

RadcliffesLeBrasseur

CORPORATE NEWSLETTER

Summer 2011

Welcome to the RadcliffesLeBrasseur Corporate newsletter

Cautiously optimistic or battenning down the hatches?



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Since our last newsletter, the UK private M&A market has shown real signs of recovery. The total value of deals in 2010 involving private UK targets more than doubled compared to 2009 (from \$7.83 billion in 2009 to \$15.97 billion in 2010) and deal volumes increased by around a quarter (from 1,077 deals in 2009 to 1,336 in 2010) (*Thomson*

Reuters, M&A database, January 2011).

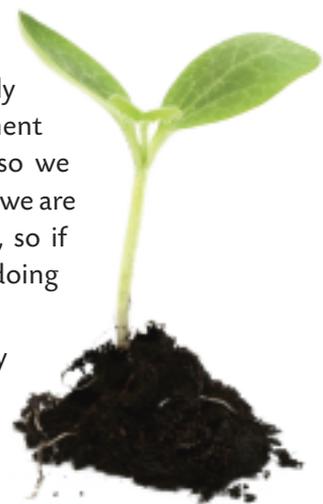
Against that, potential sellers are still often in a weakened bargaining position, depending on the level of competition for particular assets, whilst buyers still face difficulties in obtaining deal finance – at least if they are non-investment grade and/or leveraged borrowers.

Moreover, with sluggish economic growth, the impact of the proposed public sector cuts and international concerns over the Euro, a full recovery is still some way off. Nevertheless, the fact remains that the current market offers real opportunities for buyers and operators with strong balance sheets and access to funding.

In other developments, the recent commencement of the Bribery Act 2010 has led to an increased focus on anti-corruption and other ethical issues (which may impact on potential buyers, investors and lenders), whilst elsewhere the recent phone-hacking scandal, the Sony data leaks and the flurry of high-profile injunction stories have made privacy and data protection issues front-page news.

As lawyers, we monitor these developments but are rarely in a position to directly influence them. What we can do is strive to offer a good quality of service to our clients, featuring practical and user-friendly advice, coupled with a genuine desire to understand our clients and their businesses. Beyond that, our success very much depends on our clients and we are grateful to you for your loyalty. One client was recently kind enough to make the statement quoted at the bottom of the page, so we must be getting some things right, but we are always keen to improve our services, so if there are things we should be doing differently, please let us know.

Please also get in touch if you have any queries or would like more information about any of the matters covered in this newsletter.



“ In my 10 years of using a vast array of London law firms, RadcliffesLeBrasseur stands head and shoulders above the rest in terms of client service, dedication, and legal/commercial nous.”

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Peter King promoted to Associate

Peter King was promoted to Associate in March of this year, having qualified into the Corporate Department in September 2007.

Peter advises on M&A, partnerships, commercial contracts and company law and he has a particular interest in Sports Law, which reflects his passionate enthusiasm (or should we say obsession) with sport of all descriptions, especially football.

Peter read Japanese at Oxford and claims to be fluent. Since our last newsletter he has managed to reduce his commuting by buying an apartment on the other side of Westminster Bridge.



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Pre-pack Administration: will three days prevent a “phoenix”?

The purpose of corporate administration is to effect, in order of priority: (1) a rescue of a company in distress, (2) the achievement of a better result for the company’s creditors as a whole than would be achieved if the company were wound up, or (3) the realisation of company property to make a distribution to one or more of the company’s preferential creditors^[1]. It is anticipated therefore, that even with an administration not all creditors will necessarily be paid. A mantra has developed that one area of administration, the procedure commonly known as “pre-pack administration”, facilitates the “phoenix” of a company, to the detriment of the company’s creditors. As you may be aware, a “phoenix” is where a new company carrying on the same or similar trading activities emerges from the insolvent collapse of another company, often with some or all of the same directors and presenting to customers the appearance of “business as usual”. Research by Sandra Frisby of the University of Nottingham, established that 58 per cent of pre-pack sales started between 2001 and 2006 were to connected parties, almost always existing owners or managers. Edward Davey, the BIS minister may have been reacting to this when announcing an intention to introduce a three-day notice period for pre-pack sales to connected parties, now part of the new insolvency rules mentioned below. Commenting, he said *“We do not wish to outlaw them. But they must be done fairly and reasonably. Particular concerns have been raised about sales of assets back to the current management, or other connected party, something that is often referred to as phoenixism”*.

A counter view

Perhaps the position is not as clear as the mantra suggests. Steven Law, former President of R3, the insolvency trade body, commented *“it is important to note that a pre-pack is chosen due to the speed of the procedure which helps preserve the value of the business. Three days is a long time in business, and if unable to trade in that period, [a business] is at risk of losing key staff and customers. When faced with this option [the three-day notice period], directors may simply decide that liquidation is a better route, and this would reduce returns to both secured and unsecured creditors and result in considerably fewer jobs being saved than under a pre-pack.”* Mr. Davey’s intention may be to introduce what he calls “greater transparency” but, as further research by Sandra Frisby has established, in over 90% of pre-packs all the jobs in the business are saved, compared with only about 60% in other insolvency business sales. Even the Government’s monitoring report on pre-pack compliance indicated there is *“no reliable evidence to suggest that misconduct by directors is any more prevalent in pre-pack cases than in conventional administrations”*.

With the above in mind, and contrary to the general perception, a pre-pack may therefore be a good thing.

Administrators beware

Pre-pack Administration is a description of the process whereby an administrator completes a pre-arranged sale of a company’s business very shortly after their appointment.

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^[1] paragraph 3(1)(a) to (c), Schedule B1, Insolvency Act 1986s

Pre-pack Administration: will three days prevent a “phoenix”? continued

Because of the prompt completion post-appointment, criticism developed as to whether or not pre-packs are in the best interests of a company’s creditors, firstly leading to the introduction of the Statement of Insolvency Practice 16 (“SIP 16”). SIP 16 requires the administrator to provide creditors with a detailed justification of the rationale for the pre-pack as soon as possible after completion of the deal, including:

- the extent of the administrator’s role before appointment and the source of initial introduction;
- any valuation that has been obtained;
- the marketing process for the business and assets;
- the efforts made to consult major creditors;
- any alternative means of selling the business and assets and the likely financial outcomes from them;
- the reasons why the administrator felt he could not trade and market the business in administration; and
- the identity of the purchaser.

SIP 16 imposes a heavy burden on administrators, who will need to ensure they have sufficient evidence to enable the Court to determine whether:

- the pre-pack achieved the best price for the assets sold;
- carrying on trading whilst negotiating for a sale to third parties would have reduced the amount payable to creditors (due to increased debts incurred by the company); and
- the inability of the creditors to influence the transaction before it completed was outweighed by the benefit to them of the deal achieved.

If administrators considered the requirements of SIP 16 placed a heavy burden on them, the burden is likely to increase if the proposed revised insolvency rules are introduced.

The employees and the economics

The preservation of employment, topical in the present economic climate, may be one of the main justifications for the pre-pack. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) protects employees specifically when a business is sold or the services are transferred to another entity.

The effect of TUPE is that the contracts of employment (Regulation 4) automatically transfer to the new entity, together with any associated liabilities (Regulation 7). However, Regulations 4 and 7 of TUPE can be modified, or even disapplied entirely, when the business or undertaking involved becomes insolvent.



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The types of modifications depend on the insolvency proceedings that the business is undergoing.

The recent case of *OTG Limited v Barke and Others* confirmed the past understanding (previously confused by *Oakland v Wellswood (Yorkshire) Limited* suggesting to the contrary) that TUPE will always apply where there is a pre-pack administration. From an administrator’s viewpoint therefore, if the assets of a business can be sold immediately upon the administrator’s appointment, with existing employees passing to the purchaser under TUPE, then the administrator avoids the cost and expenses of those employees. This can often increase the amount available for creditors within the administration, whilst the retention of employment limits the possible burden on the National Insurance Fund.

New Insolvency Rules

The Insolvency (Amendment) (No 2) Rules 2011 (the “IA2 Rules”) published in draft and intended to be enacted in October 2011, seek to implement Mr Davey’s intention. This is noteworthy not only because of the proposed introduction of the three business day notice period but also due to the implementation of wide ranging provisions intended to be applicable to pre-pack sales to connected or associated parties (in respect of which the IA2 Rules seek to impose an extremely wide definition).

The IA2 Rules seek to introduce a statutory definition of a “pre-pack sale”. This leaves open the possibility of further questioning as to the applicability of TUPE to pre-packs. If there is to be a formal acknowledgement of an intention of an intended administrator to dispose of the “whole or a substantial part of the assets of the company, or the assets needed for continuance of the business” (the definition in Rule 4 of the IA2 Rules), then the introduction of the defined term removes scope for arguing that the primary objective of the administration is the rescue of the company.

It was this intention to attempt to rescue via an administration that was relied upon by the Court in reaching their decision in the *OTG Limited case*.

Pre-pack Administration: will three days prevent a “phoenix”? continued

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If the IA2 Rules are implemented in their present form only time will tell whether or not those creditors who are “out of the money” will be empowered by the receipt of notice of intention to effect a pre-pack to a connected party; Moreover, one questions whether an administrator would be happy certifying (as they will be required to do) their opinion that the pre-pack to a connected party “will achieve a better result for the company’s creditors as a whole than anything else” [2]. A requirement qualified by “obtainable in the circumstances” and still referring to the interests of creditors as a whole would surely be preferable from the administrator’s point of view.

The above amongst many other concerns surrounding the IA2 Rules has led to concerns that if introduced the rules will lead to lower offers being received for a company’s assets (due to uncertainty of the 3 business day period and possible claims of creditors), together

with the reduction of the value of the business itself whilst a purchaser waits for the period to pass, coupled with an increase in costs to implement a pre-pack. This may all contribute to a substantial decrease in the number of pre-pack transactions. Therefore, if Steven Law’s belief is the case and we move away from pre-packs and into the sphere of liquidation, with TUPE not applying to “bankruptcy proceedings or any analogous insolvency proceedings”, then a purchaser of assets from a liquidator may perhaps acquire those assets at a reduced price to the detriment of the creditors as a whole and without being burdened with the transfer of contracts of employment, the UK economy being left to bear the cost of any resulting increase in the unemployment statistics.

For advice on the Corporate aspects of administrations and related business sales, please contact:

Stephen Blair at stephen.blair@rlb-law.com or on DD 020 7227 7254 or for advice on the Employment aspects, please contact Sejal Raja at sejal.raja@rlb-law.com or on

[2] Rule 5(1)(b), Rule 5(2), Rule 5(3)(b), Rule 5(4)(b), Rule 6

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Tax and Private Client Department wins award

Our Tax and Private Client Department has recently won the award for the Wealth Management 2011 Inheritance Tax and Succession Planning team of the year, as voted for by readers of the Financial Times and Investors Chronicle.

Simon Goldring, the Head of the Tax and Tax and Private Client Department, accepted the award on behalf of his team and commented: “We are delighted to receive this award: we aim to provide a very high quality of service to our clients across all areas and it is extremely gratifying to receive recognition for our efforts.”



If you would like advice on any aspect of your personal tax affairs, wills, estate planning or succession issues, please contact Simon Goldring.

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Shortlisted for Healthcare Lawyer of the Year

Andrew Parsons, the head of our Healthcare Team, has been shortlisted for the “Legal Advisor” category of the Independent Healthcare Awards for 2011.

These awards are sponsored by Laing & Buisson which is an independent healthcare intelligence provider. The winners will be announced at an event taking place on 20 September 2011.

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How much do you value your name?



You may not realise the value of your trademark until someone steals it! In today's increasingly competitive and volatile market, it would be no surprise to see an increase in businesses trying to cash in on the reputation and commercial standing of their competitors.

Failure to register a trademark leaves a business having to rely on a common law action for passing off to prevent infringement of its mark. Such actions can be more time-consuming and expensive for a business.

Advantages of Registration

- Right of the owner to sue for trademark infringement. The right runs from the date of application for a UK mark.
- Unlike an action for passing off, there is no requirement to prove reputation or goodwill.
- Register is open to the public. Therefore, successful registration acts as a notice to the public of the owner's rights in the registered trademark and can deter third parties from using (and sometimes even registering themselves) identical or confusingly similar trademarks.

Thinking of Registering Your Trademark?

- The mark must be distinctive and capable of graphic representation.
- Descriptive marks (e.g. The White House is descriptive of a white house!) are often difficult to register unless there is a distinctive element – for instance, a logo or some sort of get-up or distinctiveness acquired through use (e.g. The White House).

Keeping Initial Costs Down

To avoid wasted legal costs, it is advisable to do some preparatory work. For example:

- 1 if you are developing a new trademark, consider obtaining advice from a branding expert on the development and suitability to your business and (if relevant) product. A branding expert will tell you that a trademark will not exist in isolation;
- 2 check that your proposed trademark does not have an inappropriate or unfortunate meaning in the country in which you propose to register;
- 3 do a search at the relevant online Trade Marks Registry to see whether your mark, or something very similar, is already registered. To check the UK Register, visit www.ipo.gov.uk and go to "Online TM Services";
- 4 do an internet search for the trademark you propose to register to see if anyone else is already using the mark; and
- 5 do a search at Companies House at www.companieshouse.gov.uk to see if any companies or LLPs appear using any word you propose to register as a trademark.

Next Steps

Once you have an idea of a mark you wish to register or if you would like to discuss any of the points raised in this bulletin, please contact Sumaira Choudary.

For advice on trade mark registrations, please contact Sumaira Choudary at sumaira.choudary@rlb-law.com or on DD 020 722 7389.

For advice on contentious IP matters, please contact Dominic Green at dominic.green@rlb-law.com or on DD 020 7227 7411.



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Our Employment Law Protection Scheme

The RadcliffesLeBrasseur Employment Group has launched a dedicated Employment Law Protection Scheme for our clients. It is an insurance-backed product underwritten by Vision Underwriting Limited and has some key benefits, compared with other similar products on the market. In particular:

- The advice will be provided by members of our Employment Group who are familiar with the client's business: you will not be receiving advice from, in effect, a call centre.
- The insurance cover is not set in stone but can be tailored to clients' specific requirements. For example, you can choose whether or not the policy should include an excess payable on each claim, a maximum amount of cover per claim, and/or a maximum amount per annum (and if so, how much in each case) and whether or not it will cover legal costs or just the actual award/settlement. You can also decide that the cover should only apply to really large claims which could have a substantial impact on your financial position. The size of your premium will be adjusted to reflect each of these choices.

- As well as the insurance-backed element, the Employment Law Protection Scheme includes:
 - a health-check of your current employment policies and practices. This helps us to get to know your business and advise you how to bring your policies and practices up to date and to comply with the law.
 - direct access to unlimited advice from qualified employment solicitors, not only to ensure that the matter is properly handled at the outset, but also make certain that you are fully insured under the terms of your policy. The scheme does require that you take and follow our advice for the cover to apply.

We appreciate that this type of arrangement may not suit all employers and we will of course continue to provide our legal services on the usual basis to clients who are not members of the scheme.

If you would like a quote, or just more information about membership of the Employment Law Protection Scheme, please contact Mike Elks, the head of our Employment Group, at michael.elks@rlb-law.com or on DD 020 7227 7255 or Charlotte Stern, an Associate, at charlotte.stern@rlb-law.com or on DD 020 7227 7461.

legal updates >>>>>>

Default retirement age

The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 came into force on 6 April 2011 to abolish the default retirement age of 65 ("DRA") and to implement the necessary consequential amendments. Under transitional arrangements, employers were given a short window to serve notice of the intention to retire those employees turning 65 (or who were already 65) on or before 30 September 2011.

The abolition of the DRA means that the dismissal of any employee because they have reached a certain age will be direct age discrimination. In addition, retirement is no longer a potentially fair reason for dismissal, so an employee dismissed because of age can claim unfair dismissal, provided that he has been employed for one year or more.

From an employee's perspective, deciding whether or not to continue working beyond 65 will depend on work/life balance and the size of his pension.

Some employers may retain the retirement age after the abolition of the DRA but dismissal on the basis of retirement age alone will constitute discrimination, so the employer must be able to objectively justify its practice as proportionate and legitimate.

ACAS has published guidance for employers on managing older employees and catering for succession and workforce planning and performance management, and how to develop fair and consistent policies and procedures.

The abolition of the DRA will also affect the recruitment of older workers, pension issues, good leaver/bad leaver provisions, and redundancy terms.

legal updates >>>>> continued

New electronic communications rules

New rules on how website operators should use cookies and other storage information came into effect on 26 May 2011 (the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations (SI 2011/1208)). The main change is that website operators are now required to obtain a user's consent if they want to store a cookie on the user's device.

Online company formation and filings

Companies House has launched a web incorporation service for setting up simple private limited companies and an online second filing service for correcting errors in certain Companies House forms.

Exclusion clauses: reasonableness under UCTA

In the case of *Röhlig (UK) Ltd v Rock Unique Ltd* [2011] EWCA Civ 18, the Court of Appeal has held that clauses in certain industry-standard terms which exclude the right to set off claims and set a short limitation period for claims were reasonable under the Unfair Contract Terms Act 1977. The court considered that where industry-standard terms are negotiated by both parties, the end result will often reflect a fair balance of competing interests and should be upheld. It also felt that where services are available from a range of competing suppliers, the relative size of the supplier and customer may not be relevant to an assessment of the reasonableness of standard terms.

Severance of non-compete clauses

In *Franco typ-Postalia Limited v Whitehead* and others [2011] the High Court has refused to apply the "blue-pencil test" to restrictive covenants in a franchise agreement.

Commercial contracts often contain restrictions to prevent the contract parties from competing with each other during and after the period of the agreement. If such restrictions are excessive (for example, in duration, geography or scope) they will be unenforceable as a restraint of trade. However, even an excessive clause may be saved if a court can delete the offending part – the so-called "blue-pencil" test.

The case involved two agreements which included restrictions against competing and soliciting customers. Both clauses had the same geographical limit and the court held that the limit was appropriate for non-solicitation but excessive for non-competition and it refused to apply the blue-pencil test so the non-compete clause was rendered unenforceable.

This decision shows the importance of drafting individual restrictions that can be adjusted by the court's "blue-pencil" without affecting the other clauses, and of thinking carefully about definitions which will apply in more than one clause.

Corporate manslaughter: first prosecution

Cotswold Geotechnical (Holdings) Limited has been convicted of corporate manslaughter and fined £385,000 for breach of health and safety guidelines in the first prosecution under the Corporate Manslaughter and Corporate Homicide Act 2007. A number of other prosecutions are anticipated in the near future. In this case, the company was small and had a simple management structure. No doubt a more sophisticated company would face a larger fine.



Our recent projects

Since our last newsletter, the Corporate Department has handled a number of interesting matters:

Mergers and Acquisitions

Highlights include the corporate aspects of the £37m purchase of a London office building; the £20m acquisition of an hotel company from an administrator; the sale of a major company in the primary care sector; the acquisition of a construction consultancy and quantity surveying business; the purchase of several offshore property-holding vehicles for Far Eastern clients; the acquisition of a stake in a UK company for a French buyer; the sale of a video-to-mobile company; the acquisition of a third party's interest in a financial loan company; the recapitalisation and sale of the UK subsidiary of a Spanish IT company; the purchase of shares in an online sports community website company; and the purchase and sale of companies and businesses in the care homes, dental, travel, design, testing, factoring and catering sectors.

For advice on M&A, please contact any member of the Corporate Department.

Banking and Finance

The Corporate Department has recently handled various banking matters, including advising a Scandinavian bank on the taking of security over UK assets, acting for a Swiss bank in relation to an offshore fund and handling the refinancing of a UK manufacturing client.

We have also advised a loan company on the provision of finance to an IT group of companies, a manufacturing group of 6 companies on the terms of various deeds of priority with its existing commercial lenders, and on varying the commercial terms of loan notes arrangements with a client's minority shareholders.

Other finance projects include the refinancing of an offshore telecoms company, representing an FSA-registered advisor on the provision of discretionary advice to an off-shore investment fund, and advising a hedge fund LLP on members' rights and duties and on agreements with introducers.

For advice on Banking or Finance, please contact: Peter Coats (peter.coats@rlb-law.com/020 7227 7441), Philip Maddock (philip.maddock@rlb-law.com/020 7227 7381), Stephen Blair (stephen.blair@rlb-law.com/020 7227 7254) or Sumaira Choudary (sumaira.choudary@rlb-law.com Tel: 020 722 7389)

Venture Capital, Turnaround and Private Investment

We have been active in this area, including advising on the turnaround of fast food, IT, data centre, hotel and food distribution businesses; acting for either investors or investees on the funding of a national restaurant chain, a Wi-Fi company, an IT business, a national data centre and an online marketing company, among others; and the formation of a limited partnership as an investment vehicle.

For advice on Venture Capital, Turnaround and Private Investment, please contact Stephen Blair (stephen.blair@rlb-law.com/020 7227 7254) or Sumaira Choudary (sumaira.choudary@rlb-law.com Tel: 020 722 7389).

Reorganisations

The Corporate Department has recently handled reorganisations of a restaurant group, a business consultancy company and the UK subsidiaries of a US marketing group, and the incorporation, relocation and financing of a solicitors practice.

For advice on Reorganisations, please contact Stephen Blair (stephen.blair@rlb-law.com/020 7227 7254) or Sumaira Choudary (sumaira.choudary@rlb-law.com Tel: 020 722 7389).

Commercial

Our recent commercial work has included joint ventures, commercial contracts and partnerships in the medical, dental, pharmacy and physiotherapy sectors; an agreement for supply of personnel to a major construction project; trade mark registrations, agency agreements and terms of business for an online retailer; sporting sponsorship agreements; branding agreements for a fast food chain; and an agreement for the use of a telecoms and data communications network; and a distribution agreement for a food supplier.

For advice on Commercial matters, please contact any member of the Corporate Department.

Pragma update

RadcliffesLeBrasseur is an active member of PRAGMA, an international network of commercial law firms. This enables us to offer international expertise through firms we know well and whose lawyers we meet regularly and trust with our client's work.

When you have international work, in many jurisdictions we will be able to obtain guidance from the PRAGMA law firms and put you in direct contact with an appropriate lawyer.

Our firm receives referrals of work from other members of the network and there is a regular exchange of

information between member firms during meetings throughout the year which means we are aware of relevant international legal issues and concerns.

If you have a matter with an international angle, whether it involves setting up a hotel in Mexico, establishing a trust in Switzerland or starting a business in France, our Pragma network will be able to assist.



For more information, please contact:

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We would be delighted to hear from you with any comments or feedback you may have in response to this newsletter.

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