A SUMMARY OF MAJOR DEVELOPMENTS IN KEY AREAS
CONTENTS

02 DEVELOPMENTS OF GENERAL INTEREST

02 CORPORATE
02 EU audit reform
02 New EU Market Abuse Regulation

02 DISPUTES
02 Importance of getting arbitration clauses right
02 Court of Appeal softens Mitchell guidance but insists no return to old culture of non-compliance
03 Alternative Dispute Resolution practical guides launched

03 EMPLOYMENT
03 Statutory holiday: large potential liability for back pay following European Court of Justice ruling
03 Equal pay audits: draft regulations published for implementation on 1 October 2014
04 Flexible work regulations published: employers should review their policies

04 REAL ESTATE
04 Proposed Minimum Energy Performance Standards

04 TAX
04 New exemption from stamp taxes for recognised growth markets

05 SECTOR SPECIFIC DEVELOPMENTS

05 COMPETITION, REGULATION AND TRADE
05 EU General Court ruling in the Intel abuse of dominance appeal – no effects based approach to exclusivity rebates under Article 102 TFEU
05 EU Commission adopts revised "De Minimis Notice"

05 CONSTRUCTION
05 Decision of Technology & Construction Court regarding contractual discretion to reach a decision affecting rights of the parties

06 FINANCIAL SERVICES REGULATION
06 MiFID II: Phase 2 has begun
06 Market abuse – selective disclosure of inside information in the normal course of employment

06 INTELLECTUAL PROPERTY
06 The Intellectual Property Act receives Royal Assent

07 PENSIONS
07 Pension schemes carrying out valuations should take into account the Regulator’s revised Code on defined benefit funding

07 PLANNING
07 Proposed change in the law to facilitate “fracking” for shale gas

07 TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS
07 The bare essentials: UK Government launches Cyber Essentials Scheme

09 REGION SPECIFIC DEVELOPMENTS

09 AUSTRALIA
09 Waiving legal professional privilege by co-operating with insurers
09 New South Wales Supreme Court allows subpoenaed party to recover all legal costs
09 Neighbourly love: Baxter and the “bad” seeds

09 HONG KONG
09 The Securities and Futures Commission v Ernst & Young: Hong Kong court rules that restrictions on disclosure under PRC laws are inapplicable
10 The judiciary provides a framework for e-discovery in Hong Kong commercial litigation cases

11 CONTRIBUTORS

Please do not hesitate to contact any of the named people for further information on the items set out below. We would also like to hear whether you wish to receive this update more regularly or have other suggestions for its improvement. Please e-mail your comments to Simone Pearlman at simone.pearlman@hsf.com or your relationship partner.
DEVELOPMENTS OF GENERAL INTEREST

CORPORATE

EU audit reform

Legislation, in the form of a Regulation and Directive, has been published in the Official Journal of the European Union which will substantially change the statutory audit market in the EU. Most of the changes will come into force in June 2016, but there are transitional provisions for some of the major elements.

The changes to the existing regime are substantial, particularly in relation to the audit of public-interest entities (that is listed companies, credit institutions and insurers), and both companies and auditors will need to be prepared.

Key elements of the reform are:

- Mandatory rotation of auditors after 10 years (or 20 years if the Member State allows and there is a public tender at 10 years).
- A restriction on the non-audit services that may be provided by an auditor to an audit client in terms of both types of service and levels of fees in comparison to the audit fee.
- Mandated audit committee duties.
- The inclusion of more detail in the audit report about how the audit was conducted and key issues identified.
- A prohibition on contractual restrictions on the choice of auditor.

For further information please contact Kathryn Cearns at kathryn.cearns@hsf.com.

New EU Market Abuse Regulation

The new EU Market Abuse Regulation (MAR) has been published in the Official Journal and is directly applicable in EU countries from July 2016.

MAR, and a criminal sanctions Directive (CSMAD), will replace completely the current Market Abuse Directive.

MAR has direct effect in Member States because it is a Regulation rather than a Directive, and so will not need to be implemented by way of domestic legislation. It will also create a single EU market abuse rule book. At the point of implementation, Member States will need to amend and, where appropriate, repeal the current provisions in national legislation. In the UK, for example, the Disclosure Rules for listed companies set out in the Financial Conduct Authority’s Disclosure and Transparency Rules will be repealed and the provisions of MAR will take effect in their place.

The changes to the market abuse regime that will impact traded companies include the following:

- an EU-wide harmonised format for insider lists;
- new rules on disclosure of transactions by persons discharging managerial responsibilities;
- more onerous criteria for the share buyback safe harbour; and
- new prescriptive procedures for “market soundings” (ie, the communication of information to one or more potential investors prior to the announcement of a transaction).

For more information, contact Carol Shutkever at carol.shutkever@hsf.com or Karen Anderson at karen.anderson@hsf.com.

DISPUTES

Importance of getting arbitration clauses right

Despite the English court’s benevolent approach to the construction of arbitration clauses, the recent case of Christian Kruppa v Alessandro Benedetti and Bertrand des Pallieres [2014] EWHC 1887 (Comm) gives a clear warning as to the limits of the court’s willingness to reconcile conflicting provisions. The clause in question read: “Laws of England and Wales. In the event of any dispute between the parties pursuant to this Agreement, the parties will endeavour to first resolve the matter through Swiss arbitration. Should a resolution not be forthcoming the courts of England shall have non-exclusive jurisdiction”.

The Court found that the parties had not agreed any dispute to arbitration. They had agreed to “endeavour” to resolve the matter through Swiss arbitration. The Court decided that the parties had agreed to attempt to agree on a form of arbitration between them in Switzerland. If they failed to reach that agreement, the English court would have non-exclusive jurisdiction.

While the English courts do seek to reconcile conflicting provisions in favour of arbitration, this case shows the limits of that approach. The uncertainty in the clause resulted in jurisdictional wrangling with accompanying cost and delay and underlines the importance of a tightly drafted dispute resolution clause. If the parties wish to arbitrate, the submission to arbitration should be clear and unequivocal. For further discussion of the case, please see our blog post.

For further information, please contact Nick Peacock at nicholas.peacock@hsf.com.

Court of Appeal softens Mitchell guidance but insists no return to old culture of non-compliance

In previous updates we have reported on the courts’ new tough line on compliance with rules and court orders following the Court of Appeal’s high profile decision in the Mitchell “plebgate” case. In a decision handed down on 4 July 2014 in a triple appeal, the Court of Appeal has taken the opportunity to clarify and amplify the Mitchell guidance on relief from sanctions under CPR 3.9, which it said had been misunderstood and was being misapplied by some courts:

Denton v TH White Ltd, Decadent Vapours Ltd v Bevan, Utilise TDS Ltd v Davies [2014] EWCA Civ 906.

The Court replaced the Mitchell guidance with a three-stage test which requires the court to: (i) identify and assess the “seriousness and significance” of the breach; (ii) consider why the breach occurred; and (iii) have regard to all the circumstances of the case, a point that was being overlooked in some cases following Mitchell.

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Interestingly, however, Lord Justice Jackson disagreed with Lord Dyson MR and Lord Justice Vos on the detail of this third aspect of the test. The latter considered that the two factors set out in CPR 3.9(1) (namely (a) the need for litigation to be conducted efficiently and at proportionate cost; and (b) the need to enforce compliance with rules, practice directions and orders) were to be given particular weight, whereas Lord Justice Jackson thought they were amongst the matters to be considered, no more, no less.

Although the decision continues to emphasise the need for strict compliance, it also makes it clear that the courts are ready to penalise those who try to hold their opponents to what the court sees as an overly strict approach. Heavy costs sanctions will be imposed on those who unreasonably refuse to agree extensions of time or who unreasonably oppose applications for relief from sanctions. In this way the court hopes to put an end to the satellite litigation and non-cooperative approach that Mitchell has generated.

For further information see our blog post on the decision or contact Anna Pertoldi at anna.pertoldi@hsf.com.

Alternative Dispute Resolution (ADR) practical guides launched
Herbert Smith Freehills has launched the first set in a series of ADR practical guides, designed to provide clients with essential practical guidance on various processes falling under the banner of “alternative dispute resolution”, with a particular focus on mediation.

The guides have been prepared to assist both legal and non-legal client representatives in getting the most out of an ADR process and preventing it being de-railed by issues that could have been foreseen and avoided. They include checklists of issues to consider at each stage of the process, from deciding whether and when to use ADR through to procedure and strategy on the day of a mediation.

The first five guides in the series, available here, are:
1. Common ADR processes – an overview
2. An introduction to mediation – what it is and how it works
3. When to mediate in a dispute
4. Selecting your mediator and drafting the mediation agreement
5. Preparing for mediation

To be informed when new guides in the series are published, subscribe to our ADR blog “ADR Notes” (or visit the blog at any time for the latest updates on ADR topics internationally). It can be found at http://hsfnotes.com/adr.

For more information please contact Alexander Oddy at alexander.oddy@hsf.com or Jan O’Neill at jan.oneill@hsf.com.

EMPLOYMENT
Statutory holiday: large potential liability for back pay following European Court of Justice (ECJ) ruling

Employers should review their approach to calculating holiday pay for employees and workers who have fixed normal hours but receive variable payments such as commission. An ECJ ruling has held unlawful UK provisions which permit employers to pay such workers statutory holiday pay at the rate of basic salary and ignore commission that the worker would normally generate when working.

The ECJ has ruled that workers must be paid for their four week statutory minimum holiday entitlement at their normal pay rate, to include all elements of pay which are “intrinsically linked” to the performance of the tasks which the worker is required to carry out under their contract. This includes commission paid for sales a worker would have generated had they not been on holiday (even where payable after, rather than during, the holiday). In such cases pay should be calculated using an average over a representative period.

The case will now return to the employment tribunal to determine whether UK law can be interpreted in line with the ruling. The recent trend of creative judicial interpretation suggests this is likely to be possible. The Advocate General proposed averaging pay over a 12 month period, but it may be that the tribunal will instead average over 12 weeks, given this is the period already used in UK law for workers with no normal working hours. (Lock v British Gas Trading C-539/12)

Holiday pay claims can be brought within three months from the last of the series of deductions (or underpayments), therefore potentially going back years. Employers may wish to consider making contingency plans in respect of their potential liability. There may also be an opportunity for employers to break the chain of deductions and thereby potentially render historic claims out of time, by paying a higher rate for holiday from now on (at least for the first four weeks of entitlement). On the downside is the risk of alerting employees to potential claims and the uncertainty over what the tribunals will decide – see our blog for further details.

Similar issues may arise where workers receive voluntary overtime pay or bonuses; the Employment Appeal Tribunal is due to consider the issue of overtime in two cases at the end of July 2014 (Neil v Freightliner, Fulton v Bear Scotland).

Employers should look carefully at the nature and drafting of any bonus schemes they operate for employees with fixed normal hours, to identify possible claims that holiday pay should include a bonus element, but also to minimise the potential for claims when drafting future bonus schemes.

For further information please contact Tim Leaver at tim.leaver@hsf.com.

Equal pay audits: draft regulations published for implementation on 1 October 2014

The Government has published draft regulations confirming details of its proposal to require tribunals to order equal pay audits where an employer loses an equal pay case, planned to take effect from 1 October 2014 (subject to the parliamentary affirmative resolution procedure). Tribunals must not order an audit if the employer has already carried out a qualifying audit within the preceding three years, the action required to avoid equal pay breaches is clear without an audit, there is no reason to think there may be other breaches, or the disadvantages of an audit outweigh the benefits.

The draft regulations provide that the audit must include pay information for men and women for the categories of employees and period specified by the employment tribunal, the pay difference and reasons, the reason for any potential equal pay breach identified, and the employer’s plan to avoid equal pay breaches. The employer must be given at least three months to complete the audit and if it fails to do so can be subject to a penalty of £5,000.
Significantly, the Government appears to have backtracked on its original decision not to require employers to publish the results of their audits generally, but only to the employees subject to the audit. The draft regulations require publication on the employer’s website for at least three years (save to the extent it would involve a breach of a legal obligation), together with a requirement to inform all employees covered by the audit where they can obtain a copy. Clearly employers would need to factor this into decisions on settlement of claims and on whether to conduct a voluntary audit.

For further information please contact Peter Frost at peter.frost@hsf.com.

**Flexible work regulations published: employers should review their policies**

From 30 June 2014, the right to request flexible working became available to all employees with 26 weeks’ service, not just those with caring responsibilities. For requests made on or after 30 June, the statutory procedure for dealing with a request is replaced with a duty to consider requests in a reasonable manner, supplemented by an Acas Code of Practice. The change means that employers are no longer obliged to allow employees to be accompanied by a work colleague to a discussion meeting, nor to allow an appeal where a request is rejected, although the Code states that these remain good practice. The strict time limits for meetings and notices under the old procedure are also removed. Instead, the employer has three months to consider the request, discuss it with the employee if appropriate and notify its decision; this period can be extended by agreement with the employee (perhaps to allow for a trial period).

Employers may need to update their flexible working policies to reflect these changes. Employers will also need to consider how they will handle competing requests while avoiding potential discrimination, and ensure a paper trail to explain the reasons for their decisions. Our briefing for clients looks at the new regime in detail – please contact Anna Henderson at anna.henderson@hsf.com for a copy.

For further information please contact Andrew Taggart at andrew.taggart@hsf.com.

**REAL ESTATE**

**Proposed Minimum Energy Performance Standards**

In the last General Counsel Update we reported on provisions in the Energy Act 2011 which require the Government to bring regulations into force which could prohibit the letting of the least energy efficient commercial and residential properties until measures to improve their energy efficiency have been performed. The regulations are not in force yet but must be brought into force no later than 1 April 2018. They are likely to apply to properties rated F or G on their Energy Performance Certificates which, research suggests, could amount to 17% of commercial buildings. We reported that the Department of Energy and Climate Change expected to publish a consultation in spring 2014 but, at the time of writing, the consultation has not been published. In a letter to the Prime Minister at the end of May, signed by some of the UK’s biggest property owners, the UK Green Building Council called for an end to the current prevarication and asked for the consultation to be published as soon as possible.

For further information please contact Shelagh McKibbin at shelagh.mckibbin@hsf.com or Don Rowlands at donald.rowlands@hsf.com.

**TAX**

**New exemption from stamp taxes for recognised growth markets – applies from 28 April 2014**

UK stamp taxes (ie, stamp duty and stamp duty reserve tax (SDRT)) on purchases of securities admitted to trading on recognised growth markets (which include the Alternative Investment Market (AIM) and the High Growth Segment) have been abolished. The exemption came into effect on 28 April 2014 (for contracts made on or after that date, or conditional contracts made before that date if the condition is satisfied on or after 28 April 2014).

**Eligible securities**

The exemption applies to securities that are:

- admitted to trading on a recognised growth market; and
- not “listed” on a recognised stock exchange in the UK or elsewhere.

**Recognised growth markets**

HMRC have announced five markets which have “recognised growth market” status. These are:

- Alternative Investment Market (AIM);
- Enterprise Securities Market (ESM);
- GXG Markets A/S;
- High Growth Segment; and
- ICAP Securities and Derivatives Exchange Limited (ISDX).

**Recognised stock exchanges**

In order to benefit from the exemption, the securities must not be listed on a “recognised stock exchange”. A list of recognised stock exchanges is available [here](#).

**Procedural step for issuers**

The London Stock Exchange requires an issuer of securities admitted to AIM or the High Growth Segment to certify to Euroclear UK & Ireland (EUI) that its securities meet the exemption conditions (see London Stock Exchange Notices N03/14 and N04/14). Until such certification is given, EUI will continue to collect SDRT on transactions in securities of that issuer.

For further information please contact Howard Murray at howard.murray@hsf.com.
SECTOR SPECIFIC DEVELOPMENTS

COMPETITION, REGULATION AND TRADE

EU General Court ruling in the Intel abuse of dominance appeal – no effects based approach to exclusivity rebates under Article 102 of the Treaty on the Functioning of the European Union (TFEU)

In its Intel judgment of 12 June 2014 (Case T-286/09), the EU General Court continued its line of previous cases enforcing a strict approach to so-called exclusivity rebates under the Article 102 TFEU prohibition of abuse of dominance. Exclusivity rebates are designed as a financial inducement to ensure customers obtain all or most of their requirements exclusively from a supplier. The Court found that, when granted by a dominant company, exclusivity rebates are by their very nature capable of restricting competition and foreclosing competitors from the market, without any need to assess the circumstances of the case in order to show that they (actually or potentially) have the effect of foreclosing competitors from the market.

The ruling will be a disappointment to those who eagerly anticipated that the Court might have moved away from its traditional form based approach to rebate schemes, towards an effects based analysis under the “as efficient competitor” (AEC) test advocated by the EU Commission in its Guidance on its enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct. The Court explicitly rejected the need to apply the AEC test, and found that anti-competitive foreclosure and a breach of Article 102 TFEU can exist even where a competitor is still able to cover its costs despite the rebates, or where market entry remains possible but is simply made more difficult.

See our e-bulletin for a more detailed briefing on the case.

For further information please contact Kim Dietzel at kim.dietzel@hsf.com or Craig Pouncey at craig.pouncey@hsf.com.

EU Commission adopts revised “De Minimis Notice”

On 25 June 2014 the EU Commission issued a revised version of its “De Minimis Notice”. This Notice provides a “safe harbour” from the Article 101 TFEU prohibition of anti-competitive agreements for certain minor agreements; the parties can presume their agreement does not appreciably restrict competition in breach of the prohibition where their market shares fall below specified thresholds. The new Notice does not change these thresholds, which remain as follows:

- In relation to “horizontal” agreements between actual or potential competitors, the combined market share of the parties (including their wider corporate groups) does not exceed 10% on any of the markets affected by the agreement.
- In relation to “vertical” agreements between companies at different levels of the supply chain, the market share of each of the parties (including their wider corporate groups) does not exceed 15% on any of the markets affected by the agreement.

The Notice now states, however, that it will not apply to any provisions which are regarded as restrictive of competition by “object”, or which are specified as “hard core” within any current or future “block exemption” regulation. Object restrictions are the most serious restrictions of competition law; this concept includes cartel behaviour such as price-fixing or market sharing, but it has also been extended to less obvious forms of restriction in recent years. In addition, the new Notice states that object restrictions will always be regarded as appreciably restricting competition, regardless of the size of the parties or the (lack of) impact of the agreement on competition in practice.

Whilst the renewal of the Notice is welcome, the Commission’s approach to object restrictions is strict. In particular in light of the expanding definition of such restrictions, even agreements involving small players and which may have little impact on competition in practice may breach the rules; competition law compliance is therefore more important than ever.

See our e-bulletin for further details.

For further information please contact Kim Dietzel at kim.dietzel@hsf.com or Craig Pouncey at craig.pouncey@hsf.com.

CONSTRUCTION

Decision of Technology & Construction Court regarding contractual discretion to reach decision affecting rights of the parties

A substantial judgment ([2014] EWHC 2132) was delivered by Mr Justice Ramsey on 30 June 2014. It relates to claims arising under a subcontract for the fabrication of a tower based soft yoke mooring system in the Caspian Sea. The judgment relates to many aspects of the various claims put forward by the parties but a particular focus is on the duties of a party which is given a discretion under the terms of a contract to reach a decision affecting the rights of the parties.

The first issue arose in relation to the contractor’s power to issue a notice of termination. The contractor was permitted to do so if the subcontractor had not remedied a default with actions satisfactory to the contractor. The Court concluded that the question of whether the subcontractor’s action was satisfactory was to be decided on the basis of concepts of honesty, good faith and genuineness and the need for the absence of arbitrariness, capriciousness, perversity and irrationality.

A similar conclusion was reached in relation to the contractor’s power to forfeit the subcontractor’s entitlement to compensation for a variation if the subcontractor failed to request the issue of a variation without delay or to provide supporting estimates. The Court held that this discretion was limited in the same way as the power to terminate on the basis of the Socimer case. The contractor would need to consider the effect of the subcontractor’s failures to comply with the notice requirements on its ability to adjust the contract price or schedule of key dates.

This case indicates that there are limits on what might otherwise appear to be an unfettered discretion and, although each contract
must be interpreted according to its terms, this case is likely to be of persuasive interest in relation to future cases before the courts, adjudicators or arbitrators.

For further information please contact Ann Levin at ann.levin@hsf.com.

**FINANCIAL SERVICES REGULATION**

**MiFID II: Phase 2 has begun**

The Markets in Financial Instruments Directive (MiFID), which regulates investment services across the European Economic Area, will be replaced by a new Directive (MiFID II) and Regulation (MiFIR) (MiFID II) from 3 January 2017. Implementation of MiFID II will significantly impact both the structure and operation of EU financial markets and provide increased protection for investors.

MiFID II/MiFIR included more than 100 requirements for the European Securities and Markets Authority (ESMA) to draft Regulatory Technical Standards (RTS)/Implementing Technical Standards (ITS) and to provide Technical Advice to the European Commission to allow it to adopt delegated acts.

ESMA has published:
- a consultation paper on Technical Advice (CP) which ESMA must deliver to the European Commission by December 2014; and
- a discussion paper on the draft RTS/ITS (DP) which will provide the basis for a further consultation paper on the draft RTS/ITS (likely to be published in late 2014/early 2015).

Responses to the DP and CP must be submitted by 1 August 2014.

Our briefing provides an overview of the key MiFID II/MiFIR provisions and the topics covered by the DP and CP.

For further information please contact Clive Cunningham at clive.cunningham@hsf.com, Karen Anderson at karen.anderson@hsf.com or Pat Horton at patricia.horton@hsf.com.

**Market abuse – selective disclosure of inside information in the normal course of employment**

On 27 May 2014, the Upper Tribunal issued its decision confirming the FSA decision (April 2012) that Mr Hannam committed market abuse under section 118 (3) of the Financial Services and Markets Act 2000 (FSMA) through the improper disclosure of inside information.

The basis of the market abuse decision against Mr Hannam were two emails sent by him in 2008 which were held to constitute a disclosure of inside information to another person otherwise than in the proper course of his employment, profession or duties. The FSA accepted that Mr Hannam had not intended to commit market abuse, that his honesty and integrity were not in question, that he had not gained personally as a result of the disclosure and that there was no evidence that anyone had dealt in shares as a result of the disclosure.

For listed issuers and their advisers, the judgment provides some useful pointers in its painstaking analysis of the law and the facts, and in its approach to assessing why the information disclosed was inside information, and why the disclosure could not be considered to have been made in the proper course of employment. The Tribunal also suggests that an issuer may be entitled to delay announcement to avoid the risk of share price volatility that might be created if, as a result of the announcement of partial information, the market was misled.

For further information please contact Karen Anderson at karen.anderson@hsf.com, Jenny Stainsby at jenny.stainsby@hsf.com, Hywel Jenkins at hywel.jenkins@hsf.com or Mike Flockhart at mike.flockhart@hsf.com.

**INTELLECTUAL PROPERTY**

**The Intellectual Property Act receives Royal Assent**

The main purpose of the Intellectual Property Act 2014, which has now received Royal Assent, is to modernise certain aspects of intellectual property law “in order to ensure that the IP system operates more efficiently and is clearer and more accessible, thus increasing legal certainty” (taken from the Explanatory Note).

The Act primarily deals with patent and design laws but, significantly, includes provisions to allow the UK to ratify and implement the Unified Patent Court Agreement. There are new criminal penalties for intentional infringement of registered designs, strengthening of the patent Opinions service and a new Opinions service for registered designs, as well as “improvements” to unregistered design right law. Provision is also made for a research exemption from disclosure in relation to freedom of information and for the automatic extension of certain existing copyright provisions to nationals of and works first published in other countries (without the need to include a list of countries and territories in an order).

It will be for the Secretary of State to make orders bringing the new measures into force, but it is expected that they will begin to come into force from October 2014, with all measures implemented by late 2015.

**Key elements of the Bill:**
- **Patents**
  - New powers to enable the UK to implement the Unified Patent Court Agreement (UPCA)
  - Patent Opinions – Extension of power to revoke a patent; broader grounds for seeking an opinion, and Opinions on Supplementary Protection Certificates to be allowed
  - Sharing information with overseas patent offices
  - Patent web link can replace patent number on products
- **UK design right**
  - The repeal of first ownership of UK design rights for the commissioner (transitional arrangements apply)
  - Removal of the words “of any aspect of” from the definition of “design” that can be protected by UK design right
  - Originality – “commonplace” to be limited to commonplace in qualifying countries
  - Qualifying criteria – no more “qualifying individuals”
  - Exceptions to be introduced such that acts done privately for purposes which are not commercial, acts done for experimental purposes and acts of reproduction for teaching or citation purposes will not be an infringement
- **Registered design**
  - New criminal penalties for deliberate copying of a UK or Community registered design
  - New application of criminal penalties to partnerships
PENSIONS

Pension Schemes carrying out valuations should take into account the Regulator’s revised Code on defined benefit funding

The Pensions Regulator has issued the final version of its revised Code of Practice for funding of schemes with defined benefits (DB) and its Annual Funding Statement. The revised Code, expected to be in force by the end of this month, is in part the Regulator’s response to its new objective of “minimising any adverse impact on the sustainable growth of an employer”. The Funding Statement sets out the regulator’s views on market conditions and their likely impact on schemes for schemes undertaking actuarial valuations with effective dates between 22 September 2013 and 21 September 2014.

Key messages of the Code are that trustees should adopt an integrated approach to addressing employer covenant (the employer’s willingness and ability to fund the scheme), investment and funding risks; a more tailored approach, depending on the scheme and the employer’s circumstances, should be adopted when setting deficit recovery plans. The Regulator has also put in place a new strategy for intervention with schemes called the “Funding Risk indicator”; the previous trigger for intervention when schemes put in place a recovery plan of 10 years or more will no longer apply. Employers and trustees should familiarise themselves with the Code and the Funding Statement to ensure these are taken into account in the scheme’s next actuarial valuation.

For more on the Regulator’s suite of documentation on DB funding, see our e-bulletins here and here.

If you would like to know more on how these developments apply to your scheme, please contact Daniel Schaffer at daniel.schaffer@hsf.com.

PLANNING

Proposed change in the law to facilitate “fracking” for shale gas

On 23 May 2014 the Government announced a 12 week consultation with respect to a proposal to change the law to allow licensed oil and gas operators and geothermal companies to use underground land for the purpose of the extraction of oil and gas and the promotion of geothermal developments. The media focus has been predominantly on the way in which the proposed change in law would facilitate the development of hydraulic fracturing (“fracking”) for shale gas across the UK. The existing law is a particular problem for fracking operators because of the large areas of underground land they require in order to extract gas. While oil and gas itself is owned by the Crown and licensed by the Department of Energy and Climate Change to individual operators, the existing law does not authorise the operator to access the resource via underground land not in the operator’s ownership. The change in law, if it is enacted, would be hugely welcomed by the operators as it would avoid the need to go through the archaic and lengthy Mines (Working Facilities and Support) Act 1966 court process to obtain the necessary rights.

For further information please contact Matthew White at matthew.white@hsf.com or Catherine Howard at catherine.howard@hsf.com.

TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS

The bare essentials: UK Government launches Cyber Essentials Scheme

The Government has launched its new “Cyber Essentials” scheme as the next step in its “10 Steps to Cyber Security” initiative.

The scheme provides a clear statement of the basic controls all organisations should implement to mitigate the risk from common internet based threats. In addition, it offers by way of a certification process, a mechanism for organisations to demonstrate that they have taken such steps.

The scheme’s requirements are focussed on internet originated attacks against an organisation’s IT system and concentrate on five key controls:

- boundary firewalls and internet gateways;
- secure configuration;
- access control;
- malware protection; and
- patch management.

Organisations can either self-assess their compliance with the requirements in order to be awarded the Cyber Essentials certification, with such self-assessment being subsequently verified by an independent certification body. Or alternatively, they can achieve the
higher standard of Cyber Essentials Plus through the external testing of the organisation’s cyber security approach.

BAE Systems, Barclays and Hewlett Packard are reported to be some of the first organisations to apply for the new certification and, whilst the scheme is not mandatory, the Government has confirmed that, from 1 October 2014, it will require all suppliers bidding for certain contracts which are assessed as higher risk to be Cyber Essentials certified. This is likely to include information and communications technologies and personal and sensitive information handling contracts.

For further information please contact Nick Pantlin at nick.pantlin@hsf.com.
REGION SPECIFIC DEVELOPMENTS

AUSTRALIA

Waiving legal professional privilege by co-operating with insurers

A recent Federal Court of Australia decision highlights the need to carefully consider providing confidential legally privileged information to third parties, especially insurers, unless there are specific measures in place to preserve the confidentiality of such information.

In Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 2) [2014] FCA 481, the frequently arising issue of potential waiver of privilege when policyholders provide such documents to their insurers was discussed. This decision provides important guidance on how policyholders should respond to requests from insurers for confidential documents.

To read our briefing on this case please click here.

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New South Wales Supreme Court allows subpoenaed party to recover all legal costs

The NSW Supreme Court recently allowed an application by a third party subpoenaed to produce documents for legal costs incurred in relation to that subpoena, Sunfield Resources Pty Limited v Waratah Resources Limited [2014] NSWSC 788. The application was allowed in spite of submissions that the legal costs related not only to advice provided to the applicant as to its compliance with the subpoena, but advice as to whether the applicant might resist the subpoena.

The Court noted the general principle that a subpoenaed party is entitled to recover its reasonable costs in complying with a subpoena and that these costs may include reasonable costs of obtaining legal advice in relation to the subpoena where, for example, “the terms of the subpoena are unclear” or “where there may be other difficulties in complying with the subpoena”. The Court also noted that a subpoenaed party is not entitled to recover legal costs incurred in seeking advice as to the validity of the subpoena.

In this case, the Court accepted that “it was difficult to draw [the] distinction” because the reasonable costs of legal advice as to the width of the subpoena and how the party should comply were recoverable. Having regard to the costs sought by the applicant, which the Court found to be reasonable, recovery of all legal costs by the applicant was allowed.

This case highlights the importance of seeking appropriate legal advice about subpoenas to ensure recovery of reasonable legal costs. It is also a reminder that not all costs will be recoverable – where legal advice is to challenge the subpoena, the costs of that advice will not fall within the general principle enunciated in this case (although may be recoverable on other bases).

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Neighbourly love: Baxter and the “bad” seeds

The debate regarding genetically modified (GM) foods has reigned in Australia with a recent decision of the WA Supreme Court (Marsh v Baxter [2014] WASC 187) in a matter involving neighbouring farmers, Marsh, an organic wheat producer, and Baxter, a convert to GM canola.

In 2010, when Baxter harvested his trial GM crop, GM seeds were blown onto and “contaminated” Marsh’s land, resulting in the cancellation of Marsh’s organic certification. With the support of the Safe Food Foundation, Marsh sued Baxter, seeking compensation for alleged losses and orders preventing Baxter from growing GM crops near Marsh’s property. The Court rejected the claim, finding that Baxter had used reasonable harvesting methods, had not caused any physical damage, and that there was no evidence the GM canola was harmful. The Court also suggested the appropriate avenue of redress for Marsh was against the organic certification body.

The judgment has been lauded a triumph for the freedom of farming, as the implications for the cropping community, particularly farmers neighbouring organic farms, are significant.

The case may also prove a catalyst for change, with the WA Government lodging a request with the Organic Industry Standards and Certification Council for the tolerated threshold of GM trace elements in organic products to be increased from zero to 0.9%, consistent with the approach in many countries worldwide.

As for Marsh and Baxter, the episode continues. Marsh, again backed by the Safe Food Foundation, has lodged an appeal, demonstrating that the controversy over GM foods will not easily be blown away.

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HONG KONG

The Securities and Futures Commission v Ernst & Young: Hong Kong court rules that restrictions on disclosure under PRC laws are inapplicable

In this recent case, the Court was asked to inquire into non-compliance by Ernst & Young (EY) with notices issued by the Securities and Futures Commission (SFC).

EY resisted disclosure of audit working papers to the SFC and contended, amongst other things, that the documents sought contained State secrets, which cannot be disclosed under PRC laws. The Court rejected this argument and held that whether the documents sought constituted State secrets depends entirely on their contents. As the expert witnesses were not shown the audit working papers, there was no evidence that they contained State secrets under PRC laws.

The Court therefore directed EY to comply with the notices as the documents sought were found to be in EY’s possession, and EY had no reasonable excuse to not comply with them.
As EY was held to have deliberately withheld from SFC information in its knowledge which was responsive to the SFC notices, the Court awarded costs on an indemnity basis against EY.

It is therefore important for companies to conduct all necessary internal investigations before responding to any notice issued by the SFC and ensure no information in the company’s possession is withheld from the SFC unless there is a reasonable excuse for doing so. The burden of proving that there are reasonable grounds lies with the party resisting compliance, and bare assertions will not be accepted by the court.

Click here to read a more detailed report on the case in our Hong Kong Regulation e-bulletin.

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The judiciary provides a framework for e-discovery in Hong Kong commercial litigation cases

Practice Direction SL1.2 provides a framework for the reasonable, proportionate and economical discovery and supply of electronic documents as evidence. It applies to all actions commenced in, or transferred to the Commercial List on or after 1 September 2014 where the claim or counterclaim exceeds HK$8 million and there are at least 10,000 documents to be searched, or where either the parties agree or the court directs them to follow the Practice Direction. In respect of what is discoverable, the Practice Direction applies a narrower test of direct relevance than the usual broad Peruvian Guano “train of enquiry” test, which remains applicable in Hong Kong for general discovery.

The new framework encourages a co-operative party-driven approach involving proactive discussion early on in the proceedings to agree, amongst other issues, on the scope of electronic discovery. A questionnaire called the Electronic Documents Discovery Questionnaire (EDDQ) is contained in a Schedule to the Practice Direction. It is designed to assist the process and to concentrate the parties’ minds on issues such as who the relevant custodians are, the parameters the parties want to put in place around a search, source of documents and their accessibility. The Practice Direction recommends parties file the EDDQ in draft form at the pleadings stage (but in any event, with a statement of truth, seven days before the first case management conference).

See our e-bulletin for a more detailed briefing on the practice direction and its possible implications in Hong Kong.

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