

WELCOME to Comerton & Hills summer edition of Spotlight.

The last few months have brought a wealth of changes to the law as it applies to local businesses here. This will mean varying degrees of change, depending on your individual circumstances.

The following articles summarise for you some of the key areas of change and gives you indicators on how you can effectively prepare for them now and in the months ahead.

As always, one of the Partners here will be glad to provide more detailed advice on the letter of the law as it applies to your individual circumstances.

Best wishes for an enjoyable holiday season.

Dan Fitzpatrick, Partner.



DEBT RECOVERY SERVICES: Advice for clients acting as creditors

Our clients often give their customers credit, particularly where the trading relationship is an established one and the client is part of a large group.

But businesses should be vigilant before undertaking "direct" credit.

When you approach a bank to raise finance you are asked for some form of security. If your business is incorporated as a limited company the security will almost always include third party guarantees, usually provided by the shareholders or directors. The directors then negotiate appropriate trade credit terms. You may see this as an option for you.

There are some key characteristics common to all guarantees that you need to be aware of, including:

- A guarantee is part of a Tripartite relationship in which the guarantor undertakes to a creditor that the principal debtor will fulfil its obligations.
- The principal debtor is primary liable to pay the creditor but if he fails then the guarantor must do so on his behalf.
- The guarantee is thus a Secondary obligation because it only becomes effective if the principal creditor fails to fulfil his obligations. Because it is a secondary liability, if that primary liability is not enforceable for any reason then, neither is the guarantee.
- A guarantee is a Contract and all the usual rules of contract apply but in addition, the guarantee must be in writing including all of its material terms to satisfy Section 4 of the Statute of Frauds 1677.

A modern example

In the recent dispute between Carlton Communications and Granada Media v Football League, the Football League tried to argue that an initial bid document containing a statement that OnDigital and its shareholders would guarantee all funding for the Football League was a sufficient document to satisfy the Statute of Frauds. The Court threw out the Football League's case as being unsustainable as the document was not signed by either Carlton or Granada.

If a guarantee covers a general trading situation including previous transactions, the legal document must be very carefully prepared and executed under seal as a deed.

Company guarantees

It is worth mentioning that while it is often individuals who are called upon to guarantee third party payment, companies themselves can also provide guarantee security. This should always be taken into account when granting credit to companies that are part of a trading group. It is not so long ago that builders merchants were duped into thinking that companies with whom they were dealing and which were part of well known construction groups would fulfil their credit obligations even though there was no formal guarantee in place. They learnt the hard way that this is not the case.

An alternative option, is that corporate guarantees can apply not only to the parent company in respect of the obligations of its subsidiary but also subsidiaries guaranteeing parent company obligations. In giving a guarantee a company must obtain sufficient corporate benefit. This is not

NEW DISABILITY DISCRIMINATION LAW CHANGES FROM OCTOBER 2005

Recent changes to the Disability Discrimination Act 2005 have been heralded by the Disability Rights Commission as a "major advance...for Britain's 10 million disabled people".

The first phase of this new legislation is being brought into force in October 2005 and the main provisions relate to:

- a new duty of public authorities to promote equality of opportunity for disabled people
- widening of the definition of disability
- improved access to rail transport by 2020
- improved ability to make adjustments to unsuitable rented accommodation
- liability for private clubs with 25 or more members
- liability for publishers of discriminatory adverts.

In addition, the key aspects you need to be aware of include:

The definition of disability: progressive conditions

Under the current law, a condition does not amount to a disability unless it substantially adversely affects the person's ability to carry out day to day activities.

The DDA 2005 extends the protection for people with progressive conditions. Once the changes come into force, persons with cancer, HIV and multiple sclerosis will be deemed disabled immediately, from the time of diagnosis. The government will be required to publish and implement a Disability Equality Scheme and report annually. A draft statutory instrument is available at www.disability.gov.uk.

Mental impairment

Under the DDA 1995, it was necessary to demonstrate that a mental impairment was a clinically well recognised illness. The DDA 2005 removes this obstacle. This will, no doubt, result in employees with less specific diagnoses, such as stress and anxiety, claiming protection. This highlights the need for employers to manage the risks of stress in the workplace and to deal with long-term absence pro-actively. However, it may also mean that

less need for employees and employers to obtain costly psychiatric reports for the purpose of determining the issue of disability in employment tribunals.

Public authorities

Public authorities will have a duty to promote equality of opportunity for disabled people, which is modelled on the duty to promote racial equality, introduced in 2001. This will include most local authorities, libraries, museums and NHS Trusts.

Further details are available on the HMSO website (www.hmso.gov.uk). To learn more about how this applies to your particular business, call Dan Fitzpatrick on 028 9023 4629 or email solicitors@comerton.co.uk

usually a problem in the case of a parent company guaranteeing the obligations of a subsidiary but it must be properly considered.

When the third party guarantee is provided by a company or companies, ensure you check that the company has the legal power to give guarantees and you have sight of appropriate Board Minutes (certified by the Chairman).

A final thought...

The time to obtain the guarantee is when the customer needs you and wants your credit. Many clients are now including guarantee wordings within their Credit Application Forms and some

forms are even titled "Credit Application and Guarantee".

The form of wording need not be complex but take legal advice as soon as possible.

A guarantee is not as good as money in the bank but, when if you are facing cash flow problems the greatest attention is likely to be given to those accounts which there are effective and legally binding guarantees.

For more information on how this applies to your particular business, call Mervyn White on 9023 4629 or email solicitors@comerton.co.uk

1st June 2005 marks the 15 months since the date for full implementation of the Proceeds of Crime Act (POCA) for all regulated companies such as accountants, estate agents, solicitors, and professional advisers.

15 Months on... how the Proceeds of Crime Act is shaping up Northern Ireland businesses...



"The Financial Services Authority fined banking group Abbey National £2.3 million for failing to make timely reports".

"Two Belfast IFAs charged with 22 counts of money laundering tax evasion".

"The Northern Bank fined £1.25m for failing to comply fully with identification procedures"

"Local Estate Agent prosecuted in connection with money laundering charges"

Local news clips

However, if your business handles cash transactions of £10,000 and above, you are also subject to AML regulations and the punitive repercussions will be exactly the same as the regulated sector. High value dealers such as auctioneers, jewellers, car dealers, and heavy machinery retailers are prime examples.

The POCA expects you to be able to identify suspicious activity and places a personal liability on you if you fail to do so. In addition, you must be able to demonstrate effective procedures for identifying, monitoring, reporting and recording this information.

If your business is found to have breached the legislation, the impact on your business will likely be:

- Loss of your professional and personal reputation
- Loss of your future income
- Ultimately the loss of your liberty

Below we listed the most common misconceptions Northern Ireland businesses have regarding AML compliance procedures, how local companies have been caught and how you can avoid the pitfalls.

MONEY LAUNDERING – THE TOP 10 MYTHS

'It only applies to cash transactions...'

The AML regulations regarding cash transactions of £10,000 and above only refer to High Value Dealers (HVD). For all other entities, you are NOT covered.

'The client is well known to our business...we don't need formal ID procedures'

This line of defence is worthless. Clients should understand your need to comply and support you in providing all relevant information.

'My business is small, they won't bother with me'

Criminal investigations are not ranked according to the size or significance of the perpetrators involved. In addition, criminals may often prefer the relative anonymity of smaller traders. This means small practices and sole traders are not exempt. Dedicated AML investigators have free access to all IR records, Government sources of information, Law Enforcement Agencies (LEA's), Banking/insurance returns, and will report all advisors involved in the chain of any criminal activity.

For further information on how this law applies to your business and what you should be doing to comply, call Dan Fitzpatrick on 028 9023 4629.

Property News

How the BUDGET IMPLICATIONS TO STAMP DUTY LAND TAX will affect you

As of 17 March 2005, the Chancellor doubled the starting point for SDLT to £120,000 for residential properties. This means for a property of £115,000 there will be no duty payable. However, for a purchase of £125,000 there will be a levy of £1,250 (1% of the total purchase price unless the property is located within a designated 'disadvantaged area' and is purchased for £150,000 or less, in which case, no duty is payable.). Property bought for more than £250,000 or more will attract higher rates of charge again.

In addition, Gordon Brown also announced the withdrawal of the exemption from duty of non-residential property in disadvantaged areas, with immediate effect. For non residential property, the starting point for SDLT is £150,000 but again higher rates will apply for non residential property bought for more than £250,000.

Finally, the budget also highlighted a series of new anti-avoidance rules to the SDLT regulations.

'The client didn't complete a transaction, so it doesn't count'

The focus of AML regulations is based on highlighting 'suspicious activity' not always in the form of completed transactions. If you only concentrate on completed transactions, again you risk the consequences.

'Our staff have done the CD-rom and so are fully trained'

The nature of the compliance procedures requires you and your staff to be proactive in identifying suspicious activity. It makes sense therefore that your approach to training your staff should also be as comprehensive as possible. If a member of your staff is successful in their defence of not having been adequately trained, your business itself will be liable to prosecution for breach of the Regulations.

'If we report everything then we're covered'

A lazy and dangerously easy option, which if practised, renders your statutory protection void. Also, it highlights to NCIS that you are 'defensive reporting' and don't understand the law properly. Again, you are leaving yourself open to an investigation of your procedures.

'Tax evasion isn't a crime'

Tax evasion is possibly the most significant consequence of the AML legislation. The Inland Revenue, along with the National Criminal Intelligence Service (NCIS) are dedicated to ensuring a proactive approach to secure this area of crime.

'We don't deal with criminals'

The truth of intelligent crime is that the offenders are neighbours, business colleagues, friends and family.

'We never have reason to report to NCIS'

If your business is in the regulated sector or handles cash transactions of over £10,000 you are almost certain to have regular need to make suspicious activity reports (SARs) to NCIS.

'I have a business to run and don't have the time for this'

Reporting is a matter of urgency. In addition to the revenue of over £4.5b from compliance and investigation activities alone, the Inland Revenue has increased the number of staff dedicated to proactively investigating money laundering.

Comerton & Hill Solicitors: AT A GLANCE

- An established and independent law firm specialising in Northern Ireland corporate legislation
- Over 38 years experience advising local, regional and international companies, and professional advisers on all areas of corporate law
- An extensive local network of high-quality legal and corporate contacts throughout Northern Ireland, Southern Ireland and the UK
- Act for a number of Northern Ireland's top companies including HSBC, NIIB (Bank of Ireland), Maxol & Lombard North Central (NatWest)

- Σ ISO 9001 accredited
- Σ Home Charter Scheme member

OTHER SERVICES OFFERED

- Insolvency & Bankruptcy
- Employment Law
- Landlord & Tenant law
- Property Law
- Corporate Legal work, including shares and corporate securities
- Probate
- Personal Injury Litigation