

CorporateBites

Updating you on company and commercial issues



[Forward to a Friend](#) 

This month's edition (excluding our first bite which looks at a new wealth management structure for passing wealth down through the generations) focuses on a number of practical commercial issues coming out of recent case law that should be borne in mind when negotiating new contracts or revising existing ones. As contracts represent the lifeblood of most businesses (and are generally the starting point for any litigation), it is important that the draftsman has a good understanding of the latest developments.

Finally, on behalf of Mills & Reeve, we wish you all a very successful and prosperous 2010.

In this issue:

- [Family Investment Companies \(FICs\) - an alternative to trusts?](#)
- [Limitation and Exclusion Clauses - sub-clauses not enough?](#)
- [When will e-mail communications amount to a contract?](#)
- [Will "subject to contract" be enough?](#)
- [Shortcut - FRC launches proposed reforms to the UK Corporate Governance Code](#)

Editor



Ben Turner
0121 456 8202
ben.turner@mills-reeve.com

www.mills-reeve.com

Family Investment Companies (FICs) - an alternative to trusts?

Trusts have historically been the preferred means of passing wealth down the generations. Following the Finance Act 2006 however, the ability to put funds into a trust without incurring an immediate 20 per cent inheritance tax charge has been significantly curtailed. Demand has therefore risen for a viable alternative vehicle.

FICs should provide such an alternative where trusts cannot be used. FICs offer flexibility, asset protection and an ability to retain control over family investments. They also have a number of other advantages:

- they can be incorporated as unlimited companies, avoiding the requirement to file accounts and therefore keeping financial information confidential;
- a founder can retain control by being a director and by retaining a controlling interest in the share capital;
- the rights of shareholders can be entrenched in the articles or in a shareholders agreement (that will remain confidential) which will bind future transferees;
- the parties can agree restrictions on the class of person(s) who can hold shares eg, to a tightly defined family group; and



For further information, contact [Craig Hodgson](#)

- different classes of shares can be used to manipulate voting rights and/or the right to receive a dividend.

Tax is an issue to be aware of but where the expectation is that profits will be accumulated over the longer term (as is normally the case for investment vehicles), this should not be insurmountable.

For further information on FICs, click [here](#).

Limitation and Exclusion Clauses - sub-clauses not enough?

Under the Unfair Contract Terms Act 1977 limitation and exclusion clauses which are unreasonable can be struck out as void. Following the decision in *Regus (UK) Ltd v Epcot Solutions Ltd* (2008) lawyers have sought to draft such clauses as separate sub-clauses (the logic being to safeguard the remainder of the clause if one of the sub-clauses is struck out for being unenforceable).

The above approach has however been challenged by a recent High Court ruling. In *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd & Anor* (2009), Lobster made a claim against Heidelberg relating to the supply of a printing press. Heidelberg attempted to limit its liability by relying on a term which stated that Heidelberg would not be liable for:

"....(i) for any increased costs or expenses (ii) for any loss of profit, business contracts, revenues or anticipated savings; or (iii) for any special, direct or consequential damage of any nature whatsoever...."

The court found it unreasonable to attempt to exclude liability for increased costs or expenses and on this basis held the entire clause void (meaning that the exclusions in the remaining sub-clauses which would otherwise have been reasonable and valid were also void).

Important lessons need to be learnt from the Lobster decision; these include:

- exclusions should always be drafted to avoid being unreasonable;
- any "risky" terms should be drafted as completely separate clauses; and
- a clause stating that the parties agree that each of the sub-clauses are intended to be severable is advisable.



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

When will e-mail communications amount to a contract?

In *University of Plymouth v European Language Center Ltd* (2009), the Court of Appeal has highlighted the risks of relying on informality (effectively a series of emails and phone calls) to establish a binding contract.

Under English law, a contract must contain four elements:

- an unconditional offer;
- an unconditional acceptance;
- consideration; and
- an intention to enter into legal relations.

The decision illustrates that although a contract may be concluded by e-mail or phone, it must nonetheless contain all necessary components required of any contract.



For further information, contact [Vanda Laming](#)

To ensure that e-mail exchanges do not create contractual relations, parties are advised to mark their e-mails during negotiations "subject to contract". Employers should also make staff aware of the potential risks of their informal communications becoming contractually binding. Informal communications which could potentially be construed as contractually binding, when this is not the intention should be followed up in writing, to make this clear.

Conversely, to ensure that e-mail exchanges do amount to a contract, parties are advised that it is always prudent to have the last word by sending a follow-up e-mail, which clearly sets out, in detail, all relevant terms that have been agreed. Ultimately however, the best approach will always be to ensure that a contract is recorded formally in a written document signed by both parties.

Will "subject to contract" be enough?

The High Court (*Jirehouse Capital & Others v Beller & Another* (2009)) recently handed down judgment in a matter in which the issue was whether negotiations to settle a dispute resulted in a binding agreement, notwithstanding that the relevant correspondence was marked "subject to contract".

The courts have long held that where a "subject to contract" qualification is introduced into negotiations it can only cease to apply to the negotiations if the parties expressly or impliedly agree that it should be expunged. In this case, it was not suggested that there was an express lifting of the subject to contract expression. The issue was whether or not it was to be "necessarily implied" that the restriction had been lifted.

The High Court held that, in the light of the conduct of the parties, there was a necessary implication that the words "subject to contract" no longer applied to the negotiations and a binding agreement had been reached. The lesson to be learnt is that simply marking correspondence (and draft agreements) in contract negotiations "subject to contract" does not mean that no binding agreement can be reached, when the conduct of the parties implies that an agreement has in fact been reached.



For further information, contact Sarah Riding

Shortcut - FRC launches proposed reforms to the UK Corporate Governance Code

The Financial Reporting Council (FRC) recently launched a consultation on its proposals to reform the UK's Combined Code (proposed to be renamed the UK Corporate Governance Code) to ensure that it reflects changing governance concerns and practices and economic circumstances. The consultation period ends on 5 March 2010 (it is expected that the revised Code should apply to all listed companies with a Premium Listing for financial years beginning on or after 29 June 2010). For more information, click [here](#).



www.mills-reeve.com

BIRMINGHAM . CAMBRIDGE . LEEDS . LONDON . MANCHESTER . NORWICH

Mills & Reeve LLP is a limited liability partnership registered in England and Wales with registered number OC326165 and VAT number GB 104 8345 88. Its registered office is at Fountain House, 130 Fenchurch Street, London, EC3M 5DJ, which is the London office of Mills & Reeve LLP. A list of members may be inspected at any of the LLP's offices. The term "partner" is used to refer to a member of Mills & Reeve LLP. Mills & Reeve LLP is regulated by the Solicitors Regulation Authority and is subject to the Solicitors' Code of Conduct 2007, which can be viewed at: <http://www.sra.org.uk/code-of-conduct.page>.

If this newsletter has been forwarded to you and you would like to receive future editions, please email newsletter@mills-reeve.com. If you do not wish to receive emails or other marketing material from Mills & Reeve LLP please email newsletter@mills-reeve.com or contact our marketing department on +44 (0)1223 222460. The articles featured in this newsletter have been selected and prepared with a view to disseminating key information and may not deal with individual concerns. No liability can be accepted in relation to particular cases. However, the authors would be pleased to respond to individual queries, and before taking action you should seek specific legal advice, particularly as the legal position is liable to change over time. Where hyperlinks are provided to third party websites, Mills & Reeve LLP is not responsible for the content of such sites. This newsletter is copyright © Mills & Reeve LLP 2010. Extracts may be copied with our prior permission provided that their source is acknowledged. Some/all images are copyright © Microsoft Corporation, and these may be distributed solely as part of this newsletter.

© 2010 Mills & Reeve LLP. All rights reserved. Site by www.shorthose-russell.co.uk