BirkettLong

For Business

news and advice from Birkett Long

Autumn 2011

HR Consultants and Confidentiality

The common law of privilege protects the confidentiality of communications between clients and their lawyers but does not extend to communications between clients and other professional advisers, such as human resources advisers or consultants, or accountants.

In an employment dispute, an employer client is entitled to withhold communications that take place between him and his lawyer (such as letters, emails, telephone notes, etc.) from the employee, the employee's solicitor or the employment tribunal or court. This is an absolute right when the law of privilege applies.

The underlying purpose of this rule is to facilitate free access between employer and lawyer; allowing the employer client to make use of the lawyer's professional skills and judgment, and ask any question he wishes. This rule offers a great deal of protection to the employer because communications between client and solicitor could assist the employee's case if they were to be disclosed.

However, where employers instruct a HR adviser or consultant, or receive advice from an accountant, the rule regarding legal professional privilege does not apply. The Court of Appeal confirmed in October last year that common law legal professional privilege does not extend to any professional other than a qualified lawyer. Therefore, any communications between an employer and his or her HR adviser or consultant (or accountant) must be fully disclosed.

An employer who obtains advice from anyone other than a qualified lawyer may be at a disadvantage, in that anything said or communicated between them must be disclosed. This could be embarrassing, or worse, damage the employer's case. The rule also means that advice from persons who are not qualified lawyers cannot be given freely and candidly.

Employers should keep this rule in mind when taking advice about a dispute, or potential dispute, with an employee.

For more advice contact Reggie Lloyd on 01206 217347 or email reggie.lloyd@birkettlong.co.uk

Don't get caned by unpaid school fees

Private schools are sometimes forced to increase fees in order to offer bursaries to pupils and maintain their charitable status. But increased fees, combined with a difficult economic climate, mean that many parents struggle to pay.

Paying once a term is not always practical and so some schools have allowed parents to pay on a monthly basis. However, in so doing the schools may unwittingly be breaching the Consumer Credit Act 1974. The technical legalities of the situation mean that although the school has acted in good faith by allowing a parent to pay in instalments, the school may not be able to enforce payment should the parent default. The school would have to continue to provide education, and in some cases accommodation, to the pupil but would not receive the school fees until the agreement can be terminated.

Careful drafting of an instalment agreement can mean that these arrangements could work for all parties; allowing children to stay at school, whilst easing financial worries of the parents and the school.

Contact Emily Brown in our education unit on 01206 217317 or emily.brown@birkettlong.co.uk

BIRKETT LONG LLP

PHOENIX HOUSE, CHRISTOPHER MARTIN ROAD
BASILDON SS14 3EX
T 01268 244144

ESSEX HOUSE, 42 CROUCH STREET
COLCHESTER CO3 3HH
T 01206 217300

NUMBER ONE, LEGG STREET
CHELMSFORD CM1 1JS
T 01245 453800

E BUSINESSNEWS@BIRKETTLONG.CO.UK
WWW.BIRKETTLONG.CO.UK

Commercial & Corporate Finance

The Bribery Act
What does it mean for your business?

The Ministry of Justice has published guidance on procedures that commercial organisations can put into place to prevent persons associated with them from commmitting bribery.

An organisation that can prove it has such adequate procedures can use those procedures as the basis of a defence to the offence of failing to prevent bribery under Section 7 of the Bribery Act 2010. The guidance sets out six principles intended to give all commercial organisations a starting point for planning, implementing, monitoring and reviewing their bribery free business regime. It recommends a risk based approach to adopting adequate procedures and recognises that different procedures will be dependent upon the size of the organisation, the sectors and jurisdictions in which it does business, as well as the nature of its business partners and transactions. Procedures should be proportionate to the risks faced by the organisation.

Organisations will need to review their businesses, carry out relevant risk assessments and determine whether their procedures are adequate to prevent bribery. Where they are not, they should seek to implement anti-bribery procedures without delay as the Bribery Act came into force on 1 July 2011.

For further information contact David Wisbey on 01245 453817 or email david.wisbey@birkettlong.co.uk

First ever survey of the top 100 businesses in Essex

Birkett Long has launched the first ever in-depth survey into the performance of the county's top 100 companies in partnership with business and financial advisers, Grant Thornton.

Called Essex Ltd, the survey will compile information using the latest company accounts and the results will be announced at two dedicated events in December.

Essex Ltd has been launched following the success of a similar annual survey conducted in Suffolk by Grant Thornton which, for the past ten years, has provided an important barometer of the county's overall business performance and changing market place. James Brown, Partner at Grant Thornton, said: "Essex is an exciting, entrepreneurial and diverse county, and home to many highly successful companies. The first ever Essex Ltd survey will provide a detailed insight into the county's top 100 businesses, offering a valuable picture of the Essex business economy."

The study will look at details such as company turnover, operating profit and employment figures and also include a breakdown of financial data by sector. The top 100 companies will be selected based on the postcode of their trading address and turnover levels.

David Cant, Partner and Director of Business Development & Marketing at Birkett Long, added: "We are delighted to be working alongside Grant Thornton to produce Essex Ltd. As a firm, we have a long established history in the county and have seen the business scene develop and thrive. The results of Essex Ltd should make very interesting reading."

For further information on Essex Ltd visit www.essexltd.co.uk

Insolvency

Access to justice?

You will, no doubt, have heard that the legal aid budget is to be slashed and that lawyers are up in arms protesting about changes that constitute a denial of access to justice for the most vulnerable in our society. You may not have heard, however, of the "Jackson Review", conducted by Lord Justice Jackson, into the issue of costs in civil litigation. The purpose of the proposed reforms, which are currently contained in a Bill going through Parliament, is to reduce the litigation costs and increase accessibility to the general population; undoubtedly a worthy sentiment.

The promotion of access to justice is important but in the case of these reforms it may well remove the very access that it is seeking to protect. Many insolvency practitioners, when litigating as an office holder, will want to protect their position by obtaining insurance to cover the risk of losing and having to pay their opponent's costs. This expensive insurance is currently recoverable from the respondent to the application in the event of a successful claim. This will change, however, should the Bill based on the Jackson Review become law. The proposal is to remove the right to recover such insurance premiums from respondents. "So what?" you may well ask. Consider then the nil asset liquidation where there is a claim which could result in a return to creditors. The office holder has a good misfeasance claim under section 212 of the Insolvency Act 1986 and their solicitors and barrister are happy to work on a conditional fee basis. All that is left is the adverse costs risk. Currently, the office holder would present details of the claim to a suitable legal expenses insurance company and obtain quotes.

However, if the insurance premium must be paid from any recoveries made, thus reducing the amount available for fees and creditors, many insolvency practitioners may be reluctant to accept a nil asset liquidation or bankruptcy from a referrer or the Official Receiver in the first place – thereby allowing more creditors to go without receiving the money due to them and culpable directors to escape liability. Where insolvency practitioners have accepted an appointment, they may think twice before embarking on a claim as office holder. Alternatively, should the insurance costs be prohibitive, office holders will need to look to the creditors to fund the insurance premium. Creditors, however, are unlikely to want to incur further costs in circumstances where the underlying claim may not result in a 100% recovery and where they will not recover the additional outlay in the form of the insurance premium from respondent(s). It is also conceivable that settlements may become more difficult to achieve (with all the attendant further costs and delay) if the office holder is effectively required to factor in the costs of the insurance premium as well as the potential return to creditors before agreeing a sensible level of compromise.

One more common option is to approach third parties for funding; either by assigning the claim as a cause of action (for a cash payment and a share of the damages) or by the third party funder paying the legal expenses as they go but in return taking a percentage (usually quite large) from the damages awarded by the court. Specialist companies now exist for this purpose but it does mean the loss of control of the claim to an outside party.

However, this is possibly not the end of the story! R3 – the Association of Business Recovery Professionals – via its president, Frances Coulson (and her predecessor, Steven Law of Ensors Chartered Accountants) has been campaigning heavily to take insolvency proceedings out of the reforms and allow office holders to continue to recover insurance premiums from respondents. It is unclear as to whether other forms of litigation funding could step in to fill the void should this campaign be unsuccessful. Uncertain times ahead, in more ways than one...

Contact Kevin Sullivan or David Gibbs on 01206 217376 or 01206 217609 – kevin.sullivan@birkettlong.co.uk or david.gibbs@birkettlong.co.uk

Litigation

Cash is king!

According to The Insolvency Service "more than half of Britain's small businesses collapse because of cash-flow problems."

Good cash-flow is the lifeblood of all businesses. Our debt recovery team offers a fast effective debt collection system to ensure that good cash-flow is maintained.

No pre-action protocol applies to debt collection. However, the court requires creditors to send letters before claim stating the date by which the creditor considers it reasonable for a response or payment to be received. If a claim form is issued prematurely without a letter before claim the debtor could pay the debt and then refuse to pay the costs. It would then be for the creditor to make an application to the court for a costs order. The court may not find in the creditor's favour, which would result in the creditor paying his or her own costs together with the wasted costs of the application.

In our experience, it is good practice to demand payment before issuing a claim form. Birkett Long's 'letters before claim' often have the desired effect and payment is very often swiftly received.

If payment is not received promptly we will, on your instruction, issue a claim form in the county court. In addition to the debt we add the court fee, fixed costs, collection charge and interest under The Late Payment of Commercial Debts (Interest) Act 1998 for the debtor to pay, thus maximising recovery for our clients.

For more information contact Margaret Davey on 01206 217378 or margaret.davey@birkettlong.co.uk

Commercial Property

Vacant possession: A requirement for a successful break

Tenants are not finding it difficult to negotiate the inclusion of a break clause as a term of their lease these days but, unless all conditions which are attached to it have been satisfied, they will find it is not so easy to exercise it.

Yet another case on this subject has come before the Court of Appeal, which decided that the tenant had not acted in accordance with the terms of the break clause in the lease and, therefore, lost its right to break it.

The tenant in the case had acted correctly in every respect as far as service of the break notice was concerned and had complied with the provision that the rent was up to date but, to avoid a dilapidations claim and under a mistaken belief that the landlord was in agreement, the tenant continued to occupy the property to carry out repairs after the break date.

The court decided that as the tenant remained in possession of the property after the break date he had not complied with the requirement that he should give vacant possession on that date. The tenant should have delivered the keys to the landlord on the break date and then asked the landlord if he could go back in to the property the following day in order to carry out the repairs under a licence.

The court provided a clear definition of 'vacant possession'. "It means what it does in every domestic and commercial sale in which there is an obligation to give vacant possession on completion. It means that at the moment that 'vacant possession' is required to be given, the property is empty of people and chattels and that the purchaser is able to assume and enjoy immediate and exclusive possession, occupation and control of it".

Fortunately for the tenant, he had the right to break again eight months later, which he did successfully, but at a cost of the rent for that period and legal costs.

So tenants beware, it may be easy to get the break clause at the start of the lease but do not expect your landlord or the court to be so willing to give you a break if you have not exercised your right to do so correctly!

For information on any aspect of landlord and tenant law, contact David Temperton on 01206 217310 or david.temperton@birkettlong.co.uk

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BIRKETT LONG LLP

PHOENIX HOUSE, CHRISTOPHER MARTIN ROAD
BASILDON SS14 3EX
T 01268 244144

ESSEX HOUSE, 42 CROUCH STREET
COLCHESTER CO3 3HH
T 01206 217300

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T 01245 453800

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WWW.BIRKETTLONG.CO.UK