

Quarter in law

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

Preparing for the EU alternative investment fund managers directive

The EU draft directive (the Directive) on alternative investment fund managers (AIFM) is set to change the alternative asset management industry landscape throughout the EU... [click here](#)

Court denies bloggers' right to anonymity

A recent High Court decision has cast doubt on the ability of bloggers who adopt a pseudonym to use the laws of confidence and privacy in order to preserve their true identity... [click here](#)

Is your head in the clouds? Legal aspects of cloud computing

Cloud computing allows businesses to receive IT services without purchasing the underlying infrastructure or software... [click here](#)

The Companies Act 2006 (CA 2006) – finally in force in its entirety

Since 1 October 2009 the CA 2006 has been in force in its entirety, nearly three years after phased implementation began... [click here](#)

Developments in data protection bring increased powers for regulator

The recent spate of high profile and costly data protection breaches, both in the public and private sectors, alongside recent changes to the enforcement regime have brought data protection very much to the top of the business agenda... [click here](#)

Challenge by HM Revenue & Customs of the Hastings-Bass principle

A recent case in the Guernsey courts has once again highlighted the scope of the application of the Hastings-Bass principle and the limit of HM Revenue & Customs' (HMRC) position to contest in offshore jurisdictions... [click here](#)

Deductibility of input tax in tripartite contracts – MyTravel Group plc

PricewaterhouseCoopers Legal (PwC Legal) recently acted for MyTravel Group plc, a UK-based holiday company which had previously been in financial difficulties and had restructured its business with a view to agreeing a refinancing package with its creditor banks... [click here](#)

Opportunities knock for tenants

In a tenant's market, now is the time for them to push the boundaries. We are seeing some unprecedented lease inducements being offered by landlords... [click here](#)

To give your feedback or to be removed from the *Quarter in law* mailing list [click here](#).

Preparing for the EU alternative investment fund managers directive

The European Union (EU) draft directive (the Directive) on alternative investment fund managers (AIFM) is set to change the alternative asset management industry landscape throughout the EU. The Directive, as drafted, will both compel changes to EU-based AIFM business models and increase the regulatory hurdles on alternative investment funds (AIF). This article addresses some of the AIFM issues, on the basis of the current draft Directive, which will need to be considered in relation to appointing key service providers.

Implications of the Directive

All AIFMs which become regulated will, if the Directive is enacted in its current form, need to have the following:

- Documented internal systems of management and control complying with EU standards (as yet unspecified) relating to liquidity, management of conflicts of interest, risk management (including appropriate documented and regularly updated due diligence when investing) and short selling.
- Regulatory capital of no less than €125,000, with additional own funds equal to 0.02% of the amount by which portfolios under management exceed €250m.

- An independent valuator, who must value assets in the AIF every time a subscription or redemption take place and, at least yearly, in accordance with local GAAP or in accordance with rules set out in the AIF's constitution.
- An independent depositary (which must be a EU authorised credit institution), whose function will be to receive investor subscriptions, safe keep financial assets and to verify the AIF has ownership of assets it has invested in.

An AIFM's ability to permit its valuator or EU depositary to delegate functions to non-EU banks or valutors, or itself appoint non-EU valutors or custodians or to delegate functions (including investment management) to third parties (particularly non-EU entities), will be severely limited and subject to detailed procedural requirements. Portfolio management cannot be delegated outside the EU in any event. Where an AIFM delegates some of its functions to a third party, that third party will not be permitted to further sub-delegate any of those functions. Furthermore, all AIFMs will be required to produce an audited annual report for each AIF that it manages, to be made available within four months of the fund's financial year end to investors and

the AIFM's regulator. The auditor must be EU-qualified or recognised. Some of the issues related to service provider arrangements are summarised in the table below:

Directive requirement	Issue
Depositary/custodian must be a EU credit institution	Only a few prime brokers currently qualify
Non-EU administrators must be regulated and subject to prudential supervision	Most non-EU administrators do not currently qualify
Valuator must be independent of AIFM and no conflicts of interest may exist with AIF or investors	Some administrators may not qualify to act as independent valuator
Auditor must be a EU qualified/empowered auditor	AIF may require more than one audit (e.g. Cayman funds)

Continued

Preparing for the EU alternative investment fund managers directive - cont'd

The draft Directive has given rise to significant opposition from a number of member states. In particular, the proposed third country regime and restrictive delegation provisions are under intense discussion. Nevertheless, it is prudent to assume that the Directive, when brought into law, will have a material effect on AIFM.

Actions to take

Given the proposed reach of the Directive, it is crucial that potentially affected businesses assess the possible impact of the Directive immediately and monitor the changes as it passes through the EU legislative process. By doing so they can seek to influence the shape of the final Directive and its implementing regulations and, to the extent necessary, start planning for the changes the Directive would require as currently drafted. If political approval on the Commission's proposals is reached by the middle of 2010, the Directive could come into force in 2012.

In particular, AIFMs should be considering the impact of the Directive on their operations and estimating the likely costs that will be involved both in the restructuring of operations and service provider arrangements and in the ongoing compliance responsibilities. They should be actively involved in industry body and regulator initiatives to contribute to the consultation process so as to end up with a new regulatory framework which minimises the additional cost burden while supporting a regulatory framework that is appropriate to address the risks involved.

For further information please contact:

James Greig
james.greig@pwclegal.com

Court denies bloggers' right to anonymity

A recent High Court decision has cast doubt on the ability of bloggers who adopt a pseudonym to use the laws of confidence and privacy in order to preserve their true identity. The decision may come as a surprise to many thousands of individuals who post messages and comments on the internet in blogs, wikis and discussion boards in the belief that their identity will remain secret. It is of significance to the media, businesses and employers who may wish to discover the identity of posters, and to the operators of sites who need to consider whether they are under a duty to disclose or maintain the anonymity of their users.

A duty of confidence

In *The Author of a Blog v Times Newspapers Limited* [2009] EWHC 1358 (QB), Mr Justice Eady refused to grant an interim injunction against *The Times* to prevent it revealing the identity of a high profile blogger known as Night Jack. The claimant was a serving police officer who used the blog to comment on issues relating to police work and to make criticisms of ministers. *The Times* was able to deduce his identity by investigation using public sources – there was no evidence that his identity had been disclosed to *The Times* by anyone in breach of a duty of confidence. The claimant argued that *The Times* was nevertheless subject to a duty of confidence not to reveal his identity, as he had taken steps to preserve his anonymity. Justice Eady stated that, for a breach of the traditional law of

confidence, the disclosed information (i.e. the blogger's name) must have a quality of confidence. The judge ruled that a blogger's name does not have a necessary quality of confidence. The mere fact that the blogger would have wished to keep his identity secret (not least from his employers) did not make it confidential.

The claimant also sought to rely on the relatively modern right against wrongful disclosure of private information, which was formulated in *Campbell v MGN Ltd*¹, to retain his anonymity. That case established that information should not be disclosed if it is of a private nature and that a person has a reasonable expectation of privacy (in that case, the reasonable expectation to privacy related to the subject having received treatment for drug addiction), unless there was a countervailing public interest justification for its publication. In this case, however, Justice Eady determined that the claimant did not, in fact, have a reasonable expectation of privacy because blogging is essentially a public activity, rather than a private activity – the claimant therefore failed to pass the first stage of the test.

Interestingly, the judge did not refer to an earlier binding decision of the Court of Appeal, which determined that the real name of an author who posted defamatory comments during an online discussion group was subject to a contractual duty of confidence under its terms of business (*Totalise plc v The Motley Fool*²), although the court went on to order disclosure of a poster's identity in the interests of justice. However



1 [2004] UKHL 22

2 [2001] EWCA Civ 1897

[Continued](#)

Court denies bloggers' right to anonymity - cont'd

the facts of that case were quite different because of the contractual relationship between the internet service provider (ISP) which was requested to make the disclosure and the poster.

In addition, the claimant does not appear to have advanced any arguments under the Data Protection Act 1998 (DPA), despite the public linking of his name with his political opinions, which are classed as sensitive personal data under the DPA. *The Times* would, however, potentially have been able to rely on the journalism exemption under the DPA, if it could prove that the disclosure was in the public interest.

Is blogger anonymity dead?

The blog decision is quite particular to its facts, and subsequent comments in the press that the decision has "*killed blogger anonymity*" are somewhat exaggerated. Those who wish to discover or publish the identity of anonymous posters may find that it sets a helpful precedent. ISPs, hosts and operators of blogging and online discussion group websites should, however, not rely on the blog decision as justification for disclosing the identity of bloggers or posters without careful consideration of all the circumstances of a particular case.

For further information please contact:

Jonathan Nugent

jonathan.nugent@pwclegal.co.uk

Thomas Allen

t.allen@pwclegal.co.uk

Is your head in the clouds? Legal aspects of cloud computing

What is cloud computing?

Cloud computing allows businesses to receive IT services without purchasing the underlying infrastructure or software. A business may access IT systems (generally provided by a third party) in order to manage processes and content (such as email, office solutions and application development) but will not necessarily maintain local copies of the relevant software or content. Alternatively cloud services can be used for back-up of content developed in-house.

The relevant services are often provided on demand rather than continuously, which means a customer can purchase only such services and infrastructure when required at any one time. A customer may have no knowledge of where the relevant services are being provided and therefore where data or other content is being sent or stored (commonly, over the internet). Content can generally be moved around by the service provider without the knowledge of the customer.

Examples of cloud computing services include webmail software services, such as Hotmail and Gmail, and provision of IT platforms and infrastructure for businesses, such as Amazon EC2 and Microsoft's recently launched Azure service.

Why move to the cloud?

The benefits of cloud computing are similar to those associated with traditional outsourcing models, including efficiency, cost and time savings, increased

performance and the specialist provision of services. However, cloud computing goes further than traditional outsourcing models in creating greater flexibility and efficiency (and therefore cost saving) in the extent of use of the relevant IT systems, deriving from the lack of defined infrastructure or software being allocated to the relevant business.

What legal issues need to be addressed?

- **Contract with the service provider:** The recipient of a cloud service needs to consider not only the terms of its services contract with the provider, but also the practical steps needed to monitor and enforce compliance.

Services are commonly offered on the supplier's standard terms and may provide little scope for negotiation. However, if a customer is entrusting substantial amounts of business infrastructure and content to the provider, negotiation may be essential to ensure compliance and protect legitimate business interests.

Key issues to consider include scope and level of service, payment structure, ownership and rights to content, liability for breaches, rights of audit and exit provisions.

- **Compliance:** A business must ensure it complies with its legal obligations in entrusting its systems and data to the cloud. Legal obligations will vary depending on what processes are undertaken and

data used. Issues to consider may include data protection, financial and corporate requirements, litigation (e.g. requirements for disclosure), contractual obligations to customers and industry obligations such as those imposed under Payment Card Industry (PCI) and Financial Services Authority (FSA) standards.

A business will need to consider whether it knows enough about how and where the data is being sent and stored to ensure compliance, for example:

- Who is holding the data – does the service provider use any sub-contractors?
- What data is being held – are records kept of application usage?
- Where is data being held – might it be moved to servers overseas?
- What levels of security are being applied?
- Can the business access content quickly if required?
- **Intellectual property and confidential information:** There are practical difficulties in enforcing intellectual property rights if content (such as know-how or copyrighted material) is leaked. Once content is moved on the internet it may become difficult to prevent dissemination in practice. Using the cloud service to process or store valuable intellectual property without sufficient guarantees

[Continued](#)

Is your head in the clouds? Legal aspects of cloud computing - cont'd

of the system's reliability may therefore lead to problems.

- **Availability:** A business will need to access and use content for legal and business reasons. To the extent it may need to produce any documents as evidence (e.g. in litigation), the business should ensure that they are easily accessible and that there are sufficient guarantees as to authenticity and integrity. Robust plans should be put in place to ensure business continuity in the event the provider is subject to a disaster or insolvency, and to ensure that there is orderly transfer and handover of information on termination of the contract. A business should consider maintaining internal back-ups of business critical information.
- **Policies and procedures:** Staff members who may access cloud services should be made aware how they should and shouldn't be used to avoid inadvertent misuse of systems or data and consequential liability for the business.
- **Criminal activity:** Content entrusted to the cloud may become vulnerable to malicious attacks and fraud – access and use of content may be more difficult to control outside internal systems and, in particular, over the internet. A business should consider whether it is putting its own or its customers' data at risk if it stored in the cloud.

So what should you be doing?

Use of cloud services can bring many potential business benefits including high cost savings. A business will need to balance these benefits against the legal and business interests and should assess which processes and content are appropriate for the cloud. It may be difficult to justify moving personal, valuable or commercially sensitive data or business critical applications, given the risks associated with the lack of control in the cloud. On the other hand, suppliers of cloud services should be considering what guarantees they can give customers to provide them with confidence to use the relevant services.

For further information please contact:

Olivia Patterson
olivia.patterson@pwclegal.co.uk



The Companies Act 2006 (CA 2006) – finally in force in its entirety

An overview of the main changes to the Companies Act 2006 that came into effect from 1 October 2009

Since 1 October 2009 the CA 2006 has been in force in its entirety, nearly three years after phased implementation began. This update looks at the key changes that came into force on 1 October 2009 and identifies how to take advantage of what, in many cases, are simplified and streamlined procedures. If you have not made changes to date, then it is time to take action now.

1. The company's constitution – memorandum of association (MOA) and articles of association (AOA)

The objects of a company will no longer be set out in its MOA and a shorter standard format MOA will be required instead, providing only basic subscriber information on incorporation. The AOA will now be the primary constitutional document of all companies. Any company that has been incorporated on or after 1 October 2009 will have unlimited objects; for existing companies, the objects set out in the MOA will automatically become part of their AOA. A company can restrict or otherwise amend its objects by amending the relevant provisions of its AOA.

Further companies incorporated after 1 October 2009 will no longer need to have a statement of authorised share capital. For existing companies, the provisions in the memorandum relating to authorised share capital will be deemed incorporated in the AOA; this is discussed in this article.

A set of new model articles came into force on 1 October 2009, replacing the old table A. These articles will automatically apply by default to any company incorporated on or after 1 October 2009 (unless specific articles are filed at incorporation) and are intended to provide a more streamlined constitution in accordance with the deregulatory objectives of the CA 2006. The CA 2006 provides separate model articles for public limited companies, private limited companies and companies limited by guarantee. We would recommend that all companies take this opportunity to review and update their AOA in light of the legal changes, in particular because there may be provisions in the company's existing articles that are overridden or superseded by provisions contained in the CA 2006, but also to take advantage of any applicable relaxations under the CA 2006 and to ensure that any statutory provisions referred to in the articles are up to date.

2. Authorised share capital (ASC) and allotment of shares

It is no longer a requirement for a company limited by shares (whether private or public) to have an ASC. For existing companies, any stated ASC will continue to restrict the numbers of new shares which can be issued, but it will be possible to remove or alter this restriction by means of a members' ordinary resolution or by adopting new AOA. Unless a company specifically chooses to set an upper limit in its constitution, there will be no upper limit on the number of shares that it can issue.

A related change which took effect from 1 October 2009 is that the directors of a private company that has only one class of shares will be free to allot shares (provided there are no provisions in the company's articles to the contrary) and no formal authorisation by shareholders will be required. Public companies and private companies with more than one class of shares will not be able to take advantage of this new provision. This applies automatically to companies formed on or after 1 October 2009 but existing companies wishing to take advantage of this change will need to pass a members' ordinary resolution to amend their articles.

The statutory pre-emption regime, and a company's related ability to disapply the regime, either by special resolution or by provisions in its articles, will remain essentially unchanged. Existing companies that have disapplied pre-emption rights prior to 1 October 2009 will not need to repeat the disapplication, which will remain valid until it expires in the usual course. The statutory pre-emptive offer period for public companies has been reduced from 21 days to 14 days.

3. Redeemable shares, reductions of share capital and own share purchases

As of 1 October 2009 it is no longer necessary to have a positive statement of authorisation in a company's article before that company can (i) consolidate or subdivide share capital; (ii) carry out a reduction of capital; (iii) purchase its own shares or purchase shares out of capital; or (iv) issue redeemable shares. However, in a procedural change, a company will need to file

[Continued](#)

The Companies Act 2006 (CA 2006) – finally in force in its entirety - cont'd

a new statement of capital with Companies House that sets out the current issued share capital on every occasion that a company takes action affecting its shares. Companies deterred by the previous complex procedures in relation to some of these steps may now wish to reconsider their options in light of the new rules.

4. Company names

A company can currently change its name by a members' special resolution. The CA 2006 now allows for a simpler method to be entrenched in the company's AOA, for example, a resolution passed by the board or by a members' ordinary resolution.

5. Directors' residential addresses

All directors will now be able to use a service address instead of their home address for disclosure on the public records at Companies House. Directors and secretaries will, nevertheless, be required to notify Companies House of both their residential and service address and separate registers will be maintained by Companies House: however, only specified authorities and credit reference agencies will be able to obtain a director's private home address. If no action is taken, the service address will default to the individual's residential address, so companies should ensure that the appropriate form is filed at Companies House for all their directors to record a new service address. It is also possible to make an application to Companies House for the removal from the public record of all prior filings in which directors' residential addresses are disclosed.

6. Companies House

The last date for delivery of documentation to incorporate a company under the Companies Act 1985 was 30 September 2009. No companies will be registered under the CA 2006 until 5 October 2009 or later. Any incorporation documents received from 1 October 2009 until 5 October 2009 will be logged by Companies House and processing began on 5 October 2009. A new format of Companies House forms has come into effect from 1 October 2009 and may be accessed via the Companies House website. However it should be noted that where a filing is required to be made in relation to an event which occurred prior to 1 October 2009, the former forms should be used even if the filing is in fact made on or after that date.

What action should you be taking?

In light of the extensive changes effected by CA 2006, directors of all companies (public and private) should be considering whether or not they are currently compliant with the new regime, and whether changes should be made to their MOA and AOA and/or procedures to enable them to take full advantage of the modernised and deregulatory new regime.

Please contact us if you would like advice on any of the issues covered here, or any other aspects of the CA 2006 and its impact on company law.

For more information please contact:

[Caroline Graham on 020 7212 1938](#)
caroline.graham@pwclegal.co.uk

[Andrew Mottram on 020 7213 5595](#)
andrew.mottram@pwclegal.co.uk

Developments in data protection bring increased powers for regulator

The recent spate of high profile and costly data protection breaches, both in the public and private sectors, alongside recent changes to the enforcement regime have brought data protection very much to the top of the business agenda.

Individuals and regulators now have higher expectations in relation to data protection compliance. Around 25,000 complaints were received in 2007/8 by the Information Commissioner's Office (ICO), the regulator for data protection and freedom of information issues. The ICO now expects data protection to be a management board issue and public sector bodies are obliged to carry out privacy impact assessments prior to launching new projects which may impact on privacy, such as creation or sharing of databases.

Christopher Graham, former head of the Advertising Standards Authority (ASA), has recently taken up his role as the new Information Commissioner, in succession to Richard Thomas. The new Information Commissioner will soon enjoy significantly increased powers to conduct investigations and impose fines for data protection breaches, with the activity to be funded through increases in the previously nominal fees payable for registration under the Data Protection Act 1998 (DPA).

This article summarises some of the most significant recent developments.

Increased notification fees

Recent new regulations - the Data Protection (Notification and Notification Fees) (Amendment) Regulations 2009 - create a new fee structure for notification as a data controller to the ICO, with effect from 1 October 2009. In place of the current flat fee of £35, larger data controllers (i.e. those organisations which are responsible for the collection and processing of personal data) will now be required to pay an increased annual fee of £500. The higher fee will apply to organisations which have an annual turnover in excess of £25.9 million and 250 or more staff. Smaller organisations and some other categories such as charities will still have to pay an annual fee of £35. Those which undertake only limited processing may qualify for an exemption.

New powers to impose fines

Failure to implement appropriate measures to ensure compliance with data protection law can already lead to major fines from some regulators (e.g. the Financial Services Authority has imposed fines in the range of £1m for security breaches involving customer data) and criminal convictions (for entities, directors and/or other officers) as well as damaging negative publicity and reduced customer and employee confidence. Up until now, the ICO's own powers to impose fines have been much more limited, but this is due to change from next year. Legislation was passed in the Criminal Justice and Immigration Act 2008 which will enable

the ICO to impose much higher monetary penalties on organisations which knowingly or unknowingly breach the DPA. The powers are expected to be brought into effect through secondary legislation in April 2010. Details of the level of fines are still being finalised but it is likely that these will be substantial and in line with the amounts imposed by other regulators.

Investigatory powers

The ICO is also expected to be granted increased powers shortly to investigate organisations for compliance with the DPA. These powers will enable the ICO to serve an assessment notice in order to determine whether an organisation is complying with the data protection principles set out in the DPA. Where an assessment notice is served, the ICO will be entitled to enter premises, obtain documents and information, inspect equipment and interview employees.

These powers have been proposed as part of the Coroners and Justice Bill which is currently being considered by the House of Lords, and will be reported on at the end of October 2009. Originally the powers were intended to apply only to government departments and other public authorities. The proposal has now been amended so that an assessment notice could also be issued to specific categories of private businesses, where this is felt to be necessary as a result of the type or quantity of personal data being processed, and the damage or distress which could be caused as a result of a breach.

[Continued](#)

Developments in data protection bring increased powers for regulator - cont'd

The personal information promise

This is an initiative launched by the ICO in January 2009 to promote awareness and senior level commitment to privacy and protection of personal information, in order to gain public trust in the handling of personal information. It consists of a simple ten point pledge which has been signed by senior executives from a number of leading organisations across many sectors. Key elements of the promise include commitments to go beyond strict legal requirements and adopt good practice standards, to commit appropriate resources to looking after personal information, and to conduct checks on how well the organisation is living up to the promise.

Privacy impact assessment

Serious concerns are increasingly being raised over privacy implications arising from large IT projects and new business ventures involving use of personal information in both the public sector (e.g. databases, ID cards, DNA records) and the private sector (e.g. Google Streetview, targeted internet advertising). A privacy impact assessment (PIA) is a review of risks to individual privacy which may be posed by such projects. It involves an analysis of risks, consultation with stakeholders and proposals for solutions. The ICO issued a revised version of its PIA handbook in June 2009.

Although not a strict legal requirement, the ICO recommends that a PIA should be undertaken early in a project to assess privacy risks and compliance liabilities, enable risks to be avoided or mitigated and to help instil public confidence and inform public communications. In the public sector, central Government departments have been instructed by Cabinet Office guidelines to conduct a PIA in relation to new projects and other public bodies are strongly encouraged to conduct a similar assessment. A PIA can also help avoid the need for expensive redesign of systems or processes if problems come to light at a later stage, and can assist in clarifying business needs, benefits and objectives for a project.

How does this affect your business?

Data protection is an increasingly important issue for all businesses. It is particularly important where a business holds substantial amounts of personal data relating to individuals; e.g. consumer businesses, or those with a substantial number of employees.

The impending new powers of the ICO will reinforce the need for all businesses to understand compliance requirements, identify the extent of personal data being held and used by them and their service providers, and ensure practical implementation and enforcement of policies and procedures across all relevant business units and jurisdictions.

For further information please contact:

Jonathan Nugent
jonathan.nugent@pwclegal.co.uk

Challenge by HM Revenue & Customs of the Hastings-Bass principle

A recent case in the Guernsey courts has once again highlighted the scope of the application of the Hastings-Bass principle and the limit of HM Revenue & Customs' (HMRC) position to contest in offshore jurisdictions.

The Hastings-Bass principle and its development

The principle originated from the case of *Hastings-Bass* (1975). The idea behind the principle was to ensure the beneficiary does not suffer from the trustees' mistakes. It allows the court to void an action of the trustees, which would otherwise be disadvantageous to the beneficiaries, and which the trustees would not have made if they took account of the adverse consequences.

However, over the years, the principle seems to have extended and is suggested in some instances to have been completely divulged of its main impetus. The courts have slipped into treating would as might, which can make the trustees' decisions more vulnerable and up to the challenge of the beneficiaries. The principle has been used to void trust arrangements set up with a view to minimising tax liabilities.

The extent of its modern use seems most clearly set out by the case *Abacus Trust Co (Isle of Man) v NSPCC* (2001), involving a capital gains tax arrangement, in which Justice Etherington, in applying the principle to void a distribution by the trustees as part of the arrangement, ruled the exercise of the trustees' discretion to distribute will be void if (a) the trustees have failed to take into account a material consideration,

and (b) that consideration might materially have affected their decision.

HMRC's position

As offshore jurisdictions developed and grew more sophisticated over the years, HMRC is experiencing further difficulties in contesting the application of the Hastings-Bass principle. International law has long made clear that foreign revenue claims of one jurisdiction cannot be enforced under another.

To be joined in proceedings, HMRC must ensure it has satisfied the requirements of the laws in the jurisdiction in which the application is made.

This is none better displayed than in the recent Guernsey case: *Gresh v RBC Trust Company (Guernsey) Limited* (Judgment 25/2009). Mr Gresh made an application to the Royal Court of Guernsey to set aside a transaction, which was entered into by the trustees of a pension trust, of which he was a member. Mr Gresh's reasoning for the application was the adverse tax consequences he suffered as a result of the transaction.

Mr Gresh requested the Court declare the transaction void from the outset. The response from HMRC was, unsurprisingly, to apply to join in proceedings.

In accordance with r37 Royal Court Civil Rules 2007 HMRC had to show:

- a question or issue in the proceedings between them and Mr Gresh: and

- a question or issue arises out of, is related to, or is connected with any relief or remedy claimed in proceedings; and
- it would be just and convenient for that question or issue to be determined between HMRC and Mr Gresh.

HMRC argued that it had an interest in the issue before the court, as a finding in favour of Mr Gresh would reduce HMRC's tax collection. However, the court rejected this argument, as HMRC's interest was limited only to the tax consequences following the decision, rather than the application of the Hastings-Bass principle itself.

One of the factors the court focused upon in reaching their decision was HMRC's historic reluctance to become involved in Hastings-Bass cases in the UK.

The court did not agree that HMRC was attempting to indirectly enforce foreign revenue law.

The court did not therefore recognise HMRC's interest as just or convenient to warrant joining in these proceedings, and therefore HMRC's involvement was confined to making their representations known to the court in writing.

Continued

Challenge by HM Revenue & Customs of the Hastings-Bass principle - cont'd

Conclusion

It is of interest that one of the reasons for not including HMRC in proceedings is their lack of interest in Hastings-Bass cases onshore.

The Hastings-Bass principle continues to move forward with strength, and may be an ideal tool to correct wrongs or costly mistakes, but with changing economies and ongoing Government focus on collection of taxes, the principle and the use thereof could be in for a hard time. Watch this space!

For more information, please contact:

Hed Amitai
hed.amitai@pwclegal.co.uk

Carly Russell
carly.russell@pwclegal.co.uk



Deductability of input tax in tripartite contracts – MyTravel Group plc

MyTravel restructuring

PwC Legal recently acted for MyTravel Group plc, a UK-based holiday company which had previously been in financial difficulties and had restructured its business with a view to agreeing a refinancing package with its creditor banks. Following the completion of this restructuring, which was carried out over a period of two years, the business resumed successful trading. However, a dispute subsequently arose with HMRC as to whether MyTravel was entitled to deduct input tax incurred in the professional fees of PricewaterhouseCoopers LLP (PwC). This was in respect of the restructuring work that was invoiced to MyTravel and paid in circumstances where those services were provided under a tripartite contract.

HMRC argued that MyTravel was not entitled to deduct the input tax claimed on the basis that PwC's services were supplied to the banks and not to MyTravel. On behalf of MyTravel it was argued that PwC's services were supplied to both the banks and to MyTravel and that, as those services were used by MyTravel in the course of its business and were paid for by MyTravel, it was entitled to deduct the VAT thereon as input tax.

Is input tax deductible in tripartite contracts?

The decision of the Tribunal is imminent and will provide an important analysis of the deductibility of input tax in tripartite contracts. In addition, the decision may provide guidance to taxpayers who have been assessed for input tax has been claimed in respect of business recovery services, or for services provided in respect of the acquisition of another entity.

For more information, please contact:

Mark Bryant

mark.bryant@pwclegal.co.uk

Opportunities knock for tenants

In a tenant's market, now is the time for them to push the boundaries. We are seeing some unprecedented lease inducements being offered by landlords – such as the reported six year rent-free being given to Nomura as part of their new lease at Watermark Place, London, EC1 (Estate Gazette interactive (EGi) on 1 September 2009).

Whilst the going is good for tenants, it could be improved for the joint benefit of the tenant and the landlord. Detailed consideration of the tax issues surrounding the inducements currently being offered by landlords could provide even greater value to a deal. This is good news for landlords when the right structuring can give commercial benefit to them as well as the tenant.

Types of inducements and their tax implications

Inducements typically come in the form of:

- reverse premiums, being one-off cash payments from a landlord to a tenant;
- contributions by the landlord to the tenant's fit out costs; and
- rent-free periods.

Each inducement is treated differently for tax purposes and can have tax inefficiencies associated with them, in particular:

- Reverse premiums are assessed as taxable income. There is no tax relief for the landlord or any tax benefit for the tenant.
- Contribution to fit out costs may fall outside the taxable income assessment and provide a tax benefit to the tenant, but only if the fit out costs qualify for capital allowances and the payment is made direct to the tenant. Any payments made by the landlord on behalf of the tenant, to contractors for example, would be taxable and there may be no tax relief for the landlord in this scenario.
- Rent-free periods may have hidden catches, whilst appearing to offer the best position. The monetary equivalent of the rent-free period is not taxed and there is a reduced stamp duty land tax liability, both of which benefit the tenant. However, this type of inducement reduces a tenant's tax relief on rental payments until such time as they actually commence paying rent. Also, the accounting treatment of the rent-free period can mean that landlords may suffer a tax hit before actual receipt of rent.

The win-win solution

All may not be lost. There are ways to manage tax in these situations. One possible solution may be for a landlord to set up a subsidiary company which will take on the lease and receive the inducement, with the tenant then taking on the subsidiary. With some careful structuring, the landlord and tenant may well be able to share the benefit of these savings.

It follows that it is imperative that the tax considerations are incorporated into the negotiation process by both the tenant and landlord at a very early stage to maximise the possible win-win solution. Working closely with the tax specialists within PricewaterhouseCoopers LLP (PwC LLP), we can provide seamless legal and tax advice, allowing us to help both landlords and tenants to maximise the benefits of lease inducements in these interesting times for property occupiers and owners alike.

For further information please contact:

Nathalie Pecenicic
natalie.pecenicic@pwclegal.co.uk



PricewaterhouseCoopers Legal LLP (and any other PricewaterhouseCoopers firm in the UK) may from time to time send you information about its products and services, events and newsletters that may be of interest to you. If you do not wish to receive this, please [click here](#).

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" refers to PricewaterhouseCoopers Legal LLP (a limited liability partnership in the United Kingdom) or, as the context requires, the PricewaterhouseCoopers global network or other member firms of the network, each of which is a separate and independent legal entity.