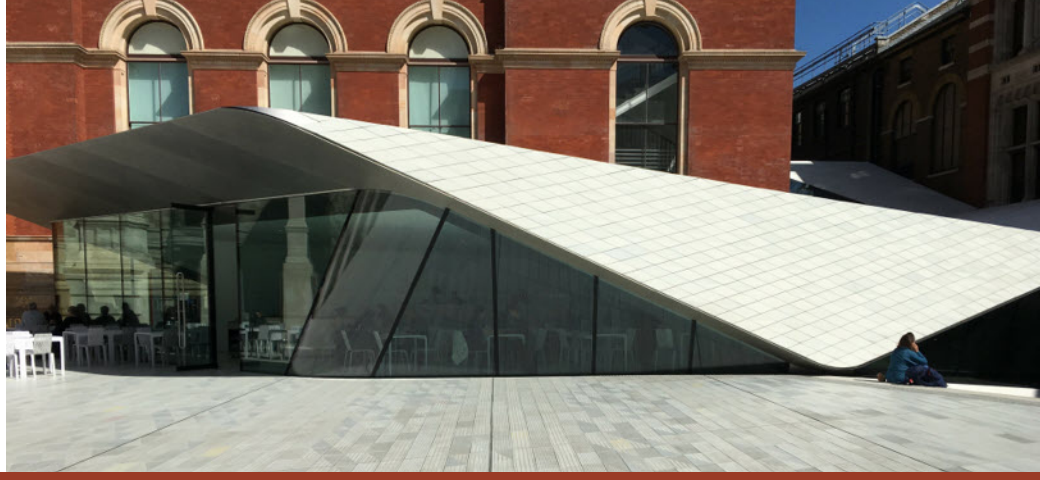
NELLEN NEWS



Summer 2018

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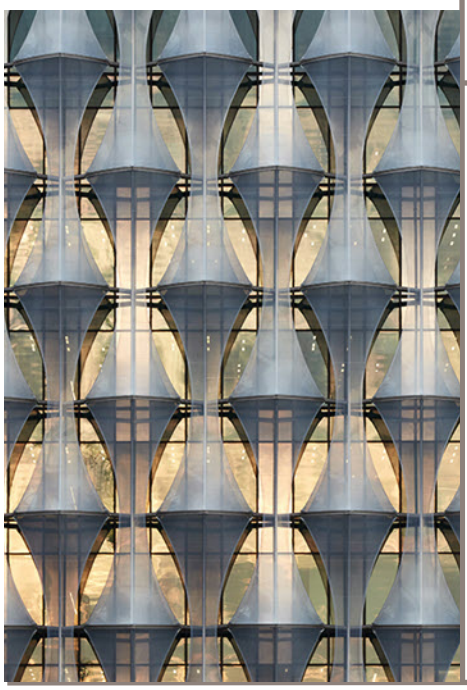

Data Protection: Anticipating the warranties

Companies who are contemplating a sale or a fundraising after 25 May 2018 when the EU General Data Protection Regulations (**GDPR**) come into force, should anticipate being required to give extensive warranties covering their personal data handling.

Their shareholders will typically be asked to warrant that the company has applied appropriate data protection policies and procedures concerning the 'collection, use, storage, retention and security of personal data...' which comply with the GDPR. This will include being able to:-

- provide evidence of the personal data the company holds, where it came from and how it is processed or shared.
- show that, when the company collects personal data, it provides appropriate privacy notices which include information on how it intends to use an individual's information, the lawful basis for its processing the data and an individual's right to complain to the Information Commissioner's Office.
- demonstrate how the company has handled subject access requests, whether it has suffered any personal data breaches and whether these have been correctly handled.

In the light of the GDPR a company's methods of collecting, processing and handling personal data will become a more important element of company transactions. It is likely that, in cases of significant non-compliance where personal data is a key asset, buyers will require indemnities or, at worst, price retentions.

Recent Transactions

Recent transactions on which **NELLEN** has advised include:

- **Wield Wines Limited** the owner of the award winning English sparkling wine brand Hattingley Valley Wines, on its equity fund raising.
- **The Square (Dailyrare Limited)** the 2* Michelin restaurant in Mayfair, on its sale to the MARC Restaurant Group.
- **The Food Doctor Limited** the health food brand, on its sale to the diversified food manufacturer William Jackson Food Group Limited.
- **Lulu Guinness Holdings Limited** the clothing, accessory designer and retailer, on its purchase from FE Partners (Europe) Limited of the outstanding 51% of its Asian associate company.
- **Wanderlust Publications Limited** the travel publisher and information company, on the sale of a majority of its share capital to Think Publishing Limited.

Share valuations: need for clear wording

Standard valuation principles apply a significant discount to minority holdings of shares. If the intention is not to apply a minority discount in pre-emption provisions in Articles, this should be expressly set out in order to avoid a dispute similar to that which arose in the recent case of *Cosmetic Warriors Limited* and *Lush Cosmetics Limited v Andrew Gerrie.*

The Articles of the Cosmetic Warriors and Lush **(C)** contained a fairly standard pre-emption procedure requiring a selling shareholder wishing to sell shares to offer them at the prescribed price to the other shareholders. The prescribed price was 'such sum per share' as agreed between a selling shareholder and C, failing which the price was to be determined by independent accountants as being, in their opinion, the fair value as between a willing buyer and a willing seller valuing C on a going concern basis.

C had appealed a High Court decision that the shares should be valued on the basis of a pro rata proportion of the value of the whole equity of C without applying any minority discount for the block of shares being sold.

The Court of Appeal dismissed the appeal on the grounds that the language indicated that no minority discount was intended. The 'prescribed price' for the shares to be sold was defined as a sum 'per share' based on valuing C on a going concern basis. Valuing C on a going concern basis meant valuing it as a whole and once that value was determined, it followed that the prescribed price must be calculated by ascertaining a price per share on a pro rata basis. The language in the clause only made sense if the value 'per share' was derived from the value of C as a whole.

Investors' Relief: further incentives for investors

The tax regime for investors in unlisted trading companies was made more attractive with the introduction in 2016 of 'Investors Relief' (**IR**). The relief applies to gains on the disposal of qualifying shares by individuals (other than employees and officers of the company, though unremunerated directors are not excluded). The shares must be:

- newly issued, having been acquired by the person making the disposal on subscription for new consideration (unlike ER, there is no minimum percentage requirement)
- be in an unlisted trading company, or unlisted holding company of a trading group (there are currently no restrictions on the type of trade)
- have been issued by the company on or after 17 March 2016 and have been held for a period of three years from 6 April 2016
- have been held continually for a period of three years before disposal

The rate of CGT charged on the qualifying gain will be 10%, with the total amount of gains eligible for IR subject to a lifetime cap of £10m per individual.

If there are circumstances where shares in a trading company do not entitle investors to EIS relief, the availability of IR is an attractive consolation prize.

Implied contractual terms: need for 'commercial or practical coherence'

In disputes over the interpretation of corporate/commercial contracts, it is often argued that where a contract is silent on a particular point, an implied term is to be assumed to give the contract commercial sense.

Yet in the recent case of *Marks and Spencer plc v BNP Paribas Securities*, the Supreme Court has clarified that the bar for implying contractual terms is high.

In the Marks and Spencer case, M & S exercised its right under break clauses in a number of its leases on 2 February, having paid its quarterly rent in advance in full on 25 December in the previous year. The key question which came before the Supreme Court was whether M & S could recover from the landlord the apportioned rent in respect of the period after the break date ie from 24 January to 24 March.

Whilst it would seem unfair that the landlord should have been entitled to retain both the rent paid in advance and a break premium which was provided for in the lease, the test whether an apportionment term should be implied was that of 'strict necessity for business efficacy'.

On this basis, the Supreme Court reasoned that such a term could not be implied. It held that a term can only be implied if, without the term, the contract would lack commercial or practical coherence and that such a term was not strictly necessary to make the break clause 'workable' or to give it 'commercial or practical coherence'.

The usual interpretive starting point is that the absence of an express term means that nothing has been agreed in relation to the event. However unfair the contract appeared, the court had no power to improve upon it.