Report on Principal UK Legal & Tax Developments

12 months to April 2009

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Relationships That Drive Results

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Chapter 1 – CORPORATE

1 Changes in Company law of General Application *(by Rhidian Jones, Consultant)*

1.1 Implementation of the Companies Act 2006

1.1.1 The implementation of this very important reforming Act, the purpose and content of which has been reported on over the past few years, is now almost complete, with the final changes taking effect on 1 October this year. These mainly comprise the new rules on company formation and constitutions, capacity, registration and other filing matters such as annual returns and company charges, and dissolution and restoration to the register, which will eventually be fully electronic.

1.1.2 Corporate lawyers have amended their advice and their clients have amended their procedures in the light of provisions already in effect, such as codified rules for directors' duties, shareholder communications and the conduct of meetings. In addition, the first cases under the Act have reached the courts, examples of which appear below.

1.2 The new statutory derivative action has been considered in *Franbar Holdings Limited v. Patel and Others* [2008] EWHC 1534 (Ch) (Trower QC)

1.2.1 This was a case brought by a minority shareholder seeking to take action against the board for breach of duty in the name of the company under the new procedure created by Part 11 of CA 06. It was alleged that ratification of the board's action had been obtained through assets being transferred to persons associated with the wrongdoer, although not connected within the meaning of CA 06, which would have prevented their votes being taken into account for that purpose.

1.2.2 The court refused permission to continue the derivative claim as, although there was some substance in it, further work was needed to identify a clear breach of duty, meaning that a "hypothetical" director as required by CA 06 S 263 (2) could decline the application to continue the derivative action. The court was also influenced by the fact that the shareholder bringing the action could achieve a similar result through making a separate claim for unfair prejudice. The latter remedy remains available notwithstanding ratification, where that was unfair, improper, illegal, fraudulent or oppressive.

1.3 Simplified procedures to deal with "company name squatting" have been developed – New Company Names Tribunal

1.3.1 These are analogous to those available in respect of cyber-squatting and domain names. Previously, it was easy to register a company name incorporating a well known trade name, as a prior check of the Trade Mark Register had been withdrawn as a cost cutting measure, and registration would only be refused if the new name was identical to, or "too like" an existing name, which was narrowly interpreted. This created a commercial "loophole" for exploitation as it was often cheaper for the owners of international brands to pay "greenmail" to the squatters than to take legal action to amend the register. Accordingly, CA 06 SS 66/74 established a Company Name Adjudicator who can order a company name to be changed if it is held to be sufficiently similar to another name in which the applicant has goodwill whether or not registered as an existing UK company.

1.3.2 The adjudicator made his first determination in such a case on 3 December 2008. Perhaps not surprisingly, this case was brought by international drinks giant, the Coca Cola Company, against the cheekily registered Coke Cola Limited. Unfortunately for legal precedent the matter was not argued (the applicant was successful in default as the respondent did not file a defence), and it therefore remains to be seen what attitude the adjudicator will take to less clearly opportunistic cases. The procedure is, however, an inexpensive and useful new tool to protect a client's goodwill.

2 Corporate Governance *(by Rhidian Jones, Consultant)*

2.1 New Combined Code

2.1.1 The Financial Reporting Council ("FRC") issued in June 2008 a new Combined Code (the "Code") incorporating changes made following its review of the impact and effectiveness of the Code.

2.1.2 As foreshadowed last year, the changes remove the restriction on an individual chairing more than one FTSE 100 company; and for listed companies outside the FTSE 350, allow the company chairman to sit on the audit committee where he or she was considered independent on appointment.

2.1.3 That edition of the Code took effect at the same time as new Financial Services Authority ("FSA") Corporate Governance Rules implementing EU requirements relating to corporate governance statements and audit committees. There is some overlap between the Rules and the Code, which is summarised in the Schedule to the Code.

2.2 Further Review of the Code following the Credit Crunch

2.2.1 On 18 March 2009 the FRC announced a further review of the Code and invited views on:

(a) Which parts of the Code have worked well? Do any of them need further reinforcement?

(b) Have any parts of the Code inadvertently reduced the effectiveness of the board?

(c) Are there any aspects of good governance practice not currently addressed by the Code or its related guidance that should be?

(d) Is the 'comply or explain' mechanism operating effectively and, if not, how might its operation be improved?

2.2.2 The FRC will publish its findings later in 2009. If the review results in any proposals to amend the Code, there will be separate consultation on them. In recent months the governance of banks has also been the subject of particular scrutiny, as a result of which the UK Government has asked Sir David Walker to conduct an independent review on that subject. While the two reviews will be conducted separately, the FRC will work closely with Sir David and share relevant research and other evidence. Also, the FSA issued in March a consultation paper on Reforming Remuneration Practices in Financial Services, which it was considered may have contributed to the financial crisis though the payment of bonuses based on short term considerations.

2.2.3 It is to be hoped that these reviews do not lead to further prescriptive rules. Lehman Brothers, and the like, were all subject to the full Sarbanes-Oxley regime, which did nothing to prevent disaster. As the late Sir Derek Higgs wrote in January 2003: "The key to non-executive director effectiveness lies as much in behaviours and relationships as in structures and processes," and the same applies to board effectiveness generally.

2.3 Smith Guidance on Audit Committees

The FRC has, as foreshadowed last year, also revised these. The main changes in the guidance published in October 2008 are:

2.3.1 Encouraging audit committees to consider the risk of the withdrawal of their auditor from the market in their planning.

2.3.2 Encouraging reporting on the appointment, reappointment or removal of the auditor, including tendering frequency, the tenure of the incumbent and any contractual obligations that restricted the committee's choice.

2.3.3 A small number of detailed changes have been made to the section dealing with auditor independence conforming it to the Auditing Practices Board's Ethical Standards for auditors.

2.3.4 An appendix has been added on the factors to be considered if a group is contemplating employing firms from more than one network to undertake the audit.

2.4 Auditor Liability Limitation Agreements

In June 2008 the FRC issued guidance on these, which are now permitted under CA 06 for the statutory audit as well as non-statutory work, but which raise potential issues both for investor representative bodies, and in terms of directors' duties.

2.5 Going Concern and Liquidity Risk

In November 2008 the FRC published an update for directors of listed companies of its advice on going concern. This brings together the requirements on directors to comment on going concern and liquidity risk in annual reports and accounts, in the light of the Credit Crunch. The update addresses the requirements of International Financial Reporting Standards, UK GAAP, the Listing Rules of the FSA, the 1994 guidance on going concern from the FRC to directors (due to be revised in mid 2009), and CA 06 and its requirements about the content of a Business Review in relation to December 2008 year ends. The update may also be useful for directors of unlisted companies.

3 AIM – New Growth Markets *(by Mehboob Dossa, Partner)*

3.1 The London Stock Exchange ("LSE") is proposing to establish and operate a joint venture market with the Tokyo Stock Exchange, Inc., which is intended to provide a new funding option for growing companies in Japan and Asia giving them access to a capital market specifically tailored for their needs and provide a new investment opportunity for Japanese and international professional investors. The joint venture market will be called Tokyo AIM. Earlier this year, the joint venture parties published the proposed new rulebook for Tokyo AIM.

3.2 This follows the launch of AIM Italia by Borsa Italiana, a group company of the LSE.

3.3 AIM Italia has been designated as a Multilateral Trading Facility rather than a stock exchange and like AIM, is an "exchange regulated" market. It is based on the model of the LSE's AIM market and will be dedicated to small and medium sized Italian companies.

3.4 The AIM Italia rulebook was finalised on 25 September 2008 and became effective on 1 December 2008.

3.5 The launch of AIM Italia and the proposed establishment of Tokyo AIM are all welcome developments, however, the current market conditions are less than ideal to give the necessary boost that these markets will require in order to flourish. Whether they will, only time will tell!

Chapter 2 – COMMERCIAL

1 Some Recent Appeal Cases Illustrating Key Principles of English Law Applicable to Contracts and Other Relationships *(by Rhidian Jones, Consultant)*

1.1 Common Law and Civil Law Systems Compared

1.1.1 The point is often made that contract law in England, and systems that are based on it, pays excessive regard to the sanctity of the bargain purportedly reached by the parties, and places insufficient emphasis on the fairness of the outcome. Thus contracts are generally strictly interpreted and may fail for uncertainty, or other technical reasons, with a reluctance on the part of the judges to fill in missing contractual terms, other than such as must be implied to give the contact business efficacy.

1.1.2 This is contrasted with the position which obtains in the Civil Law countries where, as in Germany under Para. 242 of the BGB the concept of *Treu und Glauben*, or good faith, is implied in all commercial relationships without formality, as the equivalent concept of *god tro* is in Scandinavia. Of course, the freedom to make a bad bargain has long been restricted in England, particularly in consumer contracts, even without an EU **Consumer Rights Directive**, and even business contracts in sectors such as insurance or partnership have implied terms of good faith. Nevertheless, it is sometimes necessary for the courts to mitigate harsh outcomes resulting from the application of the strict rules by recourse to equitable doctrines such as estoppel.

1.1.3 Some recent cases, three from the House of Lords (the "HL"), our supreme court and about to be re-named as such later this year, illustrate the importance of principles such as "subject to contract" and "without prejudice" in our law, as well as the judges' desire to reach a fair solution in some but not all circumstances.

1.2 Unconscionable Behaviour does not create Proprietary Estoppel – *Yeoman's Row Management Limited v. Cobbe*, [2008] UKHL 55

1.2.1 Mr Cobbe and the defendants had an informal joint venture, (but not evidenced in writing as contracts for an interest in land must be), whereby Mr Cobbe would, at his own expense, apply for planning permission to develop a plot of land, and that, once obtained, he would be sold the land for £12 million plus 50% of the amount of any proceeds over £24 million. After planning permission had been obtained, one of the defendants expressed dissatisfaction with the financial terms and sought to renegotiate, in response to which Mr Cobbe claimed that the property was held on a constructive trust for him and the company was estopped from denying that he had an interest in it.

1.2.2 The judge at first instance and the Court of Appeal accepted that, but the HL found that proprietary estoppel required clarity as to what it was the defendant was to be estopped from denying or asserting, and clarity as to the interest in the property in question that such denial or assertion would defeat. The statutory requirement for a written agreement could not be avoided by this means. The HL did, however, hold that he was entitled to a *quantum meruit* payment for obtaining the planning permission equal to the extent of the unjust enrichment of the company.

They added the court should be very slow to introduce uncertainty into commercial transactions by over-ready use of equitable concepts such as fiduciary obligations and equitable estoppel.

1.3 Oblique Assurances do create Proprietary Estoppel – *Thorner v. Major and Others*, [2009] UKHL 18

1.3.1 The Thorners were a farming family living in Somerset. David's father and Peter were first cousins. From 1976 David began to help Peter at Steart Farm. He continued to do so, without any remuneration, until Peter's death 29 years later. He received pocket money from his father. David never married. He worked very hard at Peter's farm. He came to hope that he might inherit the farm from "various noises [Peter made] that made me think I might well inherit". In 1997 Peter made a will, drafted for him by his solicitors. After some cash legacies everything was left to David, although he did not know that. A year later Peter fell out with one of the cash legatees, cancelled his will and died intestate.

1.3.2 At trial the judge awarded David the farm based on proprietary estoppel, after hearing a lot of evidence of the dealings between the two men over many years, but the personal representatives appealed to the Court of Appeal, which decided "in order to work as an estoppel, the representation must be unequivocal, it must be intended to be acted on, and in fact acted on". Moreover, they were concerned that floodgates might be opened if the trial judge's decision were to stand. The HL on the other hand, found no reason to disturb the trial judge's finding of fact, and restored the farm to David, in what was admittedly an unusual case.

1.4 Without Prejudice letter cannot defeat Claim – *Ofulue and Another v. Bossert*, [2009] UKHL 16

1.4.1 A longstanding rule of English law is that statements made in negotiations entered into between parties to litigation with a view to settling that litigation are inadmissible and could not be given in evidence, save for exceptional circumstances.

1.4.2 In 1981 Ms. Bossert and her father had been permitted to occupy a property by a former tenant, and took up residence. In 1987 the owners, the Ofulues, commenced possession proceedings and the Bosserts counterclaimed for the grant of a lease, which they claimed they had been promised for carrying out repairs. In 1992 with the possession proceedings still pending, the Bosserts by a letter marked "without prejudice," offered to buy the property. The Ofulues rejected the offer but failed to pursue the possession proceedings which were stayed automatically in 2000.

1.4.3 In 2003 by which time Ms. Bossert's father had died, the Ofulues issued new possession proceedings. Ms. Bossert contended for the first time the title to the property had passed to her because of 12 years' adverse possession.

1.4.4 The Ofulues said that the letter was an admission that they owned the property, which should be admitted in evidence despite its without prejudice nature, but they lost at first instance, in the Court of Appeal, and in the HL (by a four to one majority). As for the Ofulues' counsel's final submission that justice required that the WP rule be overridden in this case, the court was firmly of the view that there was no basis for that simply because many might think that Ms. Bossert, by changing her stance in the two proceedings, had acted unattractively.

1.5 Reasonableness Requirement is not Applicable to International Supply Contract – *Trident Turboprop (Dublin) Limited v. First Flight Couriers Limited*, [2009] EWCA Civ 290

1.5.1 The Unfair Contract Terms Act 1977 ("UCTA") was enacted to enhance the rights of domestic contracting parties against unfair exclusion clauses, including, for the purposes of this case, applying a reasonableness test to the exclusion of liability for breach of contract by misrepresentation and the resulting right to rescind.

1.5.2 S 26 of UCTA excludes international supply contracts from the statutory regime governing exclusion clauses, and that was held by the Court of Appeal also to apply to the Misrepresentation Act 1967 as amended by UCTA.

1.5.3 Accordingly, the aircraft lease contract in dispute in this case being such a contract, the Irish claimant was entitled to rely on its exclusion clause and terminate it, recover arrears of rent, damage for breach, and possession of both aircraft, notwithstanding the respondent alleged that it had already rescinded the leases for misrepresentation.

2 Mercury: The English High Court decision on proper execution of documents.
(by Josefin Nordegren, Associate)

2.1 Preliminary

2.1.1 The English Court decision on 13 November 2008 in *R (on the application of Mercury Tax Group and another) v. HM Revenue and Customs Commissioners & Ors* [2008] EWHC 2721 (Admin) has raised doubts about current commercial practice when entering into a contract.

2.1.2 A deed is a special type of written document, which must be executed with the necessary formality (if individual, signed by the individual in the presence of a witness who attest the signature and delivered as a deed by the individual and if corporate, two authorised signatories, or a director of the company in the presence of a witness who attests the signature), and by which an interest, right or property passes or is confirmed, or an obligation binding on some person is created or confirmed. The benefits of executing a deed as opposed to a "normal" contract are that deeds are generally enforceable despite any lack of consideration and the limitation period for actions brought under a deed is generally 12 years as opposed to six years in respect of simple contracts.

2.2 Background

2.2.1 The clients were asked to sign on the signature pages on early and incomplete versions of three deeds which contained a number of square brackets. The signature pages were then transferred to later, complete and amended versions of the deeds. Some of the changes made in the deeds were considered material. Mercury Tax Group and another ("Mercury") argued (i) that a contract in writing could be effectively altered after signature by a party, provided that the person making the alteration had the authority of the party in question to do so, or if his act was subsequently ratified (*Koenigsblatt v. Sweet* [1923] 2 Ch 314, "Koeningsblatt"); (ii) when a client is signing a contract containing square brackets, they must have anticipate that the square brackets would be completed, i.e. that the changes made in the deed were implicitly authorized if the changes were reasonable expected by them (*United*

Dominions Trust Ltd v. Western [1976] QB 513); and (iii) with regard to the material changes in the deeds, Mercury claimed that the clients had implicitly approved them because formal facility letters were sent to them informing them of the changes made and the client accepted them by returning the letter.

2.3 Decision

2.3.1 The Court held that the deeds had not been properly executed as deeds and were invalidated. The removal of signature pages from incomplete drafts that had been signed by the parties to the deeds and their substitution into the final versions had invalidated the deeds. The Court relied on the legislation regulating execution of deeds which requires that the signature and attestation of the documents to form part of the same physical document. With respect to Mercury argument in (i) above, the Court held that the procedure in Mercury was different from the procedure in Koeningblatt were the alteration was made in the same documents that were signed. Consequently, the governing principle was not applicable in this case and (iii) the facility letters that Mercury had sent to the clients had not specifically drawn the clients' attention to the fact that it was a change made or that it will require alterations to the documentation which they had already signed. Despite that the procedure of signing is applicable to the particular transaction in question, the Court raised doubts if the procedure could be effective for a contract which was not a deed.

2.3.2 With respect to contracts which are not executed as deeds, as most of these can be made even verbally or otherwise without specific mandatory form, the practice of inserting signature pages into final drafts should not jeopardise the validity of such contracts.

2.3.3 The judgment expressed doubt over the validity of contracts, in particular deeds, where the signature pages were signed separately form the body of the contract. As a result of the judgment, many law firms have adopted a more formal approach to procedure at signing and are more regularly arranging physical signing meetings instead of signing with exchange of e-mails even when the document in question is not a deed. In the client's perspective, these are more expensive and time-consuming.

Chapter 3 – INSOLVENCY LAW

1 Use of Pre Packaged Sales ("Pre-Packs") in Company Administrations
(by Mark Langford, Partner, and Tom Dugdale, Associate)

1.1 What is a Pre-Pack?

A Pre-Pack is simply an arrangement under which the sale of all or part of an insolvent company's business is negotiated with a buyer before the actual appointment of an administrator. The administrator effects the sale immediately on or shortly after his appointment.

1.2 Why use a Pre-Pack?

Pre-Packs can minimise the damage to supplier, customer and employee relationships that a prolonged insolvency process may cause. The costs of the administration process can be reduced and the absence of a period of non trading or trading under administration assists in preserving the goodwill of the business and can lead to a higher sale price thereby resulting in a better return for creditors.

1.3 The Process

1.3.1 If the company has sufficient cash reserves to carry on trading outside of an insolvency process, a short marketing exercise can be undertaken prior to administration in order to find a buyer and an administration and Pre-Pack sale can be planned. Without sufficient cash in a business to enable it to continue trading until all sale-related arrangements are formalised a Pre-Pack would not be a viable option.

1.3.2 The proposed administrator will become involved at an early stage, initially identifying potential buyers and then negotiating the terms of sale. Once a contract for sale is agreed with a buyer, the administrator is formally appointed and an immediate sale follows.

1.4 Main Criticisms

Pre-Packs in the UK have attracted significant adverse publicity for the following reasons:

1.4.1 Lack of transparency: unsecured creditors have no opportunity to vote on the sale proposal as they would do in other circumstances.

1.4.2 Pre-Packs may not always maximise returns for unsecured creditors: businesses are usually sold after limited marketing as only a small number of buyers may be approached due to the risk of the company's financial difficulties being leaked.

1.4.3 Lack of accountability: administrators involved in Pre-Packs do not have to obtain prior approval for their actions from the court or unsecured creditors in the same way as they do in other administrations.

1.4.4 Creation of "phoenix" companies: Pre-Packs may often involve the practice of creating "phoenix" companies where the directors of a company put it into an insolvency process only for the same business to re-emerge trading under the ownership of a new "phoenix" company managed by the same directors and/or owned by the same shareholders, but without the liabilities of the old company.

1.5 Relevant Legislation and Guidelines

1.5.1 On 1 January 2009, the Statement of Insolvency Practice 16 (E&W) ("SIP 16"), adopted by a number of regulatory bodies including the Law Society, came into effect.

1.5.2 The new guidelines are intended to improve transparency on Pre-Packs requiring administrators acting on a Pre-Pack to:

(a) Keep a detailed record of the reasons why a Pre-Pack has been chosen as the best course of action for creditors.

(b) Make it clear to the directors of the company that they have been appointed to advise the company and not the directors on their personal liability.

(c) Encourage the directors of the company to take independent advice, in particular if any of the directors proposes to acquire assets in the sale.

(d) Disclose (after the sale) certain specified information to creditors, including: the identity of the buyer of the business or assets, valuations obtained for the business or underlying assets, alternative courses of action considered by an administrator, the consideration for the sale and the terms of payment and any connection between the buyer and the company.

1.5.3 Although SIP 16 is not legally binding, failure to comply with it could result in an administrator facing regulatory or disciplinary action where the guidelines have been adopted by the administrators' regulatory body.

1.5.4 It is too early to say how the new guidelines will affect the number of Pre-Packs. Although the last 12 months has seen an increasing number of administrations in the UK, time will tell whether SIP 16 will lead to a comparative fall in the number of Pre-Packs and/or a reduction in the number of complaints regarding their use.

2 Debt Relief Orders – New Form of Insolvency (*by Mehboob Dossa, Partner*)

2.1 On 6 April 2009 a new non-court based scheme of debt relief came into effect in England and Wales. Debt Relief Order ("DRO") is designed as an alternative route to bankruptcy for someone who has relatively low levels of liabilities, no assets over and above a nominal amount and no surplus income with which to come to an arrangement with his creditors.

2.2 In order to qualify for a DRO, a debtor has to satisfy certain requirements, including that the debtor is unable to pay his debts, the debtor's total unsecured liabilities do not exceed £15,000, the debtor's total gross assets do not exceed £300, and the debtor's disposable income, following deduction of normal household expenses, does not exceed £50 per month. DROs can be applied for on-line, or through an intermediary, without the involvement of a Court. Once the DRO is granted, creditors who are included in the DRO will be prevented from enforcing their debts against the debtor and at the end of the period of the DRO (normally a year following the grant of the DRO), the debtor will be discharged from these debts.

2.3 DROs come with restrictions. A debtor with a DRO will be subject to certain restrictions during the period of the DRO including his ability to act as a company director without Court permission and the need to disclose the existence of the DRO when borrowing £500 or more.

2.4 When DROs were launched in Scotland, take up was 3 times the original estimate, and it is expected that this trend will continue in England and Wales, especially since a DRO costs around a fifth of going bankrupt.

Chapter 4 – EMPLOYMENT

1 Employment Act 2008 *(by Dan Peyton, Partner; Lucy Harrington, Associate; and Anna Samuelsson, Trainee Solicitor)*

1.1 The Employment Act 2008 (the "2008 Act"), which came into effect on 6 April 2009, significantly changes the law concerning employee dispute resolution. The 2008 Act repeals the Employment Act 2002 (the "2002 Act") which, together with the Employment Act 2002 (Dispute Resolution) Regulations 2002, provided for certain minimum statutory disciplinary and grievance procedures.

1.2 Under the 2002 Act, an employer faced a finding of automatic unfair dismissal and also an uplift in compensation of between 10% and 50% if the minimum statutory dismissal and disciplinary procedures ("SDDP") were not complied with to the letter. Further, under the 2002 Act an employee was unable to bring a claim in an Employment Tribunal ("ET") unless he had first submitted a grievance to his employer.

1.3 The SDDP were criticised for causing an increase in the number of cases being referred to the ET and their abject failure to resolve internal disputes. As a result, its repeal is much welcomed.

1.4 The main changes resulting from the 2008 Act are as follows:

1.4.1 The SDDP has been replaced by a Code of Conduct (the "Code") prepared by the Advisory, Consultation and Arbitration Service ("ACAS"). The Code is intended as a "best practice" code for employers and employees and failure to comply with the Code will be taken into account by the ET when deciding whether a fair procedure has been followed and a dismissal is unfair.

1.4.2 Failure to follow the procedures set out in the Code will not result in findings of automatic unfair dismissal and each such case will be considered on its facts.

1.4.3 If either party is found unreasonably to have failed to follow the Code, the ET now has a discretion to increase or reduce the compensation awarded by up to 25% (under the 2004 Regulations the Tribunal was obliged to increase the compensation awarded by between 10% to 50%).

1.4.4 Possibly the most significant change is that there is no longer a requirement to raise a grievance to bring a claim in the Tribunal. This will simplify many ET claims and it should be easier for employers to try to resolve grievances informally.

1.4.5 The 2008 Act signals the return of what is known as the "Polkey reduction rule". This allows ETs to reduce compensation awarded to employees if it is found that they would have been dismissed in any event, even if a fair procedure had been followed by the employer.

1.5 In practice, the 2008 Act will not require drastic changes in the way which disciplinary and grievance procedures should be handled. However, it is intended that the 2008 Act will allow the parties more flexibility to carry out the procedures in a way that is reasonable in the circumstances and in accordance with the size and resources of the employer. It is also hoped that it will reduce the number of formal grievances which employers are forced to deal with each year.

2 Annual Leave and Long-term Sickness – The impact of *Stringer and Others v. HM Revenue and Customs* C-520/06 *(by Dan Peyton, Partner; Lucy Harrington, Associate; and Anna Samuelsson, Trainee Solicitor)*

2.1 It has long been debated in England and Wales whether workers can accrue and take holidays whilst absent on sick leave. The House of Lords referred this issue to the European Court of Justice ("ECJ") in the case of *Stringer and Others v. HMRC*. The ECJ joined this case with a German case (*Schulz-Hoff*) and delivered its judgment on 20 January 2009.

2.2 The key points of the judgment are that:

2.2.1 annual leave does accrue during periods of sickness absence;

2.2.2 it is up to each member state to decide whether a worker can take their annual leave during a period of sick leave;

2.2.3 a worker on sick leave who has been unable to take his/her annual leave entitlement must be entitled to carry it over to the next leave year; and

2.2.4 if a worker's employment is terminated before he/she has had the opportunity to take his/her annual leave entitlement due to sickness, the worker must receive payment in lieu at the normal rate of pay.

2.3 The *Stringer* case will now return to the House of Lords for final judgment on its merits. In the light of the decision from ECJ, the House of Lords must determine what the position is under the Working Time Regulations 1998 ("WTR"). The UK government may also need to amend the WTR as they currently preclude any carry-over of annual leave to the next holiday year (reg 13(9)(a)).

3 Age Discrimination – The impact of *The National Council on Aging (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform* C-388/07 (otherwise known as the *Heyday* case) *(by Dan Peyton Partner; Lucy Harrington, Associate; and Anna Samuelsson, Trainee Solicitor)*

3.1 On 5 March 2009, the ECJ handed down its decision in the so called *Heyday* appeal. The question in this case was whether a default retirement age is consistent with the EU Equal Treatment Framework Directive as Age Concern argued that this was itself age discrimination. It is currently permissible under the Employment Equality (Age Discrimination) Regulations 2006 to force employees to retire from the age of 65.

3.2 The ECJ held that England's compulsory retirement age of 65 will not breach EC law provided that it is possible to show that this rule is capable of being justified as a proportionate means of achieving a legitimate aim. Consequently, it is now for the English High Court to decide whether default retirement provisions in the Employment Equality (Age Discrimination) Regulations 2006 reflect such a legitimate aim and whether the means chosen are appropriate and necessary to achieve that legitimate aim.

4 Disability Discrimination – The impact of *Coleman v. Attridge Law LLP and Another* ET/2303745/2005 *(by Dan Peyton, Partner; Lucy Harrington, Associate; and Anna Samuelsson, Trainee Solicitor)*

4.1 This case deals with the question of whether a non-disabled individual is entitled to bring a direct discrimination harassment claim under Section 3 A(5) and Section B of the Disability Discrimination Act 1995 ("DDA") based on their association with a disabled person. In this case, the woman who brought the claim was the primary carer of her disabled son.

4.2 The English Employment Tribunal referred this question to the ECJ, which concluded that the Equal Treatment Framework Directive 2007/78/EC does prohibit direct discrimination and harassment on the grounds of disability in respect of a person who is not themselves disabled but is subjected to that treatment because of their association with a disabled person. The ECJ also confirmed that discrimination by association in relation to the other protected areas covered by the Equal Treatment Framework Directive is also unlawful. This included discrimination by association in relation to sexual orientation, race and religion and age.

4.3 Following the ECJ's decision the Employment Tribunal has found that they are obliged to interpret the DDA, so far as possible, as applying to associative discrimination and that this was possible if a purposive interpretation of the DDA was used instead of a literal interpretation. Accordingly, this claim for direct discrimination and harassment could proceed to a full hearing.

4.4 This case will clearly benefit individuals who care for a disabled person. As a result of the case, employers may face claims for disability discrimination if requests for flexible working by employees who are primary carers of disabled individuals are rejected. As stated above, it is also worth noting that other areas of associative discrimination for example, age discrimination, are also likely to be unlawful, therefore this case signifies a substantial expansion of the scope of discrimination law in England.

Chapter 5 – INTELLECTUAL PROPERTY

1 Compensation for employee inventors of patents of "outstanding benefit";
***Kelly and Chiu v. GE Healthcare Limited*, [2009] EWHC 181 (Pat) (Floyd J)**
(by Marcus Andreen, Consultant, and Benedicte Kaare Fjeld, Trainee Solicitor)

1.1 The claimants, James Duncan Kelly and Kwok Wai Chiu, were scientists employed the defendant, and co-inventors of a patented radiopharmaceutical heart imaging agent, a highly successful product for the defendant. Kelly and Chiu were awarded compensation of £1.5 million under the UK Patents Act 1977 ("UKPA").

1.2 Section 40 of UKPA provides employee inventors with a means of obtaining compensation for generating patents which are of "outstanding benefit" to their employers. In practice, due to the difficulty in quantifying the benefit from the patent itself, this is the first reported case of a successful action brought by an employee under section 40.

1.3 In *Kelly and Chiu v. GE Healthcare Limited* the English High Court held that "outstanding benefit" to the employer, means "something special" or "out of the ordinary", and more than "substantial", "significant" or "good". The benefit must be something more than one would normally expect to arise from the duties for which the employee is paid. On the other hand, it is not necessary to show that the benefit from the patent could not have been exceeded.

1.4 Compensation for an invention of "outstanding benefit" was to be determined in accordance with all available evidence, in accordance with section 41 of UKPA, so as to secure a just and fair reward to the employee, neither limiting the employee to compensation for loss or damage, nor placing the employee in as strong a position as an external patentee or licensor.

1.5 In calculating the amount of compensation, the judge took into consideration the success of the product, its relative importance to the defendant's business and the impact generic competition would have had if it had not been granted patent protection.

1.6 Assuming that generic competition would have halved the sales of the product and led to a 10 per cent price reduction, the judge reached what he considered to be a conservative figure of £50 million. The court awarded the two inventors three per cent of that £50 million in compensation by way of their "fair share".

1.7 The law was amended by the Patents Act 2005 to make compensation easier to obtain by providing that it is the invention itself that has to be of outstanding benefit, not just the patent. However, this only applies to patents applied for after 1 January 2005 and was not applicable in *Kelly and Chiu v. GE Healthcare Limited*. Note, however, that action can be taken under section 40 from the date on which a patent is granted until up to a year after the patent lapses, and as a result section 40 will continue to be relevant.

Chapter 6 – LITIGATION

1 *Allianz and Generali v. West Tankers* (C-185/07) – Arbitration Ruling
(by Dorothy McMahon, Senior Associate, and Anna Vainonen, Trainee Solicitor)

1.1 London's position as a major arbitration seat could be affected by the ruling of the Grand Chamber of European Court of Justice ("ECJ") in the case of *Allianz and Generali v. West Tankers*.

1.2 A dispute arose in August 2000 when the *Front Comor*, a vessel owned by West Tankers and chartered by Erg Petroli SpA ("Erg") collided with a jetty owned by Erg causing damage. The charter party was governed by English law and provided for arbitration in London. Erg was compensated by the insurers Allianz and Generali and brought proceedings for the remaining amount against West Tankers in London. Allianz and Generali subsequently sought to recover the paid compensation from West Tankers by commencing the proceedings in Syracuse, Italy, where the damage occurred.

1.3 West Tankers contested the jurisdiction before the Tribunale di Syracuse on the basis of the arbitration agreement between the parties.

1.4 The High Court issued an anti-suit injunction directed at the proceedings in Italy and the House of Lords referred the case to the ECJ in order to determine whether one Member State could make an order to restrain a person from commencing or continuing the proceedings before the court of another Member State on the ground that such proceedings would be contrary to an arbitration agreement concluded between the parties?

1.5 Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters provides that a party should be sued in the "courts for the place where the damage occurred".

1.6 Under the Arbitration Act 1996 the courts can grant anti-suit injunctions, which can be directed against the other party in proceedings abroad. Non compliance with anti-suit injunction is a contempt of court.

1.7 West Tankers and UK Government submitted that such an injunction is not incompatible with Regulation 44/2001 since it expressly excludes arbitration from its application.

1.8 The ECJ ruled:

1.8.1 a court in one member state cannot issue an anti-suit injunction against an actual or potential claimant in another member state where there is an arbitration clause in the agreement.

1.8.2 Proceedings such as in West Tanker's case fall outside the Regulation 44/2001.

1.8.3 If a party could avoid the proceedings by merely relying on the arbitration clause in the agreement, the other party would be deprived of its ability to bring the proceedings under the Regulation in the place where damage occurred and this would mean depriving a claimant from judicial protection to as entitled according to the EC laws.

Chapter 7 – PRIVATE CLIENT

1 UK Family Law Update *(by Zoë Bagg, Senior Associate)*

1.1 Inheritance Tax

1.1.1 Inheritance Tax threshold/nil rate band

(a) On 6 April 2009 the Inheritance Tax threshold ("nil rate band") was increased from £312,000 to £325,000 for individuals who die after 6 April 2009.

(b) The nil rate band is the amount up to which an estate will have no Inheritance Tax to pay.

(c) If the estate – including any assets held in trust and gifts made within seven years of death – is more than the threshold, Inheritance Tax will be due at 40 per cent on the amount over the nil rate band.

1.1.2 Transferrable nil rate band

(a) The transferrable nil rate band was introduced by The Finance Act 2008 and is available to deaths occurring on or after 9 October 2007. It allows unused nil rate bands to be transferred between spouses/ civil partners. The effect is to increase the survivors available nil rate band by the equivalent percentage of the first deceased spouse/ civil partner unused nil rate band.

(b) This benefit must be claimed after death but within two years of the survivors death.

(c) As a result, it may be necessary to review wills in order to ensure that clauses referring to the transfer of sums to trustees of an amount equal to the nil rate band are effective and transfer the entire available nil rate band available after death.

1.1.3 Inheritance Tax account

(a) The IHT 200 inheritance tax account form has been replaced by the IHT 400 and the old supplementary pages – numbered D1 to D21 have been replaced with schedules numbered IHT401 to IHT423. The IHT 400 must be used if submitting an account after 9 June 2009.

(b) The IHT 400 is significantly longer and more detailed than the IHT 200.

1.2 Inheritance Tax planning

1.2.1 The President of the Law Society of England and Wales, Paul Marsh, has advised parents who wish to lend their children money to purchase a home to be cautious and seek the appropriate advice.

1.2.2 He noted that "A series of potential consequences need to be considered to make sure that everyone understands at the beginning what would happen in a series of different events. It is much cheaper and less traumatic to clarify the agreement at the outset with a legally valid document rather than waiting and ending up in court."

1.2.3 Examples cited include the difficulties which can arise when relationships break down or one lending parent dies and the survivor needs the loaned money. Loans may also cause disagreements between siblings who are not given the assistance.

1.2.4 As well as potential family disputes, there could be significant tax consequences of getting the form of assistance incorrect.

1.3 Intestacy

The Law Commission is reviewing the law of intestacy. The last review took place in the 1980's and the Commissioners are of the view that it should be reviewed due to the changing structure of families and property holding. A draft Bill is expected in late 2011.

1.4 Cohabiting Couples

1.4.1 Resolution (a body of 5,500 family lawyers) has joined forces with Lord Lester of Herne Hill QC to introduce a Bill to give cohabitants certain rights in the event their relationship breaks down.

1.4.2 The Cohabitation Bill (the "Bill") received its first reading in the House of Lords on 11 December 2008 and its second on 13 March 2009. The Bill is going for the next stage in the House of Lord.

1.4.3 It is not yet clear whether the Government will support the Bill. They have recognised the need for reform in this area but have not agreed to legislate.

1.4.4 The Bill calls for support of those individuals who "live in mutually supporting relationships and who make sacrifices for the future of their families."*

**David Alison, Resolution*

1.5 Prenuptials

1.5.1 The Law Commission is reviewing the use of prenuptials in English law. At present, pre nuptials are persuasive but not strictly legally binding. It has been recognised that the legislation in England lags behind that in other jurisdictions which creates particular difficulties for couples living in and coming from multiple jurisdictions.

1.5.2 The Law Commission is also looking at post nuptial agreements.

1.5.3 It is hoped that a draft bill will be available by 2012.

Chapter 8 – TAXATION

1 Income Tax ***(by Helena Whitmore, Director of Tax, and Sarah Challis, Associate)***

1.1 Domicile and Residence

1.1.1 The Finance Act 2008 introduced wide ranging changes to the residence, domicile and remittance basis rules effective from 6 April 2008. The changes potentially affect all resident non-domiciled taxpayers ("non-doms") but especially non-doms who have been resident in the UK for 7 out of the last nine tax years. Those long term resident non-doms will have to choose whether to pay £30,000 to access use of the remittance basis, or to pay tax on the worldwide arising basis.

1.1.2 As the £30,000 remittance basis charge ("RBC") is being treated as a tax, in order that it may potentially be relieved in accordance with double tax treaty provisions, this means that the taxpayer must nominate what income or gains the RBC relates to. This procedure is complex and affected taxpayers must take advice. It is particularly important to ensure that the RBC nominated income is never inadvertently remitted to the UK.

1.1.3 There are many other complexities in the new rules which must also be considered in detail.

1.2 Income Tax Rates

The income tax rates remain unchanged for 2009/10 and are 20% (basic rate) and 40% (higher rate). The basic rate limit has been extended to £37,400. The normal personal allowance is £6,475, although non-doms who make a claim for the remittance basis will lose their entitlement to the personal allowance as well as the capital gains tax annual exemption.

1.3 Future Income tax rates and Personal Allowance for high earners

The Budget 2009 announced that from tax year 2010/11, the income tax personal allowance will be gradually reduced to nil for individuals with incomes over £100,000. From 2010/11 there will also be a new additional income tax rate of 50% for those with incomes over £150,000. The dividend rates and trust rates will also be increased.

1.4 Reform of Penalty System

A new penalty system is being introduced with effect from April 2009 applying to obligations arising on or after 1 April 2009. The new system uses a behaviour based approach, which gives discounts for disclosure, but the general effect is that penalties will increase. Therefore, now is a good time for taxpayers to ensure that all their tax affairs are in order.

2 Corporate Tax – Consultation on Foreign Profits
(by Helena Whitmore, Director of Tax, and Stacy Lake, Legal Assistant)

The Budget 2009 confirmed that a foreign profits package will be introduced in the Finance Bill 2009, after a lengthy consultation, following the 2008 Pre-Budget Report. The package will consist of four main elements: a new dividend exemption regime whereby dividends and distributions received from both UK and foreign companies will largely be exempt from corporation tax; finance expense payable by UK members of a group of companies will be subject to a cap equal to the

consolidated gross finance expense of that group; removal of both the Controlled Foreign Companies ('CFC') holding company exemption and Acceptable Distribution Policy ('ADP') exemption; and the replacement of Treasury Consent with a post-transaction reporting requirement.

3 New HMRC Enquiry Powers

The Finance Act 2008 has granted new powers to HM Revenue and Customs in respect of their tax enquiries, with effect from 1 April 2009. One of the key changes is the right of HMRC to undertake on-site visits to check business records in relation to corporation tax, income tax and capital gains tax. Other features include new penalty powers, record keeping requirements and extended rights to obtain information from third parties.

4 Offshore Disclosure

It has been announced that HMRC intend to grant offshore account holders a new opportunity in 2009 to disclose, of their own accord, if they have unpaid tax or duties and to settle debts in return for reduced penalties.

5 Reduction in Standard VAT Rate

There was a temporary reduction in the standard rate of VAT from 17.5% to 15% on 1 December 2008 which will last until 31 December 2009. On 1 January 2010 it will revert to 17.5%.

6 Tax Information Exchange Agreement

On 10 March 2009, Jersey signed a Tax Information Exchange Agreement (TIEA) with the UK. The UK already has TIEAs with other territories including Guernsey, Isle of Man, Bermuda and British Virgin Islands (BVI). The UK can now request information regarding banks, trusts, companies etc from these jurisdictions regarding to aid in their tax enquiries. The signing of these agreements can be interpreted as a clear message of the UK governments call for transparency in so called 'tax havens,' and echoes similar objectives in the U.S., under the Obama administration.

Chapter 9 – GENERAL PRACTICE

1 New Regulatory Body for Solicitors Legal Disciplinary Practices – A mini revolution for law firms *(by Claire Martin, Associate)*

1.1 The Legal Services Act 2007 ("LSA"), which came into force on 30 October 2007, introduces a number of important reforms to the structure of the legal services market as a whole.

1.2 One of its key changes relates to the creation of new types of legal practices which will allow (inter alia) for non-lawyers to become partners and owners of law firms.

1.3 In the UK, the legal profession is split into different professions, including barristers, solicitors, patent agents, notaries public and trade mark attorneys and prior to 31 March 2009, they were unable co-exist in the same partnership.

1.4 Legal Disciplinary Practices ("LDP"), the first new type of legal practice permitted as of 31 March 2009 by the LSA, will allow legal service providers to be owned and managed by a combination of:

1.4.1 different kinds of legal professionals; and

1.4.2 up to 25% of non-lawyers (i.e. persons who are not legally qualified).

1.5 Non-lawyers who become partners in LDPs will be known as "managers" and their aggregate ownership in the business must not at any time exceed 25%.

1.6 Other alternative business structures will be permitted from about 2012 which will allow ownerships of more than 25% of law firms by non-lawyers.

1.7 The LSA also creates an independent oversight regulator for the legal profession, the Legal Services Board, a majority of whose members will have to be non-lawyers.

1.8 It remains to be seen whether law firms will adopt this new LDP structure or whether they will wait until more flexible structures of ownership are permitted under the LSA. What is certain is that the legal profession will be keeping a close eye on those law firms who have already chosen to become LDPs and see how they function in the legal services market.

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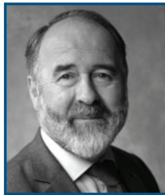

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