Devonshires solicitors

DBRIEF

Issue 49

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The autumn issue of DBrief includes articles on some current issues faced not only by trading companies but also registered providers and charities. For example, new legislation, such as the Bribery Act, and a new legal case (on insolvency) that may affect both sectors.

The repercussions of the recent administrations of Connaught Plc and John Laing Partnership Limited have affected many organisations (including councils) involved in the provision of social housing and facilities maintenance.

With the CSR contemplating that councils will need to consider outsourcing as a way of reducing the estimated £170 billion spent annually, there will be outsourcing opportunities not only for the big names but also local suppliers and charities. We look at outsourcing in our supplement. We also discuss the prospect of convergence between the public and private sectors in the provision of affordable housing.

Lessons from administration of John Laing Partnership and Connaught

With Connaught plc and John Laing Partnership Limited going into administration within a matter of weeks of each other, a number of people have unexpectedly found themselves working very long seven day weeks.

As those involved recover, for others a number of interesting lessons have been learnt. These include the importance of the way termination provisions in facilities management and development contracts are written and, for those in the social housing and local authority sector, the potential impact of the 1996 Public Contract Regulations.

Following the administration of Connaught, Lovell Partnerships Limited announced that it had acquired an "interest" in the majority of the contracts that Connaught's social housing subsidiary had entered into and related assets and employees. Subsequently, on 28 September Lovells announced that it had agreements in principle with 42 local authorities and housing association clients.

Where a supplier goes into administration, both its customers and any potential buyers of contracts with the customers, from the insolvent supplier will be scrutinising the small print of the termination clause.

One of the difficulties that buyers experience is that insolvency invariably results in the termination of the agreement with the customer. Termination either happens automatically or at the election of the customer. This is because the appointment of an administrator is treated as a material breach of contract. As a practical matter, there is little point for the customer in remaining in contract with an entity in administration that may fall into liquidation, at any stage, with subcontractors unwilling to give credit.

It would be sensible, if practicable, to at least talk to the customers prior to entering into any agreement with the receiver to acquire contracts with those customers. In addition, if a contract is to be novated (with a new supplier 'stepping into the shoes' of the insolvent one), check whether the novation agreement provides for the re-instatement of the contract before its novation.

Assuming that there is an ongoing contract to transfer, when dealing with RPs or local authorities, buyers of contacts also need to look at the EU procurement rules. These are set out in the public contracts regulations. In summary, they state that once a contract has been tendered in accordance with the rules and won, then the contract cannot be materially altered or varied without another tender process. Recent cases have held that a change in service provider (as opposed to a mere name change or intra-group re-organisation) is a material variation to a contract. The courts may also treat a novated contract as a new contract, even though it is on precisely the same terms as the earlier contract. Given the state of the law, there remains a risk that a decision to transfer the contract to a new supplier (or to enter into a new contract with the new supplier) may be challenged as a breach of EU procurement law. For those negotiating the transfer of facilities contracts, the stakes increased in December 2009, when a new directive came into force.

"The courts may also treat a novated contract as a new contract, even though it is on precisely the same terms as the earlier contract."

Now that the Remedies Directive is included in the Public Contracts Regulations, any challenge will raise the spectre not only of damages, but of contract cancellation (the "Remedy of Ineffectiveness") and a significant fine.

That said, as with all challenges under EU law, the challenger has to weigh up the legal merits along with the more prosaic commercial ones. There is

little point in launching a challenge out of pique. While the legal basis for bringing a challenge may be sound, It remains to be seen whether a contractor will consider it in their commercial interests to actually do so.

The buyer of the contracts will also want to consider the position of book debts. The parties will usually agree who will collect the insolvent supplier's book debts. The insolvency practitioner may consider that it would be easier for the buyer to collect them as they will be dealing with the supplier's former customers after closing. The buyer may also prefer this to ensure that its new customers are not unduly harassed by the insolvency practitioner, who only wants to recover payment. After all, they have no ongoing relationship to protect.

Where remedial work is required check if the administrator will pay to have this done. Apart from being a useful source of income, it

There may, for example, be a hidden liability for employment costs of any employees dismissed by the insolvency practitioner .

An insolvency practitioner in a strong negotiating position may require the buyer to pay the bulk of a purchase price for the services contracts upfront. As a result, the buyer is exposed to the risk that customers may refuse to grant consent to the assignment or novation to the buyer of the agreements. If the customer refuses to give his consent, (and the refusal is upheld on any challenge), the buyer will have paid out for contracts it may not be able to use.

Retaining lawyers with specialist procurement experience is often helpful for assisting on negotiations.

"Typically, there will only be time for limited independent investigations of the contract and liabilities."

may assist the new supplier in maintaining a relationship with particular RPs of local authorities by carrying out such work

Negotiating tactics with insolvency practitioners will be very different from those used in usual negotiations over outsourcing or facilities management deals. For example, the insolvency practitioner will only have been briefly involved with the business thus their knowledge of the assets to be sold may be very limited. This has important consequences for a buyer.

Typically, there will only be time for limited independent investigations of the contract and liabilities.

It's a case of "buyer beware". Usually the insolvency practitioner will exclude any personal liability on their part, as they will be unwilling to allow the company to give any assurance on matters which one will expect in a normal deal.

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Annual Re-election of Directors – A Questionable Benefit?

Company secretaries of both FTSE 350 companies and registered providers (RPs) may have had a frenetic summer – keeping up with corporate governance. As demonstrated by this article and the one which follows on the UK Corporate Governance Code, there's been plenty to read!

No sooner had they returned to the office when in September, the Quoted Companies Alliance published its Corporate Governance Guidelines for Smaller Quoted Companies. This follows on from the publications of the revised Combined Code (now renamed the UK Corporate Governance Code, see page 6.

One of the core principles set out in the Corporate Governance Code is that all directors of FTSE 350 companies should be subject to annual election by shareholders. Directors of other traded companies should be subject to election by shareholders at the first AGM after their appointment, and then to re-election at intervals of no more than three years. Non-executive directors who have served longer than nine years should be subject to annual re-election. The names of directors submitted for election or re-election should be accompanied by sufficient biographical details and any other relevant information to enable shareholders to take an informed decision on their election.

The Board is expected to set out to shareholders in the papers accompanying a resolution to elect a non-executive director why they believe an individual should be elected. The chairman should confirm to shareholders when proposing re-election that, following formal performance evaluation, the individual's performance continues to be effective and to demonstrate commitment to the role.

This is one of the more significant changes in the Code. The reason it was introduced was to make directors of FTSE 350 companies more accountable to their shareholders and to give boards the incentive to understand and respond to shareholders' concerns before the AGM, leading to ongoing 'engagement'. Opponents of this measure have argued that it will encourage short-term thinking and potentially destabilise the board, and that it could make it more difficult to recruit directors. It has been subsequently reported that Hermes, Railpen and the Universities Superannuation Scheme have written to 700 companies to encourage them to ignore the annual re-election requirement.

However the Financial Reporting Council (FRC) states in its report on revisions to the Code that it is "appropriate that shareholders, as the company's owners, should have an annual opportunity to express their views on the performance of the directors... It is not in shareholders' interest to undermine confidence in the board as this might potentially affect the value of their own investment".

"Non-executive directors who have served longer than nine years should be subject to annual re-election."

So far in 2010, only seven FTSE 100 companies have proposed full board re-election. These include BP plc, Astra Zenecea plc, Pearson plc and Unilever plc. This highlights that many companies will face significant change and may need to amend their articles of association if they wish to comply with this new provision.

The preface to the Code points out that, just as with all Code provisions, "companies are free to explain rather than comply if they believe that their existing arrangements ensure proper accountability and underpin board effectiveness, or that a transitional period is needed before they introduce annual re-election". The preface also encourages smaller companies to consider their policies on director re-election.

The FRC will assess the impact of this code provision (B.7.1) in 2013 when it carries out its review of the Code. In the meantime, it is

observing voting patterns on this matter.

While quoted company secretaries contemplate whether it necessary to make any changes to their Articles to deal with annual elections, their counterparts working for RPs may conclude that the Code is now a less attractive potential choice as their code of governance, given there is a trend away from retirement by rotation of board members at AGMs. Furthermore, many RPs are now dispensing with the traditional AGM. So the new FRC principle for annual re-election of all the Board at an AGM cuts across this trend.

By way of background, for those registered providers who have been set up as companies, the Companies Act 2006 neither requires private companies to hold AGMs nor prevents them from doing so. Therefore, a private company will only need to hold AGMs where required to do so by its articles. Nevertheless, a specified threshold of members always have the ability to demand a general meeting.

For those RPs who are established as an Industrial and Provident Society (IPS), there is no obligation under the IPS's regime requiring an IPS to hold an AGM each year.

The reason that companies and IPSs which are RPs, continue to hold AGMs is that, up until April 2010, this was the policy of the TSA. However, with the new approach by the TSA, this is no longer necessary. This will align RPs with registered charities (which are regulated by the Charity Commission) who already are not required to hold AGMs if not required to do so under their constitutions.

The FSA is now also prepared to consider accepting changes to rules of IPS's, that delete the requirement for an AGM.

Deleting the requirement to hold AGM's will trigger a number of consequential issues such as the procedure for the appointment of board members and approvals of accounts. However, these technical matters have already been addressed by many registered charities that do not hold AGMs each year.

Meanwhile several RP company secretaries may now be turning their attention to alternative voluntary governance codes other than the Corporate Governance Code

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"Several RP company secretaries will now be turning their attention to alternative voluntary governance codes."

The UK Corporate Governance Code

Following a review of the Combined Code on Corporate Governance, the Financial Reporting Council (the ''FRC") has published a new UK Corporate Governance Code, applicable to all companies with a premium Listing of equity shares on the London Stock Exchange, including those incorporated in the UK and overseas for accounting years beginning on or after 29 June 2010. Companies will be required to report on their compliance with the Corporate Governance Code.

As discussed on page 4, The "comply or explain" approach set out in the Combined Code still applies under the Corporate Governance Code. This allows companies some flexibility in their application of the Corporate Governance Code. Companies that fail to comply with the new provisions must explain to their shareholders in the company's annual report the reasons for the company's non-compliance.

the company's strategy for long-term success. This should be included in the same part of the annual report as the business review.

Risk Management

To improve board accountability, the Corporate Governance Code states that the board must consider and be responsible for the amount of risk the company can bear and its willingness to take risk on. The company should maintain sound risk management and internal control systems.

Remuneration

Remuneration packages are to be in accordance with the long-term success of the company and incentives should be compatible with the company's risk policies and systems. Performance-related remuneration in all forms including share options for non-executive directors is discouraged. Under new contractual provisions, companies may consider reclaiming remuneration in certain cases of misstatement or misconduct.

> *"The Corporate Governance Code includes a new principle encouraging boardroom diversity in order to improve the balance of skills...."*

Key Changes introduced in the new UK Code include:

Composition of the board

The Corporate Governance Code includes a new principle encouraging boardroom diversity in order to improve the balance of skills, experience, independence and knowledge of the company. Regard should be given to diversity, including gender diversity, when making board appointments.

The board should also consist of directors with an appropriate balance of skills, experience, independence and knowledge of the company to enable it to discharge its duties and responsibilities effectively.

Business model

Under the Corporate Governance Code, companies will be required to disclose their business model in their annual report, explaining

Responsibilities of the chairman and directors

The chairman will be responsible for the leadership of the board under the new Corporate Governance Code. The chairman must also ensure all directors are aware of the concerns of their major shareholders, and be responsible for the evaluation, training and composition of the board. Although no minimum number of days has been identified in the Corporate Governance Code, all directors should commit sufficient time for the proper performance of their duties. Non-executive directors should provide constructive challenges and assist in developing proposals on strategy.

Additional provisions applicable only to FTSE 350 Companies

Certain provisions of the Corporate Governance Code considered to be unduly cumbersome and expensive for small companies, will apply to FTSE

350 companies only (although smaller companies may consider them). These include:

Annual re-election of all directors

In order to increase accountability to shareholders, the Corporate Governance Code requires directors of FTSE 350 companies to be re-elected annually, as discussed previously on page 4.

Externally Facilitated Board Evaluation every three years

The Corporate Governance Code recommends that in addition to an internal annual board review, an external review should be made every three years. The requirement applies only to FTSE 350 companies due to the cost involved and the availability of external facilitators. Again, smaller companies may decide to voluntarily comply with this provision.

Be Prepared!

The new Corporate Governance Code sets out the highest standards of corporate governance, and whilst its provisions only apply to companies with premium listings, all listed companies should where practicable seek to comply as far as possible in order to promote transparency and accountability. For companies with a calendar year end, they will be required to explain in their 2010 Annual Report how they have applied the main principles of the Corporate Governance Code and the extent to which they have applied the provisions. It would be prudent for companies with a premium listing to start the process now to ensure that their corporate governance policies and procedures are compliant with the Corporate Governance Code.

If you would like assistance to conduct a review of your company's corporate governance policies, including board policies, directors' service contracts and incentive schemes please contact:

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Inability to Pay Debts

Many loan facilities agreements entered into by borrowers with banks and building societies will contain a clause which states that if the borrower is "unable to pay its debts they fall due", then this will trigger an event of default. Events of default usually entitle lenders to demand repayment of their loans.

A recent case heard in the High Court has provided guidance about what this expression means in practice.

The Legislation

Section 123 of the Insolvency Act 1986 defines "inability to pay debts" by two tests:

(a) the "cashflow test" (Section 123(1)); and

(b) the "balance sheet test" (Section 123(2)).

Much of the focus regarding inability to pay debts has previously centred on the more common cashflow test, which usually forms the basis for creditor driven winding ups.

The judgment of the Chancellor in the High Court in *BNY Corporate Trustee Services Limited v Eurosail UK* provides a useful insight into how the courts are likely to decide whether a company is insolvent under the balance sheet test. Under this test, a company is deemed unable to pay its debts if "it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities".

In the Eurosail case, the Chancellor set out the following principles relating to the balance sheet test:

1. only assets currently owned (not contingent or prospective assets) could be taken into account;
2. simply because the court is required to take into account the contingent and prospective liabilities of a borrower does not mean that they should be given their face value; and

3. “taking account of” means that all factors should be considered when assessing the value of contingent and prospective liabilities. This will depend on the facts of any particular case.

Take the legal, rather than the accounting approach

The Eurosail case highlighted that the test should be approached from a legal perspective, rather than from an accounting one. Various facts of the case read together meant that Eurosail was not in breach of the balance sheet test. For example, Eurosail could take into account $221,000,000 which it was attempting to recover from Lehman Brothers in ongoing litigation, despite the fact that this “asset” was not included in its accounts, as is required by accounting practice. There was also no evidence of a calculation of present assets and liabilities and the Court therefore, decided there was no deficiency because Eurosail was able to pay its debts as they fell due.

This case is helpful for those whose balance sheets may be stretched by the current economic circumstances. Before a lender is able to call a default based on balance sheet insolvency, there will have to be a determination of the likely value of assets and liabilities. In particular, the solvency of a borrower seems to rest on a looser interpretation of “assets” and “liabilities” than is used in preparing accounts. This is helpful for a borrower as it introduces a degree of flexibility into the calculations and it will prove harder for lenders to ascertain whether the balance sheet test has been breached.

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Will the CBI Call for Greater Competition in Social Housing Trigger Wage Inflation?

The Confederation of British Industry’s (CBI) recently published report, *Improving homes, improving lives: using competition for better social housing*, argues that £1.5bn could be saved in England by allowing local councils and housing associations to choose the best provider of services, whether they are from the private, voluntary or charity sectors.

The report argues that the satisfaction among the tenants of private providers (which, it states, manage 1.6% of all social housing in England) are “often considerably higher than among tenants with Councils or social landlords.” No evidence is produced to support this claim. However, the thrust of the report is “with competition, quality will rise and cost will fall.”

The following examples are cited:

- Private sector providers can reduce rent arrears to 1% of total collections at any one time; whereas average arrears for RP’s are 5.4%
- Turnaround time for non urgent repairs is five days compared with an average of 12.7 days from local authority managers.

In order to encourage greater private sector involvement in the provision of social housing, the CBI wants the Government, among other matters to:

- “Create a competitive market for social housing management services, with in-house providers competing against bidders from other sectors to deliver services
- Allow housing management contracts of at least 10 years in order to attract investment from providers and enable economies of scale to be achieved

- Use best practice case studies to show commissioners how to apply TUPE (Transfer of Undertakings Protection of Employment Regulations) correctly to ensure staff can transfer smoothly from the public to private sectors…"

Some in the social housing sector may consider that the CBI's "wish list" is overly aspirational. For example in relation to transferring public sector staff to the private sector (or for that matter, to RPs) no reference is made to the potential impact of public sector pensions. These can, potentially be "deal breakers".

Many reading the report may be weary of the somewhat polemical style. Others could question the basis for the statistics. However, it remains worth reading as it highlights the prospective convergence of the private and public sector provision of social housing.

Heads of HR departments of Councils and RP's will be conscious that their senior employees who deal with TSA and HCA procedures may become increasingly attractive to the private sector. While the CBI may argue that the mantra of competition will cut costs – in the short term it may, simply, trigger wage inflation for key housing management staff.

For those that want to debate it, the report is to be discussed on 25 October 2010 at the CBI annual conference.

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Local Housing Trusts: The Right to Build

Rural England is in crisis. Availability of housing is limited. If new housing is constructed for market sale local people generally cannot afford to buy. Planning policies/Green Belt may make it nearly impossible to obtain planning consent for new developments in the first place. Village pubs, shops and post offices are steadily closing. Young people are drifting away to find jobs and places where they can afford to rent or – in the unlikely event of the availability of a mortgage – buy. Schools are closing due to insufficient numbers of pupils. Villages are turning into glorified museums.

But new Housing Minister Grant Shapps has the answer.

In opposition to the crisis he produced the Conservative Green Paper "Strong Foundations" criticising the previous Government's reliance on "top-down control" and advocating special incentives for Councils where new housing (and especially new affordable housing) is produced.

He also promotes the concept of Local Housing Trusts that would have new freedom to develop and keep homes for local people where there is strong community backing. These new Local Housing Trusts are to ensure through ownership that the benefits of the development remain within the community in perpetuity.

Is this really new and radical? After all we already have the Excepted Sites concept to assist on planning for affordable housing, S.106 Agreements to procure on-going benefits for the community, and Community Land Trusts. What's new?

Essentially the planning process.

The planning process for Local Housing Trusts is reduced to checking that certain criteria have been met. So where there is overwhelming local public support the role of the local planning authority is essentially reduced to a tick box

exercise meaning that the entire planning process is eased. That is indeed a "revolution" as promised by Grant Shapps. Whatever the local community wants, that is what they can have.

These new Local Housing Trusts will be allowed to assist the community by providing other services for the benefit of local people. Examples include offering long-term, low rent commercial accommodation for a village shop on a serviced tenancy, a community hall or a sports facility. The Local Housing Trusts can actively seek to regenerate the village, however, there are limits. In order to prevent over-development Local Housing Trusts will be able to expand the size of a community by a maximum of 10 per cent over any 10 year period and developments are expected to be rather small with a maximum of 20 properties. The anticipation is that communities might wish to build 5 – 10 properties, which could be a mixture of market housing for sale, affordable housing for rent, sheltered housing for elderly local residents, or low cost starter homes for young local families struggling to get on the social housing ladder. In addition the Local Housing Trusts will be able to advertise housing to attract new residents to move to the area to combat shrinking populations threatening the continued existence of local community services.

There is also an element of bribery. Well, that is to say that the Government will incentivise house-building by matching local authorities' council tax take for each new house for a period of six years with special incentives for affordable housing.

As we go into the Age of Austerity where is the money to build these new homes going to come from?

Perhaps unsurprisingly, the Government is somewhat shy on this topic. It is suggested that the land may come cheap – it may already be owned by the Parish Council or it may be gifted at lower than market rates by local landowners who would not be able to develop it themselves. There may be an element of cross-subsidisation by building some homes as private housing.

But already the rain clouds are gathering over this parade. As the Planning Officers Society has already pointed out, in two-tier local government areas, some 85 per cent of the financial incentive would go to the County Council as the major infrastructure provider. Not much of a bribe for the locals, then. And under the current system, for planning applications there is a one-off infrastructure levy so that infrastructure can be improved in advance of occupation, which is preferable to six years of post construction benefits.

Who is going to sit on the Boards of these Trusts? The expectation is that local parish councillors will be the elected representatives. But are these the best people to supervise the development of new property? Will our now risk averse banks believe they have the necessary skill sets? Will there be enough cash to construct the housing?

"Will our now risk averse banks believe they have the necessary skills set? Will there be the cash to construct the housing?"

What will be the degree of local support required? 80 per cent? 90 per cent? Is that achievable in nimby conscious England?

Primary legislation is awaited in the form of the Decentralisation and Localism Bill promised for this autumn, so we will have to wait and see whether the detail gives us the housing "revolution" Grant Shapps promises.

If properly thought through there can be no doubt that this may throw a life-line to villages desperately seeking affordable housing solutions, but what is certain is that this is unlikely to make much of a dent in the 1.8 million households on housing waiting lists at this time.

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The Bribery Act 2010

The Bribery Act 2010 (the Act) is due to come into force in April 2011. It represents a significant move towards creating a level playing field for businesses from around the globe by tackling the threat that bribery poses to economic development and progress. It will be essential for all businesses large and small to understand their obligations under the Act and to take the necessary steps to implement appropriate procedures.

The changes are being introduced due to the fact that current law on bribery was generally considered to be unsatisfactory as it was inconsistent with the Organisation for Economic Co-operation and Development's Bribery Convention which was ratified in 1998 in the UK. It was also considered outdated in light of modern global economic practices.

In addition to the core offences of bribing, being bribed and the bribery of foreign officials, the Act introduces a new offence of failing to prevent bribery.

The four key offences are summarised below:

1. Bribing Another Person

Offering, promising or giving a financial advantage to another person:

a. intending the advantage to bring about the improper performance of a relevant function being a public function or business activity (or an activity to reward such improper performance); or

b. knowing or believing that the acceptance of the advantage offered, promised or given, in itself constitutes the improper performance of a relevant function of activity.

2. Offences relating to being bribed

Receiving or accepting a financial or other advantage to perform a function or activity improperly. It does not matter whether the recipient receives it directly or through a third party or whether it is for the recipient's benefit or not.

3. Bribery of a Foreign Public Official

Offering, promising or giving (whether directly or through a third party) any financial or other advantage to a Foreign Public Official (FPO) in an attempt to influence them in their capacity as an FPO and to obtain or retain business, or an advantage in the conduct of business.

4. Failure of commercial organisations to prevent bribery

A commercial organisation could be guilty of an offence, on a strict liability basis, punishable by an unlimited fine, if a person associated with the organisation bribes another person, intending to obtain or retain business or a business advantage for the organisation. This offence can be committed in the UK or overseas. Persons "associated" with the organisation. It could potentially include employees, agents, subsidiaries, joint venture partners and sub-contractors. The organisation will have a defence to this offence if it can show that it had in place "adequate procedures" designed to prevent bribery.

Although there will not be any statutory guidance as to what constitutes "adequate procedures", the Ministry of Justice will publish non-statutory guidance in January 2011. In the meantime, the Ministry of Justice has recently published a consultation document on guidance for organisations to help them ensure that they have adequate procedures in place. The draft guidance contains the following six principles:

c. Top level commitment to prevent bribery – i.e. ensure there is clear unambiguous message, which is made regularly to employees and business partners;

d. Risk management and mitigation – i.e. keeping abreast of potential bribery risks in your particular sector;

e. Due diligence – know who you are doing business with;

"It does not matter whether the recipient receives it directly or through a third party or whether it is for the recipients benefit or not."

f. Clear, practical and accessible policies and procedures – in other words applying policies and procedures consistently to all employees and business partners;

g. Effective implementation – doing more than just a "box ticking" exercise and instead ensuring that anti-bribery measures become an integral part of your company's operational procedures internally and externally; and

h. Monitoring reviews – this means regularly reviewing policies and procedures and considering whether an external verification or audit would be beneficial.

It is imperative that companies and organisations prepare for the Act coming into force and take the necessary steps to review their existing arrangements, such as their compliance procedures, and their policies relating to hospitality and political contributions. Equally important will be to conduct a review of contractual arrangements with employees, agents or joint venture partners.

Companies without policies and procedures in place need to act now - before the Act comes into force in April 2011. These policies and procedures will vary according to the type of organisation and will therefore need to be adapted appropriately to suit particular circumstances.

It will be of paramount importance that organisations communicate a clear message of zero tolerance towards bribery that is targeted not only at employees but also at agents, subcontractors, subsidiaries and joint venture partners. Continuous training and guidance should also be a feature of effective anti-bribery procedures.

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Lord Young and the Politics of Health & Safety

We have now had a chance to read and digest Lord Young's report into the operation of health and safety law. As Lord Young recognises, the legal structure for health and safety law in the UK is sound and requires no urgent amendment. He states in the report that:

"There is no need for major changes to the framework provided by the Health and Safety at Work etc Act."

We have a system that, while demanding in certain areas, places the onus for health and safety squarely on the employer or "Duty Holder" through a process - backed up with very strong penalties - of assessing and managing risk. So what has Lord Young spent the past several months mulling over? Below is a selection of his recommendations, taken from the report.

PI Claims

- A simplified procedure for PI claims similar to that for Road Traffic Accidents ("RTAs") under £10,000 on a fixed costs basis. Possible extension of the scheme to low value clinical negligence claims.
- Possible extension of the upper limit for RTA claims to £25,000.
- Introduce the recommendations in Lord Jackson's review of civil litigation costs.
- Restrict the operation of referral agencies and controls on advertising.

Low Hazard Workplaces

- A simplified risk assessment procedure for "low hazard workplaces".
- HSE to create periodic checklists for low hazard workplaces and voluntary organisations.

- Exempt employers from risk assessments for employees working from home in a low hazard environment.

Raising Standards

- Professionalise health and safety consultants. HSE to take the lead in establishing a validation body for qualifications.
- Establish a web directory of accredited health and safety consultants.

Insurance

- Insurers to cease requiring low hazard businesses to have a full health and safety risk assessment.
- Health and safety risk assessments to be carried out by qualified consultants who are on the internet register.

Education

- Simplify the health and safety procedure for school trips.

Health and Safety Legislation

- HSE to produce guidance under the Code of Practice focused on small and medium businesses engaged in low risk activities.
- Health and safety regulations to be consolidated.

Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (“RIDDIOR”)

- Amend to extend to seven days the time taken by an injured employee off work after an incident, after which workplace accidents need to be reported.
- HSE to re-examine the Regulations to “determine whether this is the best approach to providing an accurate national picture of workplace accidents”.

Larger Companies

- Consultation to improve the system with an enhanced role for the HSE for large multi-site retail businesses.

“Lord Young does not advocate much in the way of changes to law on health and safety.”

- Single consent form to cover all activities a child may undertake during school time.
- Simplified risk assessment for classrooms.
- Shift from a system of risk assessment to a “risk-benefit” assessment and consider reviewing the Health and Safety at Work etc Act 1974 to separate leisure from workplace contexts.

Local Authorities

- Officials to put reasons in writing when events are banned on health and safety grounds.
- Citizens to be able to challenge local officials’ decisions.
- Citizens to be able to refer unfair decisions to the Ombudsman and a fast-track process to be introduced to take no more than two weeks with additional powers to award damages.

One of the primary targets for Lord Young’s report is the “no win no fee” and “compensation” culture. It is unclear why Lord Young decided to look into this; as he recognises, Lord Jackson has already completed a comprehensive and extremely detailed report on litigation funding in the UK.

Lord Young does not advocate much in the way of changes to law on health and safety. What he does recommend is a consolidation of the current health and safety regulations, a minor amendment to RIDDOR and an open-ended instruction to the HSE to re-examine RIDDOR.

What he does criticise is the application of the law. The main thrust of his argument, throughout the recommendations, appears to be that what is required is a move away from slavish and over the top compliance with health and safety regulation. This is exemplified by media stories of over-zealous health and safety consultants and cancelled

school trips. Instead, Lord Young harks back to the pragmatic approach which he says the Health and Safety at Work etc Act 1974 provided for.

While increased pragmatism in health and safety procedure appears to be sensible (and popular), Lord Young appears to have avoided the substance of the argument. There is no suggestion from him that the policies applied by, say, schools in combating legionella or ensuring that pupils, teachers and parents are adequately protected from the risk of fire lacks common sense.

The summary of recommendations suggests that Lord Young has an eye on headlines. For example, simplifying the health and safety procedure for school trips. He says that:

"The process for taking children on education visits involves a huge amount of form filling – ranging from consent forms to risk assessments."

This suggests that there is a complex statutory health and safety procedure for school trips that is responsible for a reduction in educational visits by schools. In fact, aside from the procedures (e.g. investigation and reporting of incidents) and training that schools should already have in place, the law imposes few extra burdens on schools and a risk assessment proportional to the dangerousness of the activity being undertaken is normally sufficient. Perhaps health and safety procedures are over-enthusiastically applied by school staff. If so, this is a question of education and information and hardly a sweeping reform of health and safety.

Placing a large proportion of the blame for "over egging the pudding" on specialist health and safety consultancy firms, he says that there are no minimum standards for health and safety consultants and that employers often take action on their advice that is not required by law and adds no benefit to workplace health and safety.

In fact, in many cases it is unlawful to retain consultants who are not up to the job. The law specifies that anyone carrying out a fire, asbestos or legionella risk assessment (to name but three) has to be sufficiently qualified. The reality is that failing to ensure that a competent person carries out a risk assessment is a criminal offence and in the most severe of cases can result in a prison sentence upon conviction.

In returning to a pragmatic approach to health and safety in the workplace, Lord Young recommends that the procedures for risk assessments in "low hazard" workplaces are simplified. He proposes that standard simplified guidance and checklists are made available to small and medium sized enterprises so that they can be confident that they have complied with health and safety law without reliance on expensive consultants.

That said, while there is certainly sense in the simplification of guidance and in making easy to follow checklists available on government websites, there is already a great deal of common sense in the operation of health and safety law – that is why the UK has one of the best rates of workplace health and safety in Europe. To suggest otherwise hints at political grandstanding for its own sake.

"The summary of recommendations suggests that Lord Young has an eye on headlines."

So what does it mean? Lord Young's report comes down to this: *people who are subject to health and safety law should interpret their legal obligations sensibly and appreciate that no activity is without some risk. Indeed, life is full of it.*

For further information please contact:

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Proving You Are "Fit and Proper"

As FDs of charitable organisations grapple with the significant tax implications of Schedule 6 of the Finance Act 2010, company secretaries of registered charities may decide to add yet another document to the pile of those to be signed by incoming directors.

It may also be worth considering a change to the terms of employment to be used for new members of a charities senior management team.

The Finance Act 2010 introduced a new condition, for charities and other organisations entitled to UK charity tax reliefs. The definition includes a requirement that to be a charity, an organisation must satisfy the 'management condition', which applies to claims for charity tax reliefs.

For a charity to satisfy the management condition its managers must be "fit and proper persons". There is no definition in the legislation of a 'fit and proper person'. Her Majesty's Revenue and Customs (HMRC) guidance explains how the HMRC applies this test to those who have the general control and management of the administration of the charity. If the trustee or employee signing the tax reclaim forms is not a fit and proper person, HMRC can refuse the tax reliefs.

The fit and proper persons test was introduced to make it harder for sham charities and fraudsters working within a charity or targeting a charity from outside to abuse charity tax reliefs. It is not intended to deny tax reliefs to charities who make a genuine mistake.

Factors that may lead to HMRC deciding that a manager is not a fit and proper person include, but are not limited to, individuals:

- with a history of tax fraud;
- with a history of other fraudulent behaviour including misrepresentation and/or identity theft;
- for whom HMRC have knowledge of involvement in attacks against or abuse of tax repayment systems; and
- who are barred from acting as a charity trustee by a charity regulator or Court, or disqualified from acting as a company director.

However, just because an individual has been, say, barred from acting as a charity trustee, it does not follow that the charity will always fail the management condition.

HMRC states that it assumes that all people appointed by charities are fit and proper persons unless they hold information to show otherwise. Provided charities take appropriate steps on appointing personnel then they may assume that they meet the management condition at all times unless, exceptionally, they are challenged by HMRC.

"It may also be worth considering a change to the terms of employment to be used for new members of a senior management team."

As a practical matter, the company secretary could consider asking a prospective trustee (or the HR team could request the prospective employee) to read the basic guide (http://www.hmrc.gov.uk/charities/guidance-notes/chapter2/model-dec-ff-persons.pdf) and sign the model declaration included in the guide in order to is demonstrate to HMRC that the charity has taken the necessary steps to reassure itself its managers are fit and proper.

For senior employees a representation could be added in the employment agreement that the employee does not fall into one of the categories listed above. If they are deemed to be not fit and proper by HMRC, should they be sacked without compensation?

For further information please contact:

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Charities Update

At the end of November, the Charity Commission will be publishing a consultation document on investment guidelines. There will be a three month period for consultation.

On 1 April 2011, subject to the impact of the government spending review, the Charity Commission intend to go live with charitable incorporated organisations.

For further information please contact:

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Upcoming Seminars

All seminars will be held at our offices.

8 November - Direct Access to Institutional Investors in the Post-Crisis World

9 November - Housing Law for Beginners

10 November - TUPE: Managing Legal and Financial Risks

11 November - Management Toolkit: Dealing with Disciplinary, Grievances and Capability - Investigations, Hearings and Outcomes

24 November - Employment Contracts & Policies: What You Need to Have in Place for Your Workforce

1 December - Disposals and Consents

8 December - Maternity and Paternity Leave: What you need to know about family friendly rights

Further information can be obtained from our Marketing Department on 020 7628 7576 or email info@devonshires.co.uk or from the events section of our website at www.devonshires.com.

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