

REGULATORY LAW & DISPUTE RESOLUTION

MOBILE PHONES AND DRIVING

The new requirements New regulations concerning mobile phones and their use whilst driving came into force on the 1 December 2003. The penalty for breaching the regulations at the moment is a £30 fixed penalty or up to £1,000 if convicted in a Court, although this rises to £2,500 for drivers of goods vehicles, buses or coaches. It is understood the Government has plans to increase the fixed penalty fine in due course.

What do the Regulations say? The regulations prohibit the use of handheld phones or other similar handheld devices whilst driving. The definition of handheld device is something that 'is or must be held at some point during the course of making or receiving a call or performing any other interactive communication function'. This definition is wide and would include, for example, the sending and receiving of written text messages, or sending or receiving images via a mobile telephone or even seeking access to the internet. It is possible that utilising a personal digital assistant may be caught by the legislation.

What does 'use' mean? If the phone has to be held in some way, then this is using it and is an offence. This equally applies to cradling the phone between your ear and shoulder. The offence is committed if a mobile phone is held whilst driving. The definition of driving includes the times when you may be stopped at traffic lights or during other hold ups when, in effect, you would be expected to move off after a short while. The Government has, however, indicated that in exceptional traffic jams it may be clear that an individual is not driving if the engine is switched off and a call would be permissible.

Hands (fully) free? Other points to note are that a phone can still be operated provided you do not need to hold it. This extends to pushing buttons on a phone whilst it is cradled or operating it in some other way, provided you do not actually hold the phone.

Just drivers? It is important for employers also to realise that the regulations apply to "anyone who causes or permits any other person" to use a handheld mobile phone whilst driving. The Government has indicated that employers would not automatically be liable simply because they had supplied a mobile or even because they had telephoned an employee who was driving. Whilst a practical approach has prevailed in those instances, employers could still be liable if they required their employees to use a handheld phone whilst driving. There is an argument also that an employer might be liable if they failed to forbid employees to use mobile phones or other devices whilst driving on company business. The answer to those concerns is to implement a policy whereby the use of handheld mobile phones is prohibited whilst driving and/or introduce the installation of hands free equipment which will mean that a phone can be operated without holding it.

These regulations apply additionally to anybody supervising a learner driver.

TO MEDIATE OR NOT TO MEDIATE?

The courts have been sending out mixed signals in relation to the costs consequences of a refusal to mediate in the last couple of years.

In one case Railtrack were penalised in costs (even though it ultimately succeeded in its case) because it had refused the other side's offer of mediation which the court considered might have brought about a cheaper result for the parties. However, in another case a Defendant who refused to mediate with a particularly difficult Claimant managed to avoid costs penalties because the court agreed with him that mediation would inevitably have failed due to the Claimant's intransigence.

In the recent case of *Corenso (UK) Ltd. v. the Burden Group plc*, the parties settled on the eve of trial through negotiation (as opposed to mediation, which had been offered by the Defendant but refused by the Claimant). Costs remained in dispute. The Claimant argued the Defendant should be liable for its costs because the settlement effectively gave it the majority of what it was claiming in the first place. The Defendant, on the other hand, argued it was not so liable because of its opponent's unreasonable refusal to mediate. The court looked at the case as a whole. Because the parties in *Corenso* had negotiated, ultimately reaching settlement this way, and the Claimant had substantially "won" on its claim, the Defendant should pay costs.

The message appears to be that a tactical offer to mediate where the offeror's case is patently weak is therefore unlikely to be effective but mediation remains an important consideration in every case and the courts will "punish" a party in appropriate circumstances for failing to consider mediation.



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THE ENTERPRISE ACT 2002

Significant changes to insolvency law, insofar as it relates to companies, came into force on the 15 September 2003.

The Enterprise Act 2002 contains a number of important provisions though those relating to individual insolvency, designed to make bankruptcy less onerous for non-culpable bankrupts, will not be implemented until next year.

To summarise the main changes becoming operative now:

1. H M Customs & Excise and the Inland Revenue's privileged position as "preferential creditors" have been abolished. In the past the effect of this status was that in a corporate insolvency, on many occasions the only creditors to receive any dividend on their indebtedness were the Bank and the Crown. The abolition will benefit debenture holders (such as banks) and unsecured creditors, although the benefit to unsecured creditors may take some time to work through. This benefit will be achieved by creating a reserved fund to be used to pay unsecured creditors rather than the bank but only operates where the bank's debenture was created after 15 September 2003. In addition, it remains to be seen whether the Revenue and Customs & Excise's attitude to non-payment changes and, in particular, whether they become even less tolerant of late or non-payment. The possibility must be that if the Crown's prospects of recovering its debt in an insolvency have reduced, it will be less inclined to allow a business any latitude in payment.

2. The right of debenture holders (e.g. banks) to appoint Administrative Receivers has been abolished in relation to Charges created after 15 September 2003. Accordingly, although receiverships will continue for some time in relation to "old" Charges, Administration Orders will become much more frequent.

3. The Administration Order procedure has been radically changed in an attempt to encourage greater efforts to save the company and/or its business. In certain circumstances an Administrator can now be appointed without a Court Order and an attempt has been made to streamline the whole procedure. In addition there has been a change in the purposes for which an Administration Order can be obtained with the Administration having to give first priority to the survival of the company itself, if that is possible.

If you have any queries, please contact Ralph Gilbert on 01482 323239 email ralph.gilbert@rollits.com

LICENSING REVOLUTION

The Licensing Act 2003, when it finally comes into effect (currently predicted to be anywhere between April 2004 and September 2004) will revolutionise alcohol and entertainment licensing. Amongst many innovations, it will:

- (i) Introduce a uniform code for the licensing of alcohol and entertainment
- (ii) Transfer the Magistrates Licensing jurisdiction to Local Authorities
- (iii) Introduce the concept of "personal" licences
- (iv) Introduce the concept of "premises" licences
- (v) Introduce the concept of a "designated premises supervisor"
- (vi) Introduce the concept of "open all hours"

The Act was much trumpeted as an act of deregulating of licensing. However, if anything the regulatory requirements appear to have increased rather than decreased. This will be particularly so if Local Authorities require the new form of super licensee, the "designated premises supervisor", to be resident at premises as opposed to being someone such as an Area Manager.

When the Act becomes operative (i.e. on what is known as the First Appointed Day), there will then be a six month transitional period during which there will be a dual system of licensing in place:

- (a) The current system operated by the Magistrates; and
- (b) The new system operated by the Local Authorities

During this transitional period, all licensees will have to apply to the Local Authority where they live (as opposed to where they work) to be registered as the holder of a personal licence and operators of all licensed premises will have to apply to the Local Authority in which the premises are situated for the grant of a premises licence. Currently the forms and procedures required for such steps to be undertaken are as yet to be finalised. Unless new personal/premises licences are granted, all existing licences will expire on the Second Appointed Day (i.e. the end of the six month period). There is no doubt this period will generate many problems and confusion. There is a risk that overworked Local Authorities will simply reject certain applications out of hand causing further problems.

Although these problems may appear several months away, all licensees and operators of licensed premises would be well advised now (if they have not already done so) to begin preparing to meet the challenges presented by the new Act so as to be able to manage the licensing function efficiently during the transitional period and be in a position to make all necessary applications as soon after the First Appointed Day as is possible, so as to limit any risk of interruption to business.

The challenge is there and all licensees and operators of licensed premises must be prepared to meet it.

For any further information on the Licensing Act 2003 and its implications for the licensed trade contact George Coyle on 01482 323239, email george.coyle@rollits.com

ARE YOU GETTING YOUR JUST DESSERTS?

According to a recent study, businesses have not taken full advantage of the Late Payment of Commercial Debts (Interest) Act 1998 ("the Act").

The Act was designed to help businesses that suffer cash-flow difficulties as a result of late-paying commercial customers.

Broadly speaking, under the Act, businesses can now charge commercial customers interest at 8% above the Bank of England's base rate on debts that are paid late as well as claim additional compensation depending on the size of the debt concerned. For each debt (i.e. per invoice) below £1,000, the current compensation figure is £40, for each debt between £1,000 and £9,999, £70 can be claimed, and for each debt of £10,000 or more, £100 can be claimed. The compensation levels are likely to be revised in future.

If you would like assistance with claiming against persistent late-payers, please contact Ralph Gilbert on 01482 323239, email ralph.gilbert@rollits.com

INFORMATION

**If you have any queries on any commercial disputes please contact:
George Coyle at Hull on (01482) 323239
David Watson at York on (01904) 625790**

This Bulletin is for the use of clients and will be supplied to others on request.

It is for general guidance only. It provides useful information in a concise form.

Action should not be taken without obtaining specific advice.

We hope you have found this bulletin useful. If, however, you do not wish to receive further mailings from us, please write to Mrs. Pat Coyle, Rollits, Wilberforce Court, High Street, Hull, HU1 1YJ.

**The law is stated as at 1 December 2003
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