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Quarterly Commercial Update

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Foreword

Welcome to our Autumn edition of Quarterly Commercial Update. Publication of this edition coincides with the long-awaited final implementation of the Companies Act 2006, almost three years since it received Royal Assent. In this edition two of our articles focus on issues arising from this final stage of implementation: new rules for protection of directors' residential addresses, and the new regime for registration of company charges. The new service address provisions require all companies to create a new register of directors' residential addresses to go in the company's statutory books but you need to take care not to disclose the information in that register without the relevant directors' consent.

Recent developments in business rating and their potential to kick start regeneration programmes are the subject of Andrew Williams' article and Rosie Sarrington in our Pensions team looks at some of the issues which arise when closing a final salary pension scheme to the future accrual of pension benefits. This is a popular way to reduce costs, but not without its own pitfalls.

Elsewhere, two recent cases are reviewed. Olivia Carter looks at contractual interpretation and the recent case of *Chartbrook v Persimmon*. The House of Lords, with Lord Hoffmann giving his final judgment, confirmed that evidence of pre-contractual negotiations will usually be inadmissible, although the courts will adopt a common sense approach to poorly drafted clauses and take into account the background knowledge of the parties at the time the contract is entered into.

Finally, Chris Paul in our Projects and Construction department considers the recent Scottish case of *Langstane v Riverside*, which for the first time considered whether a net contribution clause in a contract would be enforceable. This is of great interest to the construction industry but is provoking much debate.

If you have any queries on the issues raised in this edition, please do not hesitate to contact any of the writers or me at any time.



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Directors' residential addresses – protection from disclosure

With effect from 1 October 2009, company directors who are individuals will enjoy increased protection in respect of public access to their residential addresses.

Service address

Under the current law, the residential address of a company director is publicly available unless the director concerned has obtained a valid confidentiality order preventing his address from being disclosed.

Under the new regime, any filing of a director's details will have to include both the director's home address and a separate service address. The service address will be on the public record, whilst the residential address will be 'protected information'. Any address may be used as a service address, including the registered office address of the company or the director's work address, provided documents may effectively be served on the director at that address. If an existing director does nothing, his residential address will automatically become his service address, or a director may choose to use his residential address as his service address. In both cases, the fact that the two addresses are the same will be protected information.

The protected information will continue to be protected even when a person ceases to be director. However, the new rules are not retrospective and so will not protect directors' home addresses where these already appear on the public register unless the director has applied for and qualifies to receive additional protection (see below).

Company records – new obligations

From 1 October, companies will be required to continue to maintain a register of directors, which will include directors' service addresses. In addition, they will also need to establish and maintain a separate register of directors' residential addresses to contain each director's home address. A company may not disclose the information on the register of residential addresses without the consent of the relevant director. In addition, the company will not be able to use protected information other than to communicate with its directors, to comply with filing requirements under company law, or to comply with a court order.



Disclosure by the registrar

Once the new laws are effective, the registrar may only disclose the protected information:

- to certain public authorities (specified by reference to a list of bodies set out in regulations) and to credit reference agencies but only on written application by the relevant body or agency and only if certain conditions are satisfied; or
- in compliance with a court order; or
- if the service address is not effective and the director concerned has not responded to the registrar with notification of an effective address.

Broadly, protected information will only be disclosed to a public authority if it can show the registrar that it requires access to the protected information to fulfil a public function and it will only be disclosed to a credit reference agency if it can show that it requires the protected information to assist with an evaluation of the financial standing of an individual director or to carry out checks for the prevention and detection of crime or fraud. In each case, the public authority or agency must confirm to the registrar that the data disclosed will be kept within the EEA and in compliance with EU data protection legislation.

Additional protection

In certain circumstances, additional protection is available to directors who apply to the registrar to prevent disclosure of protected information to credit reference agencies (but directors cannot prevent disclosure to a public authority) or to remove their residential address from documents on the register going back to 1 January 2003. In order to secure the additional protection a

director must apply in writing to the registrar and be able to show that as a result of the activities of either (i) the companies of which he is director (or proposes to become a director); or (ii) the companies of which he was a director; or (iii) his participation in a relevant organisation (for example, the police force), the disclosure of protected information would pose a serious risk of intimidation or violence to him or to a person who lives with him.

LLPs

The new laws outlined above will also apply to members of limited liability partnerships.

Next steps

In summary, from 1 October 2009, all filings for changes to directors' details or new appointments will include both the residential address (protected information) and service address for each directorship (public information). With this in mind, directors should identify which service addresses they will want to use bearing in mind that this will be public information and notify Companies House. This information should be used to make the necessary changes to the register of directors and to compile the new register of directors' residential addresses.



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Kick starting regeneration through rating: panacea or false dawn?

Much has been made of the potential for planning reforms (such as extending a consent beyond its current three year life span) to kick start regeneration programmes. However, recent developments in business rating have opened up other potential routes.

Business rate supplement

The Business Rate Supplements Act 2009 received Royal Assent on 2 July 2009. This legislation gives higher tier local authorities in both England and Wales (namely the Greater London Authority (GLA) together with county councils, county boroughs and unitary authorities where there is no county council) the power to impose a supplemental business rate of up to a maximum of two pence in the pound, subject to the proviso that the revenue raised must be used on projects that promote local economic development. There is the ability for these councils to exercise their powers jointly in order to undertake a large project together.

To date only the GLA has declared an intention to raise such a levy. On 30 July 2009 it proposed that, from 1 April 2010, all commercial properties (from both the public and private sectors) in London with a rateable value of £50,000 and above will be subject to an additional two pence in the pound levy for 2010-2011 in order to part

fund Crossrail. Charities and amateur sports clubs will only be required to pay 20% of the charge and the GLA has estimated that this levy will last for between 24 and 30 years. Given that (with the exception of the Crossrail scheme) there is a requirement for a ballot of business ratepayers should the supplement fund more than one-third of a scheme, it will be interesting to see if other local authorities adopt similar proposals. Much may depend upon the impact of the revaluation of business rates in England due on 1 April 2010.

Business rate payers do not get the opportunity to vote on the principle of a levy. However, the GLA is consulting until 22 October 2009 on the details of its scheme. As the GLA has not yet decided if the levy will apply to empty properties, but has announced it will consider the 2010 revaluation before settling the supplement, there may yet be an opportunity for business ratepayers to influence the process. However, the GLA has confirmed that areas (such as the West End) classed as Business Improvement Districts (BID) (where the majority of business ratepayers have voted to pay for additional services through increased rates) will not be exempt from the levy on the basis that the BID payment is for local projects such as enhanced street cleaning.

Tax increment funding

With influential backing from the British Property Federation, and at a time of increased pressure on public expenditure, there is growing interest in the American concept of Tax Increment Funding (TIF) as an alternative method of funding regeneration projects. Broadly speaking, a TIF involves a local authority trading off



In the United States two ways of raising TIF funding have evolved. The first is for the authority to borrow funds (by selling interest bearing tax exempt bonds) to pay for the improvements which are redeemed out of any increased tax stream. One of the problems is that the actual rise in revenue may fall short of what was anticipated and so some authorities impose safety net 'special assessment' levies on all properties in a TIF area, which are reduced when revenues are generated. The second method (known as a 'pay as you go' scheme) shifts the risk away from the public sector. Developers bear the costs and are repaid annually out of the increased tax revenue. In view of the current economic climate, it may be harder to establish a scheme where upfront costs are met by the private sector without there being any public sector pump priming.

Some concern has been expressed as to whether TIF status may simply operate to divert funds from one deprived area to another with no overall gain. This was the perception with some of the Enterprise Zones that were established in this country during the early 1980s which focused on short term tax and rating breaks for developers. However, the greatest disincentive to TIFs in this country is the prevailing business rating system with its annual inflation linked cap on increases which would probably prevent a TIF realising its full revenue potential.

anticipated increases in tax revenue to finance current improvements that are expected to generate that additional revenue. The principle is that once the improvement has been kick started (for example by site decontamination) then the resulting development will raise the overall level of property taxation.



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Pensions focus: terminating pensionable accrual in final salary pension schemes

Faced with rising scheme deficits in final salary or defined benefit pension schemes, employers across all industries are increasingly taking the decision to close their schemes to the future accrual of pension benefits. Barclays, Interserve and the NSPCC are just a few of the names that have been in the press recently. Terminating pensionable accrual is one way of de-risking a scheme and reducing costs. Employees' pension benefits accrued to the date of closure are protected by legislation but as no further benefits accrue post closure this means that the employer saves on the cost of funding future benefits. However, despite the financial attractions of terminating pensionable accrual, actually making the decision to cease future accrual is never an easy one for employers and implementing such a proposal needs to be handled very carefully both from a legal and an employee relations perspective.

Scheme rules

A careful review of and an amendment to the scheme rules will be required to terminate accrual. Most pension scheme amendment powers do not give unilateral

power to the principal employer to amend the scheme which invariably means that pension scheme trustee consent will be required. This can give the trustees significant bargaining power over the terms of the closure. Whilst trustees should not necessarily refuse to agree to closure, the trustees will normally have their own legal advisors and as part of the negotiations they will take the opportunity to request an improvement in funding from the principal employer (depending on the funding level of the scheme) or that certain provisions of the scheme will survive the closure (such as death in service benefits). Furthermore, some of the trustees may also occupy senior decision making positions within the principal employer's structure and hence mean that they have a conflict of interest. Appropriate arrangements will need to be made to ensure that any conflicts are managed (such as the appointment of an independent trustee or a particular trustee being excluded from the decision making process).

Employer debt

Great care must also be taken when terminating pensionable accrual not to trigger an employer debt to the scheme or inadvertently trigger a winding up of the scheme where an employer debt would also be due. Employer debts are due when one employer ceases to employ members in the scheme but another employer continues to. The debt can be crippling expensive as it is calculated on a "buy out" basis which is the cost of securing all the pension scheme members' benefits with an insurance company. Triggering employer debts can be avoided if termination is handled in the right way.



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Future provision

Lastly consideration should be given to future pension provision. Many employees may feel significantly aggrieved and feel that they have "lost" their final salary pension. Whilst this is not strictly true (as their benefits accrued to date of closure are protected), offering a good quality alternative defined contribution arrangement with a market standard employer contribution rate is one way of mitigating any perceived loss.

Of course terminating pensionable accrual is not the only way to reduce pension costs or 'de-risk' your pension scheme. Other solutions are available such as reducing the

accrual rate, capping pensionable pay increases, buying out benefits or longevity swaps (where the risk of members living longer than expected and hence pensions being paid for longer than expected is borne by an insurer). There may also be scope to reduce employer contributions in respect of any recovery plan in place. No one scheme is alike and so bespoke solutions must be found.



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The importance of good drafting and the risk of taking a contract at face value

In the recent House of Lords case of *Chartbrook Ltd v Persimmon Homes Ltd*, the Law Lords had to decide whether to interpret a poorly drafted contractual clause literally, regardless of the resulting injustice of such an interpretation, or whether to adopt a "commonsense" approach and take into account the background knowledge of the parties at the time the contract was entered into in determining the legal effect of that clause.

The problematic clause was contained in a development agreement pursuant to which Chartbrook, the owner of the site, granted a licence to Persimmon to construct a mixed residential and commercial development and

then sell the properties on long leases. Upon receipt of the sale proceeds from the purchasers, Persimmon would pay to Chartbrook an agreed proportion of those proceeds, representing the agreed land price per unit. In order to take into account the rising property prices at this time, the agreement also incorporated provision for an additional payment to be made to Chartbrook. The additional payment was designed to capture a proportion of any increase in the residential sales value of the development after the date of contract, and it was the wording of this clause which resulted in protracted litigation.

Chartbrook successfully argued at first instance and in the Court of Appeal that the clause should be interpreted literally, as is the usual position in English law. That meant it was entitled to an additional payment of almost £4.5 million – a sum almost double the overall land price! Whilst there is, of course, considerable merit in being able to take the provisions of a contract at face value (on the basis that such an approach generally provides certainty to the



contracting parties) it was evident that Chartbrook's interpretation of the additional payment calculation would result in it receiving a sum of money which the parties could not have possibly envisaged. Chartbrook's interpretation of the clause also had the effect of making the structure and language of other relevant provisions in the agreement appear arbitrary and irrational.

Persimmon argued that on a true construction of the relevant clause, which required a rearrangement of the syntax, Chartbrook was entitled to a much smaller payment in the sum of £897,051. This amount fairly represented the commercial purpose of the additional payment and would provide Chartbrook with a top-up sum to reflect increases in sales values arising after the development agreement had been entered into.

The House of Lords unanimously agreed with Persimmon, confirming the principle that the Court is perfectly entitled to correct or rearrange a contractual provision in cases where it is (1) clear that something has gone wrong with the language and (2) clear as to what a reasonable person would have understood the parties to have meant taking into account background knowledge or the "factual matrix" and context.

In drawing such conclusions, the Law Lords took the opportunity to reaffirm the age old principle that the Court cannot take into account evidence of pre-contractual negotiations in interpreting contractual wording. Such evidence is considered unreliable since the respective positions of the parties are constantly changing whilst the agreement is negotiated and it is only the finally agreed document which records

(or which at least should record) a consensus as between the parties. It is important to distinguish, therefore, between admissible evidence of background knowledge and inadmissible evidence of pre-contractual negotiations in interpreting contractual wording, whilst noting that evidence of pre-contractual negotiations would be admissible if used for the purpose of establishing the background knowledge of the parties.

This judgment is in practice likely to result in more challenges being brought in respect of contractual interpretation, with disgruntled parties arguing that the background knowledge of the parties, or the factual matrix to a particular contract, renders the literal meaning of a particular clause commercially irrational. Undoubtedly, anyone pursuing this line of argument would need a strong case to persuade the Court to go beyond the four corners of the contract in deciding that the literal wording leads to a commercial nonsense.

In order to avoid becoming embroiled in lengthy litigation regarding the construction of a contract, it is important to get the wording right prior to signature of the agreement. Where appropriate, it may also be worthwhile making reference to the commercial purpose of a particular clause in order to minimise the risk of confusion, which could potentially be used to overturn actual wording in a contract if the two are inconsistent.



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Joint and several liability and net contribution clauses

A net contribution clause is a contractual provision that provides that a party's liability for breach of contract or negligence will be limited to an amount which it is just and equitable for that party to pay taking into account its responsibility for the loss or damage caused. It may seem innocuous but it is a contentious issue because it changes the common law position of joint and several liability.

Joint and several liability means that if two or more parties contribute to or cause the same loss the innocent party can choose to sue one rather than both of them in order to recover their loss. The paying party then has to bring proceedings against the other wrongdoer if they want a contribution from them – if they do not have the means to pay (due to lack of assets or insolvency) it is the paying party rather than the innocent party who bears the risk of non payment.

To apply this in a construction context: two years after a set of works are finished a defect is discovered due to bad workmanship. The contractor is primarily responsible but the contract administrator negligently failed to notice the problem during construction and bring it to the client's attention so they are partially responsible. Joint and several liability means the client can sue the consultant or the contractor and recover 100% of their losses instead of



having to sue both and recover their loss piecemeal. The paying party then has to sue the other in order to recover a contribution. If the appointment included a net contribution clause the client could only recover the proportion the consultant is responsible for and will have to sue the contractor for the balancing payment or alternatively sue the contractor for the entire loss. If the contractor is unable to pay, the risk of non payment rests with the client rather than the consultant. The potential impact of a net contribution clause is, therefore, significant and something that clients and beneficiaries of warranties (where they are also found) should be aware of.

Until earlier this year there was no judicial interpretation on whether such clauses are enforceable.

However, then came the Scottish case of *Langstane v Riverside & others* which involved a dispute about whether an appointment included a net contribution clause and if it did whether that clause was enforceable. The judge found that the edition/revision which included a net contribution clause was applicable and that:

- the clause was neither unusual nor onerous and so did not need to be specifically



drawn to the client's attention in order to be incorporated into the contract;

- the ACE forms of appointment are capable of being used across the engineering profession so could not be construed as being the consultant's standard terms and conditions of business which meant the client did not fall within the definition of a 'customer' under the Unfair Contract Terms Act 1977 (UCTA) so UCTA (with its requirement that restrictions on liability be reasonable) did not apply;
- there was considerable force to the consultant's argument that the clause did not exclude or restrict its liability for breach but rather sought to ensure that it was liable for the consequences of its own breach and not others (which meant that it would not constitute an exclusion or restriction of liability to which UCTA could apply in any case);
- if his judgment was wrong about UCTA not applying he would "hold [the clause] to be fair and reasonable" (and hence enforceable) because although it shifted the risk of insolvency from the consultant to the employer it was open to the employer to engage a financially sound and well insured professional team and contractors from whom they would be

able to recover the balance of their losses.

Whilst UCTA did not apply to the net contribution clause on the facts of Langstane it may be relevant in other situations. Furthermore, the judge's view that if UCTA applied the clause was fair and reasonable does not form part of his main judgment and so is persuasive rather than binding. The judgment as a whole is not (as some consultants and contractors may argue) confirmation that net contribution clauses are reasonable per se. Clients should, therefore, continue to consider requests to include them on a case by case basis especially as they are still likely to be resisted by third parties such as funders, purchasers and tenants. If agreed, clients should seek guidance on drafting in order to minimise the effect of such a provision, particularly in the design and build context where a poorly drafted net contribution clause may allow a consultant to avoid liability altogether.



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Registration of company charges

The registration regime for company charges will change on 1 October 2009 when the final provisions of the Companies Act 2006 (the 2006 Act) come into force. For UK companies the change will be largely one of form whilst for overseas companies the changes will be more substantial.

Domestic companies

Part 25 of the 2006 Act (ss 860-877) sets out the new law on the registration of company charges. Under the new provisions the law as set out in the Companies Act 1985 (the 1985 Act) has not changed radically and in particular the categories of charge requiring registration have remained the same as has the requirement for registration within a 21 day period although the 2006 Act offers some clarification as to when this time period begins to run.

One thing that will change, however, is the designation of the forms for registering company charges. Form 395 will be no more and will be replaced by Form MG01 (currently in draft form) although the information required to be submitted is similar to that prescribed by the current regime.

Overseas companies

The registration of charges by overseas companies will be governed by The

Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 (SI 2009/1917) (the Regulations) which were published on 21 July 2009.

One of the main aims of the charges provisions in the Regulations is to simplify the registration regime for overseas companies. Under the current 1985 Act the requirement to register charges applies to any overseas company with a place of business in the UK whether or not that company has registered with the Registrar of Companies. If the company is not registered, then the details of its charges are placed on the so-called Slavenburg register (which is named after the 1980 Slavenburg case, which established the need for non-registered overseas companies to register charges). Although filing the charge at Companies House means that the company has complied with any potential registration requirements, as the Slavenburg register is not available for public inspection its existence is of little benefit to creditors or other third parties. Slavenburg registrations are also wasteful in terms of time and money; in 2007/8 whilst there were fewer than 9000 overseas companies registered at Companies House there were 33,126 charges on the Slavenburg register.

The Regulations remove the need for the Slavenburg register and make it clear that the requirements to register charges only applies to overseas companies whose details have been registered with the Registrar of Companies and are available for



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public inspection. This latter condition has been included to assuage concerns that creditors would continue to lodge precautionary registrations against all overseas companies in case their details had been lodged with the Registrar but had not yet appeared on the appropriate register.

The Regulations only apply to assets situated in the UK. Whilst this is easily determined for fixed assets, it is not necessarily so easy for moveable or intangible assets. However, the importance of this issue has been somewhat reduced, for the company, by the fact that it is no longer a criminal offence if an overseas company fails to register a charge. The main risk now is the commercial one for creditors that the charge will be void for want of registration. In such circumstances it is likely that creditors will take the prudent course and require registration.

Further consultation

Before, however, everyone gets too comfortable with the new provisions, the Department for Business, Innovation and Skills has stated its intention to consult in early 2010 on proposals to change the general regime for the registration of charges for both domestic and overseas companies. We will keep you up to date of any future changes.



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