Perspectives:
A review of current legal issues and trends looking ahead to 2017
Contents

4 Introduction
6 Employment: Key developments: the Uber case, holidays, gender pay reporting and tax on termination
11 Tax: Down the rabbit hole: an update on this year’s key tax consultations
14 Intellectual Property: Are you buying a whole brand? Key issues to consider
16 Pensions: Recent pension headlines: good news or bad?
18 Real Estate: Lease guarantees: the unforeseen consequences of trying to be too clever
20 Contacts: Weil Transaction Specialist contacts
24 Training offered
26 About Weil

There has been much uncertainty following the Brexit referendum vote, and what this may mean from a business perspective, and our cross-practice Brexit working group is monitoring events as they develop. Aside from Brexit, there are many significant changes affecting UK businesses currently taking place. We address a number of these key changes in this edition of Perspectives. Topics include: key employment developments – the Uber case, holidays, gender pay reporting and tax on termination; an update on 2016’s key tax consultations; key issues to consider when buying brands; a perspective on recent pension headlines; and the unexpected consequences of transferring a lease to an existing guarantor.

2016 marks the London office’s 20th anniversary. Our ongoing successes have been recognised in the market, including in the past six months winning an unprecedented five awards at International Tax Review’s European Tax Awards (US Law Firm in Europe; European M&A Tax Deal of the Year; European Joint Venture Tax Deal of the Year; European Tax Restructuring Deal of the Year; and European Media and Entertainment Tax Deal of the Year). We also had some fantastic results in the new editions of Legal 500 and IFLR1000, with a number of top tier rankings. Providing clients with best-in-class full-service support and innovation has always been at the forefront of how we do business, and will continue to shape our strategy in 2017 and beyond.
Recent matters

Our transaction specialist team continue to advise a broad range of clients globally, including corporates, private equity houses, sovereign wealth funds, pension funds, multi-asset managers and financial institutions, on some of their most significant mandates, including:

- Sanofi in its $25 billion exchange of its animal health business (Merial) for the consumer healthcare business (CHC) of Boehringer Ingelheim
- HgCapital in its acquisition of Citation from ECI Partners
- GHO Capital Partners in its acquisition of Visufarma and the European commercial operations of Nicox
- Securitas Direct and its core management team with respect to the complex, multi-jurisdictional restructuring of its management incentive plans following Hellman & Friedman’s acquisition of Bain’s interest in the company
- The ad hoc creditor’s committee in the ground-breaking Ukraine $18 billion sovereign debt restructuring
- Equiniti in its IPO and listing on the London Stock Exchange
- Advent International and Bain Capital in the dual track process leading to the IPO and London Listing of Worldpay
- Willis Group in its $18 billion merger with Towers Watson
- Advent International and Bain Capital in the €2.15 billion acquisition of Istituto Centrale delle Banche Popolari Italiane (ICBPI)
- General Electric in the $30 billion sale of its commercial lending and leasing businesses to Wells Fargo, and in the European aspects of its $50 billion asset disposal programme
- A number of partnerships operated by Ingenious Games LLP in a dispute with HMRC in respect of over £1 billion
- Securing landmark £1.25 billion High Court and Court of Appeal victories for the Littlewoods group in its long-running dispute with HMRC concerning interest on overpaid VAT
Key developments: the Uber case, holidays, gender pay reporting and tax on termination

Introduction

There are a number of changes in UK employment law which employers will face in the next 18 months. In this article, we highlight two of the more significant changes, these being the new gender pay gap reporting obligations and the changes to the taxation of termination payments. However, before we do so, we discuss below the latest case law dealing with the calculation of holiday pay and the increasing trend of individuals challenging their work status in the growing so-called ‘gig economy’ as highlighted by the decision in the recent Uber case.

The Uber case – workers or self-employed?

The last few years have seen the emergence of the so-called ‘gig economy’ and a growing tendency for companies in this sector to use self-employed contractors instead of employees particularly in low-skilled roles. The benefits for companies engaging self-employed contractors are significant. Self-employed contractors are cheaper and more flexible – they do not need to be paid holiday pay or the national minimum wage and, from a tax perspective, employer’s National Insurance contributions are not chargeable in respect of fees paid to self-employed contractors. However, the backlash against this practice is gathering pace with companies such as Uber, Deliveroo, Hermes and City Sprint in the firing line. A number of high profile cases have been brought with individuals arguing that the terms and conditions of their work mean that they are not self-employed but rather are ‘workers’.

But who exactly is a ‘worker’, as opposed to an ‘employee’ or ‘self-employed person’? A worker is an individual who (even if they do not have an employment contract) has a contract to provide their work personally to another person and that other person cannot be described as a client or customer of any profession or business undertaking being carried out by the individual. In short, a worker is an individual whose employment status sits somewhere between a fully-fledged employee and a self-employed contractor or freelancer.

The distinction is important because whilst workers do not have all the rights that employees have (such as the right not to be unfairly dismissed, the right to redundancy pay and the right to maternity leave), workers do have some of the statutory rights that employees enjoy, e.g. the right to be paid the national minimum wage and benefits under the Working Time Regulations such as holiday pay and minimum rest breaks.
One of the most high profile of these cases is the one brought by two drivers against the ride-hailing app, Uber, which has 30,000 drivers in London classified by Uber as self-employed. On 28 October 2016, an employment tribunal ruled that these two Uber drivers are in fact workers for employment law purposes. In doing so, the Tribunal rejected Uber’s argument that the drivers were working directly for the customers and that the Uber app merely facilitated that work or provided a platform for drivers to contract with customers. The degree of control exercised by Uber over its drivers was key to the Tribunal’s decision and the Tribunal found that Uber dictates various aspects of the work carried out by its drivers.

Significant factors that pointed towards the drivers having worker status were as follows: (i) the fact that Uber reserved the power to amend its drivers’ terms unilaterally; (iii) the fact that drivers are required to accept and/or not to cancel trips on Uber’s terms; (iv) the numerous conditions Uber imposes on drivers instructing them how to do their work and controlling them in the performance of their duties (e.g. Uber fixing the fare, setting the default route for each trip and strongly discouraging deviations from the default route and limiting the choice of acceptable vehicles); (v) Uber determining issues about rebates, sometimes without involving the driver whose remuneration is liable to be affected; (vi) Uber’s policy to bear the loss (e.g. when there has been a fraud or a where Uber has refunded a customer in circumstances where the driver is not at fault) which if the drivers were genuinely in business on their own account would fall on them; (vii) Uber handling passenger complaints; (viii) the fact that Uber interviews and recruits drivers; and (xi) the fact that Uber controls key information (in particular details about the passenger’s identity and intended destination) and does not share this with its drivers.

We understand that Uber is planning to appeal the ruling. Nevertheless, the decision is expected to affect not only the thousands of Uber drivers but is also likely to encourage others working in the gig economy to consider bringing similar claims. This is not to say that these other cases will necessarily succeed, as each case will depend on the specific arrangements in place. Therefore, whether this ruling calls into question the business model of on-demand companies that rely heavily on self-employed contractors remains to be seen. However, given that the distinction between a self-employed person and a worker is a fine one, such companies will be following developments closely. We may even see certain companies deciding to change the way they treat those carrying out work for them, either to strengthen the argument that such persons are genuinely self-employed or, conversely, to confer worker status upon such persons before being forced to.

Just prior to the decision in the Uber case, a UK Government Select Committee (The Business, Energy and Industrial Strategy Committee) announced that it was launching an inquiry into the “future world of work”, focussing on the rapidly changing nature of work as well as the status and rights of agency workers, the self-employed, and those working in the gig economy. As part of this investigation, the Committee has said that it will consider the definition of ‘worker’, the balance of benefits between workers and employers, flexible contracts, zero-hour contracts, the role of the Low Pay Commission, minimum wage enforcement and the role of trade unions in providing representation. The inquiry follows the Committee’s report on working practices at Sports Direct and questions raised about working practices at other companies such as Deliveroo, Asos and Hermes. It will be interesting to see whether the Committee’s recommendations result in any legislative changes in this area.

**Holiday Pay Update**

It has now been established through case law that employers must take into account both guaranteed and non-guaranteed overtime when calculating statutory holiday pay (i.e. 20 days’ holiday under the Working Time Directive). However, one of the areas where the position remained unclear concerned voluntary overtime, i.e. whether such payments should also be included within the calculation of statutory holiday pay. To date, there have been a number of Employment Tribunal cases which have held that
voluntary overtime payments should be included within the calculation of holiday pay provided such payments amount to “normal remuneration” (i.e. where payments are made with sufficient regularity over a period of time). Until further guidance is provided by an appellate court, employers should be aware that if voluntary overtime is carried out regularly, it may be described as being part of “normal remuneration” and, therefore, should be included within the calculation of statutory holiday pay.

A further area awaiting clarification had been the question of commission payments and whether these should be included within the calculation of statutory holiday pay. In Lock v British Gas Trading Ltd, the Court of Justice of the European Union (“ECJ”) held that holiday pay under the EU Working Time Directive cannot be based on basic salary alone and that commission payments paid to Mr Lock should be taken into account when calculating statutory holiday pay. The case then returned to the Employment Tribunal to apply the ECJ ruling to UK law, which was subsequently upheld by the Employment Appeal Tribunal (“EAT”). The case has now been heard by the Court of Appeal, which has upheld the EAT’s decision that the UK’s Working Time Regulations should be interpreted to provide that contractual, results-based commission should be included in statutory holiday pay derived from the Working Time Directive.

Whilst this decision is not surprising, the ramifications may be felt widely. It has been suggested that British Gas is facing approximately 1,000 further potential cases pending the outcome of this case. Some employers have already taken steps to alleviate the risk of claims by starting to include commission within the calculation of statutory holiday pay. However, it is understood that British Gas intends to seek leave to appeal to decision in the Lock case to the Supreme Court. Nor did the Court of Appeal deal with the question of whether employers need to include other types of commission and/or results-based bonuses in the calculation of statutory pay. Therefore, this may not be the end of this particular story.

Gender Pay Gap Reporting Obligations

Mandatory gender pay gap reporting obligations for large employers (those with 250 or more employees in the private and voluntary sectors) are now due to come into force in April 2017. The current draft regulations require employers to publish:

- overall gender pay gap figures using both the mean and median gross average hourly pay;
- numbers of men and women in each of four pay bands, based on the employer’s overall pay range;
- details of the proportion of men and women who receive bonus pay; and
- the percentage difference in mean bonus pay between men and women.

Employers subject to these reporting obligations will be required to analyse their gender pay gap each April, to publish their gender pay gap report on their websites within 12 months (the first reporting date for publishing such information being no later than 4 April 2018) and to keep the information there for three years. The information must also be uploaded to a government website. The draft regulations do not contain any penalties for non-compliance, although the UK government has stated that it will monitor non-compliance and publish employers’ reported gender pay gaps, as well as possibly naming and shaming those employers who do not comply.

At present, there is still a degree of uncertainty in certain areas of the regulations including which “employees” will be covered by the regulations. The current understanding is that it is the government’s intention that a wider definition of employee will apply which is likely to extend to workers which will include, say, fixed share LLP members and possibly some self-employed contractors. A further area of uncertainty is the definition of “pay”. Currently, pay will include most remuneration paid through payroll including bonuses, shift premiums and other allowances. However, overtime will be excluded.
UK employers likely to fall within scope of the regulations should start to take steps now in order to ensure that they are able to comply with these obligations. Recommended steps include:

- Trialling now the implementation of systems and procedures to gather, analyse and process pay data in order to prepare gender pay gap reports.
- Although any communications and analysis of the gender pay gap report with lawyers will be subject to legal privilege, employers should be aware that any preliminary or draft version of the report itself may be disclosable.
- Assemble and update employee records to ensure that all employees, such as casual workers, are within scope for the purposes of the gender pay gap report.
- Senior management should be involved as early as possible in the process, to provide input and oversight, as they will be required to sign off on the report.
- Senior management should also work closely with Human Resources to manage and address any internal employee concerns following publication of the gender pay gap report.
- It will be important to involve the company’s marketing and public relation officers in preparing and managing external communications with the media addressing any disparities in pay revealed by the gender pay gap report.

**Taxation of termination payments**

In July 2015, the UK government published a consultation on the tax and National Insurance contributions (“NICs”) treatment of termination payments. The UK government has now published its response and draft legislation for further consultation, with the new rules due to apply from April 2018.

It has to be said that the drafting of the legislation is complex and could be simplified. However, the changes proposed to come into force in are as follows:

(a) **Termination payments:** Certain payments relating to the termination of employment will continue to have a £30,000 income tax and NICs exemption up to this threshold. There will also continue to be an unlimited employee’s NICs exemption on the entirety of such termination payments (i.e. even when the termination payment is over £30,000). However, in an effort to simplify the system and “prevent manipulation” by employers, the employer’s NICs exemption, where such a termination payment is over £30,000, will no longer apply. Therefore, this will increase costs for employers who agree such termination payments with employees in excess of £30,000 as they will be required to pay employer’s NICs (at 13.8%) on any amounts above £30,000. It is not entirely clear from the draft legislation if the £30,000 exemption will only apply to statutory redundancy payments and unfair dismissal awards made by a Tribunal (i.e. an award made by a Tribunal pursuant to a successful claim for unfair dismissal). Therefore, for example, it is not clear if the first £30,000 of compensatory payments negotiated between employees and employers in settlement of actual or potential/threatened unfair dismissal claims will benefit from the exemption. In addition, it is not clear if an enhanced redundancy payment (i.e. a payment made to an employee who is dismissed by reason of redundancy which exceeds a statutory redundancy payment) will fall within the scope of the exemption. We are seeking clarity on these points.

(b) **Notice periods:** Currently, a payment in lieu of notice (“PILON”) made to an employee pursuant to a clause in their employment contract that entitles an employer to make such a payment would be subject to tax and NICs in full, whilst PILON payments made by an employer where there is no such PILON clause in the employment contract may be paid free of income tax up to the first £30,000 (aggregated with other termination payments) and entirely free of NICs deductions. This distinction between a contractual and non-contractual PILON will be removed, which will mean that all such payments will be taxable and subject to NICs in full.
(c) **Payments for injury to feelings**: Employment Tribunals can award successful claimants who bring discrimination claims and certain types of whistleblowing claims, compensation for “injury to feelings”, as well as for financial loss. The intention is for the claimant to be compensated for the upset, hurt and distress the discrimination has caused them. In settlement negotiations, lawyers for claimants often attempt to apportion a specific sum of any settlement as compensation for injury to feelings in the belief that this sum will not be subject to tax (due to an exemption for payments for disability or injury). However, as a result of conflicting legal case law, there is currently uncertainty as to whether payments for injury to feelings are subject to tax. Consequently, the UK government has decided to clarify the position to make it clear that the exemption does not apply in cases of injured feelings unless this relates to an injury or disability of a physical or psychiatric nature which is serious enough to prevent an employee performing their job. The position is unclear in the draft legislation with regards to damages awards in discrimination cases (as distinct from injury to feelings awards) and settlement payments negotiated between employers and employees in relation to actual or potential/threatened discrimination claims. We are seeking clarity on this point.

(d) **Foreign service relief**: Currently, foreign service relief allows termination payments for qualifying UK resident employees to be exempt from UK tax if they relate to periods spent working outside the UK. This exemption will now be removed, save for seafarers.
Down the rabbit hole: an update on this year’s key tax consultations

Although the EU referendum, and the various (tax and non-tax) implications for business arising out of the UK’s decision to leave the EU, has somewhat dominated the news for much of this year, another important development which has garnered rather less attention has been the proliferation of proposed changes to the domestic tax code. While Brexit will undoubtedly lead to widespread changes, those changes are unlikely to begin in a material way until the UK comes closer to leaving the EU (which will probably not be for at least two more years following the triggering, in Q1 2017, of Article 50 of the Lisbon Treaty).

In the meantime, however, we are in the midst of a reform of a number of areas of the UK tax regime. In the first ten months of 2016, HMRC and HM Treasury published 66 tax consultations (the same number that appeared in the whole of 2015 – see “Recent tax consultations”), with the Autumn Statement (which usually engenders a flurry of new consultations) still to come. Some of the changes began in the UK, while others came as a result of the OECD’s “Base Erosion and Profit Shifting” (“BEPS”) proposals.

Attempting to divine the future tax effects of Brexit is akin to trying to solve the Mad Hatter’s riddle, and risks a business losing focus on significant changes taking place in the UK now. While not every consultation leads to a change in law, in most cases the UK Government is committed to carrying out a formal public consultation on areas of significant reform. This means that, somewhat helpfully, taxpayers have the opportunity to prepare ahead of time. As Alice said as she navigated her way through Wonderland, “how puzzling all these changes are” but, while we cannot be completely sure what the UK tax code is going to be from one minute to another, the consultations do give us a fair idea of what may lie ahead.

Recent tax consultations

The remainder of this article summarises a handful of the more significant changes, namely:

- Restrictions on the deductibility of interest expense
- Introduction of “secondary adjustments” for transfer pricing purposes
- Reforms to the way losses may be “carried forward” to shelter future profits
- Reforms to the Substantial Shareholding Exemption
- Extensions to the Double Tax Treaty Passport Scheme
Weil was involved in the consultation process for each of the above, and provided HMRC with detailed comments on the scope and implementation of the proposed new laws. The UK Government is now in the process of analysing the feedback it received from the public.

Restrictions on the deductibility of interest expense

In response to BEPS, the UK government has proposed new rules (expected to which apply from 1 April 2017) that restrict the tax deductibility of interest payments. The government estimates this will generate an additional £4 billion-odd of tax by the end of 2020-21.

Currently, interest expenses are available to: (a) reduce current year profits of the UK group; (b) carry back against profits of the loss-making entity from the prior year; and (c) carry forward against restricted classes of profits of the loss-making entity in future years. However, certain rules apply to limit UK tax deductibility, including (for example): (x) transfer pricing; (y) the world-wide debt cap; and (z) unallowable purpose rules.

If the proposals are enacted in their current form, the deductibility of net UK interest expense would be restricted to 30% of UK EBITDA, or (if higher) an amount determined by reference to the ratio of net interest expense to EBITDA for the worldwide group. All groups will be able to deduct net UK interest expense of up to £2 million per year. The new regime will apply in addition to and after other existing UK rules which restrict interest deductibility (such as the transfer pricing rules), although the worldwide debt cap regime is to be replaced with a new debt cap regime, and specific rules will be introduced in relation to public benefit infrastructure projects, banking and insurance.

Introduction of “secondary adjustments” for transfer pricing purposes

The UK government intends to introduce new transfer pricing rules (expected to apply from 1 April 2017) to realign the economic benefits of related-party transactions.

At present, related-party transactions are treated, for UK tax purposes, as being undertaken at the price that would have applied in comparable transactions between non-related parties. This “primary adjustment” only applies for tax purposes, and does not alter the actual amount paid, which means that one of the parties (who may be in a low tax jurisdiction) could benefit from holding more cash than would have been the case in an arm’s length scenario.

The proposals introduce a further tax charge in respect of the excess cash, by way of a “secondary adjustment”. Suggestions as to how the adjustment might work include:

- a deemed dividend payment with the payer required to withhold an amount on account of tax;
- an equity contribution by the payer, taxable on disposal; or
- a loan, notionally subject to taxable interest (at a rate which may be “well above” market rates), until the ‘loaned’ excess cash is repatriated to the UK entity.

Each of these suggestions carries the risk of double taxation: i.e., the recipient of the additional cash may suffer a tax charge on receipt which may not be relievable against the tax arising from the secondary adjustment.

Reforms to the way losses may be “carried forward” to shelter future profits

The government has consulted on two major proposed reforms in this area, with implementing legislation expected to apply from 1 April 2017.

The first proposed reform would increase flexibility by allowing losses arising from 1 April 2017 to be carried forward and set against both the taxable profits of a company’s group members and the taxable profits arising from different types of income within the company.

The second proposed reform, which is designed to increase revenue, would limit the use of carried forward losses. From 1 April 2017, only 50% of annual profits over £5m may be sheltered by carried forward losses in any given year. The £5m allowance will apply per
group and can be allocated at the companies’ discretion (so, for companies whose losses do not exceed £5m, the new rules will be a welcome simplification of their tax computations). N.B., banks are already subject to a 50% restriction on the use of carried forward losses that accrued before 1 April 2015; from 1 April 2016 that restriction increased such that only 25% of annual profits can be relieved by such losses.

Reforms to the Substantial Shareholding Exemption (“SSE”)

The UK Government has consulted on a proposed reform to the UK’s SSE regime, in order to make it “simpler, more coherent and more internationally competitive”.

The SSE (the UK’s “participation exemption” from corporation tax on chargeable gains arising from the disposal of shareholdings) is often a factor in determining whether the UK should be used as a holding jurisdiction. However, access to the SSE involves navigating various complex qualifying conditions which can sometimes be difficult to apply (and meet) in practice.

The proposed reform is a positive development: the UK government has acknowledged the difficulties that may arise in applying the SSE, and a simplification of the qualifying conditions would be welcome and strengthen the case for holding investments through the UK. That said, the consultation document referred to a wide range of potential changes; some of which, including a mooted reduction in the 10% minimum equity “participation”, the UK government is openly sceptical about.

Extensions to the Double Tax Treaty Passport (“DTTP”) Scheme

The DTTP scheme was introduced in September 2010 to simplify the process for applying for relief from interest withholding tax under the UK’s tax treaties. The scheme enables certain overseas corporate lenders to apply to HMRC for a 5 year “treaty passport”. Unlike traditional UK treaty relief applications, which typically take between 6 weeks and 6 months, HMRC will consider an application for a treaty passport within 30 days. In addition, as its name suggests, a treaty passport can be “passported” across multiple loans to UK borrowers, removing the need for separate treaty relief applications each time the passported lender makes a loan to a UK borrower.

At present, the DTTP scheme only covers corporate-to-corporate lending into the UK. HMRC’s proposals include making the scheme available to non-corporate lenders.

The review of the DTTP scheme is timely as, following Brexit, there will likely be an increase in the number of treaty applications by EU-based lenders in respect of loans to connected party UK borrowers that would currently benefit from the EU Interest and Royalties Directive.

Recent Tax Consultations

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Are you buying a whole brand?
Key issues to consider

The recent case of Millen v Karen Millen Fashions Ltd and another serves as a useful reminder of key issues which must be considered on the acquisition of a business where the founder’s/chief designer’s name is being used as a brand.

Following the sale of the Karen Millen fashion business back in 2004, the buyer has subsequently been in a dispute with Karen Millen over the fashion designer’s attempts to register trade marks of her name in the US and China in relation to various homeware goods.

The relevant clause of the sale documents prevented Karen Millen from using the name “Karen Millen” (or any other confusingly similar name) in connection with any business which is similar to or competes with the activities of the Karen Millen clothing business. The English High Court concluded that the proposed homeware items were an extension of the existing goods produced by the Karen Millen clothing business which she sold and therefore competed with that business. Accordingly it was decided that Karen Millen could not use her own name on homeware products in China and the US as consumers might, if they came across such homeware products, conclude that they were from the same source as Karen Millen clothes. It was also decided that she was not permitted to use the name “Karen” for clothing.

The case has highlighted the importance of clearly documenting brand restrictions in sales agreements and the need to future-proof in order to accommodate business growth and expansion.

Key takeways

Clear and unambiguous restrictions:
When buying a branded business, particularly where the brand is that of the name of a person, the sale documents should contain clear and unambiguous restrictions on the seller restricting them from using the brand in a manner which could encroach on the buyer’s rights. This should include a clear and precise definition of the “business” being bought and aim to future-proof against any expansion into other goods/services and geographies.

Permitted uses in the sale documents:
If the seller is retaining use of the brand for a retained part of the business, the sale documents should contain a clear, prescriptive and preferably exhaustive list of such permitted uses and the parties should ensure that the provisions expressly address online use of the brand. The buyer also needs to ensure the same restrictions bite on any successor or transferee of the retained business.
**Reliance on trade mark protection:**
Clearly, buyers should ensure any relevant registered trade marks are purchased along with the business. However, sometimes own name brands rely solely on unregistered rights. Whilst under English law the law of passing off provides a useful tool to protect such unregistered rights, buyers should be aware that generally speaking registered protection affords a greater degree of protection and unregistered protection in other jurisdictions is notably less favourable. As such, buyers should review the target’s trade mark portfolio following completion and consider making further registrations to cover the full scope of goods/services and geographies necessary for both current business needs and future expansion.

**Own name defence:**
Even when a business owns registered trade marks for the brand name, buyers should be aware that there is a defence to trade mark infringement of an EU trade mark which permits a person to use their own name in the course of trade, provided use is in accordance with honest practice. Accordingly, contractual restrictions should be included obliging the seller to cease to use the name as a brand.
Recent pension headlines: good news or bad?

Introduction

Pensions has hit the news in a big way in 2016. In Spring 2016 the collapse of high street retailer BHS and the size of its pension scheme deficit hit the headlines. Parliamentary sub-committee inquiries looking into the collapse of BHS and questioning the adequacy of pension regulation were then a gift to editors. Then in early Summer 2016 the media highlighted the news that thousands of Tata Steel workers’ jobs and pensions were in the balance as potential buyers of the Tata Steel business baulked at the £2 billion pension deficit in the former British Steel Pension Scheme. And in the last couple of months, there have been pension headlines on the “dumping” on the government pensions lifeboat, the Pensions Protection Fund (“PPF”), of the Bernard Matthews pension scheme for current and former workers of the turkey producer.

So are these pensions headlines good news or bad?

In the short term arguably both good and bad. Bad in so far as they are stories about failed businesses and pension schemes, mass redundancies and impoverished retirements for workers. Also bad in so far as each headline underlines the 2016 reality of the steady general demise of UK defined benefit pension schemes and underscores the fact that there are no easy solutions for a loss making business with a large defined benefit scheme pension deficit. Yet maybe also good, forcing the “players” behind each failed pension scheme headline (company directors, advisers, the Pensions Regulator (“TPR”), the PPF and the Government) as well as the public, to confront some harsh pensions truths. That a pension scheme’s funding deficit is not just a balance sheet issue but potentially has the power to make or break the business going forward. That the funding of the pension scheme and the strength of the employer covenant behind it need to be considered in most financial decisions relating to that business. The headlines have undoubtedly also highlighted the public’s desire for directors and advisers to behave ethically where pensions are concerned and not just follow the letter of the law which must be a good thing.

Fundamental questions are now being raised as to whether the pensions regulatory system (in the shape of TPR) has sufficient power to prevent pensions underfunding and dumping of liabilities on the PPF from occurring. Further changes to the pensions regulatory landscape could therefore be on the horizon. Any changes are probably a fair way off and whether any implemented changes are good or bad will, of course, depend on the reader’s perspective.
So where are these stories now?

At the date of writing, the Tata Steel £2 billion pensions deficit sale block remains unresolved with 15,000 jobs still on the line. The three month public consultation which set out four possible options for dealing with the deficit has just closed and it looks as though the most radical, headline grabbing option of reducing the pension scheme’s long term liabilities by a projected £2.5 billion by changing the annual uplift in pensions for existing pensioners to a lower measure of inflation and cutting other benefits without members’ agreement is to be rejected. No doubt because such a change would have required legislative changes that pensions experts and politicians warned could set a dangerous precedent in allowing members’ accrued pension benefits to be reduced. If this is correct, it is possibly good for the UK’s defined benefit scheme pensioners if not for the future of Tata Steel and its employees or for those seeking to rescue or restructure ailing businesses.

A report for MPs has said that the pre-administration deal for Bernard Matthews, the turkey producer, was “carefully crafted” to benefit secured creditors and company controllers to the detriment of the pension scheme and concern has been expressed that this pre-pack (which is expected to see the Bernard Matthews pension scheme pass into the PPF with a £17.5 million deficit and about 700 employees facing pension cuts), like others, paid no attention to the hardship caused to retired and existing employees. Frank Field, chairman of the committee currently inquiring into the regulation of the UK’s 6,000 private sector defined-benefit pension schemes has made clear that the committee will be targeting pre-pack mechanisms as part of their pension inquiry.

And what of BHS? Its sale by Sir Philip Green for £1 in 2015, its subsequent collapse within a year and the fate of its pension scheme (which also seems likely to be “rescued” by the PPF) highlight the risk to company pension schemes when a company is sold and currently remains an unredeemed bad news story. A story that raised questions and brought forth criticism about the roles not only of the parties to the sale and their professional advisers but also of TPR which has been accused of having no teeth. The TPR head, Lesley Titcomb, has asked for new powers to stop defined benefit pension schemes being dumped when companies are sold. Possible changes to the legal/regulatory framework might include strengthening TPR’s information gathering powers, making TPR clearance of certain corporate events such as shares and assets sales mandatory rather than optional as currently, placing restrictions on dividend pay-outs and giving TPR a role in approving scheme recovery plans. Good news for pension schemes maybe but, again, what about for business?

It’s too early to say if the final headlines for each of these three 2016 pensions stories will be seen as good or bad news and much of course depends upon the reader’s perspective. What is clear is that these particular stories made the headlines because bad pensions news is newsworthy whereas good is not. And policy makers need to be aware that knee jerk reactions to bad news stories in an attempt to make good news out of bad can cause as many problems as they solve.

The headlines remind us that funding of defined benefit pension plans not only continues to be a thorny issue for employees and employers but is a focus of parliamentary scrutiny and yet again we face potential legislative change. Pension plan sponsors are therefore once again left needing to “watch this space....”
Lease guarantees: the unforeseen consequences of trying to be too clever

Background

Prior to 1996 an original tenant and most assignees remained liable for payment of rent and performing the tenant’s covenants until the end of the lease, notwithstanding any subsequent assignment. During the property crisis in the early 1990s, following the insolvency of current tenants, many original tenants and assignees were pursued by landlords in respect of long forgotten leases. This resulted in huge pressure from tenants for change and equally a huge resistance to such change from landlords, particularly institutional investors.

In 1988 the Law Commission had proposed a radical reform reflecting the position in Scotland and, indeed, in Ireland and many other common law jurisdictions, that on assignment the tenant's liabilities came to an end. Such proposal faced very strong opposition in Parliament and, uniquely, the government encouraged the warring sides of the property industry to agree a compromise which became the Landlord and Tenant (Covenants) Act 1995 (the "Act"). As a result, for new post 1995 leases, a tenant is released from its obligations on an assignment with consent but can be required to provide a guarantee which continues until its own assignee assigns the lease to another party. To prevent abuse of these new freedoms the Act contains very wide anti-avoidance provisions. Although over the last 20 years the Act has worked well, these anti-avoidance provisions have seen a series of increasingly complex structures being struck down with unforeseen consequences. In March this year we had another example.

The issue

As you will recall, HMV’s retail business went through hard times in early 2010s and in 2013 collapsed into administration. This litigation arose out of a scheme intended to avoid guarantor liability.

In 1996 HMV had leased a shop in Worcester. HMV’s obligations were guaranteed by its then parent, EMI Group. As part of the restructuring of HMV following its administration, the lease of the Worcester shop was transferred to such guarantor, EMI Group, who then underlet the shop to a new company, HMV Retail. EMI Group then argued that, whilst the assignment was valid, the landlord could not enforce the tenant’s covenants against EMI Group as to do so would fall foul of the Act’s anti-avoidance provisions. Not surprisingly, the landlord objected to this argument, not least because the business was continuing to
trade from the premises. It is clear from her judgment that she did not feel that the HMV/EMI argument had any merit: after all the ongoing business was still trading from the premises. Therefore, she held that the assignment to EMI, as the former guarantor, was void and that the EMI guarantee continued to have effect.

Consequences

In a restructuring, or on a sale of part of the business, transferring a lease to the guarantor is not uncommon, not least because it is unlikely that a landlord will object to the financial worth of that guarantor – if a guarantor was good enough to be a guarantor it is surely good enough to be a tenant. One of the immediate results of this decision is that on any such restructuring or sale of part, the parties will need to find another entity to take the lease and that may not be that easy. Landlords will also be nervous about the existing guarantor guaranteeing the incoming assignee. In addition, the decision places questions over any derivative underlease or any security granted over the assigned lease by the former guarantor now assignee as well as the position of the party in occupation who is no longer the legal tenant under the assigned lease. Will it have some beneficial interest or is a periodic tenancy created?

A less well publicised consequence is that this decision questions the validity of lease assignments made prior to March this year when the law became clear. On the face of it, such assignments will have been void even though they were subsequently registered at the Land Registry. So far this consequence has not rocked the industry but it should do. It is increasingly being picked up on due diligence reviews and, for example, it is a point which is covered by the current edition of the CLLS Certificate of Title which is the industry standard for such certificates.

The future

All is not lost. The decision in the EMI case arose because of the choice faced by the judge in light of the arguments put before the court in that case. Mr Justice Morgan is a senior High Court judge who has developed a speciality in cases involving the Act. At the end of last year he gave a lecture to the Property Bar Association in which he argued most strongly for a rational and commercial interpretation for the applicability of the Act’s anti-avoidance provisions. It is his view that one provision of the Act operates to release the guarantor from its earlier guarantee, whilst another provision operates to impose the burden of the tenant covenants on the former guarantor as it becomes assignee. Mr Justice Morgan is of the opinion that neither provision frustrates the other and that, therefore, anti-avoidance should not be brought into play. He concluded that, in fact, there is no conceivable policy reason not to give effect to this logic. However, until Mr Justice Morgan’s views are adopted in a case, which probably will need to go the Court of Appeal if not to the Supreme Court, the EMI decision represents the current state of the law with all the unwelcome consequences.
Peter King
Corporate
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+44 20 7903 1011

Peter is a Corporate partner in London. He has over 30 years of experience across a wide range of industries, transaction types and geographies, with a particular interest in India. His principal areas of work include cross-border M&A and equity capital markets, with a particular industry focus on the financial services, mining, information technology and utilities sectors.

Peter has particular expertise advising boards of directors on corporate governance and related issues, including the UK Bribery Act 2010 and the Modern Slavery Act 2015, and is a regular speaker at conferences and seminars on matters such as the UK Takeover Code, London listing rules and anti-corruption programmes. Peter is co-chair of the firm’s Pro Bono Committee, a trustee of several UK charities, a director of the Salvation Army International and was a founder, together with Archbishop Desmond Tutu, of the Tutu Foundation UK.

Peter is consistently highly ranked throughout the legal directories for Corporate/M&A and Equity Capital Markets. According to market commentators interviewed by Chambers UK, he is “very bright, highly experienced, and also knows the space and how to navigate it.” Peter is recognised for his expertise in Equity Capital Markets and M&A by Legal 500 and IFLR1000.

Recent experience includes advising:

- Equiniti in its IPO and listing on the London Stock Exchange
- Advent International and Bain Capital in the IPO and London Listing of Worldpay
- HNA Group in its acquisition of Swissport, the world’s largest ground and cargo handling company
- Willis Group in its $18 billion merger with Towers Watson
- DFS in its IPO and listing on the Main Market of the London Stock Exchange
- Multi-national companies, including the British Venture Capital and Private Equity Association, on developing procedures to comply with the UK Bribery Act and the FCPA (including businesses based outside the UK)

Barry Fishley
IP/IT/TMT
barry.fishley@weil.com
+44 20 7903 1410

Barry is a partner and head of the Technology and IP Transactions practice in London.

Barry specialises in technology and intellectual property transactions, data privacy, commercial contract and social media matters. He has extensive experience of advising major international companies and private equity funds on a range of issues including the technology and IP aspects of private equity and M&A transactions, IP and technology acquisitions and divestitures, outsourcings (including IT and BPOs), international licensing arrangements, strategic alliances and general commercial matters including manufacturing, supply, distribution and agency arrangements.

Barry also extensively advises on data privacy matters including the privacy implications of monetisation of personal data and cyber security issues. He is a frequent speaker on technology, IP, cyber security and data privacy issues, including European data privacy laws within the context of international M&A transactions.

Barry is recommended for TMT by Legal 500 UK, which has also described his TMT practice as showing “cutting-edge knowledge and keen commercial sense.”

Recent experience includes advising:

- HgCapital in its acquisition of Citation from ECI Partners
- GHO Capital Partners in its acquisition of Visufarma and the European commercial operations of Nicox
- Providence Strategic Growth in its investment in Skybox Security
- Facebook in a wide range of e-commerce transactional and advisory matters in the UK, including its landmark $16 billion acquisition of WhatsApp
- eBay in its acquisition of Shutl, a SaaS platform developer and operator
- Yahoo! in the acquisition of Summly, a UK iPhone applications developer
- Technology Crossover Ventures on its acquisition of minority stake in Spotify
- Avista Capital Partners and Nordic Capital in their joint offer for Swiss pharmaceutical company Acino
- Getty Images on data protection and privacy matters
Oliver is a tax partner and advises clients on tax issues principally relating to corporate transactions, with particular focus on:

- providing tax and structuring advice in relation to private equity and general corporate M&A transactions and reorganisations;
- designing and advising on complex equity incentive arrangements; and
- providing VAT advice.

Oliver is also regularly involved in tax cases before the English and European Courts, and led the tax on the recent decision in *Littlewoods v HMRC*, one of the largest money judgements in English history.

Oliver is recommended for Corporate Tax and Tax Litigation by *Legal 500 UK*, where he is described as being “thoughtful and responsive”.

**Recent experience includes advising:**

- HgCapital in its acquisition of Citation from ECI Partners
- GHO Capital Partners in its acquisition of Visufarma and the European commercial operations of Nicox
- Public Sector Pension Investment Board, along with BC Partners, in the acquisition of Keter Plastic
- Sechrist Direct and its core management team with respect to the complex, multi-jurisdictional restructuring of its management incentive plans following Hellman & Friedman’s acquisition of Bain’s interest in the company
- Advent International and Bain Capital on the IPO and London Listing of Worldpay
- Equiniti on its IPO and listing on the London Stock Exchange
- Providence Equity Partners on the take-private, with WPP Group, of Chime Communications
- The Littlewoods group in its landmark £1.25 billion High Court and Court of Appeal victories in a claim against HMRC concerning compound interest on overpaid tax

Joanne is a partner and head of the Pensions practice in London. Joanne is experienced in advising on the pensions aspects of high profile cross-border mergers, acquisitions, disposals, private equity transactions, joint ventures, IPOs, re-financings and insolvencies, as well as on market-leading pensions litigation. She has a particular expertise advising on strategy for employers in dealing with pension trustees and the Pensions Regulator both in the context of corporate transactions and also in issues relevant to the lifecycle of occupational pension schemes.

Joanne is a Fellow of the Pensions Management Institute, was awarded a Diploma in International Employee Benefits, and is a member of the Association of Pension Lawyers. She is ranked in *Chambers UK*, which describes her as “a superb pensions lawyer.” Joanne is also recommended in *Legal 500 UK* for her “real expertise” and “practical, commercial approach”.

**Recent experience includes advising:**

- Sanofi in its $25 billion exchange of its animal health business (Merial) for the consumer healthcare business (CHC) of Boehringer Ingelheim
- HgCapital in its acquisition of Citation from ECI Partners
- GHO Capital Partners in its acquisition of Visufarma and the European commercial operations of Nicox.
- Cinven, Blackstone and CPPIB in the consortium bid for assets of Holcim and Lafarge
- Alstom in GE’s $16.9 billion bid to acquire Alstom’s power and grid business, representing GE’s biggest ever deal
- Lehman Brothers Holdings Inc. in the UK pension and insolvency issues arising from Lehman Brothers bankruptcy proceedings, including successfully advising on the landmark settlement of the Lehman group’s UK pension liabilities
- The Joint Special Administrators to MF Global UK on the settlement of the Group’s pension liabilities
Ivor is head of the Employment practice in London. He advises on the full range of employment law issues, both contentious and non-contentious, and has extensive experience advising on the employment aspects of a wide variety of private equity, M&A and outsourcing transactions, as well as restructuring schemes and IPOs.

Ivor has been recognised for his employment law expertise by Chambers UK where he is a “noted expert in transactional employment concerns” and praised by clients as “exhibiting sound judgement in highly sensitive situations” and for his “phenomenal commitment” and ability “to succinctly explain problems and outline different approaches”.

Recent experience includes advising:

- Ongoing advice to various private equity and corporate clients, including on the recruitment and dismissal of senior executives and investment professionals across Europe
- Willis Group in its $18 billion merger with Towers Watson
- Verizon Communications in its $4.4 billion acquisition of AOL
- HNA Group in its CHF 2.73 billion acquisition of Swissport
- KPMG as joint administrators in the special administration of MF Global UK
- Equiniti in its IPO and listing on the London Stock Exchange
- Gores Group in its joint venture agreement with Premier Foods in the Hovis business

Rupert is head of the Real Estate practice in London. Rupert advises on the real estate aspects of private equity transactions encompassing due diligence of UK and pan-European portfolios, transitional service agreements, complex separation issues, post-completion asset transfers and provision of security. He has significant experience in providing day-to-day support on management issues relating to lease negotiations, lease renewals, break clauses and terminations and devising solutions to maximise the return on real estate assets through outsourcing, partnering as well as Opco/Propco and other structures. Rupert also advises administrators and other insolvency practitioners on all aspects of real estate issues in restructurings and insolvency related transactions.

Rupert is a member of the City of London Law Society’s (CLLs) Planning and Environmental Law Committee (having been chairman 2005 – 2015), and recipient of the 2014 CLLS and City of London Solicitor’s Company “Distinguished Service Award” for outstanding service as Chairman of the Future of the Livery Working Party. Rupert has also been awarded “Property Lawyer of the Year” by Legal Business, and is recommended for Real Estate by Legal 500 UK.

Recent experience includes advising:

- Oaktree Capital in the sale of the UK business of Fitness First to DW Fitness
- HgCapital in its acquisition of Citation from ECI Partners
- HNA Group in its acquisition of Swissport, the world’s largest ground and cargo handling company
- BHS Limited and BHS Properties Limited in their proposals for Company Voluntary Arrangements which were intended to allow BHS to address lease arrangements across its store portfolio - one of its largest fixed costs
- DFS in its IPO and listing on the Main Market of the London Stock Exchange
- Barclays Bank in the £1.5 billion restructuring of General Healthcare Group, owner and operator of the BMI hospital chain
- KPMG as joint administrators in the special administration of MF Global UK
Doug Nave

Doug is a partner and head of the EU Competition practice in London. He is a US-qualified attorney with over 30 years’ experience, including over 15 years in Europe advising and representing clients in matters arising under the laws of both the EU and its Member States. Doug has acted on a wide range of corporate/M&A and private equity transactions, with extensive experience in consumer branded goods, heavy industrial products, pharmaceuticals, financial products, public media, retail/wholesale operations, and a variety of service industries. He also regularly advises clients on application of the competition laws to joint ventures, competitive conduct, customer-supplier relationships, potential abuse of dominance, and the licensing and use of intellectual property.

Doug has been recognised as a leading practitioner in Competition/European Law by Chambers UK and Legal 500 UK, where he has been “applauded for his strong commercial capabilities and ability to provide an in-depth understanding of merger control and joint venture concerns”, and praised as being “valued for his succinct and targeted advice”.

Recent transactions include advising:

- Iron Mountain in UK review of its £1.6 billion merger with Recall, combining global leaders in records management services
- Johnson & Johnson in EU Member State reviews of its sale of the KY business to Reckitt Benckiser
- Array BioPharma in EU review (and remedial intervention) regarding Novartis’ acquisition of GlaxoSmithKline’s oncology business
- Lion Capital in Nordic/Baltic reviews of the sale of its Vaasan business to Lantmännen, combining regional leaders in the bakeries business
- Forest Laboratories in global pre-merger reviews of both its $25 billion merger with Actavis and its $2.9 billion acquisition of Aptalis
- Lenovo in EU and other regulatory reviews of its $2.9 billion acquisition of Motorola Mobility from Google
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<table>
<thead>
<tr>
<th>Training offered</th>
</tr>
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<tbody>
<tr>
<td>Investor directors — issues to think about at different stages in a portfolio company’s life cycle</td>
</tr>
<tr>
<td>We consider the directors duties and related issues which those individuals will have to consider through the life of an investment.</td>
</tr>
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<td>Trends in compliance</td>
</tr>
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<td>This presentation reviews developing practice in compliance programmes adopted by businesses in response to increasingly aggressive enforcement by UK and other non-UK authorities (including the US in relation to FCPA enforcement). Trends in due diligence in this area are also discussed. Compliance issues cover an increasingly wide range, including corruption, sanctions, money laundering, supply chain management and tax avoidance.</td>
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<td>Preparing for an IPO</td>
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</tr>
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<td>From diligence to defence: Investing under the competition laws</td>
</tr>
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<td>Private equity and other investors face sizeable and increasing exposures where companies in which they invest are found to have infringed the competition laws. This presentation provides concrete advice on how investors can identify and address potential risks before they become a problem.</td>
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<tr>
<td>Back to the Future? Use of IPRs under the competition laws</td>
</tr>
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<td>Regulators worldwide have placed the licensing and use of intellectual property rights under greater competition-law scrutiny than they have done in decades. This presentation focuses on these trends and emerging rules, which must be borne in mind both in ongoing commercial operations and in evaluating potential acquisitions.</td>
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<tr>
<td>Competition law— basic rules and emerging trends</td>
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<td>This presentation provides an overview of the basic rules on competition, as well as emerging regulatory emphases (such as on information exchanges) that will help companies to comply with their legal obligations, identify when competitors or business partners may not be doing so, and evaluate important regulatory considerations in possible joint ventures or acquisitions.</td>
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<tr>
<td>Current Tax Issues in M&amp;A Transactions</td>
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<td>This presentation will outline key tax issues tailored to the particular audience.</td>
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<td>UK Pensions and Restructuring – how to cope when the pressure points arise</td>
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<tr>
<td>This presentation looks at how to manage pension risk when the pressure points arise and considers the possible options and strategies to adopt in restructuring situations, taking into account the Pensions Regulator’s powers, the potential involvement of the Pension Protection Fund and the considerations of the different stakeholders.</td>
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<tr>
<td>UK Pensions—pitfalls to avoid in corporate and financing transactions</td>
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<td>This presentation looks at the risks of triggering significant cash payments to a UK pension plan either as a result of deal structure or the powers of the UK Pensions Regulator. In addition, the risk of significant unforeseen pension liabilities as a result of a proposed or previous TUPE transfer where employees have or used to have defined benefit pension rights and strategies to adopt in these situations.</td>
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<td><strong>UK Pensions—when is it necessary to involve the UK Pensions Regulator and/or the Pensions Trustees?</strong></td>
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<tr>
<td>This presentation looks at the powers of the UK Pensions Regulator and the pension trustees to intervene in corporate transactions (including internal reorganisations, restructurings and refinancings or where there may not initially appear to be a UK angle), potentially demanding cash injections to the pension plan or otherwise impacting the deal’s financial viability and possible strategies to adopt when navigating these issues.</td>
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<tr>
<td><strong>Do Pension Trustees have a place at the table in public takeovers?</strong></td>
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<td>This presentation examines the Takeover Panel rules in relation to the rights of pension trustees to be involved during takeover discussions and how these rights link to the Pensions Regulator’s powers in the context of takeovers and suggests strategies for navigating these discussions.</td>
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<tr>
<td><strong>Financial Support Directions and Contribution Notices—how significant a risk in practice?</strong></td>
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<td>This presentation examines the situations where the Pensions Regulator has exercised its moral hazard powers to date, lessons to learn from these cases, and the key uncertainties on the extent of the Regulator’s powers.</td>
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<tr>
<td><strong>General Data Protection Regulation — practical implications</strong></td>
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<tr>
<td>New General Data Protection Regulation will fundamentally change data protection laws in Europe. This will impact every organisation, particularly those which exploit and seek to monetise personal data. This presentation highlights these changes and the practical implications for businesses.</td>
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<td><strong>Recruitment and dismissal of senior managers</strong></td>
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<td>A presentation on the effective recruitment and dismissal of senior managers across Europe and other jurisdictions.</td>
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<tr>
<td><strong>TUPE regulations—developments</strong></td>
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<tr>
<td>The Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) apply to protect employees in relation to business (asset) transfers as well as on service provision changes (e.g. outsourcings and insourcings). There have been a number of interesting decisions by the Employment Appeals Tribunal in the last few years, many of which shed light on issues relating to service provision changes. This presentation explores the main themes to emerge from these cases and to explain what they mean in practice for employers.</td>
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<td><strong>Monitoring employee use of e-mail and internet—the basics</strong></td>
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<tr>
<td>Monitoring e-mail and internet use of employees has always been a legal minefield. This presentation summarises the main rules whilst also exploring how employers are attempting to manage the risks posed by the use of social media by their employees.</td>
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<tr>
<td><strong>Employment law—what’s on the horizon?</strong></td>
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<tr>
<td>This presentation includes a round-up of the most important recent and planned changes to UK employment law.</td>
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<tr>
<td><strong>End of lease term opportunities and liabilities</strong></td>
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<tr>
<td>This presentation looks at end of lease liabilities, primarily from a tenant’s perspective: what to anticipate and how to mitigate such end of term liabilities as dilapidations and reinstatement of alterations.</td>
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<tr>
<td><strong>Realising value from asset rich real estate</strong></td>
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<tr>
<td>Realising value from asset rich real estate is the holy grail for private equity and similar investors who are attracted to financing structures which differentiate between capital rich real estate, which many see as “dead money”, and leased operational real estate assets. This presentation looks at the evolution of the propco/opco type structures, the reasons for disenchantment with those structures and possibilities for the future.</td>
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<thead>
<tr>
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<td>Established for 85 years in the Americas</td>
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<td>25 years in Europe</td>
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Restructuring Team of the Year
Financial News Awards 2016

US Law Firm in Europe; European M&A Tax Deal of the Year; European Joint Venture Tax Deal of the Year; European Tax Restructuring Deal of the Year; European Media and Entertainment Tax Deal of the Year

Dispute Resolution Team of the Year
Legal Business Awards 2015

Structured Finance and Securitisation Deal of the Year; Loan Deal of the Year
IFLR European Awards 2015

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<td>SILICON VALLEY</td>
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<tr>
<td>WARSAW</td>
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<td>WASHINGTON, DC</td>
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</table>

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