

EDITORIAL

This Newsletter being the first of 2007, we wish our readers a prosperous year ahead.

It contains topical articles on The Companies Act 2006, employment issues, commercial leases and drink-driving.

We are pleased to welcome to Palmers two new assistant solicitors:-

- **Becky Karaman**, who has joined our Wills, Trusts and Probate Department
- **Lynn Perry**, who has joined our Residential Conveyancing Department

Clive Tant has recently been accredited as a Mediator by the Chartered Institute of Arbitrators. Many commercial disputes are now resolved by mediation - parties are often directed to mediation by the courts, before being allowed to proceed further in litigation proceedings.

Mediation has become a key part of the work undertaken by our Dispute Resolution team. Clive is based at our Basildon office and may be appointed directly as a mediator, by parties seeking to resolve disputes in that way.

Please visit our website at www.palmerslaw.co.uk for further information about our firm and its services.

INSIDE

- Page 2 *The Companies Act 2006 - a breath of fresh air in the corporate jungle*
- Page 3 *Agency Workers - Are you the Employer?*
- Page 4 *Drinking, driving and the well-meaning friend*

Deal or no deal - getting lease terms right, straight out of the box

By Carey Jacobs



The aim

If you are a landlord, your priority will be to let premises quickly and on the right terms.

If you are a tenant, your priority might be to move your business on - whether physically or financially.

The deal

Deciding to enter into a commercial lease usually means that there is to be a long term business relationship between previously unacquainted companies and/or individuals.

The parties will generally want to achieve a bargain which, on balance, is reasonably fair to both parties.

The pitfalls

Negotiating the basic terms of a lease may seem simple, but if you don't get the terms right at the very start, delays and problems may occur during the transaction.

The solution

This article focuses on some common traps when dealing with commercial leases, and how to avoid them.

Trap 1 - Negotiating terms without first taking legal advice

If you take legal advice *before* you start to negotiate terms with the other party, you will almost certainly save money. This may not be something you usually hear about instructing solicitors - but it is true!

A skilful solicitor will:

- Ask you about the property in question - its age, its condition, whether it is easily divisible, what works may be needed to bring it into a decent and usable state.
- Discuss with you your intentions for the property and your financial expectations, in terms of rent, service charges and insurance costs.
- Help you to decide whether your priorities - whether as to timing or as to finance - are both achievable and realistic.
- Liaise with the letting agents, to craft a set of heads of terms that are right for you, and - unless you say otherwise - fair to all.

You should then have a good foundation upon which to build.

If you don't see a solicitor first, you could fall into....

Trap 2 - Agreeing to something you shouldn't

We find that if we become involved only *after* heads of terms are agreed, there will usually be something that we advise you to change:

continued on page 2

19 TOWN SQUARE
BASILDON
ESSEX SS14 1BD

TELEPHONE: (01268) 240000
FAX: (01268) 240001
EMAIL: enquiries@palmerslaw.co.uk

PROSPECT HOUSE
1/3 BRICKFIELDS ROAD
SOUTH WOODHAM FERRERS
ESSEX CM3 5XB
TELEPHONE: (01245) 322111
FAX: (01245) 324363
WEB: www.palmerslaw.co.uk

ASCENSION CHAMBERS
FLEMING ROAD, THURROCK
ESSEX RM16 6HH
TELEPHONE: (01375) 484444
FAX: (01375) 484448
EMAIL: enquiries@palmerslaw.co.uk

continued from page 1

"...if you don't get the terms right at the very start, delays and problems may occur during the transaction."

- Repair obligations:
 - Landlords may be unrealistic about what tenants should be expected to repair (and be disappointed when tenants don't agree).
 - Tenants may agree to onerous (potentially expensive and troublesome) repair obligations, without really knowing what they mean, whether practically, financially or legally.
- Contributing to the other party's legal costs. Does it really make sense to pay another party's costs, thereby paying their solicitor to argue with you?
- Granting or accepting an unprotected lease. Heads of terms will often mention the exclusion provisions of the Landlord and Tenant Act 1954. Whether you are the landlord or the tenant, you should take early advice upon the effect of excluding statutory rights of renewal.

If we advise you after the event that something in the heads of terms needs to be unravelled or renegotiated, you may fall into....

Trap 3 - Being accused of renegeing on the deal

This immediately puts you on the defensive. The real traps linked to this are as follows:

- You feel pressure to agree a deal which is not right for you.
- You feel pressure to conclude a deal without properly considering all of your options.
- You and the other party to the lease do not get off to a good start in what may be a long term relationship.

The legal and practical arguments in renegotiating heads of terms may lead to...

Trap 4 - Delay

If you are a landlord, delay means no rental income. If you are a tenant, it means that your business is on hold until issues are resolved.

Delay therefore creates...

Trap 5 - Financial loss

This is quite the reverse of what the parties want to achieve, when negotiating heads of terms.

If you don't get the heads of terms right from the start, you may have to pay your solicitor, later, to deal with necessary changes.

The Closure

If you haven't fallen into Trap 1 (because you have spoken to your solicitor first), you should be able skilfully to avoid the other traps and, in so doing, minimise delay and costs.

Carey Jacobs is a partner at the Basildon office specialising in commercial property.

"...changes are heralded in all areas of company law and practice, generally making it easier to set up and run a company."

The Companies Act 2006 - a breath of fresh air in the corporate jungle

By Denise Phelan

The Companies Act 2006 comprises 1,264 Sections and 16 Schedules and largely replaces the Companies Act 1985. Major changes are heralded in all areas of company law and practice, generally making it easier to set up and run a company.

Most provisions of the Act will come into force in October 2007, but some are already in force (in order to implement the EU Transparency Obligations Directive).

The changes affect directors' duties, companies' constitutions, share capital, shareholder communications, accounts and audits and the registration of directors at Companies House.

Principal Changes

- There is a new duty for directors to promote the company's success, for the benefit of its members as a whole. A director must "act in the way he considers, in good faith, would be most likely to promote the success of the company, for the benefit of its members as a whole." He must have regard to the principle of "enlightened shareholder value".
- Shareholders are given a new statutory right, to sue directors in a derivative action on behalf of the company, for negligence, default, breach of duty or breach of trust, subject to the court allowing any action to proceed.
- The directors of a pension trustee company may now be indemnified by the company or by an associated company.
- Private companies are no longer required to have a company secretary, but may still choose to have one. Directors and secretaries of public companies are automatically authorised signatories.

- New provisions permit auditors to limit liability. They may agree with corporate clients to limit liability in respect of an audit, subject to annual shareholder approval and to the limit being "fair and reasonable". The government has the power to require that companies disclose liability limitation agreements.
- The Operating and Financial Review is abolished, but most of its provisions have been re-introduced as a Business Review. All (except small companies) must continue to publish a Directors' Report, containing a Business Review in respect of each financial year. All are exempt from disclosing information, if seriously prejudicial to the company's interests.
- Directors are given 'safe harbour' from civil liability, in respect of statements in and omissions from the Directors' Report.
- Directors' home addresses may now be kept private, as a service address may be registered. Home addresses may be kept on a separate register (with restricted access) but addresses already on the register will not be removed.
- Shareholders' addresses are now to be subject to restricted access. Anyone wishing to inspect the register must submit a request to the company and provide their details.
- Beneficial shareholders are given enhanced rights. For example, a registered member may nominate another person to enjoy or exercise his or her rights.

Small businesses should benefit from the creation of a separate default constitution for private companies, abolition of the requirement for private companies to have private secretaries and simplification of private companies' decision-making procedures.

Larger companies will benefit from deregulation, on registration, of present and past members of the company and clarification of rules on the transfer of assets between companies in the same group.

Denise Phelan is a paralegal at the Basildon office specialising in company and commercial law.

Agency Workers - Are you the Employer?

By Jane Elgar



Many employers contract with agencies to provide temporary workers. While employers may pay a premium for these workers, one of the major benefits is seen to be flexibility, in particular the employer's ability to bring the contract to an end when circumstances change.

This flexibility has traditionally been based upon the assumption that temporary agency workers are not employees and, therefore, not entitled to statutory employment protection, notably protection against unfair dismissal.

The Court of Appeal challenged this assumption in 2004, advising Employment Tribunals to consider whether an implied contract of employment between the agency worker and the end-user client had arisen by conduct, irrespective of what was agreed between the parties and was contained in written contracts.

Two important 2006 cases have developed this theme further.

In the first, the Court of Appeal upheld an Employment Tribunal's decision that a telecoms specialist was employed by Cable & Wireless. He provided his services through an agreement between his Company, E-NUFF Limited, and an employment agency.

By contrast the Employment Appeal Tribunal held, in the more recent case, that an agency worker who worked for five years for the London Borough of Greenwich was not an employee, and that no implied contract of employment had arisen between her and the Council.

What appears to have been material to these recent decisions are factors such as:

- If the end-user client cannot insist on the agency supplying a particular worker, and the agency is entitled to provide a substitute, for instance in case of illness, it is not appropriate to imply a contract of employment.
- Where agency arrangements are genuine - as is likely to be the case where there was, prior to the agency arrangement, no pre-existing contract between the temporary worker and the end-user client - it will be rare for an Employment Tribunal to imply a contract of employment.
- The passage of time does not in itself justify implication of a contract.

While the Greenwich Council judgment will bring some relief to employers, it appears that the debate is far from over. There is a policy imperative, expressed by Lord Justice Sedley in the 2004 case. He commented that "the conclusion that Mrs Dacas was employed by nobody is simply not credible".

This issue has not been resolved by more recent decisions. Employers who make use of temporary agency workers should, therefore, continue to be aware that a long-standing arrangement may give rise to an implied contract of employment between the agency worker and the employer.

"...flexibility has traditionally been based upon the assumption that temporary agency workers are not employees..."

Jane Elgar is a solicitor at the Basildon office specialising in employment.

PALMERS COMMERCIAL TEAM

Adam Shirley	<i>Company commercial</i>
Amy Leivers	<i>Commercial and residential property</i>
Andrew Skinner	<i>Insolvency and litigation</i>
B J Chong	<i>Intellectual Property, company and commercial law</i>
Carey Jacobs	<i>Commercial property</i>
Clive Tant	<i>Company and commercial law and litigation</i>
David Dadds	<i>Company commercial and licensing</i>
Jane Elgar	<i>Employment</i>
Jane Williams	<i>Employment</i>
Joanne Smith	<i>Commercial property</i>
John Morgan	<i>Company law and commercial property</i>
Karl Barnes	<i>Employment</i>
Mahmud Ahmad	<i>Commercial litigation</i>
Matthew Poli	<i>Company commercial</i>
Mike Hunter	<i>Company law and commercial property</i>
Raymond Fern	<i>Commercial litigation</i>
Simon Bruce	<i>Commercial property</i>
Tom Lawrence	<i>Commercial litigation</i>

Drinking, driving and the well-meaning friend

By Jeremy Sirrell



Have you ever received a drink from a friend with, well, just a little more in it than you expected?

Well-meaning friends often put a tot of whisky in tea, or vodka in orange juice, to help "cheer you up". Unfortunately, if this leads you to drive with more than the permitted amount of alcohol in your body, it may lead to a charge of driving with excess alcohol and subsequent disqualification from driving - not a very cheerful prospect at all.

It is incumbent on us all to make sure we drive responsibly - this means taking particular care about what we drink, if we are planning to drive afterwards. Most of us do so but, occasionally, people find themselves in excess of the prescribed limit, even though they think they have drunk little or no alcohol. These are people who may well have been subject to a well-meaning friend's largesse.

If you are unlucky enough to find yourself in that position, and can't understand how it can be, it may be worth while asking the people you have been with to confirm that they haven't been helping your drinks along. If they have, you may have a defence to a charge of drinking and driving.

Strictly speaking, the 'spiked drinks defence' is not a defence at all, because driving with excess alcohol is what is known as a 'strict liability offence'. But it *is* a special reason not to disqualify - the onus of proof lies with the defendant, and not with the prosecution.

To have any chance of success, the defendant must show:

1. That, but for the additional alcohol unwittingly consumed by him, he would not have been over the limit.
2. That he did not know that he was consuming additional alcohol.
3. That he did not realise, or should not have realised, that he was in excess of the prescribed limit.

To prove the first, a report by an expert will be required, confirming that the alcohol reading would have been below the legal limit, but for the additional alcohol unwittingly consumed.

The second will, crucially, require evidence both from the person charged with the offence and from the person who put the additional alcohol in his drink. Without such a witness, the defendant will have no way of proving that his drinks were 'spiked'.

The Court will not find special reasons not to disqualify where a person has clearly drunk so much that he should have realised he was over the limit. This is so, regardless of what he planned to drink and whether he consumed more alcohol than he intended.

Mere carelessness in picking up another's drink will not be sufficient, but if you really have been the victim of spiking action, whether at the hands of a well-meaning friend or otherwise, then you may have a challenge if you find yourself pulled over at the side of the road and are invited to blow into the dreaded machine.

Jeremy Sirrell is a partner at the Basildon office specialising in road traffic offences and criminal matters.

PALMERS SOLICITORS



If you would prefer to receive this newsletter by e-mail then please contact Andrea Marchant with your details at:

AMarchant@palmerslaw.co.uk

Also, if we have not addressed this correctly, please advise correct details.

Ref: AM/Newsletter8

FINANCIAL SERVICES

The firm is not authorised under the Financial Services and Markets Act 2000 but we are able in certain circumstances to offer a limited range of investment services to clients because we are members of the Law Society. We can provide these investment services if they are an incidental part of the professional services we have been engaged to provide. We may otherwise refer you to someone who is authorised by the Financial Services Authority.