise the impact of the recession on them.

As always, please get in touch with me or your usual Mills & Reeve contact if you have any feedback on the topics covered in this edition.

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Can a shareholder claim for share dealing losses?

The High Court dismissed a group of shareholders' claims for damages against Cable & Wireless plc based on breaches of the listing rules and the market abuse provisions of the Financial Services and Markets Act 2000 (FSMA). The shareholders had suffered losses as a result of dealing in Cable & Wireless plc's shares.

The case made it clear that a shareholder does not have a direct cause of action against a company for breaches of the listing rules or the market abuse provisions of FSMA. The court did however indicate that a shareholder may be able to bring a successful claim against a company if the shareholder can establish an action for negligent misstatement provided that the shareholder can establish that the alleged negligence caused them to suffer loss. Proving negligence is, of course, more difficult than simply proving a breach of the listing rules or the market abuse regime.

The case pre-dates the Companies Act 2006 which introduces a further potential remedy under FSMA. A person who acquires shares and who suffers loss as a result of an untrue statement in certain financial statements can now bring a claim directly against the company concerned. In bringing such a claim, there is no need for the shareholder to establish some form of negligence on the part of the company or its officers.

Following the Davies Review, the Government is considering whether to extend this liability to cover not only financial statements but also any other market announcements. If this were to happen, we may see more shareholders seek to recover their share dealing losses where they can



For further information, contact [Stephen Hamilton](#).

show that a statement was untrue or misleading.

NAO reviews PFI performance

The National Audit Office (NAO) has recently published its report on how PFI performs to contracted timetable and to price. Click [here](#) for a copy.

The NAO recognises that construction performance is central to achieving the Government's delivery of capital projects. PFI is just one of the options available to the public sector and with the Treasury's 2009 Budget forecasting the value of forthcoming PFI deals at £13 billion measuring its performance is crucial. The NAO last reviewed this in 2003 and has now updated its previous work. The key findings are:

- PFI projects were delivered to timetable in over two thirds of cases and to price in around two thirds;
- non-PFI projects scored two thirds to timetable and around one half to price;
- PFI projects have a good record in user consultation and good quality ratings are more common than in 2003; and
- less than half of project teams had PFI experience.

The findings will be welcomed by PFI's supporters but there are still lessons to be learned particularly for the public sector. Since 2003, for example, the percentage of sampled projects which delivered on price has actually reduced, primarily due to public sector initiated changes.



For further information, contact [Raith Pickup](#).

Commercial agents regulations – a loophole?

For companies planning their routes to market, it has always been fundamental when considering agency arrangements to determine whether the Commercial Agents Regulations 1993 will apply. If they do, the agent receives important benefits including the right to payments on termination which the parties cannot exclude in the agency agreement.

The recent Court of Appeal decision in *Sagal (trading as Bunz UK) v Atelier Bunz GmbH* has gone some way to clarifying the applicability of the regulations. The Court of Appeal expressed the view that the regulations will not apply where the agent concludes contracts in its own name rather than that of the principal even where the contracts are made on behalf of the principal.

This decision increases the prospects that principals will seek to effectively "contract out" of the regulations by including a provision requiring the agent to contract with customers in its own name. As this has significant benefits to principals, it is clearly a form of contracting structure that merits closer consideration by any entity considering agency arrangements.



For further information, contact [Sarah Riding](#).

Default retirement age lawful (but may have short shelf-life)

Last month Heyday (a branch of Age Concern) failed to overturn the national retirement age exemption in the High Court. That means employers can continue to retire employees once they have reached the age of 65 without facing age discrimination claims, provided the



For further information,

correct procedures are followed. It also means that age discrimination claims against employers in the pipeline will fall away to the extent that they are based on the premise that the retirement exemption was unlawful.

However the judge made a number of comments that sent a clear signal to the Government that maintaining the status quo is not an option when it conducts its promised review of the exemption next year. While this decision provides a welcome window of certainty for the next year or so, employers need to be prepared for significant changes ahead. Whatever the outcome of the next general election the default retirement age is likely to be either on the way up - possibly to 70 - or on the way out altogether.

contact Charles Pigott.

Directors' use of information for personal gain

A recent Court of Appeal decision has restated the strict prohibition against directors using information gained as a result of their position as directors for their own personal gain.

In *O'Donnell v Shanahan Allied Business & Financial Consultants* (the company) acted for the seller of a property. A buyer was found but later pulled out of the transaction, at which point two of the company's directors decided to purchase the property in their own names.

The court held that in completing the transaction the directors had breached the "no conflict" rule and the "no profit" rule. The directors had obtained their information and the opportunity to purchase the property in the course of acting as directors, which was a breach of the "no conflict" rule. In addition, as they had not offered the opportunity to the company to purchase the property they were liable to account for profits they made under the "no profit" rule.

The directors in question should have discussed the proposed transaction with the company even if the company would not have wanted to purchase the property. They should also have gained the consent of the company to continue with the transaction.

The decision highlights the need for directors to gain their company's consent when using information obtained by them as directors. Being satisfied that the company would have not been interested in the transaction is not enough to satisfy the rules - full disclosure of the material facts to the board is necessary.



For further information, contact Mary Prentice.

Shortcut – M&R survey results

The responses to last month's survey taking the business temperature one year after the collapse of Lehman Brothers have now been collated. The results were surprisingly positive with many of the respondents cautiously optimistic about the economic outlook. To read the survey results click [here](#).



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