

## CorporateBites

Updating you on company and commercial issues



They say that a week in politics is a long time, but the month which has passed since the last issue has seen the type of political upheaval not seen for several generations. The ink is hardly dry on the newly signed coalition agreement and the scrutiny of its ambitious objectives has begun in earnest, not least with regards to the plans for business. A clear focus on boosting enterprise promises a cutting of red tape by the adoption of a “one in, one out” approach where new regulation will only follow the scrapping of existing red tape. Yet the urgency which the coalition agreement places on the need to reform the banking sector by imposing tighter regulation will in itself make for an interesting clash of objectives. As has been demonstrated in Europe recently, attempts at reform can easily send the money markets into spasm and that can only serve to heap pressure on to this new style of “partnership government”. The composition of the new cabinet has also raised a few eyebrows with the inclusion of only 4 women, a fact made more interesting in light of the Equality Act 2010 which became law just before the election and which is considered below.

### In this issue:

- [The Equality Act 2010 – time to revisit your anti-discrimination policies](#)
- [“Agree first and start work later” - risks in starting work before a contract is in place](#)
- [CGT – “Coalition Gets Tough”?](#)
- [New 21st century rules for distribution agreements – might yours be unlawfully anti-competitive?](#)
- [Lease assignments within a group of companies – negotiate with care](#)
- [Legal professional privilege - in-house counsel likely to be left unprotected](#)
- [Pensions in the UK – where do we go from here?](#)

### The Equality Act 2010 – time to revisit your anti-discrimination policies

The main effect of the Equality Act, which became law just before the general election, is to consolidate all our discrimination legislation. So while the substantive changes are relatively few and far between, the process of codifying the law has inevitably given equality issues a higher profile. It presents all organisations with an opportunity to revisit their policies before the bulk of the Act’s provisions are implemented, probably in October this year.

Some changes have been made to the law, of which the most significant are probably in the disability field. The duty to make reasonable adjustments to accommodate the disadvantages that disabled people face has been widened, and there will now be restrictions on asking health-related questions during the recruitment process. Steps have also been taken to reverse a House of Lords decision of two years ago, which limited the protection from discrimination that disabled people had previously enjoyed under the Disability Discrimination Act.

Another significant difference from the existing law is the increased emphasis the Act places on top-down action to tackle disadvantage. A controversial provision which could have been used to make private sector employers publish details about their gender pay gap is now unlikely to be brought into

### Editor



Alex Kenworthy  
01603 693424  
[alex.kenworthy@mills-reeve.com](mailto:alex.kenworthy@mills-reeve.com)  
[www.mills-reeve.com](http://www.mills-reeve.com)



For further information, contact **Charles Pigott**.

force, but the range of duties on public authorities has been widened. They will now have an obligation to look at the needs of all groups protected by the Act when carrying out their public functions. While they will largely be left to set their own priorities, there is likely to be more focus on using Government spending channelled through procurement to address inequality. That may mean changes for organisations bidding for what is likely to be a declining number of public sector contracts.

More information about the Act (with particular focus on its implications for employers) is contained in our briefing [here](#).

### **“Agree first and start work later” - risks in starting work before a contract is in place**

In the recent case of *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Company*, which involved the makers of Müller yoghurt, the Supreme Court held that where the work had been started, completed and partly paid for during the negotiations, a draft contract which had not been signed was nevertheless contractually binding on the parties. Some terms of the contract had still not been agreed, yet the court held that the essential terms had been agreed and neither party had intended agreement of the remaining terms to be a precondition to the concluded contract. In other words, an honest, sensible businessman would objectively conclude that the parties intended to be legally bound by the contract. Despite the fact that the draft contract contained an express “subject to contract” clause, the parties had effectively waived this clause by proceeding to perform their contractual obligations.

The case highlights the very significant risk to parties starting work on a project before a final contract is signed. Whilst relations are good, there is often no problem. However, if relations turn sour, parties may suddenly find themselves faced with the unenviable prospect and huge expense of trying to establish their contractual position in court. In short, think twice before giving into commercial pressures and commencing performance before the contract is signed. In the judge’s own words in this case, “the moral of the story is to agree first and to start work later”.



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

### **CGT – “Coalition Gets Tough”?**

One of the headline tax policies from the new coalition government is reform of the capital gains tax regime, but the substance of the changes is not yet clear despite recent speculation. Any increase in CGT rates is likely to have far reaching implications for the disposal of assets such as shares, by individuals and trusts, as well as implications more generally for share schemes and their viability as a tax efficient remuneration mechanism.

The initial Coalition Agreement between the Conservatives and Liberal Democrats simply stated, “We further agree to seek a detailed agreement on taxing non-business capital gains at rates similar or close to those applied to income, with generous exemptions for entrepreneurial business activities.” The more formal Agreement issued on 20 May added nothing to this (in particular, it did not give us any more information as to what “generous exemptions” can be expected for business assets). It seems as though the coalition government is heading for its first major disagreement on an issue which clearly divides certain members of each party.

Notwithstanding the lack of official detail, some commentators are predicting that we may end up with three rates of CGT, namely:

- for non-business assets, rates which broadly mirror income tax (ie, a 20 per cent basic rate of CGT and a 40 per cent rate for higher and additional rates taxpayers);
- a lower rate for business assets (perhaps staying at 18 per cent); and



For further information, contact [\*\*Matthew Short\*\*](#).

- the 10 per cent rate applicable to assets which benefit from entrepreneurs relief,

although clearly, at this stage, no one yet knows the form the CGT changes will take.

We also do not have a clear picture of the time from which the CGT changes will become effective. It is usual for changes in tax rates to take effect from the start of a tax year onwards (so one might expect the CGT changes to take effect from 6 April 2011), but it is not inconceivable that the changes in rates will take effect immediately. Given this, it is difficult for taxpayers to know whether it is better to trigger a disposal in respect of a business asset now (paying CGT at 18 per cent) or speculatively hold out for the possibility of a more generous business asset relief being available following the Budget. What's clear is that a degree of panic is already setting in, as talk of pre-budget "fire sales" hit the press.

The only recent significant change to entrepreneurs relief was to raise the lifetime limit from £1m to £2m. We don't know if this relief will be changed by the CGT reforms or whether it will be retained along with two separate general CGT rates for other business/non-business assets. The Budget, set for 22 June, will tell us more.

### **New 21st century rules for distribution agreements – might yours be unlawfully anti-competitive?**

The European Commission has published the new vertical restraints block exemption which will replace the existing exemption this summer. Provided that suppliers and distributors keep within the scope of these exemptions, their agreements will not be considered unlawfully anti-competitive.

The new exemption and accompanying guidelines mark a clarification of the Commission's view of distribution agreements in the 21st century, most notably in relation to online retailers and how a supplier may (or may not) place restrictions upon its online distributors without losing the protection offered by the exemption.

The new exemption will apply to agreements made on or after 1 June 2010. Agreements which are currently within the scope (and benefit from the protection) of the existing exemption will continue to have that protection until 31 May 2011, regardless of whether or not the agreement would qualify for protection under the new exemption.

Suppliers and distributors need to ensure that after 1 June any new agreements comply with the new exemption to minimise the risk of time consuming investigations by the OFT or the Competition Commission and the fines of up to ten per cent of worldwide turnover that may result.

A more detailed briefing on this subject will be available on our website shortly.

### **Lease assignments within a group of companies – negotiate with care**

In today's unpredictable property market tenants need to retain flexibility with their property portfolio and often need to dispose of leased properties which they no longer require, or restructure where their properties are held within the group. Modern commercial leases will set out the conditions to any assignment, one of which is often "no assignment to a group company". Such a condition can sometimes be overlooked by a tenant during negotiations. If a tenant company wants to assign within the group, that condition allows the landlord to refuse its consent. The lessons here are twofold. At the outset, assignment provisions in leases need to be negotiated with care, and later down the line such provisions need to be reviewed in good time so as to avoid undue



**For further information, contact Simon Elsegood.**



**For further information, contact Jodie Hosmer.**

complications and delays.

More information on this subject is available [here](#).

### **Legal professional privilege - in-house counsel likely to be left unprotected**

Dawn raids by competition authorities can be intimidating at the best of times. Arguments with officials about what documents can be seized or copied often make the experience even worse.

Where the raid is carried out by a UK competition authority, usually the Office of Fair Trading, the company is able to refuse to hand over documents containing relevant legal advice from its in-house lawyers since this advice is protected by legal professional privilege under English law. Where the investigation is carried out by the European Commission, on the other hand, communications with in-house lawyers must be handed over since only advice from external lawyers attracts privilege under EC law.

Akzo Nobel Chemicals Ltd are challenging the current position under EC law following a raid of their offices by the European Commission in 2003. Unfortunately the Advocate General for the European Court of Justice has given an opinion upholding the present position. Given that only a handful of the 27 member states treat in-house and external lawyers equally as regards privilege, the AG's opinion is likely to be followed by the ECJ. The final ruling is expected later this year.



For further information, contact [Miranda Whiteley](#).

### **Pensions in the UK – where do we go from here?**

A recent study highlighted that pensions are still considered by the UK workforce to be the most valuable workplace benefit. With increased life expectancy, the retirement age seems set to increase until later in life. Indeed, Iain Duncan Smith, the Work and Pensions Secretary, has recently suggested that the state pension should be indexed in line with life expectancy. However, we are currently seeing a trend in the UK of people seeking new ways to retire early but little thought is given as to how this will be affordable.

Despite the value of pensions to employees, a further study concluded that senior executives aiming to reduce costs in these austere times are apparently more likely to reduce a company's pension contribution than they are to cut the board's biscuit budget.

This contradictory state of affairs begs the question "where is pension provision in the UK heading?" The only honest answer would have to be, "who knows?"

Worryingly, millions of people in the UK are simply not saving enough to support themselves in retirement. Further, it is estimated that the UK economy faces a £1.2 trillion shortfall in pension savings. After the economic climate, final salary pensions are considered the second biggest threat to companies and nearly one in ten employers has cut or stopped contributions into an employee pension scheme.

The government has sought to improve this state of affairs through the introduction of NEST, National Pensions Saving Scheme, Brit Save or Personal Accounts (if you have lost track of the re-branding). Under NEST, the compulsory minimum employer contribution will be three per cent. However, currently employers contribute on average six per cent into defined contribution schemes. Employers may now consider reducing this to three per cent, resulting in the dumbing down of benefits.

One can only hope that the new coalition government follows through on its promise to reinvigorate occupational pensions. If not, will the last one out please switch off the lights?



For more information, contact [Robert Butler](#).

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