

Directors' Personal Liability Risk Increases

A recent decision of the Court of Appeal has important implications for any director who is purporting to sign an agreement on behalf of the company.

In *Context Drouzhba Ltd v Wiseman* 2008, a director had signed an agreement on behalf of the company for the purchase of goods, knowing that it had no prospect of being able to afford to pay for those goods. When this became apparent the supplier, Context Drouzhba Ltd, brought a claim against the director, Wiseman. The court found that Wiseman had fraudulently represented that the company had the capacity to meet its obligations to pay for the goods and was therefore liable in damages for deceit. In addition, it was held that the defence in section 6 of the Statute of Frauds (Amendments) Act 1828, which provides a defence when the representation is made by conduct, did not apply as the representation was made in writing signed by the party to be charged.

Wiseman appealed, arguing that the court should have found that the representation to Context was one of conduct, and not a representation in writing and that the defence in section 6 should have applied. The Court of Appeal rejected the appeal, stating that where a director was effectively the mind of the company and where the document they signed made a fraudulent representation to their knowledge, it was clear that their director would have a personal liability for their own fraud.

Although each case will depend on its own facts, there is a possibility that in other cases a director who is the controlling mind of the company and makes a representation that the company can make a payment when it

TOTAL DEAL VALUE OVER £104,000,000



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<p>Asset Purchase Domiciliary care provider</p> <p>Demerger Wine merchants</p>	

Getting a Good Deal Done

With business owners keen to sell before the increases in the rates of Capital Gains Tax (which came into force on 6 April 2008), this meant a rush of extra work in the couple of months leading up to this deadline for Birkett Long. In our Commercial & Corporate Finance team, we were particularly busy with buying, selling and refinancing companies and businesses of all shapes and sizes. With one of the largest specialist teams in Essex, we were able to cope with this high demand for our services and successfully complete on every deal before the tax deadline.

The diagram above is an illustration of the types of deals this team successfully completed during February and March, and up to the 5 April deadline. It shows we are

involved with advising buyers and sellers of a variety of businesses of all sizes.

While mergers and acquisitions have slowed down nationally over the summer due to the threat of recession, this has meant that there are bargains to be had in the form of buying the assets of financially distressed businesses that are otherwise sound and have potential. Purchases of businesses from administrators and liquidators are on the increase and such businesses can often be bought for very little. If you are looking to acquire other businesses at bargain prices, you can register your interest on a new website www.IP-BID.com. However, purchasing a business from an administrator or liquidator is not without its risks and specialist legal advice should be sought. The Insolvency team at Birkett Long can provide such advice.

continued from previous column:

cannot, will be found to be personally liable in deceit. This decision will therefore be of particular concern for directors trading in difficult circumstances as it provides the creditors of such a company with an alternative means of redress.

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Companies Act 2006 Check Up

In previous issues of this newsletter we have updated you as to the progress of the Companies Act 2006, including its implementation in various stages. Although it was originally intended that every part of the Act would be in force by October 2008, the final parts are now not due to come into force until 1 October 2009. A draft of the eighth Commencement Order that will bring the provisions into effect on that date has now been published.

As many of the provisions coming into force on 1 October 2009 will require significant changes to Companies House computerised systems, the commentary to the draft Commencement Order explains how Companies House will accommodate the changes and confirms that their electronic filing system and online search facility will not be available over the weekend of 3 to 4 October 2009.

The Commencement Order also answers a question that has been raised in connection with the changes to the memorandum of association introduced by the Act, as to whether a company will have to file updated articles. From 1 October 2009 the memorandum of association will no longer contain an objects clause. The objects of existing companies will be treated as provisions of their articles of association but a company will not need to file updated articles of association to include the objects clause until it actually amends its articles.

However, as the articles of existing companies remain the same despite the new requirements and de-regulatory measures introduced by the Act, every company should consider conducting a full review of its constitution. For a one-off payment of £130 plus VAT, Birkett Long can offer a review of your current memorandum and articles of association to highlight

any provisions that are now illegal under the Act, or any provisions that prevent you from making the most of the Act, and explain the process required to update them.

To take advantage of this offer, please contact our team on 01245 453822 or companiesact@birkettlong.co.uk.

Civil Penalties for Illegal Working and Sponsor Licensing Scheme

The UK Border Agency (UKBA) is now implementing their strict new Civil Penalty Regime for employers suspected to be in breach of illegal working legislation. The details of the business owners' names and level of fines imposed are now being posted on the internet for public view. Several businesses have been fined in excess of £20,000 to £30,000.

Fines imposed can be up to £10,000 per illegal worker found on a visit to a business premises. The UKBA do not have to prove strictly that the worker they find is illegal, but can issue a Notice of Potential Liability, to be followed by a Notice of Liability 28 days later if a successful objection to the fine is not lodged by the employer. The fine can be appealed in the County

Court, however this is at the risk of considerable potential cost to the employer. There are also criminal offences for which the employer can be prosecuted.

If you are employing foreign nationals, you need to be aware of the new requirement to become a Licensed Sponsor. The application process to become a Licensed Sponsor will involve an inspection visit to your premises by the UKBA to assess your HR practices and procedures. If you are found to be non-compliant, you may face refusal of your Sponsor Licence application and/or prosecution or imposition of a Civil Penalty.

At Birkett Long, we can assist you with these issues in the following ways:

- As recognised assessors on the approved Home Office list (www.ukba.homeoffice.gov.uk/employers/points/helpandsupport/additionalsupport), we are authorised to visit and assess businesses and issue a report to the Home Office if you achieve compliance, which will speed up your application. The Home Office has stated that in cases where a favourable report has been issued by an authorised assessor, they will not normally duplicate the assessment visit. Solicitor and client confidentiality is not affected.
- We can also assist with legal advice and/or training regarding these issues so that your business will be compliant.

For further information please contact our Immigration team on 01206 217356 or email immigration@birkettlong.co.uk.



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