

# one step ahead

winter 2005

## PENGILLYS

SOLICITORS  
& MEDIATORS

### money laundering



**Local businesses are not always as careful as they should be about payments in cash. Money laundering legislation is very strict indeed and if you accept large cash**

**payments for goods sold in your business, you may be at risk of breaking the law.**

Some car dealers for example, now prohibit customers from purchasing top of the range cars costing £40,000 in used notes in order to avoid falling foul of the legislation. Any reader who has opened a bank account recently will know that it is not as simple as previously. ID is now required. The same goes for instructing an accountant or solicitor. You may be obliged to show your original passport and a recent original utility bill, the certificate of incorporation of a limited company and other documents.

Solicitors and other advisers may need to make a report to a body called NCIS if they have suspicions about a client's involvement in money laundering activities. A court of appeal decision *Bowmen v Fels* looked at how this requirement works when solicitors have a duty of confidentiality to their client, as it was causing problems in practice. In October the Law Society issued guidance on the impact of the case. For clients, the important issue is to be aware that in certain circumstances their professional advisers may have a duty to notify NCIS of matters such as illegal tax evasion which has come to their attention, although in some cases following this recent case, the solicitor can maintain client confidentiality.

Taking on employees is not without risks either. Tightening of immigration legislation means that employers need to check an employee has a right to live and work in the UK. Ask to see passports and check details given as some prospective employees lie about their nationality or status. Please contact us if you need information on what identification you will require.

### tax evasion and pensions

**Tax avoidance has always been lawful.**

**Everyone is entitled to arrange their affairs to pay less tax.**

For example, it is not an offence to invest in an ISA or for a husband and wife both to go out to work part time so they have two personal allowances rather than one. Nor for an elderly person to give assets away in the hope they survive for seven years and avoid inheritance tax. But when does lawful avoidance drift into evasion? The current Government has a concerted campaign to stop tax "loopholes" and render unlawful some schemes which may have previously been lawful.

The rules change from time to time as well. Many couples have set up businesses on the

advice of their accountants by way of limited companies paying themselves dividends. In a recent case the courts held that HM Customs & Revenue was entitled to apply the law so that where one of the couple does not work in the business, that scheme no longer saves tax. The IR35 tax rules for contractors with few clients also had a similar effect.

In addition, there are rules under which new tax avoidance schemes must be notified to the Revenue.

**Pensions 'A' Day in April 2006**, changes the pensions system in the UK in many ways. All individuals should now be considering whether they should be putting more money into their pension now or later.

Secondly if they have a very large pension fund already, they must decide whether they should be registering it so it does not incur the new tax charge that may be imposed on pension funds.

Although the new rules, for example, allow residential properties at home and abroad, fine wines and even expensive cars and pensions to be placed in a self invested pension, if the tax payer derives any benefit from those assets such as by staying in a Spanish villa without paying a full rent or even viewing the oil paintings, then tax reliefs can be lost. So please contact us for advice.

## e-procurement rules

**From early next year in the UK, new public procurement rules come into force.**

**They apply however, to large value public sector contracts, not to contracts between two private businesses.**

One change is that electronic procurement will be made easier. A new European Commission document offers answers to queries on the legal aspects of e-procurement and also explains terminology to purchasers who will be required to computerise their orders.

### **traditional and electronic means of communication are on equal footing**

With regard to the exchange of information, the new directive places traditional and electronic means of communication on equal footing. It leaves market operators free to choose which means of communication to use for the procedures. If electronic means are used, the contracting authority is able to reduce the time limits as follows:

- The electronic publication of a prior information notice makes it possible to reduce the time limit by seven days for the receipt of tenders in open and restricted procedures. The same applies for the receipt of requests

to participate in negotiated procedures and the competitive dialogue;

- On top of the previous reduction, time limits in open and restricted procedures may be further reduced by five days where the contract documents are available on the Internet.

A new purchasing technique has entered the scene: the dynamic purchasing system. It is exclusively based on electronic means of communication.

### **electronic auctions**

A contracting entity may hold an electronic auction to award a contract, except for certain works and service contracts such as the design of works which relate to intellectual performances. The electronic auction shall be based:

- either on prices when the contract is awarded to the lowest price,
  - or on prices and/or the values of the features of the tenders, when the contract is awarded to the most economically advantageous tender.
- The specifications shall contain the following details:
- the quantifiable features (figures or percent-

ages) whose values are the subject of the electronic auction and the minimum differences when bidding;

- the electronic auction process and the technical specifications for connection. Before proceeding with the electronic auction, the contracting authority shall make a full initial evaluation of the tenders.

All tenderers who have submitted admissible tenders shall be invited to take part simultaneously by electronic means.

The invitation shall state the date and time of the start of the auction and, if appropriate, the number of phases. It shall also state the mathematical formula to be used to determine automatic rerankings, incorporating the weighting of all the award criteria. Throughout each phase, the participants shall know their relative rankings compared to the other participants, but without knowing their identity.

The electronic auction shall close either at a date and time fixed in advance, or when a certain amount of time has elapsed after receipt of the last submission, or when the number of phases in the auction has been completed.

## competing fairly

**Competition law infringements continue to be common in British businesses and abroad. In the UK, fines of up to 10% of worldwide group turnover can be imposed for breach of the Competition Act 1998 and individuals can be jailed under the Enterprise Act 2002.**

Several criminal investigations are currently on-going. In October, the EU charged four of the world's biggest lift manufacturers with running a price-fixing cartel in several European

markets. The European Commission investigation targeted ThyssenKrupp of Germany, Schindler of Switzerland, Finland's Kone and Otis, a unit of US group United Technologies.

Those companies in a dominant market position can abuse that position when they impose "ties" of this kind contrary to Article 82 of the Treaty of Rome or the Chapter II prohibition in the Competition Act 1998. The EU is looking at whether it needs to update these rules at the moment.

If you are unsure about practices your business engages in, please contact us and we can tell you if they are compliant with the UK or EU competition rules. Breach of the rules can lead to:

- fines of up to 10% of worldwide group turnover
- clauses infringing the rules being void
- actions for damages in the national courts
- jail sentences (under UK law and then only for hardcore dishonest cartels and bid rigging offences only)
- bad publicity.

## sustainability

**In October the Office of Government Commerce (OGC) launched a sustainable procurement section on its website, creating a central point to access guidance: [www.ogc.gov.uk](http://www.ogc.gov.uk)**

Sustainable procurement includes all issues where public procurement is seen as relevant for economic, social and environmental policy objectives. All large value contracts in the public sector have to be put out to tender following strict rules set out in the legislation. In theory this should make it as easy for a Polish firm to compete for a local government contract in Hull as a local Hull supplier. EU standards to be

met must be specified, not UK ones and the criteria for award of the contracts set out. If the rules are not followed businesses who have lost out in the tender process can sue for damages or even get a court order stopping a tender going ahead. From January 2006, new public procurement regulations will be in place that relates to environmental issues and looks at different aspects of sustainability - equality, innovation and sustainable construction. There are also links to the UK Government Sustainable Development Strategy, which defines the UK public sector's commitment to sustainable procurement, and the Sustainable Procurement Taskforce, which is drawing up an action plan to bring about a step-change in sustainable public procurement in the UK. Please contact us for legal advices about your specific sector.

## Selling your business



Selling their own business is one of the biggest decisions many of our clients ever make. Once the basics such as who will buy and the price are agreed, it is crucial to decide if the

assets or the shares of the business will be sold. Sales of assets allow a buyer to 'cherry pick' to some extent and leave behind assets they may not want, but on the other hand the buyer then, in many cases, has problems over assignment or transfer of contracts to a buyer. If instead, the shares are sold existing contracts continue (unless, very

rarely, they contain a 'change of control' clause).

It pays to prepare a business well in advance for a sale. The buyer will want to undertake 'due diligence' as well as ensuring that a detailed purchase agreement is in place. So having contracts in good order and copies ready to be shown to the buyer, (but only once appropriate confidentiality undertakings have been obtained), helps make the sale go smoothly. Consider material issues the buyer may need to know about such as past litigation or employment disputes. Think about commercial issues post sale, such as how much of a restriction will the sellers be prepared to accept on their competing with the business sold after the sale. Most buyers will insist, for their own protection, on several years of restrictive covenants post sale. Often one of the sellers will continue to contract their services to the business after a sale so consultancy agreements will need to be drawn up in advance. Contact us for assistance.

## employment law and internet blogs

Hundreds of thousands of individuals around the world have set up personal web pages on the internet on which they write about themselves and their lives. Indeed some businesses use regular blogs to market their products or even describe legal developments – there is one in the field of intellectual property law for example. Some Chief Executives of large businesses find them a useful way to keep employees up to date and also to engage in subtle or not so subtle marketing efforts.

However some employees go too far. Their blog libels their employer or the employer's customers or suppliers. Employees in blogs may:

- Libel their employer, its products or customer service levels, colleagues, suppliers, customers or third parties in their blogs.
- Disclose other people's personal data which is protected by the Data Protection Act 1998 in a blog – e.g. describing things relating to their spouse or children without permission could be a breach of these provisions particularly if the blogger's identity has become known or could be easily ascertained by personal information in the blog.
- Breach copyright or disclose confidential information of the employer by including material protected by such rights.
  - When writing them at work, can waste employer time in breach of the employment contract.
  - Breach a contractual provision in the employment contract which restrains the blogging activity concerned.
- Breach some other law which may or may not be sufficiently serious to justify termination of the employment contract.

We can advise you on setting rules in this area for your employees either as part of a general employment email policy or as a separate blogging policy.

## data protection compensation

**Are you registered under the Data Protection Act 1998? If not perhaps you ought to be. You can check with us or via the web site of the Information Commissioner. Whether registered or not, you have to comply with the 8 data protection principles in the Act and ensure you process individuals' personal data fairly and lawfully.**

The Financial Ombudsman Services has ordered financial compensation in two cases where a data protection mistake resulted in a breach of confidentiality. The disclosure had allowed violent partners to find out where women they wished to harm were living. The women were ordered compensation for breach of their privacy rights.

One was a bank customer, Miss J, who had left her violent partner, Mr C. Miss J had told

her bank very clearly not to give Mr C her new address. When the bank changed the address on Miss J's account, her joint account with Mr C was also automatically updated. He went to Miss J's new address and severely assaulted her. Miss J subsequently complained to the bank, which at first would not accept it had done anything wrong. However, the bank then apologised and offered Miss J £300 in compensation. Miss J complained to the Financial Ombudsman Service. On seeing the photos of the injuries suffered by Miss J, the Ombudsman suggested that the bank increase its offer to £3000.

The other was another domestic violence case. Mrs B arranged to move with her daughter away from her violent husband and again she told her bank to keep her new address from him. The bank sent a 'confirmation of new address' form to Mrs B at her old

address. Mrs B found out what had happened when Mr B forwarded the bank's letter on to her.

As a result of this mistake, Mrs B was in fear for her and her daughter's safety and so moved. She was not physically hurt but she felt she had to move to protect her safety and sent the bank a claim for those extra costs. The bank offered her £500 for inconvenience. Mrs B complained to the Ombudsman.

The Ombudsman upheld the complaint, stating that the bank should reimburse Mrs B for removal costs, changeover costs for utility services, the difference between the rent on the old flat and the rent on the new flat for the six-month tenancy and the cost of a new school uniform for Mrs B's daughter.

This compensation was awarded in addition to the bank's inconvenience offer of £500.

## keeping records

**How long should you retain documents in your workplace? Storage is expensive and yet sometimes documents are needed many years after they are prepared.**

In the US, some businesses have been criticised by the courts for not keeping documents long enough when court action arises later and it has been found no effort was made to preserve documents subsequently needed in the litigation. In the UK, businesses grapple with setting up document retention policies. Too strict a policy may see documents destroyed too early and then it is found that they are needed later or else they are retained for too long. The Data Protection Act 1998 will be breached if documents are retained for longer than necessary. Indeed there is an employment Code of Practice under the Act which addresses this issue.

The following issues are necessary to consider - periods of retention depend on the kind of record:

- Keep accident records for three years
- Retain accounting records for three years or six

years if you are a public limited company

- Keep income tax records normally for at least three years
- Maternity records should be kept for three years
- Pensions records should usually be retained for six years
- Records relating to hazardous materials must be kept for at least 40 years, sometimes 75 years
- Under the Data Protection Act 1998 employment records in general should not be kept for longer than necessary
- Recruitment records should usually be kept only for as long as a claim relating to them might be brought (e.g. unfair dismissal – three months after dismissal)
- Vetting of potential employees records to be destroyed after six months
- Records from monitoring employees' email and web access not to be kept for longer than six months.

If you need any guidance on document retention and relevant legislation, please contact us for advice.

## unfair terms bill

One of the most commonly argued clauses in many negotiated IT contracts is exclusion and limitation of liability. A typical result is a supplier excluding all liability for consequential loss, loss of profit, revenue and goodwill and accepting liability for direct loss up to the value of the contract, or 125% of the contract value or whatever is agreed. Liability for death and personal injury and fraudulent misrepresentation must not, as a matter of law, be excluded otherwise the entire clause can be invalid. The Law Commission has published a draft Bill which proposes some changes in this area although it has not yet been adopted. It is proposed that businesses with nine or fewer staff would have a right to challenge most terms as unfair, where they were indeed unfair, although not clauses as to price or about intellectual property rights. In addition, the legislation currently in the Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contracts Regulations 1999 would be merged.

Check whether your contracts comply with current law on a regular basis. Make sure they:

- Do not exclude liability for death or personal injury caused by your negligence
- Do not exclude liability for fraudulent misrepresentation
- Provide some guarantee of performance – a total exclusion will be void
- Only limit liability to the extent that is reasonable in all the circumstances.

It is also wise to check they list carefully what losses are or are not included, as general terms such as “consequential loss” are not always as broad as those writing contracts believe.

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## distance selling

**Do you sell goods by mail order, telesales or from a web site?**

**This is what is known as “distance selling” – selling goods or indeed services where the consumer does not come to your shop.**

To give consumers a chance to look at the goods or test the services before they are finally committed, the Distance Selling Regulations (which were recently amended), give consumers the right to reject the goods within 7 working days after the date of delivery.

For services contracts the period is 7 days from the contract date. However, if your terms and conditions such as those appearing on your web site do not tell consumers about their right to cancel, then the cancellation period is extended by an additional 3 months - a very nasty trap for the unwary seller. Is it time you had your terms checked to ensure compliance with the latest changes? The Office of Fair Trading regularly undertakes trawls of web sites to ensure compliance.

The regulations also require that certain information be given to consumers such as the name of the seller, VAT number, full details of the price and delivery charges and set out rules for the return of products and refunds of the price. It is important that companies are aware of these rules. Recently the Office of Fair Trading and Department of Trade and Industry have launched a consultation on joint draft guidance that will update and inform those trading over the internet and other traders of their duties under the Distance Selling Regulations.

If you trade by way of telephone, mail order or internet web site it may be worth taking legal advice on whether you are trading lawfully.

This newsletter has been prepared for general interest and it is important to obtain professional advice on specific issues. We believe the information contained in it to be correct at time of print. While all possible care is taken in the preparation of this newsletter, no responsibility for loss occasioned by any person acting or refraining from acting as a result of the material contained herein can be accepted by the firm, the authors or the publishers.