

corporate bites

The first British Coalition Government since the 1940s will shortly be marking its first 100 days in office and has already put into effect a number of its plans outlined in its wide ranging May 2010 manifesto. This issue of *Corporate Bites* looks at a couple of those initiatives, namely its plans to abolish the default retirement age and to dismantle the regulatory regime headed by the Financial Services Authority.

Also in this month's issue we consider a couple of recent cases that will be of relevance to commercial organisations in relation to non-disclosure agreements and to contractual rates of interest on late payments.

Finally a word of warning - apparently Companies House has rejected a very high number of annual accounts to date this year. Make sure you avoid committing one of the common simple errors or omissions in your accounts that Companies House has identified that might result in their rejection and your company being hit with a fine for late filing!

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Compulsory retirement exemption to end next year

Last month's [consultation document](#) sets out the Coalition Government's plans to abolish the default retirement age, which allows employers to retire staff compulsorily at 65 without facing age discrimination or unfair dismissal claims, regardless of the nature of the job or the abilities of the employee. The exemption would be removed from 1 April 2011, with transitional protection for retirements notified before that date and taking effect prior to October next year. These plans reflect one of the early policy commitments of our new Government, though some may have been surprised by the limited time businesses will have to prepare for the new regime.

A briefing on the implications for employers if the proposals go ahead as planned is available [here](#). Among other things, it explores whether some businesses will be able to retain a compulsory retirement age, at least for certain posts, by demonstrating that it is objectively justified.

Editor



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Bribery Act to go live in April 2011

The Ministry of Justice has confirmed that the Bribery Act 2010 will come into force in April 2011, rather than October 2010 as originally envisaged. The Government will launch a consultation in September 2010 on the guidance for commercial organisations on what will amount to the "adequate procedures" that they will need to put in place as a defence to the new corporate offence of bribery under the Act. The guidance is expected to be available in final form by early 2011, so that organisations have time to familiarise themselves with it, before the Act goes live.



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Companies House rejects record number of annual accounts

Companies House is currently experiencing a high rejection rate for annual accounts - 11.1 per cent year to date. Most of these rejections are due to simple errors or omissions but the consequences for the company or limited liability partnership can be significant. If the accounts are submitted close to the filing deadline and subsequently rejected, an automatic late filing penalty will be issued if the accounts are not returned before the filing deadline. Companies House has issued a briefing, available [here](#), on how to avoid common mistakes.



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Non-disclosure agreements - avoiding a damages claim

A recent Privy Council case serves as a reminder that businesses may be able to claim compensation for breach of a non-disclosure agreement even if they cannot show any demonstrable loss. The decision should be of note to those engaged in corporate transactions of all descriptions, where entry into such agreements is a common precursor to negotiations. Although Privy Council decisions are not binding on the English courts, they are highly persuasive.

If a party breaches a confidentiality agreement, the usual rule, that damages should put the victim in the position they would have been in if the agreement had not been breached, can result in negligible damages being awarded. As such, it is often assumed that non-disclosure agreements are worth little more than the paper they are written on.

The most common remedy open to a court (if asked early enough) is to grant an injunction to stop the party from breaching their obligations. However, a recent case has highlighted that a business may also be entitled to claim what are commonly referred to as "Wrotham Park" damages, which may be awarded in limited cases, usually where negative obligations have been breached. Wrotham Park damages represent the amount of money the party might reasonably have asked for if the party in breach had asked to be released from their contractual obligations, and the parties had then both willingly entered into negotiations. On the particular facts of this case, the court held that the parties would have agreed \$2,500,000. The court therefore awarded damages in that sum.

This case highlights the value in businesses seeking legal advice and putting in place well-drafted non-disclosure agreements at the earliest possible stage in negotiations. On the flipside, it acts as a stark reminder that businesses should take their own obligations under non-disclosure agreements seriously because the financial implications of breaching them may not be insignificant.



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Distance Selling Regulations - do you know your obligations?

The Distance Selling Regulations have been in force for almost 10 years, yet businesses are still failing to understand and fulfil their obligations under these Regulations. A recent BBC investigation has shown that a number of major UK businesses, including Next and Littlewoods, are not complying with the Regulations by refusing to refund delivery charges.

The Regulations cover situations where consumers purchase goods at a distance, for example, via the internet or mail orders. The Regulations allow for a seven day cooling off period after the consumer has received the goods during which the consumer can cancel the contract by informing the retailer or returning the goods.

When a consumer cancels a contract, they are entitled to a full refund. This includes postage and packaging fees.

The Regulations do not contain an obligation for consumers to return goods once the contract is cancelled. Therefore, it is essential that retailers include this within their terms and conditions of sale. If this clause has not been included, the retailer may make a charge for the direct costs of returning the goods.

Consumers are becoming alert to their rights under the Regulations, therefore retailers should review their terms and conditions of sale and ensure staff dealing with consumers are fully informed so that they may properly comply with the Regulations.



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When 0.5 per cent isn't substantial enough

All business contracts must provide a creditor with a "substantial contractual remedy" for the late payment of invoices. A contractual interest rate which is not a substantial remedy will not be enforceable. Instead, the statutory interest rate of 8 per cent above base rate will be imposed.

The Late Payment of Commercial Debts (Interest) Act 1998 says that any remedies will be substantial unless the remedy is "insufficient for compensating the creditor for the late payment", or "it would not be fair or reasonable to allow this remedy to be relied upon or oust the right to statutory interest". This wording of the Act has not given businesses any certainty on what is and what is not a substantial remedy.

Evidence that the rate has been discussed between the parties will support the contractual rate. The courts will also consider the wider circumstances of the contract, such as the size of the debt and the nature of the business, especially when the contractual rate is below the statutory rate.

In *Yuanda (UK) Co Limited v WW Gear Construction Limited* (2010) the High Court has recently decided that the 0.5 per cent over base rate in Gear's standard terms was not a substantial remedy. Therefore the contractual rate clause was void and was replaced by the statutory interest rate.

To avoid having contract rates being struck out and being faced with the statutory rate, businesses should ensure that the rate they choose is not unreasonable to the parties when drafting the contract. This is particularly true for standard terms of business, over which there is usually no negotiation (as in the *Yuanda* case), to ensure that any interest rate below 8 per cent above base is justifiable.



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The abolition of the FSA - a return to the pre-millennium world of "The Old Lady of Threadneedle St"?

In his Mansion House speech, Chancellor of the Exchequer George Osborne said he will abolish the Financial Services Authority and give most of its power to the Bank of England, undoing the regulatory system set up by Gordon Brown in 1997. But what does this announcement actually mean? Is it a return to the pre-millennium world of "The Old Lady of Threadneedle St" in the form of the Bank of England accompanied by self-regulation organisations like IMRO and LAUTRO?"

A recent article written by Ian Benson, Head of Financial Regulation and Risk at Mills & Reeve and published in *Complinet* (a market-leading daily, web-based news service for compliance professionals in the financial services sector) argues that this will not be the case. Firstly, because an organisation like the FSA is just too important and complicated to dismantle immediately; secondly, the perimeter of regulation has widened significantly since the introduction of the Financial Services and Markets Act 2000 (eg, important financial products such as insurance and even domestic mortgages were not regulated ten years ago); and thirdly, because of the European imperative which has driven and shaped much of our financial services regulation over the last 10 years in regard to the harmonisation of both conduct of business and prudential regulation.

The full text of the article is available [here](#).



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Ambush marketing - a warning ahead of the London Olympics

The decisions of the referees were not the only controversy of the 2010 World Cup. Ambush marketing has always been a paramount concern at any large sporting event and the recent World Cup in South Africa was no exception. Dutch beer Bavaria apparently staged an ambush marketing stunt which led to 36 women wearing promotional dresses being ejected from the stadium and 2 of them being jailed! There is of course the view that if FIFA had ignored the issue then Bavaria would not have had free publicity at all.

Official beer sponsor Budweiser had paid enormous sums in securing the exclusive rights to associate themselves with the World Cup and FIFA had to be seen to act or potentially face reduced value in the sponsorship rights for the future. To maintain value in the rights FIFA therefore had no choice but to enforce the exclusivity.

This danger of ambush marketing will remain key with the Olympics in London not far away. Being in breach of the rules stipulated in the Olympics Act could leave directors paying unlimited fines if a company attempts an ambush marketing stunt. The Olympics Act prevents the use of certain terms including "2012", "games", "gold", "silver" and "bronze" in combination except by those who are official sponsors of the Olympic Games. It also controls advertising around the Olympic venues. The Olympics Act also creates the London Olympics association right which can only be granted by the London Organising Committee for the Olympic Games (LOCOG). If this is infringed then the LOCOG can take the matter to court.

Given the large amounts of money involved in securing advertising space with global reach, Olympics sponsors are likely to be vigorous in defending their positions and so marketing campaigns must ensure that they keep within the law.



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