

# one step ahead

## PENGILLYS

SOLICITORS  
& MEDIATORS

summer 2005

### new government

**More new laws were proposed in the Queen's Speech this May than ever before. It included 45 Bills to push through in the first parliamentary session of Mr Blair's final term in office.**

Some Bills will be of greater interest to clients than others. Changes include the introduction of biometric ID cards, welfare reforms and new curbs on gun crime, knives and drink-related violence. A Violent Crime Bill includes tougher laws on the sale of replica firearms, raising the minimum age on knife purchases from 16 to 18, and powers for headteachers to search pupils for knives. There will also be a new offence of using children or innocent parties to hide or carry knives or guns.

For our business clients we recommend that they look at the new Government's proposed legal changes. We can advise you on how you are likely to be affected. There are some measures that have to be passed very quickly such as new rules on pensions.

On pensions reform, the Government has said it will not force employers and employees to pay into their pensions for at least the duration of this parliament. However other measures are possible such as an increase in retirement age. David Blunkett in his new role, will also need to deal with the reforms to incapacity benefit. The proposed new benefits are more generous for the genuinely disabled but worse for malingers.

David Miliband has been promoted to a new cabinet post responsible for communities and local government. Mr Prescott is handling

policies on reform of council tax, public sector pensions and housing. Mr Des Browne has been made responsible for the 2006 spending review which could have one of the biggest impacts for our business clients if it results in a reduction in public spending. Labour is committed to a programme of deregulation including the implementation of the Hampton and Arculus reviews.

Patricia Hewitt as Health Secretary will deal with reforms to the health service which aim to ensure hospitals compete more with each other for patients which will also affect those of clients in that sector.

Now is a good time to lobby in relation to particular proposed legislation which affects your business. Contact us for advice and information in relation to that.

### reform of transfer of undertakings

The DTI is consulting on the law known as TUPE which protects employees' rights when assets of a business are transferred. The current rules protect employees on business transfers. Their period of employment which counts for assessing whether their length of service to claim unfair dismissal and related areas is based on the period when their employment began with their first employer. In practice some employees end up several times being subject to TUPE.

All business sales require some advice in this area and buyers of a business need to understand the impact the rules will have on them. Sometimes passing on the same benefits to employees is not easy and in other cases it is not clear if an undertaking has been transferred and thus the rules may or may not apply. The essence of the TUPE rules will not change but it is worth noting that the draft regulations include proposals to:

- improve business flexibility by extending coverage of TUPE to so-called service provision charges – service contracting operations, such as cleaning services so employers and employees know where they

stand from the outset of an ownership transfer. This will not apply to services bought in on a "one-off" basis;

- create a 'professional business services exemption', so that TUPE will not apply to service provision changes involving "white collar" employees;
- increase the transparency of the transfer process by introducing a requirement on the old employer to notify the new employer of any employment liabilities, or face a fine of up to £75,000;
- clarify the circumstances in which employers can lawfully make transfer-related dismissals and negotiate transfer-related changes to terms and conditions of employment for 'economic, technical or organisational' reasons; and,
- give a claimed boost to the DTI's promotion of the 'rescue culture' by introducing new flexibility into the Regulations' application to the transfer of insolvent businesses.

Revised regulations are likely to come into effect on 1st October 2005.

## liability for stress at work



When will an employer be liable to an employee for stress suffered at work? The court of appeal decided in *Harman v South Essex Mental Health and Community Care NHS Trust* - and five other test cases heard at the same time - that liability for psychiatric injury caused by stress at work

was no different from liability for physical injury. The employer will be liable for any foreseeable injury flowing from the employer's breach of duty.

The court looked at issues such as work pressure - the nature of the work, the hours and staffing levels; whether the employer was or should have been alerted to the condition starting and developing; what systems were already in place and whether they were adequate and utilised; and what steps the employer took once they realised the condition existed.

## damages for data protection mistake

Many readers will have been following the data protection/privacy case concerning the Beckhams. The court said a signed confidentiality agreement with a member of their staff was trumped by the public interest because the famous individuals had made a show, and indeed money, out of presenting a very happy family life when that is allegedly a misrepresentation of how their lives actually are. A much more mundane but similar case which did not obtain as much publicity concerned a passenger from Manchester Airport. He won £4,000 from the airport when his photograph was taken without his permission, in breach of the Data Protection Act, according to a report by the Manchester Evening News. Pictures were taken of passengers on domestic flights passing through security and used by staff to check the correct passenger was boarding a flight, and also to stop domestic passengers buying goods at duty-free prices. Passenger Tim Hedgley complained that his photograph was taken against his will and in breach of the Data Protection Act. After a prolonged battle for an apology, airport bosses made a payment to settle his claim. Manchester Airport now gives passengers leaflets that advise them of their right to refuse being photographed. If you need advice on the data protection laws contact us for further information.



## selling at a distance

Do you sell goods by telephone, email, mail order or over the internet? Anyone involved in selling in this way should note the recent changes in the Distance Selling Regulations.

The regulations since 2000 have allowed consumers to cancel contracts made at a distance within 7 days and impose certain information requirements. The changes are made to the Consumer Protection (Distance Selling) Regulations of 2000.

The principal change is that now a supplier no longer needs to inform the consumer in writing before the contract is made that he will not be able to cancel the contract once the supply of services has begun. In its place the obligation is that the supplier must provide the consumer with information as to how the right to cancel may be affected if the consumer agrees to performance beginning less than seven working days after the contract was concluded.

In one of the cases, a Mr Best was a lecturer at Staffordshire University. He had to retire through ill health and said his employers were liable as he had warned them he was being given too much work. However the court said his breakdown was not reasonably foreseeable. The university provided a counseling service and he chose not to use it. The university was not in breach of its duty of care to him. His health breakdown was not a reasonably foreseeable consequence of the circumstances in which he worked at the university.

In one of the other cases a Mrs Wheeldon worked for HSBC Bank plc on a part time basis. She complained to her line manager about the pressure of work. The judge said it would only be in exceptional circumstances that someone working 2 or 3 days a week for limited hours could make good a claim for injury caused by stress at work. However that was the case here. She suffered a moderate depressive episode with panic attacks. The bank had not acted on its own medical advice and had failed in its duty of care.

If any of your staff complain about stress and their health keep full details of the matter and consider asking them to be examined by the company doctor, if there is one. Take legal advice at an early stage. Contact us for further information about any personal injury or related matter.

This information must be provided prior to or in good time during the performance of the contract.

Other parts of the original Regulations are amended so that:

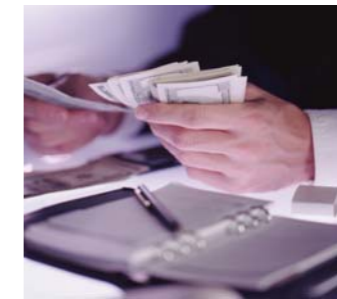
- where a supplier of services provides the written confirmation before performance of those services begins and the consumer agrees to such performance beginning before the end of the cooling-off period, there is no right to cancel; and
- where a supplier of services provides that information in good time during the performance of the services, there is a right to cancel even if the consumer agrees to performance beginning within seven working days of the contract being concluded, but the cooling-off period begins when the consumer receives the information and ends seven working days later or when performance is completed (whichever is the sooner).

## misuse of sports store vouchers scam

If you are involved in the retail sector how good are your checks on those returning goods for a refund? Those involved in cleaning "dirty money" are increasingly turning to this method of generating clean cash.

JD Sports this year was forced to change its refund policy after it became clear that criminals were using its store gift vouchers to buy drugs. Tim Edwards, the company's loss control director, said the chain had "tightened up its refund policy" and would no longer offer gift vouchers in exchange for items brought back without a receipt, after it uncovered "some fairly major fraud". Thieves were stealing goods from one JD Sports store and returning them to another, claiming thousands of pounds of gift vouchers in exchange. Mr Edwards said: "As part of the investigation we have uncovered a drug connection with some of the people bringing goods back. The vouchers were being used as currency at 50% of their face value to acquire drugs."

JD Sports makes a note of customers' names and addresses when issuing a refund as standard practice, and an investigation was launched after the company realised the same people were regularly bringing back items. The company now insists on a receipt, or other proof of purchase such as a credit card receipt or bank statement before issuing a refund, Mr Edwards said. He added: "We are not offering gift vouchers as an exchange." All businesses need to be very vigilant about money laundering issues. Have you issued instructions to your staff about



what to do if a customer arrives to pay for a very expensive item with a suitcase of cash?

We can advise on money laundering issues and also the law relating to sale of goods, refunds, vouchers and money back to customers.

## unfair commercial practices directive adopted

The European Commission has adopted the Unfair Commercial Practices Directive. This should now lead to the Government producing Unfair Commercial Practices Regulations to implement this Directive into UK law. Final Regulations have to be introduced by end 2007. Although that may seem some time away businesses should be preparing now for this important new measure. So the first question is what is an unfair practice under these new rules? -

- Including in an advertisement a direct exhortation to children to buy advertised products or to persuade their parents or other adults to buy advertised products for them
- Claiming that a product has been approved, endorsed or authorised by a public or private body when it has not
- Falsely stating that the product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.

## domain name disputes

Have you registered your business name as an internet domain name?

It is sensible in addition, to also register it with the Trade Marks Registry as a registered trade mark and possibly also at Companies House as a limited company. If you also use it and build up goodwill in the name you will have good protection through all those means and in many cases the ability to stop others using your name. Even so disputes over internet domain names can arise. We can advise on your legal position.

The most lucrative domain name in history - sex.com has led to lots of litigation. A Stephen Cohen in April lost an appeal against a ruling that he must pay \$65 million to Gary Kremen, the man who registered sex.com in the USA. Cohen stole the domain name in 1995 and used it as a front for a porn business. Cohen, an ex-convict, took the name from Kremen by sending a forged letter of transfer to Network Solutions (which subsequently became part of VeriSign). Cohen then ran a highly profitable porn portal until November 2000 when a court awarded Kremen the return of the domain name.

Cohen has paid nothing to Kremen, and Kremen says that a warrant is out for his arrest. However apparently Mr Cohen is now in Europe, making what he describes as a "very comfortable living" in the European casino and construction industries. Kremen also sued VeriSign for the initial blunder, a case that settled last year with the company paying Kremen an undisclosed sum. Disputes over domain names can go through mediation if that is preferred using the Uniform Dispute Resolution Procedure. Under English law if you have registered a trade mark first or built up reputation and goodwill in the name then you can usually stop cybersquatters misusing your name. Please contact us for further information.

- Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not
- Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer
- Creating the false impression that after-sales service in relation to the product is available in a Member State other than the one in which the product is sold
- Requiring a consumer who wishes to claim on an insurance policy to produce documents that could not reasonably be considered relevant as to whether the claim was valid, or systematically failing to reply to related correspondence
- Creating the false impression that the consumer has won, is to win or will, on doing a particular act, win a prize, when in fact either there is no prize or taking any action in relation to claiming the prize is subject to the consumer paying money or incurring a cost.

## Use of on line archive material

On a regular basis businesses are caught out breaching copyright. Either they do not realise they need a licence to copy from newspapers at work or they use parts of a competitor's copyright material in their own documents for example. The last edition of this newsletter reported on a company fined £39,500 for copyright infringement.

The BBC, Channel 4, the British Film Institute (BFI) and the Open University have collaborated to create the 'creative archive licence' which has just been launched. This developed from the BBC's online archive project which was aimed at making thousands of hours of BBC content available to the UK public on the internet for non-commercial use. It creates a legitimate way for people to gain free access to the archive material of the

BBC, Channel 4, the BFI and the Open University. There are some limitations and it is based on a flexible copyright scheme from the US called the creative commons ([www.creativecommons.org](http://www.creativecommons.org)).

It gives the public access to footage from the different archives so they can use it to create new things such as for school projects or to create a home movie or make their own video music.

Channel 4 will make very little of its own broadcast content available under the scheme - at least initially - because as a commissioner of content rather than a producer, it does not own the rights. Instead, it plans to use the licence to build on its PixnMix music video project. The BBC plans to make some of its factual and learning content available, but exactly how much will be determined during an 18-month trial which has just begun with the launch of the new licence and website:

[www.creativearchive.bbc.co.uk](http://www.creativearchive.bbc.co.uk).

BFI's use of the creative archive licence will cover mostly old newsreel footage, early literary adaptations of Shakespeare, and out of copyright silent comedies. Open University plans to offer five hours of video under the new licensing scheme, including a volcanic eruption and footage of several different chemistry experiments that are no longer allowed to be performed in schools because of safety concerns.

Do you use copyright material at home or at work? If so always check the legal position as increasingly copyright owners are enforcing their rights against infringers. There are some exceptions for what is known as "fair dealing" and for private research but they are not always straightforward to follow so it can be wise to take legal advice.

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## scams



The Office of Fair Trading recently held a scams awareness month and there has been much press comment about scams such as misuse of premium rate numbers.

Always check your home and work telephone bills carefully to ensure no one has accessed your account.

The OFT identified the top ten scams targeted at people in the UK to alert the public to the swindles that may part them from their money. It is estimated that about £1 billion a year is lost through scams. Many businesses have been victims but few like to publicise the fact.

A lot of these scams come from outside the UK which makes enforcement against the perpetrators very hard. However the OFT has been collaborating with other enforcement bodies in more than 30 countries. In October 2004, for example, OFT co-

operation with partner agencies in the United States and Canada, such as the FBI and the Royal Canadian Mounted Police, helped lead to over 100 arrests in the US and 35 in other countries for telemarketing scams.

Microsoft has filed 117 lawsuits against people who it claimed created phishing web sites designed to look like pages hosted by the software giant.

The suits are being brought against operators of web sites that feature trademarked logos or images used by Microsoft on its official web pages and products.

The Anti-Phishing Working Group reported that phishers are ramping up their use of instant-messaging services instead of e-mail to trick people into revealing personal information. For the third month in a row, the number of attacks that do not use e-mail has steadily grown.

If you are involved in a scam you may well need legal advice particularly if you are being required to pay a bill for which you are not responsible.

Conversely, if you are a service provider and a customer seeks to avoid payment you may be able better to protect your financial position through judicious drafting of your terms and conditions for use of that service. Please contact us for further information.