



# The Advocate

The newsletter of Bennett Griffin Solicitors | issue 6

## Lifting the Corporate Veil

### Q: When is limited liability not limited liability?

The above question almost sounds like the start of a joke, except it's not and, as Bennett Griffin has recently proved in the Court of Appeal, the consequences are no laughing matter.

What started as our client's debt claim for £1,800 back in 2005 had by April 2011 escalated to the Court of Appeal with a director of the debtor company at risk of a legal bill in excess of £100,000.

For Bennett Griffin's client, the story is a happy one; they recovered their legal costs and they were justified in following our advice to pursue the director in question for what would otherwise have been a costs bill swallowed up in the liquidation of the debtor company.

For company directors, the story is a worthwhile reminder of their duties and obligations to the company.

In this case, when Bennett Griffin raised questions as to a particular director's discharge of his duties and obligations in relation to the conduct of the litigation that followed our client's debt claim, he was found wanting and his actions caused the Court of Appeal to find that he should be personally liable for the bill of costs the debtor company could not pay.

Primarily, the case is a good result for our client. But for the firm, the outcome, which will no doubt be followed as a precedent for future claims of this type, is a reflection of the dedication shown by Darren

Edwards, Peter Bennett and Mark Diamond of the firm's Company and Commercial Department throughout the case.

A: When the person seeking to rely on the limited liability acts without proper and expert advice.

**If you have any questions on dispute resolution or the duties of directors, please do not hesitate to contact Peter Bennett on 01903 706952 or email [pgb@bennett-griffin.co.uk](mailto:pgb@bennett-griffin.co.uk) or Mark Diamond on 01903 706977 or email [msd@bennett-griffin.co.uk](mailto:msd@bennett-griffin.co.uk)**



Mark Diamond,  
Solicitor

## How will the proposed pension rules affect your business?

The UK Government are introducing new pension rules from 2012 that will have a wide spread impact on businesses. The new brand of pensions will be called – The National Employment Savings Trust or NEST.

These changes will be aimed at increasing the number of people saving for retirement which for many millions, is largely under funded.

Using compulsion the Government widely expects to transform UK State Pensions and make it easier for people to save for retirement.

The new legislation does however create a huge cost and responsibility for businesses.

Employers will be required to automatically enrol employees into a qualifying workplace pension scheme from October 2012. Depending on the size of your company you will be required to contribute a minimum of 3% of each of your employees 'eligible earnings', assuming they do not opt out.

Recognising the administrative difficulties involved the DWP is proposing to 'stage' the employer duties over 4 years.

A small group of randomly selected employers with less than 50 workers will have their staging date brought forward before the majority of small employers to make sure that the auto-enrolment systems and processes work properly for these employers.

These changes might have significant consequences for your business and you should seek professional advice as soon as possible. There will be fixed and then escalating penalties for non compliance of between £50 and £10,000 per day, depending on the number of employees involved for non compliance.

**If you would like further information or advice on pensions please contact Nick Jenner, our pension expert at BG Wealth Limited the Financial Planning arm of Bennett Griffin on 01903 331280.**

# Changes To Business Rate Relief For Small Premises

Prior to April 2011 owners of smaller commercial premises in England benefitted from a relief from business rates when those premises were vacant provided the rateable value of the premises was under £18,000.00.

From 1 April 2011, the threshold of the rateable value of premises for which the relief can be claimed reduced to £2,600.00.

The purpose of the change is to stimulate activity in the market for such premises by placing an incentive on the owner to offer better terms to smaller businesses for buying or leasing such premises in order to pass the liability for the rates to the new owner/occupier. Improved terms may include, amongst other things, reduced rents, longer rent free periods and renovations or

improvements being carried out at the cost of the landlord.

Bennett Griffin LLP acts for all of the following on commercial property transactions:

- Landlords - leasing premises to new tenants or transferring existing leases between tenants;
- Tenants – taking grants of new leases or acquiring or disposing of existing leases;
- Sellers or buyers of commercial premises including acquisitions for pension funds and charities.

**Please contact Rob Fawcett on 01903 706967, email [rjf@bennett-griffin.co.uk](mailto:rjf@bennett-griffin.co.uk) or Darren Edwards on 01903 706971, email [dre@bennett-griffin.co.uk](mailto:dre@bennett-griffin.co.uk) for further information.**



## Bribery Act 2010

Earlier this year the Government published its long awaited guidance on the procedures organisations should put into place to enable them to rely on the statutory defence to a charge of failing to prevent bribery. The guidance also confirmed that the Bribery Act will come into force on 1 July 2011.

After publication of the Act last year there were serious concerns that corporate hospitality would constitute bribery under the Act. The Guidance makes it clear that the Act is not intended to prevent “bona fide hospitality” such as taking clients or customers to Wimbledon or the Olympics. However, it does warn that in some sectors the lavish nature of corporate hospitality, such as long flights and lavish accommodation, may put organisations at risk.

Organisations have a limited period to put into place procedures to prevent bribery and therefore be able to rely on the statutory defence. The guidance stresses that it is not advocating a one-size-fits all approach. However, no matter what the size of your organisation you should put in place anti-bribery policies and procedures proportionate to the risks faced by your organisation, if you have not already done so.

Particular consideration should be given to the extent and nature of permissible gifts and hospitality so as not to breach the new laws.

**Please contact Peter Bennett on 01903 706952, Elaine Smith on 01903 706966 or Charlotte Hammond on 01903 706981 for further information.**

## Ignoring your Disciplinary Procedure

You could be forgiven for thinking that we are going to remind you of the importance of following your disciplinary procedure. Of course, that’s normally an important rule. But the Employment Appeal Tribunal, in a display of lateral thinking, has found a way of excusing an employer which failed to follow its own procedure.

In *Ezias v North Glamorgan NHS Trust*, a consultant surgeon claimed he had been unfairly dismissed. The real reason for the dismissal was that his behaviour had led to a breakdown of his relationships with colleagues at work, and they had expressed unwillingness to continue working with him. The NHS Trust did not follow its misconduct disciplinary procedures, and the Employment Appeal Tribunal said this did not make the dismissal unfair because Mr Ezias was not dismissed for his conduct, but because of the breakdown in relationships.

Don’t be too heartened by this case; it was unusual. Normally, a failure to follow your own disciplinary procedure is likely – unless the breach is minor – to make a dismissal unfair even if the employee is plainly guilty of misconduct as can be seen by a case our Employment Team recently dealt with. Charlotte Hammond represented a client who had been dismissed for verbally threatening her manager during an appraisal. The Tribunal found that the context in which the comment was made under no circumstances could be taken as threatening. The Tribunal also agreed with our submissions that the disciplinary procedures adopted by the Respondent were woefully inadequate and unfair and found fifteen aspects of procedural unfairness. The Tribunal found our client to have been unfairly dismissed and she was awarded in excess of £33,000.00. This award included an uplift of over £6,500.00 for failing to follow disciplinary procedures.

**Please contact Elaine Smith on 01903 706966 or Charlotte Hammond on 01903 706981 if you require advice on any employment matter.**

For further advice contact **01903 229999**, email [info@bennett-griffin.co.uk](mailto:info@bennett-griffin.co.uk) or visit [www.bennett-griffin.co.uk](http://www.bennett-griffin.co.uk)  
Or if you prefer please talk to your usual Bennett Griffin contact.

# Bennett Griffin LLP Employment Club

“Up to the minute advice from our team of employment law specialists, a delicious breakfast, a lively open forum and informal business networking.”

In the current economic climate there has never been a better time for you to join. Many employers are facing new challenges. Redundancy, pay freezes or reducing working hours are appearing on the boardroom agenda. For other employers it can be a headache simply trying to keep up with changes in employment legislation.

Members tell us that the club is vibrant, lively and informative. It's an opportunity for you to raise any employment issues that you would like to discuss and to share your experiences with other members. With not a PowerPoint presentation in sight, we also keep you up-to-date with new developments, new case law and new legislation in the pipeline and of course we're there to answer your burning questions.

## Who attends?

Members hail from a wide range of business sectors. If you have three employees or more, you'll benefit from membership.

## The investment?

The first meeting including breakfast is free. If you then decide to join, one year's membership is £100 plus VAT. This entitles you to attend four meetings including breakfast and you can bring a colleague along as well.

## Venue and Time

The Ardington Hotel, Worthing

7:30 AM - 9 AM on the first Friday of February, May, August and November

**Contact Elaine Smith on 01903 706966 or Charlotte Hammond on 01903 706981 for further information or visit our website**

## Employee Fairly Dismissed for Inappropriate Comments on Facebook

An employment tribunal has decided that a pub manager was fairly dismissed for gross misconduct after she made inappropriate comments on Facebook about two of her customers, who verbally abused and threatened her. Her employer was entitled to take the view that the conversation on Facebook, which took place while at work, did not reflect upset or anger at the customers, but seemed more like a joke between friends. It did not matter that she thought her privacy settings meant that only close friends could see her entries; in fact a wider audience was able to view her Facebook page, including relatives of the customers in question. As a result, the manager was found to be in breach of the employer's email and internet policy, which specifically referred to employees' use of social media such as Facebook whilst at work.

### Facts of the Case

Miss Preece worked for JD Wetherspoons Plc (Wetherspoons) as a manager from May 2009 until June 2010. Her contract of employment provided that Wetherspoons could immediately terminate her contract if it found her guilty of gross misconduct. Miss Preece's contract also referred to Wetherspoons' employee handbook (the Handbook), which contained its disciplinary and dismissal procedure. Examples of gross misconduct included acts committed outside work which had an adverse bearing on the employee's suitability for the job, amounted to a serious breach of trust, affected employee

or customer relations or brought the Wetherspoons name into disrepute.

The Handbook also provided that a failure to comply with the company's email, internet and intranet policy (the Policy) would amount to gross misconduct. The Policy referred to blogging (defined as "the sharing of opinions and thoughts in an online diary") and stated that Wetherspoons' had the right to take disciplinary action should the contents of any blog, including pages on sites such as MyFace or Facebook "be found to lower the reputation of the organisation, staff or customers and/or contravene the company's equal opportunities policy".

In May 2010, Miss Preece and another employee were subjected to a torrent of verbal abuse and physical threats from two customers. As a result, Miss Preece asked the customers to leave. After a while, someone, believed to be the customer's daughter, made several abusive phone calls to Miss Preece.

A little later, while Miss Preece was still on duty, she entered into conversations on her Facebook account about the earlier incident and made several negative comments about the customers.

Wetherspoons was contacted by the customer's daughter who complained that offensive comments about her mother had been made "very public". During an investigatory meeting, Miss Preece admitted that she had made some comments on Facebook while she was supposed to be working, and understood that her actions

"brought her into conflict" with the Policy. She explained that she had been angry and upset but understood that Facebook was the wrong place to vent her anger and frustration.

Miss Preece was invited to a disciplinary hearing and was subsequently dismissed for gross misconduct. The manager considered that writing inappropriate comments on Facebook about customers (which, by their nature, identified Wetherspoons) breached the Policy and amounted to gross misconduct.

Miss Preece's appeal was unsuccessful and she brought a claim for unfair dismissal.

### Decision

The tribunal dismissed her claim.

The employment tribunal held that the manager had a genuine belief about the nature of Miss Preece's conduct and had reasonable grounds to sustain that belief, having conducted a reasonable investigation into allegations of gross misconduct, namely the claimant entering into a conversation on Facebook. The sanction of dismissal fell within the range of reasonable responses available to a reasonable employer. Miss Preece's mitigation had also been taken into account.

### Comments

This case highlights the importance of having a properly drafted policy regarding the use of social media.

**Please contact Elaine Smith on 01903 706966 or Charlotte Hammond on 01903 706981 if you require advice on any employment matter.**

# Meet the BG Commercial Team

## Elaine Smith

Elaine is a Partner and Solicitor in our Commercial Department and has recently been appointed as Head of the Commercial Department.

As well as specialising in employment Elaine also advises clients on liquor licensing, debt recovery and commercial law.

Elaine enjoys travelling.

**Please contact Elaine on 01903 706966 or email [es@bennett-griffin.co.uk](mailto:es@bennett-griffin.co.uk)**



## Peter Bennett

He has been a Partner in the firm for over 20 years dealing with litigation in the High Court, County Courts and Magistrates Courts. He was a Councillor on Worthing Borough Council for 24 years and was Mayor of Worthing.

Peter specialises in all aspects of Company law including but not limited to the formation of limited companies, shareholders agreements and directors responsibilities. We do also provide advice and assistance in all aspects of law relating to businesses including advice on buying and selling businesses and partnership law.

**Please contact Peter on 01903 706952 or email [pgb@bennett-griffin.co.uk](mailto:pgb@bennett-griffin.co.uk)**



## Robert Fawcett

Rob joined Bennett Griffin in 2004 and is a Partner and Solicitor within our Commercial Property Department

Rob studied in part at Aalborg University Denmark graduating with an honours degree in Politics and European Integration. He then went on to complete his legal studies at the College of Law in London.

Rob specialises in both commercial and residential property transactions.

One of Rob's main hobbies is classic cars and he hopes to have the time and expertise to locate, purchase and restore a true classic sports

**Please contact Rob on 01903 706967 or email [rjf@bennett-griffin.co.uk](mailto:rjf@bennett-griffin.co.uk)**



## Charlotte Hammond

Charlotte is an Associate Solicitor

Charlotte completed her solicitor's finals at the College of Law, Guildford and joined Bennett Griffin LLP in 2002.

Charlotte specialises in contentious commercial work and all aspects of employment law including drafting and reviewing contracts of employment, service agreements and advising on compromise agreements. She gives



general employment advice on a day to day basis to businesses of all sizes and employees on breach of contract, sex, disability, age and race discrimination, unfair and constructive dismissals.

Charlotte is also a member of Bennett Griffin's landlord and tenant team.

**Please contact Charlotte on 01903 706981 or email [ceh@bennett-griffin.co.uk](mailto:ceh@bennett-griffin.co.uk)**

## Darren Edwards

Darren is an Associate Solicitor and joined Bennett Griffin LLP.

Darren is a member of the Commercial Property Team and is able to advise you on the preparation of leases and acquisitions, disposals and refinancing of commercial premises. Darren also specialises in non contentious commercial work, including, business sales and purchases, contract negotiation and drafting, internet and website legal compliance, company acquisitions and disposals

Darren's interests are wide and varied but include music, playing football and socialising with his friends

**Please contact Darren on 01903 706971 or email [de@bennett-griffin.co.uk](mailto:de@bennett-griffin.co.uk)**



## Mark Diamond

Mark is a solicitor in our Commercial Department and joined the firm in 2007.

Mark specialises in non contentious commercial work, including, business sales and purchases, negotiation and drafting of contract as well as commercial disputes.

**Please contact Mark on 01903 706977 or email [msd@bennett-griffin.co.uk](mailto:msd@bennett-griffin.co.uk)**



Finally the most recent member of the Commercial Team is:

## Hannah Bennett

Hannah Bennett completed her 2 year training Contract with the Bennett Griffin LLP and was admitted as a solicitor on the 15th December 2010 Before embarking on her training contract, Hannah firstly obtained a geography degree at the University of Plymouth and then went on to do her conversion course and Legal Practice Course at the College of Law in Guildford.

During her two year training contract with Bennett Griffin Hannah worked in the Family Department, Wills and Probate, Conveyancing and finally Company and Commercial. Hannah enjoyed working in all the departments but favoured Company and Commercial due to its fast pace and variety deals with general litigation cases, contentious probate and landlord and tenant matters.

**Hannah can be contact on 01903 706972 or email [hbr@bennett-griffin.co.uk](mailto:hbr@bennett-griffin.co.uk)**

