WINTER 2012

For Business

NEWS AND ADVICE FROM BIRKETT LONG

Distressed companies: a stitch in time

It never ceases to amaze us how late some people leave it before seeking professional advice, particularly directors served with a winding-up petition.

To a degree, it's easy to understand the reluctance to incur costs initially. The directors probably think they can sort the mess out themselves so why go running straight into the arms of a lawyer until absolutely necessary? Well, in the scenario where a company is served with a winding-up petition, there may be very good reasons behind the old adage of "seek advice promptly". Once a winding-up petition has been presented to the court, the matter is listed for a hearing – usually 6 weeks or so later. The petitioning creditor must then serve the petition on the debtor company.

At this point, the chances are that no one other than the directors know about the petition. Unless they let slip to their bank that the company is now the subject of a live petition or they are under a positive duty to inform the bank of such circumstances, this is the period when, generally speaking, the bank may be oblivious to the petition. And now would be a good time to seek advice and assistance!

Why? Well, in order for a winding-up order to be made, the petition first has to be advertised in the London Gazette (sometimes it may also feature in one or more national/local newspapers). Once the bank and other creditors/ suppliers are aware of the petition it starts to get messy and potentially expensive. The bank account is usually frozen – potentially frustrating any ability to trade – other creditors may seek to support the existing petitioning creditor and suppliers may tighten up terms of trading (or refuse to continue doing business with the company). If the company or the directors can raise sufficient monies to settle the petition debt, this initial pre-advertisement period gives the best prospect of fending off the attack. However, once word of the petition is out, and assuming survival remains the objective, it may be necessary to make an application to court for permission to use the company bank account and other creditors' claims may need to be dealt with if the petition is to be dismissed or withdrawn. In the meantime, untold damage could be done to the business.

So seek advice promptly! In the mid to long-term it will invariably be the cheaper and less painful option...

Kevin Sullivan
01206 217376
kevin.sullivan@birkettlong.co.uk

Employee or shareholder?

The Coalition Government has taken to the idea of making us a nation that holds shares in our employers. How likely is it that a major change will happen?

George Osborne announced a scheme to the Conservative Party Conference by which staff will agree to give up some of their employment rights in return for being granted a shareholding in their employing company. Before that, the Nuttall Review, published in July 2012, made a series of recommendations of how to reduce barriers to employee ownership. The Review illustrated a number of benefits for companies where all employees own a substantial stake in their employer, including faster job creation, greater staff commitment and lower staff turnover. It also set out the broad categories of obstacles to employee ownership: lack of awareness of the concept; lack of resources to support employee ownership; and actual (or perceived) legal, tax and regulatory complexity.

We are all for doing our part in raising awareness! As Nuttall said, some businesses, such as John Lewis Partnership, are well known for their employee ownership model. But employee ownership does not have instant recognition in contrast to, say, franchising or operating as a charity.

Birkett Long's Commercial and Corporate Finance team has lots of experience of putting in place different types of employee ownership.

One of the most useful ways of giving employees a stake in their business, which we encourage clients to consider, is a share option scheme. There are several possible ways of setting these up but the clumsily named Enterprise Management Incentive scheme (the Government might help by giving it a snappier title) is a particularly straightforward scheme. Employees are given a right to buy shares at a future date, at a price set in advance. If the company does well and the shares are worth more than the purchase price, the employee gets the benefit. The scheme has beneficial tax treatment – for example, there is no income tax payable at any point. We can provide all the legal documents needed to establish such a scheme.

Another means of giving staff a substantial stake in their employer is by shares being held collectively on their behalf, usually by an employee benefit trust (one of our local Essex employers, Wilkin & Sons, has adopted this route and was mentioned in the press release at the Nuttall Review launch). We can advise on the legal requirements for such a structure, which are

Bare essentials

Legal facts you can't do without

Live music and licenses

Historically pubs have provided an opportunity for musicians to develop their careers by playing live music, although this was limited as venues were only permitted to put on a performance of acoustic music by no more than two musicians at a time without being obliged to obtain a licence. All this changed when the Licensing Act 2003 came into force in 2005 as it required this and other types of entertainment to be licensed. The Act has been criticised as being unduly bureaucratic and having introduced an appreciable amount of unnecessary red tape.

The Government is undertaking a review of various aspects of the existing licensing legislation. One positive to come out so far is what began as a Private Members' Bill and is now the Live Music Act 2012. This Act provides that no licence will be needed by pubs and similar venues to put on live music between 8.00am and 11.00pm when it is unamplified or when it is amplified with an audience of no more than 200 people. The legislation came into effect on 1 October 2012. Those behind the drafting of Live Music Act 2012 stress that it provides important protection for local residents but they express the hope that a boost will be given to the performance of live music in small venues.

ron.rosenthal@birkettlong.co.uk
01206 217319

not particularly complex. The simplest means of employee ownership is for the employee directly to own shares from the outset. There are a number of legal issues to consider, including how the shares are to be dealt with if an employee leaves and lack of resources to fund a purchase.

As a result of the Nuttall Review, the Government issued a "call for evidence" on the idea of giving all employees a statutory right to request employee ownership. As the employer would only have to give "reasonable consideration" to the request and there would be a broad range of grounds for refusing, we think it is difficult to see what a statutory right will achieve, except more red tape for businesses to cope with. At the time of going to press, we have not seen details of George Osborne's "shares for employment rights" idea. It is difficult to judge whether it will be popular. Buying shares is a risky business in any event, because a company could fail and the shares lose all their value. Adding to that the risk of losing unfair dismissal and redundancy rights does not appear particularly attractive.

It will be interesting to see whether the proposals to raise awareness of employee ownership and to simplify the structures for putting it in place will lead to an increase of the model; we suspect that there is less appetite among owners to share their ownership, and among employees to become shareholders, than has been suggested.

If you are interested in exploring it for your business, please come and talk to us.

David Wisbey
01245 453817
david.wisbey@birkettlong.co.uk

Meet the team

Keith Songhurst

A partner and Head of the firm's Chelmsford Commercial Litigation team, Keith joined Birkett Long in 1999. He had previously gained valuable commercial experience at British Telecom and litigation experience whilst working within the legal team of an international engineering company.

Today, Keith specialises in property litigation and leads the firm's dedicated team. His experience includes both commercial and residential landlord and tenant issues as well as property disputes. He is also a key member of the construction team, dealing with all types of building disputes and regularly acting for local authorities, property developers and construction and engineering companies.

Keith's experience encompasses dealing with disputes in the County Court and High Court, the Leasehold Valuation Tribunal, the Lands Tribunal and proceedings before the Adjudicator to H.M. Land Registry.

Keith qualified as a solicitor in 2001 and was made a partner at Birkett Long in 2008.

Keith is a member of the Property Litigation Association.

Keith Songhurst
01245 453821
keith.songhurst@birkettlong.co.uk

employment law

Redundancy during maternity leave

Employers must be careful if they decide to make an employee redundant when that employee has taken maternity leave. The Maternity and Parental Leave Regulations state that an employer must offer an employee who is on maternity leave, and whose job becomes redundant during the maternity period, any suitable available vacancy that exists.

The Regulations state that the alternative work must be both suitable and appropriate for her to do and that the new terms must not be substantially less favourable than those of her previous contract.

So if a vacancy exists and the employee can do that work the vacancy must be offered to her; even if the new job involves more favourable terms, such as a promotion, or better pay or conditions.

These Regulations place a heavy burden on an employer because it must consider all vacancies and assess whether the work is suitable for the employee to do. If such a vacancy exists but is not offered to the employee her dismissal will be deemed to be automatically unfair.

This can mean that the employee on maternity leave will 'leap frog' over more suitable or better qualified candidates for a particular vacancy. It is not a defence for an employer to fill the vacancy instead with a better qualified or a more experienced candidate, or even a "cheaper" candidate.

The Employment Appeal Tribunal has made it clear that the only relevant question for a Tribunal to ask is "was there a suitable vacancy available?". If the answer to this question is 'yes', any unfavourable consequences for the employer (in offering that vacancy to a woman on maternity leave) are irrelevant.

What amounts to a suitable available vacancy must be determined in each case with reference to that employee's individual circumstances. Unless a new job is clearly the equivalent of an employee's current role, it can be very difficult for an employer to decide whether a vacancy amounts to a suitable available vacancy or not.

During a redundancy programme employers should ensure they engage in specific consultation with any of their employees who are on maternity leave. This should be in addition to, or in conjunction with, the normal redundancy consultation. They should consider whether suitable alternative employment exists under the normal redundancy consultation process and whether a suitable alternative vacancy arises under the Regulations.

Employers should document the issues identified during this consultation process, especially if a vacancy exists but it is not offered to an employee on maternity leave. The issues identified and the reasoning behind the explanation given to the employee as to why she was not offered the vacancy will be crucial if a claim is made in the Tribunal.

Reggie Lloyd
01206 217347
reggie.lloyd@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

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