BirkettLong

# For Business

news and advice from Birkett Long

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## Copyright - You can sell it *and* get it back!

The Court of Appeal recently confirmed that it is possible for songwriters to sell the copyright in songs they have written, but to then get the copyright back (and therefore sell it again) if the first buyer hasn't behaved properly.

In Crosstown Music 1 LLC v Droite Music Limited & Ors the facts were that two songwriters signed agreements with a publisher which made provision for the copyright to revert automatically to the writers in the event of a material breach of the agreement by the publisher that had been notified to it, but not remedied.

The court found that the publisher had breached a number of provisions in the agreement by failing to account properly for sums due to the writers. The breaches included miscalculating the royalties payable, failing to communicate adequately with the writers and obstructing the writers' auditors. Notices were served by the writers notifying the publisher of the breaches and these were not remedied within the required time period. The publisher then sold part of its business (including the copyright in the writers' songs) to Crosstown, the claimant.

Proceedings were brought against both the publisher and the writers by the claimant, which asserted its ownership of the copyright. The publisher then went into administration, as a result of which the claimant sought a declaration from the court that no automatic reversion of the copyright to the writers had occurred. Instead the court decided that automatic reversion was permitted by the terms of the agreement (where there was a material breach that hadn't been remedied) and as a matter of law.

The decision will be of interest to all copyright owners and buyers of copyright. The buyers, such as music publishers, should review their purchase agreements to see whether the copyright they have acquired could revert back to the original owner if the buyer breaches the agreement. Creators of copyright material should similarly ensure that on a sale of the copyright, they can benefit from reversion of the rights to them if the buyer misbehaves by, for example, failing to pay royalties properly.

If you require expert advice in relation to any intellectual property question you may have, please contact david.wisbey@birkettlong.co.uk.

## Snow good for business

**Over the past months the country has been badly affected by snow and ice, with transport networks coming to a shivering halt. So what does this mean for an employer left with a depleted workforce? This is an issue not limited to snow, as last year's ash clouds demonstrated.**

### Do I have to pay staff that can't make it in to work?

**Where an employee is paid for work carried out, then clearly they do not need to be paid where they have not carried out any work. The situation with salaried staff is slightly more complex - they are paid regardless of the quantity of work done. Salaried staff need only be paid where they are 'ready and willing to work'. If an employee is unable to make it in, they are not 'ready' to work and need not be paid. This is a view supported by ACAS.**

**Employers must consider the non-legal implications of their policies. Refusal to pay employees who are unable to attend work through no fault of their own is bad for staff morale and can lead to negative PR for the business.**

**In order to deal with these problems, provisions can be included in a contract or a policy can be implemented to deal with the circumstances. Alternatives can also be suggested, such as working from home, working from an alternative location, shutting the entire workplace or offering a choice of paid or unpaid leave. Either way, it is worthwhile taking a proactive, rather than reactive, approach to prevent employees being left out in the cold. Contact martin.hopkins@birkettlong.co.uk**

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# Insolvency

## What are pre-pack administrations?

There has been a great deal of recent press about 'pre-packs'. This article looks at what they are and why they have been in the press.

The Enterprise Act 2002 enables a company or its directors to appoint an administrator without having any recourse to the courts and this led to an increase in pre-packs. Companies such as Whittard of Chelsea, USC and MFI have been the subject of a pre-pack.

A pre-pack administration sale (pre-pack) allows for a failing company to enter into administration and for the administrators to sell the business of the failing company. The 'pre' relates to the fact that the sale is lined up before the company goes into administration. The sale is often to the directors of the failing company.

The advantage of this procedure is that the business of the company can carry on with minimum interruption. The disadvantage is for the unsecured creditors whose debt is likely to be simply written off.

The process has been criticised for being an unjust way to restart a business, leaving creditors unpaid and without notice of the pre-pack until after it has been completed. However, the Insolvency Service has stated that 'a pre-pack may offer the best chance for a business rescue, preserve goodwill and employment, maximise realisations and generally speed up the insolvency process'.

To combat the negative publicity of pre-packs, new guidelines have introduced safeguards which aim to resolve the complaints about lack of transparency and accountability. These guidelines include a requirement for the administrator to consider other options, such as re-financing or a company voluntary arrangement, prior to taking the appointment as administrator. They must also consider the interests of all of the company's creditors and provide unsecured creditors with a detailed explanation and justification for the pre-pack.

The new guidelines may mean a decline in the use of pre-packs, but they remain a valuable tool. We work with Insolvency Practitioners who are well qualified to ensure that the best option is always chosen to enable a business to be saved whilst ensuring creditors are fully informed.

## The balance sheet test

When is a company insolvent? The Insolvency Act 1986 sets out a number of tests including the following:

"A company is deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities" (Section 123 (2) Insolvency Act 1986).

This test is known as the "balance sheet test" and has been recently considered in the case of BNY Corporate Trustee Services Limited v Eurosail–UK 2007-3BL PLC & 7 Ors before the Chancellor of the High Court. The Chancellor made the following points regarding the meaning of this test:

- The only assets to be valued are the present assets of the company. There can be no consideration of assets that may come into the company in the future.
- The requirement to "take account of contingent and prospective liabilities" does not mean simply adding up all of the liabilities of the company and deducting them from the assets. This requires a commercial view to be taken of the position, including the facts of the case, when contingent or prospective liabilities will become due, and whether or not assets will be available to meet that debt.

As this test is often used as a trigger in commercial contracts, for either termination or for the calling in of debts, it has particular relevance now. It is no longer as simple as totting up all of a company's debts to see if it is insolvent, and more heed needs to be paid to the facts surrounding a case, rather than a superficial exercise.

If you have insolvency issues you would like to discuss, contact David Gibbs on 01206 217609 or email david.gibbs@birkettlong.co.uk

# Immigration

## Immigration update

There have been several recent changes to immigration legislation. The major issues are as follows:

**Immigration Limits: PBS Tier 1 and Tier 2**

- The Secretary of State for the Home Department has indicated that a new limit to Tier 1 (highly skilled) and Tier 2 (skilled workers with a job offer) will be applied from April 2011. The proposed cap will mean a decrease in the numbers of these migrants of 20% when compared with last year's figures.
- The new limits will principally be applied to the Tier 1 category (highly skilled workers who do not need a sponsor or job offer in the UK before travelling here). It is thought that the Tier 1 highly skilled category may effectively close as a result of the proposed changes.
- Tier 2 "ICT" transferred workers will not be included in the quota, however they will need to earn more than £40,000 to qualify to stay in the UK for longer than 12 months.
- The proposed changes are likely to cause difficulty for many employers who rely on specialist qualified overseas staff to fill gaps in the resident labour skills set.

**Illegal Working:**

- Employers need to be aware that the UK Border Agency is currently very active in raiding business premises to check for illegal workers.
- It is essential to check that all employees have the right to work in the UK before they start work, to ensure the protection of the "statutory excuse" against civil penalty fines of up to £10,000 per worker. Criminal prosecution for employing illegal workers is also a possibility in these circumstances.
- The guidance relating to the necessary document checks is being regularly updated at the moment, and needs to be checked frequently to ensure compliance with the law.

**Proposed Changes to Student Immigration:**

- The Government is launching a public consultation with a view to phasing out student entry into the UK for applicants below degree level.
- It is also proposed that the "Post Study Work" category (whereby students can stay on and work in the UK after passing their degrees) will close.
- The proposals also highlight intentions to raise the standard of English students must reach before coming to study in the UK, and to monitor their academic progress more closely whilst they are studying here.
- Following recent changes to some students' permitted hours of work, students' right to work is to be restricted further, as is their right to bring in their dependants to the UK.
- Colleges will be required to achieve compliance with a more rigorous accreditation procedure, and will be subject to a more stringent inspection regime.

Whatever the outcome of the consultation process, the overall impact of the proposed changes is likely to affect employers and educational establishments in the number of overseas employees and students they are able to sponsor.

Employers need to take particular care to ensure that they keep careful records of their recruitment processes (including job advertisements) to prove that they are compliant with UKBA requirements. If a Sponsor Licence has been granted to a business by UKBA, they have clearly signalled that they intend to monitor the way the licence is run by the employer, and that they will suspend and terminate licences if they consider this to be appropriate.

Similarly, if licensed colleges and other educational establishments do not keep meticulous records and achieve full compliance with UKBA requirements, they are likely to forfeit their licences.

In both cases, if licences are forfeited, all employees and students sponsored by these businesses will lose their right to work or study in the UK, as they will no longer have a licensed sponsor, and will be required to leave the UK.

If you have immigration issues you need to discuss, then call Miranda Leate on 01206 217356 or email miranda.leate@birkettlong.co.uk

# Commercial Property

## Where there's muck, there's brass!

**The Government consults on changes to contaminated land scheme**

The English contaminated land regime has been in place since the mid 1990's, and although a relatively young area, there are now many experts advising on, and technologies available for, assessing and remediating contaminated land. Many property owners and developers have been able to generate significant profits by understanding the risks involved and the technologies available to deal with them.

Current policy aims at stopping new contaminated land being created, whilst taking a risk-based approach to deal with existing contamination. The Government is going out to consultation to "fine-tune" the existing regime, to ensure that the guidance:

- Is simpler and more transparent.
- Is more targeted – focusing on finding the highest risk sites and dealing with them first. Speeds up local authority decision making by having low risk sites dismissed.
- Reduces regulatory burdens for businesses – greater clarity on whether land is contaminated or not.
- Is more consistent.
- Is more proportionate – the benefits of intervention should outweigh the impacts.
- Is more accountable – increases the chance that polluters will pay, or that land owners will pay the costs of remediation, where they stand to benefit financially from that remediation.

The new Guidance should protect health and the environment from significant risks, whilst avoiding disproportionate impacts on society and business. It should improve consistency amongst local authorities, and make the position more certain for those who own or wish to develop land. Contamination of land will now be treated in the same way as pollution of water – in the past, liability for pollution of water had a lower threshold.

Since the mid 1990's, remediation has largely taken place either under the planning regime when sites come up for redevelopment, or as a result of transactions taking place. The new guidance will not change that, but if you own or have an interest in developing contaminated land, reading the proposals and taking part in the consultation – which closes on 15 March 2011 – should be of vital importance to you.

For further information and advice on contamination or pollution issues contact David Rayner on 01245 453826 or david.rayner@birkettlong.co.uk

## "It's for you" Telecommunications Update

It appears that the telecommunications market is changing as fast as the technology produced by it. In the last 6 months we have seen the merger of T-Mobile and Orange into the combined entity Everything Everywhere and an historic agreement between Everything Everywhere and H3G to share their equipment. This has resulted in over 12,000 sites being consolidated - and with Vodafone and O2 rumoured to be in similar talks, more consolidations are likely to follow.

Landowners with telecom masts on their land may be approached by their telecom provider tenants, stating that they are now site sharing or - for the unlucky ones - vacating. It is vital however, that proper advice is sought if you are approached in this way as the situation may not be as straightforward as it first appears. For example:

- Your agreement may prohibit site sharing and you may be able to require an increased rent before giving your consent.
- The telecom provider may need to put additional equipment on the mast which may be prohibited under the agreement.
- If a break notice is served on you terminating your agreement make sure it is valid. If not you may be entitled to additional rent.
- If it does transpire that your agreement is coming to an end make sure your tenant complies with their covenants on determination fully.

Telecom companies have the habit of telling land owners "how it will be". If any correspondence is received, advice should be sought. Things may not be as cut and dried as your tenant would like you to think. For more advice contact Julian Pritchard on 01245 453866 or julian.pritchard@birkettlong.co.uk

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