Quarter in law

Welcome to the Spring edition of our quarterly newsletter. Please click on the tabs to read recent case updates and about current regulatory issues affecting employers.

New notice period to call a general meeting for listed companies.

The minimum notice period for calling a general meeting (other than an AGM) of listed companies is set to be extended...click here

Success for Coca Cola against the Coke Cola Limited registered company name

The first objection under section 69 of the Companies Act 2006 (the Act) was upheld by the new Company Names Tribunal in December 2008...click here

The carbon reduction commitment

This new UK carbon trading scheme will have significant consequences for many businesses and is expected to commence in April 2010...click here

New obligations on internet service providers to retain data

On 6 April 2009, requirements for public communications providers to retain communications data were extended to include retention of internet data...click here

Execution of documents – getting it right

A recent case has confirmed the law on the execution formalities of documents and, in particular, deeds to ensure that they create legally binding obligations...click here

Three key messages

On 1 April 2009, new tax tribunals came into existence and new tax appeal procedures came into force...click here

What does the future hold for non-executive directors?

The Higgs report is more relevant than ever, particularly to a UK financial services industry that is reeling from the global banking crisis ...click here

New notice period to call a general meeting for listed companies

The minimum notice period for calling a general meeting (other than an AGM) of listed companies is set to be extended, but listed companies may continue to hold general meetings as they currently do on 14 days notice, provided certain conditions are met.

The Companies (Shareholders' Rights) Regulations 2009, which implements the EU Shareholder Rights Directive (2007/36/EC), will come into force on 3 August 2009. These apply to any meetings of the shareholders, if the notice is sent out on or after 3 August 2009. Article 5.1 of the EU Shareholder Rights Directive provides that listed companies will need to give at least 21 clear days notice to call a general meeting. This is a change from the provisions of the Companies Act 2006 which require 14 days notice to be given.

The UK has exercised the option for EU member states to allow listed companies to call meetings on 14 days notice, provided certain conditions are fulfilled. The conditions are:

1. The shareholders must pass a resolution at an AGM approving the holding of general meetings on 14 clear days notice. This resolution will only be valid until the company's next AGM and will need to be renewed annually.
2. The company must offer shareholders the facility to vote by electronic means that are accessible to all shareholders. UK Department for Business, Enterprise and Regulatory Reform (BERR) is also consulting on how companies can satisfy this requirement.

Whilst the Directive states that the requisite shareholders' resolution needs to be passed by a two thirds majority, BERR is consulting on whether this should be a three quarters majority, so as to align it with the UK regime to pass a special resolution. BERR has issued guidance that whilst the results of the consultation are outstanding, listed companies should consider proposing the resolution as a special resolution — which may be passed on a show of hands or on a poll.

BERR is also currently consulting on the application of the requirement for voting by electronic means, but has said that the issue does not need to be resolved in order to pass the relevant shareholders' resolution. This applies only when a meeting is called after 3 August 2009 on less than 21 days' notice.

This means that listed companies who wish to take advantage of the option to call a general meeting on 14 clear days' notice after 3 August 2009 should consider now passing a resolution at their next AGM, as outlined above.

For further information please contact:

Stuart Hatcher
stuart.hatcher@pwclegal.co.uk

Success for Coca Cola against the Coke Cola Limited registered company name

The first objection under section 69 of the Companies Act 2006 (the Act) was upheld by the new Company Names Tribunal in December 2008. The objection was brought by the Coca-Cola Company (Coca-Cola) against the registered company name Coke-Cola Limited.

The new procedure

Section 69 of the Act came into force on 1 October 2008. It provides a new route for any brand owner (person or company) with goodwill in a name, to object to opportunistic registrations, which are intended to take advantage of another person's brand or trade mark. The objection can be made on the grounds that the name:

(a) is the same as a name associated with the applicant in which he has goodwill; or

(b) is sufficiently similar to such a name that its use in the United Kingdom would be likely to mislead by suggesting a connection between the company and the applicant.

If the applicant can show that the company name is the same as its brand name or trade mark (or sufficiently similar), then the onus is on the new company name registrant to show that it has made a legitimate registration without any opportunistic intention. The objection is likely to fail if the registrant demonstrates that the name was registered without any opportunistic intent, by contending one of the defences below:

(a) the company name was registered before the commencement of the activities on which the applicant relies to show goodwill; or

(b) the company is operating under the name, or is proposing to do so, and has incurred substantial start-up costs in preparation; or

(c) the company was formerly operating under the name and is now dormant; or

(d) the company name was registered in the ordinary course of a company formation business and the company is available for sale to the applicant on the standard terms of that business; or

(e) the name was adopted in good faith; or

(f) the interests of the applicant are not adversely affected to any significant extent.

Each of the above grounds raises the presumption that the company name was legitimately registered. However, even if one of the above grounds is found to apply, the objection can still succeed if the applicant can prove that the purpose for registering the name was either to obtain money from the applicant, or to prevent the applicant from registering the name.

What are the benefits of this new procedure?

The new procedure is good news for brand owners to protect their brands. It is likely that brand owners will use this procedure in addition to, or even sometimes instead of, the law of passing off (misrepresentations made by one trader which damage the goodwill of another trader). However, there are a number of defences that the registrant can use to show that it has registered the company name validly, provided there is no opportunistic intention.

The Company Names Tribunal procedure is retrospective and appears to be efficient, useful and relatively fast. The Coca-Cola matter was decided in roughly three months. However, Coca-Cola's application was the first to be decided under this new process, it was not opposed and involved one of the most established brands in the world. Therefore, it remains to be seen how quickly future objection applications under section 69 of the Act will be decided by the Company Names Tribunal, the extent of the retrospective effect under this process and how far it will actually go to protect names with goodwill/reputation attached that are not as well known as the Coca-Cola brand.

For further information please contact:

Purabi Chatterjee-Das
purabi.chatterjee.das@pwclegal.co.uk

The carbon reduction commitment

- 5,000 businesses across many sectors will be covered by a new carbon trading scheme, the carbon reduction commitment (CRC), commencing in April 2010.
- CRC will have both financial and reputational impact on businesses.
- Businesses need to understand who is caught by the CRC and start preparing for it now.

This new UK carbon trading scheme will have significant consequences for many businesses and is expected to commence in April 2010. Failure to address the requirements of the CRC could cause significant financial and reputational harm to your business.

The Government is currently finalising the CRC – a new scheme which will require businesses across many sectors to purchase credits to cover their carbon dioxide emissions from energy usage. The CRC will affect non-energy intensive businesses, which includes many sectors such as property, retailers, banks, supermarkets and hotel chains, as well as public sector entities such as hospitals, schools and universities, government departments and local authorities.

To help combat global warming the UK Government passed the Climate Change Act 2008, which sets legally binding targets to reduce carbon emissions by 80% by 2050. The Government is planning to introduce the CRC under this legislation, as a "pay as you pollute" trading scheme. Draft legislation and guidelines have been published for consultation and were open for comments until 4 June 2009.

Participation in CRC will be mandatory for all businesses that use 6000 mega watt hours (MWh) or more of electricity per year through half-hourly metering systems (equivalent to an annual bill of approximately £600,000). It is estimated that about 5000 businesses will be required to participate fully in the scheme, which together are responsible for about 40% of CO^2 emissions. Many other businesses will have to comply with reporting obligations.

Participating companies will have to purchase allowances (from the Government at the beginning of the trading period, or from other businesses during the period) sufficient to cover carbon dioxide emissions from the energy they use. At the end of each trading period, participants must surrender sufficient allowances to cover their emissions during that period. The total amount of allowances available to companies will gradually reduce as trading years pass.

League tables will be published showing the best and worst performers in reducing emissions each year, which will have a reputational impact.

The scheme is intended to be "revenue neutral". To achieve this, the income from sale of allowances will be returned to participants following the end of each trading year, but the best performers will receive a greater share of the repayment, and worst performers will receive a smaller share, creating a financial incentive to improve efficiency. Businesses that fail to comply with the scheme can also be punished through fines.

Who is responsible for CRC compliance?

The customer named in an energy supply contract will be responsible for the CRC, but companies within a group structure are treated as a single organisation, with the parent company participating on behalf of its subsidiaries. Only entities inside the UK will be counted, and notification must be given where a subsidiary would qualify for the CRC in its own right.

Cont'd

The carbon reduction commitment - cont'd

Particular issues in the relationship between owners and occupiers:

- Responsibility as between landlord and tenant – in many cases, landlords may be responsible under CRC for energy usage by their tenants. They should consider how to monitor emissions and how to pass on costs, penalties or bonuses. Going forward, parties may wish to enter into "green lease" terms to regulate the treatment of the CRC between the parties.
- Shopping centres and multi-occupancy buildings – particular difficulty is likely to arise when allocating any penalty or bonus payment between tenants in a multi-occupancy building. Separate sub-metering may assist, but there will still be an administrative burden. The landlord is likely to remain responsible for energy usage in common parts.
- Large property portfolios – businesses with many properties will need to identify the energy usage for which they are responsible, and ensure they are able to collect the information and evidence required under CRC.
- Franchises – franchisors are legally responsible for the energy usage of all franchisees, even if the franchisee is legally owned by a separate group.

What should you be doing now?

Although allowances won't have to be bought until 2010, organisations should put in place plans now to deal with the CRC, including the following:

- Ensure there is clear responsibility for CRC management within the organisation.
- Identify whether qualification criteria are met (note: organisations on half hour metering but using less than 6000MWh p.a. will still have to submit an information disclosure).
- Ensure there are robust data collection and measurement systems.
- Identify the opportunities CRC may bring for cutting energy costs and improving energy efficiency: e.g. in relation to buildings or IT systems.
- Identify any projects which have the potential to increase carbon emissions.
- Plan and prepare a trading strategy.

Conclusion

Although awareness of the CRC is gradually growing, many companies and public sector organisations have not yet begun to make adequate preparations. Failure to prepare for this legislation adequately is likely to harm a business both financially, through penalties for poor performance, and through reputational harm. Companies need to put plans in place to prepare for CRC, to enable them to measure emissions and to take energy efficiency issues into account in their decision-making processes.

For further information please contact:

Nistha Jeram-Dave
nishta.jeram-dave@pwclegal.co.uk

New obligations on internet service providers to retain data

On 6 April 2009, requirements for public communications providers to retain communications data were extended to include retention of internet data. Previously, the obligations applied only to fixed line and mobile telephony data. The Data Retention (EC Directive) Regulations 2009 require the retention of communications data for a period of 12 months.

Under new regulations, "communications providers" now have an obligation to retain "internet data" as well as "fixed line and mobile telephony" data for 12 months. Previously, only the latter had to be retained.

The definition of "communications providers" limits the scope of the regulations to "providers of public electronic communications networks or services", such as telephone and mobile phone companies and internet service providers. The Regulations recognise that data is sometimes held at both network and local levels. Therefore, to avoid duplicating the duty of retention, notice will be given to providers which need to comply with the requirements.

"Communications data" includes the manner in which, and the method by which, a person or machine communicates with another person or machine, but does not include the content of a communication.

Specific data types to be retained are listed in the Regulations. These include user names, addresses and telephone numbers, user IDs for internet access, and dates and times of calls and internet access.

Accessibility is also important, as organisations must transmit data without undue delay in response to requests. However, access to the data is limited to specified purposes, such as national security, economic well-being of the UK and public health (under the Regulation of Investigatory Powers Act 2000). *The Times* reported that in 2007, 520,000 such requests for communications data were made, which gives an idea of the likelihood of a request being made (*The Times*, 5 October 2008).

Retained data must be stored securely to prevent unauthorised access, loss or alteration. The UK Information Commissioner, who also regulates data protection legislation in the UK, will be responsible for monitoring these security requirements. The Regulations allow organisations to be reimbursed for the additional storage and logistical costs caused by the legislation. Various reports indicate that the government has given almost £18.5m in grants over the past five years to telecommunications providers to meet the cost of retaining data.

Although the Regulations are limited to communications providers and to certain types of data, where they do apply significant logistical planning is needed. Companies will have to consider the new requirements in the context of other legal and commercial retention needs, such as those under data protection and general information security requirements. Specifically, organisations affected by these rules should review how they can identify and capture the data subject to the new rules; how and where they will store it (including the adequacy of security measures); and how they will assess and action requests for access to the data.

For further information please contact:

Olivia Patterson
olivia.patterson@pwclegal.co.uk

Execution of documents – getting it right

Attaching a signature page from an earlier, previously executed draft of a deed to a final form deed will not create a validly executed deed

A recent case has confirmed the law on the execution formalities of documents and, in particular, deeds. This will ensure that legally binding obligations are created.

Mercury Tax Group Limited (Mercury) set up a lawful tax avoidance scheme for certain clients which involved the execution of numerous documents as deeds. The scheme's lawfulness depended on the completion of a number of steps within a short timeframe. Accordingly, the clients were asked to execute early draft versions of the deeds to be entered into and, when the terms of these documents had been finalised, the signature pages from the draft deeds were transferred and attached to the final deeds, whose provisions differed in certain respects. In November 2007, HM Revenue & Customs (HMRC) had successfully argued that these actions were, amongst other things, evidence that the scheme had been dishonestly implemented. One of the grounds for this being that the deeds essential to the scheme were ineffective, and obtained warrants (under the Taxes Management Act 1970) to raid both the offices of Mercury and the homes of the individual participants in the scheme.

Mercury challenged the decision to issue the warrants. It argued (amongst other things) that the manner of execution of the deeds was standard commercial practice and so they were effectively executed. It also argued that this practice was akin to the established legal principle of amending a document that had been previously signed with the authority of the parties, and that even if the document was not effective as a deed, the documents concerned could have been legally concluded as simple contracts.

How does this affect businesses?

The Act ruled that the use of signature pages from previous drafts of a document to attach to the final form of a deed would invalidate the deed. Section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 requires, for execution of a deed by an individual, that the signature of the individual and attestation by a witness must form part of the same physical document which makes up the final version of the deed. Therefore, in order to be validly executed a deed must be complete in all material respects when signed, and if a document is expected by the parties to be executed as a deed, then its validity would be judged upon that basis.

Execution of other documents

The case addresses the execution of documents as deeds and not as simple contracts. However, it has cast doubt on the practice of "recycling" signatures from draft contracts which are not deeds. The Act distinguished the established legal authority permitting the amendment of a contract after signature with the consent of all parties, from the situation where the signature is attached to an entirely new document.

Conclusion

The case reminds us that by signing a document, a party is agreeing to be bound by the terms contained within that document, and so it is important that it is complete in all material respects at the time of execution. It further highlights that signed pages of a previous draft of a document may not be attached to the final version.

For further information please contact:

Caroline Graham
caroline.graham@pwclegal.co.uk

Three key messages

From 1 April 2009:

- Tax appeals will proceed to the new First Tier Tribunal and Upper Tribunal.
- Taxpayers (not HMRC) may refer disputes to the Tribunal; and in certain circumstances, non action by taxpayers will amount to an admission of the legal position taken by HMRC.
- The successful party will be more likely to recover his costs of the appeal.

Tax tribunal and tax appeal reforms

On 1 April 2009, new tax tribunals came into existence and new tax appeal procedures came into force. These changes are important to every taxpayer who is likely to be involved in a dispute with HMRC, as if the taxpayer gets the procedure wrong, he may be taken to have accepted HMRC's position on the tax (in a similar way to proceedings in a Court).

The new tribunals

The new tribunals are the First Tier Tribunal (FTT), which is a tribunal of first instance; and the Upper Tribunal (UT), which has appellant function (taking over the role previously performed by the High Court).

New appeal procedures

There are important changes to the appeal procedures. Taxpayers must, as before, give HMRC notice of appeal in writing within 30 days after HMRC closed their enquiries. A taxpayer may now, however, require HMRC to carry out an internal review of the matter. HMRC may offer taxpayers an internal review and if this happens, the taxpayer must respond (as described below). If he does not, he is taken to accept HMRC's position on the tax. The taxpayer may either accept the offer for an internal review or he may refer the appeal to the FTT. There is no time limit for any of these procedures, but strict time limits apply after HMRC offers a review.

Hearing of appeals

Virtually all appeals go to the FTT, which allocates cases according to their complexity. Exceptionally, very complex cases may go straight to the UT (only at the request of the parties and the consent of the FTT). Cases that were first heard before the old tribunals continue in the FTT. Appeals on points of law can be made, with permission, from the FTT to the UT, from the UT to the Court of Appeal and from the Court of Appeal to the House of Lords. In the latter two instances this is subject to permission.

Costs

The FTT may make various costs orders, including a "wasted costs" order where a party has acted unreasonably and, in relation to a complex case, where the taxpayer has not opted out of the costs regime relating to complex cases. The UT has a broadly similar costs jurisdiction.

So what?

Taxpayers must be aware of the new procedures and ensure that they safeguard their positions against an automatic finding against them for failure to take the correct procedural step.

For further information please contact:

Boaz Goren
boaz.goren@pwclegal.co.uk

What does the future hold for non-executive directors?

"In order to fulfil their role, non-executive directors must acquire the expertise and knowledge necessary properly to discharge their responsibilities. They must be well-informed about the business, the environment in which it operates and the issues it faces. This requires a knowledge of the markets in which the company operates as well as a full understanding of the company itself." Higgs Review January 2003.

Over six years ago, Sir Derek Higgs published his seminal report on the role and effectiveness of non-executive directors (NEDs). The Higgs Review recommended, amongst other things, that NEDs should:

'…have the knowledge, skills, experience and time to make a positive contribution to the board;

understand and represent the views of major investors;

constructively challenge and monitor the management team; and

satisfy themselves that the financial controls and systems of risk management are robust and defensible.'

The Higgs Report is more relevant than ever, particularly to a UK financial services industry that is reeling from the global banking crisis. Serious corporate governance failings at UK banks, and in particular ineffective NEDs, have taken a large part of the blame for recent bank failures. For example, during the Treasury Select Committee hearings on Northern Rock, the NEDs, (including the Chairman of the Board, the Chairman of the Risk Committee and the senior NED), were held responsible for failing to ensure that the bank was liquid and solvent, failing to take adequate risk mitigation measures and failing to act as an effective restraining force on the strategy of the executive members[1].Similar failings in corporate governance have occurred in other large UK banks during the financial crisis.

Both the recent Turner Review into the global banking crises (the Turner Review) and Sir David Walker's ongoing review of corporate governance of the UK banking industry (the Walker Review) focus on the role and effectiveness of NEDs. The Walker Review team intends to publish a consultation paper this summer, and the results of the review in October 2009. The significant changes advocated by these two reviews will have important implications for both financial services firms and the wider corporate community.

Following the Turner Review, the UK Financial Services Authority (FSA) are increasing their focus on:

- NEDs' competence and qualifications - according to the FSA, at least one NED seeking FSA approval has had to go through to a second taped interview;
- NEDs' time commitment – those from large complex banks will probably need to spend weeks, rather than days per month, to discharge their responsibilities;
- the extent to which NEDs challenge dominant CEOs pursuing aggressive growth strategies; and
- penalties for non-performing NEDs.

The FSA expect to produce further recommendations in relation to NEDs over the next few months, which will be coordinated with the work being carried out by Sir David Walker.

For further information please contact:

Andrew Devine
andrew.devine@pwclegal.co.uk

1 Treasury Select Committee Fifth Report – The run on the Rock, dated 26 January 2008, Session 2007-2008, paragraph 31

This publication has been prepared for general guidance on matters of interest only, and does not constitute professional advice. You should not act upon the information contained in this publication without obtaining specific professional advice. No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this publication, and, to the extent permitted by law, PricewaterhouseCoopers Legal LLP, its members, employees and agents accept no liability, and disclaim all responsibility, for the consequences of you or anyone else acting, or refraining to act, in reliance on the information contained in this publication or for any decision based on it.

© 2009 PricewaterhouseCoopers Legal LLP. All rights reserved. PricewaterhouseCoopers Legal LLP is a member of the PricewaterhouseCoopers network of firms, each of which is a separate and independent legal entity. Misc135