Insights and Commentary from Dentons

On March 31, 2013, three pre-eminent law firms—Salans, Fraser Milner Casgrain, and SNR Denton—combined to form Dentons, a Top 10 global law firm with more than 2,500 lawyers and professionals worldwide.

This document was authored by representatives of one of the founding firms prior to our combination launch, and it continues to be offered to provide our clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.

SNR DENTON

On the Horizon for 2013

What do you need to watch for in 2013? Did you miss any major changes in 2012?

Our experts select the highlights likely to impact businesses in the UK generally, so you can check quickly.

Business Regulation

2013

Bribery Act

The Bribery Act 2010 has now been in force for 18 months, but some businesses have still failed to assess its impact and so have not put in place "adequate procedures" to protect themselves from the risk of being used for bribery. We still await the first prosecution under the Act for the offence of failure to prevent bribery. The Government is also pushing through legislative amendments to allow enforcement agencies to enter into deferred prosecution agreements with businesses that have committed certain corporate economic crime offences. The new head of the Serious Fraud Office has updated prosecutorial guidance on the Act, including its views on self-reporting of instances of bribery. See The Bribery Act – Has It Made A Difference?

For further information, contact: Rosali Pretorius, Emma Radmore, Dominic Sedghi or Andrew Barber

Construction

2013

Concurrent delays and global claims

The judgment in *Walter Lilly & Company Ltd v. (1) MacKay and (2) DMW Developments Ltd* [2012] EWHC 1773 may prove to be the most significant decision to come out of the The Construction Court in recent years. In deciding what was a routine dispute between the parties over claims by the contractor for further payment and extensions of time, and by the employer for defects and snagging, the TCC laid down important guidelines in relation to concurrent delay, global claims and the use of formulae in overhead recovery claims.

See *Walter Lilly & Company Ltd v. (1) MacKay and (2) DMW Developments Ltd* — Clarification of the Law on Concurrent Delays in English Law Construction Contracts.

For further information, contact: Alastair Young

Paying the adjudicator

Adjudicators get paid to make decisions where parties have a dispute that needs to be resolved. However, up until recently an adjudicator could expect to be paid even if the decision that was produced was unenforceable and therefore worthless. However, in the important decision of *PC Harrington Contractors Ltd v. Systech International Limited* [2012] EWCA Civ 1371 the Court of Appeal decided that an adjudicator could not recover his fees in circumstances where the decision of that adjudicator was unenforceable by reason of a failure to comply with the rules of natural justice. See Paying the Adjudicator.

For further information, contact: Alastair Young

Contract, Tort and Disputes

2013

Cross-border contracts

As expected, during 2012 the UK Government published its response to the EU proposal for a Common European Sales Law (CESL). It reported an unenthusiastic reception from UK stakeholders to the plans. The European Commission has previously published a draft Regulation, so if implemented the new law will have direct effect in member states.

It will sit alongside, rather than replace, national contract rules. Importantly, it will only apply if the parties to the contract agree to this. Due to criticism of the proposal, other limits have been introduced. The CESL will apply only to cross-border contracts where one party is established in the EU. In a business-to-business context it applies only if at least one party is an SME. And, as drafted, it covers only contracts for the sale of moveable tangible goods or digital content (or related services). There remains concern that, once implemented, the CESL could be extended to other areas of contract law. The proposal is now awaiting its reading in the European Parliament. The Commission's original aim of having the CESL agreed by 1 January 2013 (the 20th anniversary of the internal market) is obviously doomed but progress later in 2013 remains possible.

Unfair terms

The Law Commissions of England and Scotland have indicated that in spring 2013 they will aim to publish their final reports into the reform of unfair terms in consumer contracts. These reforms will form part of the proposed Consumer Rights Bill. The original recommendations have attracted much criticism, particularly on the issue of price and subject matter terms which are exempt from an assessment of fairness. The OFT and FSA have been among those voicing concerns, and the extent of opposition may delay future progress.

2012

Endeavours obligations

The Court of Appeal struggled to give effect to a clause that required an airport operator to "*use all reasonable endeavours to provide a cost base that will facilitate [the airline's] low cost pricing*". This was held to be too uncertain to enforce. The majority did uphold the other part of the clause, calling for the parties to "*co-operate together and use their best endeavours to promote [the airline's] low cost services from [the airport]*" though the minority again thought this was too "open-textured" to enforce. The lessons for those drafting endeavours clauses where the objective is general rather than specific are clear. Provide as much detail as possible about what the endeavours have to achieve and bolster it if possible with precise examples of the steps required towards securing that outcome. See Endeavours Obligations — Can You Take Your Commercial Interests Into Account?

Side letters

The Court of Appeal declined to give effect to a side letter requiring the parties to negotiate an investment and shareholders' agreement in good faith, even though it accepted that the parties intended this to be binding. That intention did not save the side letter from being an unenforceable agreement to agree. The letter lacked the necessary certainty for enforceability, even though it set out considerable detail about the type of provision the parties anticipated incorporating and included several boilerplate clauses. See *Barbudev v. Eurocom Cable Management Bulgaria EOOD* [2012] EWCA Civ 548.

Tort: liability for damages

The Court of Appeal held a parent company had assumed responsibility and was therefore liable in tort to an employee of its subsidiary for asbestosis contracted as a result of exposure to asbestos dust during his employment. Among the issues considered relevant by the court were: the close relationship between the two companies' businesses; the fact that the parent had greater depth of knowledge of relevant health and safety issues (its group medical officer had corresponded with government over asbestosis cases within the group); and the parent's awareness of the subsidiary's unsafe working practices. It was foreseeable that the subsidiary and its staff would therefore rely on the parent to use its greater expertise and experience to protect them. The case was clearly heavily fact-specific and the principles adopted are most readily applicable to similar health and safety issues. But a similar approach could be applied to other tort claims, such as negligence, in appropriate circumstances. See *Chandler v. Cape Plc* [2012] EWCA Civ 525.

For further information, contact: Tracey Petter

Disputes

2013

Civil litigation funding

Most of the changes to civil litigation funding recommended by Lord Justice Jackson's review are due to take effect in April 2013. These will include ending the recovery of conditional fee arrangement success fees and after-the-event insurance premiums from a losing opponent and introducing damages-based agreements (effectively contingency fees).

The Jackson reforms will also introduce a new system of costs budgeting by the court in most cases. Parties will have to submit budgets covering the costs incurred to date and those anticipated for the remaining stages of proceedings. Later, if assessing costs on the standard basis, the court will have regard to the receiving party's last agreed or approved costs budget for each phase of proceedings. It will only depart from that budget if there is good reason to do so.

Damages

There will be a 10 per cent increase in general damages awarded for pain and suffering, loss of amenity, physical inconvenience and discomfort, social discredit and mental distress, whether claimed in tort or in contract, in judgments given after 1 April 2013. The core types of claims potentially covered will include professional negligence, nuisance, defamation, personal injury, clinical negligence and housing disrepair claims. The Court of Appeal has, however, confirmed that this will not apply to claimants with the benefit of a conditional fee arrangement entered into before 1 April 2013 (because that can still be the subject of a valid success fee). See *Simmons v. Castle* [2012] EWCA Civ 1288. See Legal Aid, Sentencing and Punishment of Offenders Act 2012 for more details of these changes. Stand by for the expected slew of satellite litigation when the courts start applying the new rules.

2012

Disclosure

The courts continued to signal their disapproval of parties who fail to take their disclosure obligations seriously, including in particular when dealing with disclosure of e-mails and other electronic material. A party was significantly criticised and penalised in costs for an inadequate e-disclosure exercise, outsourced to an overseas litigation support company. Shortcomings included: not de-duplicating documents properly; incorrect redaction of documents; failing to identify and deal with the collection and review of documents held by all custodians; not providing adequately searchable fields in the document database. See *West African Gas Pipeline Company Ltd v. Willbros Global Holdings Inc* [2012] EWHC (TCC).

The litigation reforms in 2013 are expected to introduce new "menu options" for dealing with disclosure requiring parties to come up with and implement solutions that are proportionate to the claims involved.

Appeals

The appeals process was overhauled in October 2012. The result will be to enable the courts to dismiss more unmeritorious appeals at an earlier stage and where appropriate to cut down on the level of paperwork and submissions required for an appeal hearing.

Jurisdiction clauses

The French Supreme Court held a one-sided jurisdiction clause was invalid. The parties had agreed to submit disputes under their loan agreement to the Luxembourg courts, whilst reserving to the lender alone the right to bring proceedings in any other competent court. The court held this offended the civil law concept of *"potestativité"*. This renders invalid a condition precedent which makes the fulfilment of the contract dependent on an event which one of the parties has the power to prevent, or make happen. The court then interpreted Article 23 of the Brussels Regulation (upholding contracting parties' choice of applicable jurisdiction) in light of the concept of "*potestativité*". In transactions with a nexus with France (or another civil law jurisdiction recognising the same concept) it may be preferable to simply opt for an exclusive jurisdiction clause. That would avoid similar dispute about whether the party without the benefit of the one-sided clause can bring proceedings other than in the chosen court. See *X v. Banque Privée Edmond de Rothschild*, No. 11-26.022.

The English courts continue to give effect to one-sided jurisdiction clauses. There remains, however, a possibility that an EU court will at some point refer the matter to the ECJ which might agree with the approach of the French courts.

The ECJ held in 2009 that it is incompatible with the Brussels Regulation for a court to grant an anti-suit injunction restraining a party from commencing or continuing with proceedings in the court of an EU member state, where those proceedings are in breach of an arbitration agreement. In a more recent decision in the ongoing *West Tankers* saga, the Commercial Court held that this does not, however, prevent a tribunal from entertaining a claim for damages for breach of an arbitration agreement, even if the award would be inconsistent with the decision of an EU member state court.

For further information, contact: Tracey Petter

Corporate

2013

Company charges

The long-awaited reform to the statutory regime for registering charges created by UK companies is expected to come into force on 6 April 2013. Under the new regime all charges, with limited exceptions, will require registration at Companies House. Other key changes will include: electronic filing, including filing a certified, redacted copy of the security instrument and a brief statement of particulars; improvements to the searching of the public register at Companies House; and abolishing the need for companies to keep their own registers of security. See Draft Regulations laid before Parliament under section 894(2) of the Companies Act 2006 for the approval by resolution of each House of Parliament and related Explanatory Notes to Accompany Draft Regulations Revising Part 25 of the Companies Act 2006: August 2012.

Directors' pay

Shareholders of listed companies will have greater control over directors' pay. At least every three years, listed companies will have to put a forward-looking directors' remuneration policy (including a policy on exit payments) to a binding shareholder vote. Payments not falling within the shareholder approved policy will be unenforceable. There will also be an annual shareholder advisory vote on implementation of the policy over the previous year. We anticipate the new rules will apply to financial years ending on or after 1 October 2013 and will include changes to the content of directors' remuneration reports. See Directors' pay: guide to Government reforms.

Narrative reporting

All large and medium-sized UK companies will have to prepare a strategic report which will replace the current business review. The purpose of the new review is to make it easier for shareholders to find out about a company's strategy, the risks it faces and how it is performing. For listed companies, the strategic review will have to include information on gender diversity and human rights issues. We anticipate the new rules will apply to financial years ending on or after 1 October 2013. See The Future of Narrative Reporting.

2012

Accounts and audit

For financial years ending on or after 1 October 2012, changes to the Companies Act 2006 exempt more small companies from the need to audit their accounts. There are also new exemptions for subsidiary companies applying to the preparation, audit and filing of individual accounts. And there is greater flexibility for companies which prepare accounts under International Accounting Standards to change to UK GAAP. See Government Response to Consultation.

Prospectuses

Effective 1 July 2012 were changes to the Financial Services and Markets Act 2000 and the FSA Handbook, notably the Prospectus Rules. The changes include a proportionate disclosure regime for rights issues and small and medium-sized enterprises, standardising prospectus summaries and changes to certain thresholds. The changes reflect EU-level changes to reduce unnecessary burdens on issuers and intermediaries, and to improve the clarity of the legal framework. See Policy Statement on UK implementation of Amending Directive 2010/73/EU.

Listing regime

Effective 1 October 2012 were changes to the Listing Rules to preserve the "operational effectiveness" of the listing regime. The changes include abolishing class 3 transactions, removing the "revenue nature" test from the exemption for class and related party transactions, and expanding the scope of the reverse takeover regime. The FSA is also consulting further on improving the effectiveness of the listing regime, with the principal focus on companies with a controlling shareholder. See Enhancing the effectiveness of the Listing Regime and feedback on CP12/2.

Short selling

On 1 November a new EU-wide regime regulating the short selling of traded securities came into force. The new regime covers a much broader range of securities than the UK's previous domestic regime, severely restricts the practice of "naked" short selling and imposes new record-keeping and disclosure duties. See Short selling regulation – Handbook changes.

For further information, contact: Richard Barham, Jeremy Cohen or Candice Chapman

E-commerce

2012

E-signatures

On 4 June 2012, the European Commission adopted a proposal for a Regulation on electronic identification and trust services for electronic transactions in the internal market. According to the Commission, the proposed Regulation seeks to enable secure and seamless electronic interactions between businesses, citizens and public authorities, thereby increasing the effectiveness of electronic commerce in the EU, as foreseen in the Digital Agenda for Europe. The proposed Regulation widens the scope of the Electronic Signatures Directive, including the mutual recognition of e-IDs across the Member States. The proposed Regulation will go through the Ordinary Legislative Procedure for its adoption by the European Parliament, with the Committee on Industry, Research and Energy (ITRE) expected to vote on 9 July 2013. See the Progress Report and Orientation Debate, published on 7 December 2012.

2012

Sales promotions

The Committee of Advertising Practice (CAP) recently published updated guidance on significant terms and conditions in sales promotions. The guidance has been updated to include examples of recent ASA adjudications and, in particular, considers marketing over Twitter. For online marketing (which can be severely restricted in space), CAP has provided useful tips around how many clicks away relevant terms and conditions should be from the initial marketing communication. See Sales promotions: Terms and Conditions (T&Cs).

For further information, contact: Martin Fanning, Scott Singer, Ingrid Silver or Nick Graham

Employment

2013

Employment law reform

The Government continues its proposed reforms of employment law and a number of significant reforms are proposed. The cap on the compensatory element of unfair dismissal claims will be reduced to either notional medium average earnings (c. £25,000) or an individual's net annual salary. The Enterprise and Regulatory Reform Bill will also abolish third party harassment and discrimination questionnaires. It also provides for protected conversations which would prevent discussions about terminating employment being admissible in unfair dismissal claims. The Bill also stops employees bringing claims based on a breach of their own employment contract, as qualifying disclosures will have to be in the public interest. In addition, a new status of "employee shareholder" is proposed in which employees could be given shares in exchange for giving up certain employment rights, including unfair dismissal and redundancy. Fees will also be imposed for bringing Employment Tribunal claims, although these may be reimbursed by employers at the Tribunal's discretion.

Timing of obligation to consult on collective redundancies

After an inconclusive response from the ECJ, the Court of Appeal must now decide whether the obligation to consult in a collective redundancy situation arises before or after the strategic or commercial decision that would lead to the collective redundancies (*USA v. Nolan* [2010] EWCA Civ 1223).

Retirement ages

After a lengthy journey through the courts, an Employment Tribunal will hear *Seldon v. Clarkson Wright & Jakes* [2012] UKSC 16 and must decide whether the chosen retirement age of 65 was a proportionate means of achieving a legitimate aim. The Supreme Court has already decided that staff retention, workforce planning and dignity were legitimate aims. If the Tribunal decides that the chosen retirement age was proportionate, it will have been objectively justified for the purposes of indirect age discrimination claims.

2012

Unfair dismissal

The service requirement for unfair dismissal claims was increased to two years for employees who began work on or after 6 April 2012 (unless they were dismissed in circumstances where no qualifying service is required).

Equal pay

Employees who miss the six-month deadline for bringing equal pay claims in the Employment Tribunal now have six months to bring a breach of contract claim in the civil courts (*Birmingham City Council v. Abdullah* [2012] I.C.R. 1419).

TUPE

Tribunals have been tightening their interpretation of when a service provision change occurs under TUPE. Employees must now be deliberately organised by reference to a particular client before employees assigned to that client will constitute an organised grouping that will transfer. This cannot be a matter of chance (*Eddie Stobart Ltd v. Moreman & Others* [2012] I.C.R. 919). The mere fact that an employee spends 100 per cent of their time working for a client does not mean that there is an organised grouping (*Seawell Ltd v. Ceva Freight (UK) Ltd* [2012] I.R.L.R. 802). To be assigned to a client, individuals should be directly providing services to that client, as opposed to undertaking strategic or management roles in relation to the transfer (*Edinburgh Homelink Partners*

& Others v. The City of Edinburgh City Council 2012 WL3062481). In addition, for there to be a service provision change, the client must remain the same (*McCarrick v. Hunter* [2012] EWCA Civ 1399/*SNR Denton (UK) LLP v. Kirwan* [2012] I.R.L.R. 966).

For further information, contact: Pauline McArdle, Richard Nicolle or Simon Whysall

Energy

2012

In 2012, DECC published the Energy Bill. This establishes the legislative framework for energy market reforms that aim to provide secure, affordable and low-carbon electricity. To achieve this aim, the Bill contains provisions concerning:

- *Feed-in tariff with contracts for difference*
  Low-carbon electricity generators will receive guaranteed revenue for selling electricity to the market, but may also receive "top-up payments" (or be liable to pay back sums) depending on whether they sell electricity above or below a set price.
- *Capacity agreements*
  Payments are to be made to reliable providers of capacity to ensure a dependable and secure supply of electricity.

The Government also agreed to increase the support available under the Levy Control Framework (the cap on the amount that energy suppliers can add to consumers' bills) to fund low-carbon electricity investment until 2020. This support will increase from £2.35 billion in 2012 to £7.6 billion (at 2012 prices) in 2020.

Government lifts suspension on shale gas exploration

The Government has recently announced that hydraulic fracturing, commonly know as "fracking", can resume in the UK, subject to new controls to mitigate the risks of seismic activity.

In 2011, two minor earthquakes in Blackpool, thought to be caused by fracking, prompted the Government to suspend fracking activity across the UK. However, the Government has concluded that the seismic risks associated with fracking can be managed effectively with certain controls.

The Gas Generation Strategy

In 2012, DECC published its Gas Generation Strategy setting out the role that it perceives gas will play in providing the UK with a secure, low-carbon and affordable supply of electricity in the future and to increase flexibility in the generation mix to meet the growing demand. The Government wishes to stimulate investment in the gas-fired generation market to offset increasing support for other forms of generation and ensure fair competition. The measures to be adopted include:

- improving the planning regime by giving potential developers greater flexibility with their applications and consents under the Planning Act;
- enabling the Government to act to improve the wholesale market liquidity;
- introducing potential measures to encourage gas storage; and
- establishing the Office for Unconventional Gas and Oil, which will provide a single point of contact for investors to ensure a simplified and streamlined regulatory process.

2013 and beyond

UK Government publishes response to Maitland report

On 18 December 2012, the Government published its response to the Maitland report, which contained a long list of post-Macondo conclusions and recommendations for the UK oil and gas industry in the field of environmental and safety regulation. On the whole, the Government's response was consistent with its previous official statements and publications in that it strongly supports and endorses the existing UK offshore regulatory regime, and does not indicate any radical changes to the prevailing legal system. The thrust of the Government's response was to highlight progress that has already been made by DECC and the oil and gas industry in responding to the Deepwater Horizon disaster.

One issue that is not covered in any detail in the Government's response is the awkward question of how the UK's response to Deepwater Horizon will (or will not) fit with the EU's proposed legislation in the field of offshore environmental and safety regulation. In October 2011, the European Commission published a proposal for a new regulation on offshore safety in the oil and gas industry, and in October 2012 this proposal was updated and amended, most importantly to propose the legislation in the form of a directive rather than a regulation. See UK Government publishes response to Maitland report by Sam Boileau.

The Green Deal

DECC has indicated that householders and businesses in non-domestic properties will be able to sign up to Green Deal finance plans from 28 January 2013. The Green Deal is the flagship Government initiative for improving the energy efficiency of buildings in Great Britain.

The initiative creates a "pay as you save" financing mechanism to enable a range of energy efficiency measures to be installed in homes and businesses at no up-front cost. The Green Deal attaches the liability to repay Green Deal financing to the property's energy bills, and requires energy suppliers to recover the Green Deal payments from the consumer through their energy bills.

Roll-out of smart meters

Energy suppliers will be responsible for replacing over 53 million gas and electricity meters with technologically advanced smart meters. The mass roll-out is expected to start in 2014 and to be completed in 2019.

Smart metering enables a two-way flow of electricity and information that allows real-time information about demand for energy to inform the level of required supply. The Government expects that smart meters will play an important role in the UK's transition to a low-carbon economy, reduce emissions and cut consumers' energy bills. However, concerns have been raised about the privacy implications of smart metering. The European Data Protection Supervisor warns that, unless proper safeguards are introduced, smart meters could be used to track much more than energy consumption.

For further information, contact: Danielle Beggs or Charles Wood

Environmental

2013

Key development in 2012 – *Cape v. Chandler* case on parent company liability

In April 2012, the Court of Appeal made a historic ruling concerning the liability of parent companies to the employees of subsidiaries. The case, *Cape v. Chandler* [2012] EWCA Civ 525, concerned asbestos exposure, but the decision has wide implications for parent company liability across all areas of a company's operations.

The case was brought by an individual who was exposed to asbestos fibres whilst employed by a subsidiary of Cape plc during the late 1950s and early 1960s. He was later diagnosed with asbestosis. The subsidiary had been dissolved many years ago, and its insurance policy had a broad exclusion which would have prevented recovery. Therefore, Mr Chandler began proceedings against the parent company, Cape plc.

In general, parent companies are not liable for the negligence of their subsidiaries on the basis that each has a distinct legal personality and it is not possible to "pierce the corporate veil". In this case, however, the Court of Appeal held that the parent company, Cape plc, was liable because it owed a direct duty of care to Mr Chandler, which it breached.

The court was keen to stress that technically the corporate veil was not pierced. However, in identifying a direct duty of care between a parent company and an employee of a subsidiary, the case was unusual, and has significant potential implications. Companies may wish to review their corporate management structures and policies, as well as their insurance arrangements, in the light of this judgment.

Coming up in 2013 – Mandatory greenhouse gas reporting

From April 2013, all UK "quoted companies" will be required to report on their greenhouse gas (GHG) emissions in their directors' report. The requirements are set out in the Draft Greenhouse Gas Emissions (Directors' Reports) Regulations 2013, which are being made under powers in the Companies Act 2006. The draft regulations have been published for public consultation, and will need to be approved by Parliament, but are widely expected to come into force early in 2013.

The reporting requirements will apply to any company that: is UK incorporated and whose share capital is listed in the Main Market on the London Stock Exchange; is officially listed in an EEA State; or is admitted to dealing on either the New York Stock Exchange or Nasdaq.

The first year of mandatory reporting is expected to be the first financial year ending after 6 April 2013.

Companies must report on GHG emissions (in CO_2 equivalents) from various activities including electricity; heat and steam or cooling; fuel combustion; transport; and manufacturing.

The regulations are not prescriptive about the method used to calculate emissions, but companies must state which method they used. Companies can use data already collated under other obligations, such as the CRC Energy Efficiency Schemes or the EU Emissions Trading Scheme (EU ETS).

The Government will consider, in 2016, whether to extend mandatory GHG reporting to all large companies.

Coming up in 2013 – Phase 3 of the EU ETS

The third phase of the EU ETS starts on 1 January 2013, and will run until 31 December 2020. The EU ETS is one of the key mechanisms introduced by the Eu to reduce GHG emissions. Phase 3 will be more onerous for participants and this may have an impact on energy prices for all businesses.

One of the key changes is that, subject to a few exceptions, there will be no "free allocation" of allowances for power generating installations. Operators of power stations will need to buy allowances equivalent to their emissions, either through Government-run auctions or on the open market. Free allocations for other sectors will be significantly reduced and based on an EU-wide benchmark for each particular industry. Other changes include a single "Union Registry" rather than individual registries in each Member State, and some additional protection for sectors deemed to be at risk of "carbon leakage", that is, moving production outside the EU to avoid high environmental compliance costs. Additionally, "small emitters" (under 35MW) and hospitals can opt out of Phase 3, although they will need to participate in an equivalent (but less administratively onerous) scheme.

For further information, contact: Stephen Shergold or Sam Boileau

Pensions

2013

Auto-enrolment

The first tranche of employers reached their auto-enrolment staging date in 2012. 6,000 more employers will reach it this year. Many commentators have predicted that pension schemes will hit capacity constraints, highlighting the need for employers to plan ahead and engage with auto-enrolment providers at least six months before reaching their staging date.

Find out how to meet your legal obligations here. See Are you Ready for Auto-Enrolment?

Priority of Financial Support Directions (FSD) on insolvency

The Supreme Court will hear the appeal in *Bloom and Others v. The Pensions Regulator and Others* [2011] EWCA Civ 1124 on 14 May 2013. It will decide where FSDs sit in the order of priority on insolvency.

The Court of Appeal decided that FSDs are an expense of the administration and therefore rank ahead of other creditors' claims in the administration. If the Supreme Court wants to change this decision, it will have to overturn or limit the effect of the House of Lords decision in *Re Toshoku Finance UK plc* [2002] 1 WLR 671(HL). In that case the House of Lords established a general rule that where by statute Parliament imposes a financial liability that is not a provable debt and which does not fall into any other category for payment, then it will rank as an expense of the administration. It remains to be seen if the Supreme Court will change this or uphold the Court of Appeal decision.

Background information on this case is available here. See Pensions: Priority

Ambit of FSDs

In April 2013 the Court of Appeal is set to hear whether the Lehman Brothers Pension Scheme Trustees appeal the decision of the Determinations Panel of TPR not to impose an FSD on 38 companies in the Lehman Brothers Group.

SNR Denton represents 22 companies involved in this case and will provide further information about the hearing in due course. More information on TPR's determination to issue FSDs to companies in the Lehman Brothers Group is available here. See Financial Support Directions: Lehman Brothers Companies Still at Risk of an FSD from TPR

IBM case

The IBM case *IBM UK Pensions Trust Limited v. IBM UK Holdings Limited, IBM UK Limited and George Metcalfe* [2012 EWHC 2766] is due back in the High Court in early 2013 for the court to examine the application of the employer's implied duty of good faith to members following on from the court's decision to partially allow rectification of the scheme's deeds last year. In this context, the duty of good faith requires that an employer does not, without reasonable and proper cause, act in a way calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

TUPE

We may obtain some clarity on the extent to which pension rights transfer under TUPE. Old age, sickness and survivor benefits under an occupational pension scheme do not automatically transfer under TUPE. Under the *Beckmann* and *Martin* cases, benefits payable on redundancy or early retirement rights automatically transfer under TUPE. Both cases concerned public sector pension schemes.

The Court of Appeal is due to hear the appeal in *Procter & Gamble v. SCA* [2012] EWHC 1257 about the scope of *Beckmann* rights on a TUPE transfer involving private sector pension schemes. See Court Clarifies Pension Rights on Business Transfer for the background to this case.

Finance Act 2013

The Finance Bill 2013 will wind its way through the parliamentary process onto the statute books to become the Finance Act 2013. The clauses published on 11 December 2012 include provisions to reduce the current allowances for tax-advantaged pension saving for the 2014/15 tax year as follows:

- The annual allowance will be reduced from £50,000 to £40,000.
- The lifetime allowance will be reduced from £1.5 million to £1.25 million.
- Transitional relief will be available for individuals that may be adversely affected by the drop in the lifetime allowance, but only where the individual has not already claimed primary, enhanced or fixed protection. Accrual of further benefits must also cease.

In addition, the use of family pension plans, where employers pay pension contributions to other family members' pension schemes to circumvent restrictions on tax relief, will be curtailed.

Changes will be made to existing provisions in the Finance Act 2004 relating to bridging pensions to reflect increases in state pension age.

Consequential amendments will be made to primary legislation following the abolition of DC contracting-out on 6 April 2012 (including removing legislative references in the Finance Act 2004 to contracted-out rebates).

Meaning of "money purchase benefits"

It is not certain whether the legislation on money purchase benefits, hastily drafted by the DWP following *Houldsworth v. Bridge Trustees* [2011] UKSC 42, will be brought into force in 2013. The proposed legislation will have retrospective effect from 1 January 1997. It includes provisions giving the DWP power to make transitional provisions in relation to past decisions that cannot practically be revisited, for example where a scheme has wound up.

A DWP factsheet, issued alongside the draft legislation, sets out the Government's view that the term "money purchase benefits" should only refer to benefits where there is no risk of a funding deficit. For this reason, measures such as the employer debt and scheme-specific funding legislation only apply to defined benefit schemes. The DWP said that without action "anomalous results" could have arisen whereby schemes would have been unable to pay out benefits that had always been considered money purchase in nature, but which, equally, would not have been protected by the Pension Protection Fund.

Details of the *Houldsworth* case are available here. See The Dividing Line Between Money Purchase and Final Salary Benefits

Small pension pots

Small pots are a growing problem because people now move jobs more frequently than they used to and often fail to move their pension pots with them. The Government estimates that unless the current system, which requires individuals to take active steps to consolidate their pension savings, is changed some 50 million pension pots will be dormant by 2050. 12 million of these small pots will be worth less than £2,000. Furthermore, when individuals cease to pay into their pension pots, the value can quickly be eroded by high annual management charges.

It now seems likely that the DWP will introduce legislation to deal with small pension pots. Pensions Minister Steve Webb has previously said that the Government will introduce automatic transfers using the "pot follows member" model.

Banking Reform

The proposed changes to the banking system in the UK (see Banking Structure Reform later in this alerter) will have a profound effect upon the pension schemes of many banks. Some details have already been released during 2012 but further information will be disclosed in secondary legislation due in 2013.

The draft Banking Reform Bill has already indicated that depositors covered by the Financial Services Compensation Scheme will be given special priority over other unsecured depositors, meaning that pension scheme deficits will be subordinated to the claims of such depositors. This will lead inevitably to a weakening of the bank's financial covenant to the pension scheme and may, in turn, lead to the trustees adopting more prudent recovery periods and investment policies. The policy of ring-fencing between different banking businesses will also lead to a need to separate pension liabilities between the two businesses and the problem of deciding to which pension pot respective employees should be attributable. Details of how this will be undertaken have not yet been announced but there are a number of inherent problems associated with this exercise, particularly if the covenant of one business is significantly weaker than the other. To attribute the accrued rights of an employee to the pension arrangement for the weaker business could increase the chances of that pension not being paid in full. Furthermore, what should happen to employees who historically have worked in both businesses?

The other big outstanding issue is whether pension scheme deficits should be subject to the "bail-in tool" whereby in the event of insolvency the outstanding debt is converted into equity of the bank. Interestingly, we can also see considerable scope for conflict between the interests of different regulatory authorities in the forms of TPR, who will be interested to protect the rights of pension scheme members, and the Prudential Regulatory Authority (as successor of the FSA), charged with regulating the banking industry.

Inflation measures

A consultation on both the methodology and the constituents of RPI has recently closed. The impact of the consultation on RPI is not yet known but will be announced on 10 January 2013. In the most extreme case, this could lower the level of RPI to the CPI level. See Proposed Changes to Calculation of RPI to Bring the Index Closer to CPI

The Office of National Statistics plans to create a version of the Consumer Prices Index that includes housing costs, to be called CPIH. This will be introduced in March 2013. Schemes should monitor these developments and discuss their impact with their advisers.

For further information: contact Alan Jarvis, Elmer Doonan, Andrew Patten or Jay Doraismy

Privacy and Data Security

2013

Industry reports show that global privacy risk remains one of the top issues keeping GCs awake at night. There is the risk of an organisation suffering a hack, cyber attack or data leak as well as the growth in data privacy laws and regulation.

The big question for 2013 is: "How do I avoid being the next big privacy press story?". Two specific issues to consider are the proposed new EU regulation and an ICO keen to flex its muscles.

- EU Data Protection Regulation: In 2012 there has been much debate about the European Commission's proposed new EU-wide Data Protection Regulation (the Regulation). These proposals are game changing in terms of the risk for any organisation that handles personal data. The new requirements include: (i) fines of up to 2 per cent of global annual turnover for companies that violate the new rules; (ii) a new obligation to notify the national data protection regulator of a data breach within 24 hours after having become aware of it; (iii) the need for public authorities and private companies with 250 or more staff to formally appoint a data protection officer to ensure data protection compliance; and (iv) the new principle of "accountability" requiring data controllers to adopt policies and procedures to ensure, and to be able to demonstrate, compliance with the Regulation. This is likely to mean more companies undertaking data privacy audits in 2013 to identify privacy risks and implement "fixes". The "fixes" are likely to include putting a "control framework" in place to manage privacy risk. We are also likely to see many more Chief Privacy Officers being appointed. This is all about being "ahead of the wave". It is likely that the Regulation will be agreed and finalised during the course of 2013/14.
- More ICO enforcement: 2012 has seen an increase in the number of fines and penalties imposed by the UK ICO. The total amount of financial penalties imposed by the ICO is now over nearly £2.7 million. On 28 November 2012, the ICO fined the owners of Tetrus Telecoms £440,000 for sending spam texts. This is the first fine for breach of the Privacy and Electronic Communications Regulations 2003 and a clear indication that the ICO is ready and willing to use its new fining powers. We expect more enforcement action from the ICO including for spam email and the new cookies rule. The ICO is also pursuing a strategy whereby, where it finds a significant issue or complaint against an organisation, it uses the opportunity to ask for more information about the organisation's policies and procedures. The Information Commissioner is on record as saying he is looking for a "high level of assurance" as to privacy compliance. Failure to be able to demonstrate this will also likely increase the risk of enforcement action.

For further information: contact Nick Graham

Real Estate and Planning

2013

Hedging in real estate finance transactions

Hedging is a feature of most real estate finance transactions. Despite the publication in 2012 of the recommended form of real estate finance facility agreement by the Loan Markets Association, the position of the hedge counterparty is likely to continue to be subject to significant negotiation See Hedging and the LMA's Real Estate Finance Agreement by Edward Hickman and Lorraine Davis.

The Community Infrastructure Levy (CIL)

CIL is the latest attempt by government to capture land value in the town and country planning system. It has led to a debate about who reaps the benefits, and who bears the costs, of the allocations the system makes. See The Year of the Community Infrastructure Levy by Roy Pinnock and Stephen Ashworth.

Affordable housing

Affordable housing is a bellwether. If the development market is vibrant and the planning system is efficient then significant levels of affordable housing can be provided. The Amber Valley decision highlights a range of issues that will need to be explored further over the coming months. See Affordable Housing Decision Highlights Issues in UK Real Estate Market by Stephen Ashworth.

For further information, contact: Richard Budge, Lorraine Davis, David Cox or Stephen Webb

Reform of Financial Services and Banking

2013

Financial Services Bill

The Financial Services Bill (FS Bill) received Royal Assent on 19 December 2012, and will take effect on 1 April 2013. It will put in place a new structure for the regulation of all financial services providers authorised under the Financial Services and Markets Act 2000 (FSMA). The main change authorised firms will see is the "twin peaks" regulatory structure, with the Financial Services Authority (FSA) being replaced by the Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA). Banks, insurers and large investment firms will become dual-regulated by both regulators and will see the most fundamental change, but all firms will see changes to the style of supervision and the detail of the rules. A late addition to the FS Bill introduces new activities to be regulated under FSMA relating to LIBOR, and the inclusion of benchmark manipulation as a new criminal offence. The Government and regulators are working towards 1 April 2013 as the date of "legal cut-over" so firms must prepare for that as there will be few transitional arrangements. Consumer credit regulation, though, is not expected to pass to FCA until 2014.

Banking structure reform

Following the report of the Independent Commission on Banking, and the so-called Vickers recommendations, Treasury published the draft Banking Reform Bill in mid-October 2012. This Bill would require structural separation of "core" banking services from others. It is likely to force banks to create separate entities in which to house deposit-taking and related services for consumers and small businesses. The core services will have to be "ring-fenced" within these banks, which will also have to meet stricter financial resources requirements than other banks. The precise services which will be within and outside the ring-fence are still under discussion. The Banking Reform Bill is in draft form, so it can undergo pre-legislative scrutiny in Parliament. Once this is complete, it can start its formal passage through Parliament. There is also a possibility of further legislation setting out sanctions against directors of failed banks.

Retail financial markets

December 2012 saw the implementation of the FSA's Retail Distribution Review, which imposes new standards on all firms that advise retail investors on a range of retail investment products. It sets out requirements for the giving of independent or restricted advice, charging structures (including banning commission) and qualifications of advisers. Retail markets are also concerned about the FSA/FCA's new product intervention powers and the EU initiatives regarding retail investment, insurance and fund products. The FSA also finally made its rules implementing its Mortgage Market Review but in the main these will not be in force until 2014.

Trading and markets reform

The full effects of the EU's EMIR Regulation on OTC derivatives transactions, central counterparties and trade repositories will start to be felt during 2013. EMIR requires all financial counterparties, and all non-financial counterparties trading derivatives above certain thresholds, to ensure the contracts are centrally cleared wherever possible, or face onerous risk mitigation or capital requirements to balance the risk of bilateral OTC trades. For investment firms, the revisions to the Markets in Financial Instruments Directive (MiFID) are likely to be agreed at EU level in early 2013 but not take effect until 2015. The changes will, among other things, narrow the current exemptions from MiFID's scope, introduce new regulation for all trading platforms and put in place measures to control high frequency trading. The changes will also affect retail markets by imposing further requirements on standards of advice, and allowing regulators to intervene at product level to protect consumers.

Bank capital reform

EU negotiations on a package representing the EU's implementation of Basel III stalled during 2012. The package will introduce better quality and larger quantity of capital, new buffers to address key risks, including counter-cyclical buffers, and new requirements around risk mitigation and governance, and remuneration. It also paves the way for a single EU banking rulebook, overseen by the European Banking Authority (EBA). The new rules were supposed to take effect at the beginning of 2013, but there will clearly be a delay. Industry has called for a delay consistent with the delay in implementation in the US, as it feels EU banks would be at a competitive disadvantage were the EU to implement reforms earlier.

Alternative Investment Funds

The Alternative Investment Fund Managers Directive (AIFMD) takes effect in July 2013. It will require all managers of non-UCITS funds to become authorised and impose on them and on key service providers such as depositaries and prime brokers, new and onerous conduct, transparency and valuation standards. A complementary package introducing a lighter regulatory regime for managers of venture capital and social entrepreneurship funds is expected to take effect at the same time. Certainty on the UK's implementing rules should come soon, but has been delayed by the European Commission's failure to publish key technical measures due under the AIFMD.

For further information, contact: Rosali Pretorius, Emma Radmore, Jim Baird or Andrew Barber

Tax

2012

Anti-avoidance: 2012 marked a significant change in attitudes towards so-called tax avoidance, and was the year in which consumers demonstrated that they could influence the tax policies of multi-national enterprises. Starbucks' admission that it had paid only £8.6 million in corporation tax since launching in the UK subsequently led to the coffee-house chain offering to pay £20 million of corporation tax over the next two years, an announcement not met with universal gratitude. SDLT was hiked to discourage "enveloping" of high-end residential property. Political and media scrutiny of the tax arrangements of individuals and corporates varied from considered and analytical to overblown and hysterical.

CFC reform and North Sea oil and gas: On the positive side, the long-awaited new CFC rules, whilst long and at times impenetrable, have undisputably made the UK more attractive as a holding company jurisdiction. New brownfield allowances for certain North Sea fields will kick-start new investment in the sector.

2013

More anti-avoidance: The long-anticipated general anti-avoidance rule will come into effect, as will rules imposing capital gains tax on certain non-natural persons disposing of high-end residential property. New rules to determine whether an individual is resident in the UK for tax purposes will be introduced, and it is imperative that those wishing to remain non-UK resident engage appropriate advisers to review their affairs.

1,073 pages of draft clauses and explanatory notes for the Finance Bill 2013 suggest that UK tax law is unlikely to become simpler or shorter any time soon.

For further information, contact: Jeremy Cape

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