

Late Payment of Commercial Debts



A recent Court of Appeal decision has provided some useful clarity on the application of the Late Payment of Commercial Debts Act 1998. The case involved the hire of equipment by a plant hire business to DEFRA in order to deal with an outbreak of swine fever and foot and mouth disease. The invoices submitted contained various errors which led to a dispute between the parties and proceedings being issued in which a claim for late payment interest was made. A question that the court had to consider was whether "notice of the amount of the debt" within the meaning of Section 4(5) of the 1998 Act required the invoices to be correct. Counsel for DEFRA argued that any error, however small, was sufficient to exclude the provisions of the Act. The Trial Judge had originally

refused to allow interest on the invoices which contained errors. The Court of Appeal, however, decided that mistakes in the invoices did not enable the paying party to avoid the late payment provisions. The paying party could have worked out the correct rate of interest from the supporting documentation and the Act did not require invoices to be perfect before interest could be claimed. Errors on the invoices was insufficient reason to delay payment of the entire debt with the Court accepting that in the "real world" mistakes on invoices were common place. What DEFRA should have done was pay the amount it considered due and queried the balance. Businesses that wish, therefore, to be able to utilize the Late Payment of

Commercial Debts Act should ensure their claim for payment is clear and accurate and supported by documentation although minor errors should not lead to the claim being rejected. Businesses faced with a claim for late payment interest where part of the claim is in dispute should pay the amount they acknowledge to be due and query the balance at the first possible opportunity - *Ruttle Plant Hire v Secretary of State for Environment 2009*.

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New Gas Safety Laws



From 1st April 2009 landlords and employers should ensure that engineers working on gas appliances are registered under the new Gas Safe Register. The old CORGI registration is no longer effective from that date. Registered engineers will carry a Gas Safe Register ID card with their own unique licence number. Landlords allowing their gas

appliances to be checked by an engineer not registered on the Gas Safe Register will breach the Gas Safety (Installation and Use) Regulations 1998. Engineers who are registered can be found on line at www.gassaferegister.co.uk or by calling 0800 408 5500.

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Recruitment & Social Networking



Research reported in Personnel Today indicates that 12% of employers in the UK are now using social networking sites, such as Facebook and MySpace to vet potential job applicants. The research carried out by DDI management consultancy also revealed that:

- a quarter of job applicants believed that what they put on such sites could affect their chances of getting a job.
- the younger the person carrying out the interview process the more likely social networking sites would be checked.
- those employers that do research prospective employees on such sites admit that the information is then utilized in deciding whether or not to employ.

However, does the use of social networking sites offer any advantages to the employer in the recruitment process? Some HR professionals are in favour of using such sites believing that they provide a valuable insight into the thoughts and lifestyles of potential employees. Others consider that much of the information on such sites is "private" and only accessible to friends, and what is on offer and available to employers could be out-of-date and may not even be factual.

Use of social networking sites, it is claimed, could also leave employers open to accusations of discrimination. Employers who become aware of a person's race, religion, age, sexual orientation or disability through a social

networking site, and then do not offer that person a position, could face a discrimination claim.

Whether or not social networking sites are utilised in the job application process employers must always ensure that solid recruitment practices are followed which should include an application form, interview, taking-up of references and a carefully worded offer letter.

Employers must be careful in their use of social networking sites in vetting job applicants and must never abandon more traditional methods during the recruitment process.

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Welcome to Hodge Halsall's Newsletter For Business and Commercial Clients

This Newsletter is designed to summarize various areas of law that may impact upon your business. It is a periodic publication of Hodge Halsall LLP and is intended for legal guidance only. It is not to be construed as a substitute for legal advice. For advice specific to your circumstances please contact your Hodge Halsall representative.

We are interested in your opinion. If you have any suggestions about how we can improve Business News or if you would like us to cover a specific topic please contact: Derek Alman at derekalman@hhlegal.co.uk or call 01704 531991.

Directors' Personal Liabilities



As businesses struggle to get to grips with the economic downturn it is worthwhile reviewing the areas of risk and their legal implications for directors of companies in financial difficulties.

Personal guarantee

In many cases, particularly with bank borrowing, a lender or creditor will seek personal guarantees from the directors of a company in order to secure the obligations of the company before credit facilities are granted to it. A personal guarantee is a legally enforceable agreement providing that if the company who entered into the loan or credit facility fails to pay its debt, the guarantors (usually the directors) become personally liable to repay. It is essential to look carefully at the terms of any guarantee that a director is being asked to sign and foolish to sign an open ended guarantee document. Even if bank guarantees are for a fixed sum that amount is usually exclusive of bank charges, interest and legal fees that the Bank may incur in enforcing the guarantee.

Fraudulent trading

A director may be guilty of fraudulent trading if he allowed the company to trade with intent to defraud creditors. Fraudulent trading can be both a civil and

criminal offence under the Insolvency Act 1986 which provides that anyone who *knowingly* allowed the company to trade in this manner can be liable to make such contribution to the assets of the company as a court thinks proper. Criminal penalties for fraudulent trading include up to seven years imprisonment and/or an unlimited fine.

Wrongful trading

As a claim for fraudulent trading can be difficult to prove the Insolvency Act also introduced the concept of wrongful trading which takes place where at some point before commencement of the winding up of the company the person who was a director *knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation*. There is no requirement to prove intent to defraud creditors as there is for fraudulent trading. In order to determine whether a director knew or ought to have known that there was no prospect that the company would avoid insolvent liquidation Courts will look at both the knowledge of the particular director and the knowledge that a reasonably diligent person having the general knowledge, skill and experience that may reasonably be expected of a person carrying out the function of

Director would have had in those circumstances. A director liable for wrongful trading may be ordered to make a financial contribution to the assets of the company based upon the losses suffered by creditors as a result of the director's conduct.

Misfeasance

The Insolvency Act also refers to misfeasance which is a breach of a fiduciary duty/duty of care to the company by misapplying, retaining or becoming accountable for any money or property of the company. Anyone involved in the promotion, formation or management of the company or who has been a director could be found liable for misfeasance and ordered to contribute to the assets of the company in the event of liquidation.

Disqualification

Disqualification from acting as a director may result from being held to have fraudulently traded, wrongfully traded or been found guilty of misfeasance. Disqualification means that a person cannot, for a specified period of time fixed by the court, act as a director or take part in the management of a company without the permission of the court. Orders for disqualification are regularly made when a court is satisfied that a person who acted as a director of a company which became insolvent is unfit to take further part in the management of a company.

As Directors concentrate all their time and effort on steering their businesses through the current economic downturn it is vital that they remain aware of their personal liabilities and the legal implications for the directors of companies in financial difficulties.

New P45s

HMRC has announced that new forms P45 have been introduced with effect from 6th April 2009. The old forms become invalid from that date. The forms are now A4 size and contain extra details of the date of birth and gender of the employee.

Holiday Pay for Workers on Sick Leave



On 20th January 2009 the European Court of Justice gave its decision in the case of *Stringer v HMRC* on the question of whether employees absent on sick leave should continue to accrue holiday entitlement. The ECJ held that employees right to paid annual leave will continue to accrue during sick leave and that where an employee has been unable

to take the holiday due to sickness it can be carried over to the next holiday year. An employee on sick leave cannot be denied holiday once it has been accrued. The result is that employees accrue twenty eight days paid holiday even if they do not attend work for a whole year. The decision only relates to the statutory twenty eight days holiday (effective

from 1st April 2009) and not to any more generous holiday entitlement that individual employers may provide to their employees. The impact of the decision is likely to have a major costs consequence for employers with workers on long term sick leave.

Extension To Right To Request Flexible Working

New rules effective from 6th April 2009 have amended the Flexible Working Regulations to enable employees to request flexible working in order to care for a dependant child under the age of seventeen. Previously, the Regulations

only covered children under the age of six. The BERR in their explanatory note on the new Regulations observe that "Extending the right to request flexible working to parents of older children will introduce greater fairness and equity

amongst working parents...whilst ensuring that businesses have the flexibility to refuse requests on business grounds". An explanatory memorandum on the Regulations is available on the BERR website.

Stamp Duty Land Tax – Apportionment of goodwill

Historically, certain properties such as pubs, clubs, hotels, petrol stations, cinemas, restaurants and nursing homes have when sold had part of the purchase price apportioned to the goodwill of the business. The practice of HM Revenue & Customs in such circumstances has been that they considered there was little or no goodwill in trade related

property businesses and that any amount that had been apportioned to goodwill should be reapportioned to the property and upon which Stamp Duty Land Tax (SDLT) became payable. HMRC, however, have published a new practice note on 30th January 2009 confirming a change of policy. They now accept that in circumstances where

such a business is sold as a going concern the acquisition price will include some element of goodwill. The practice note confirms "the question to be answered is not whether goodwill exists, but what is the value of that goodwill?".