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Financial Foundations

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Safeguard your rights

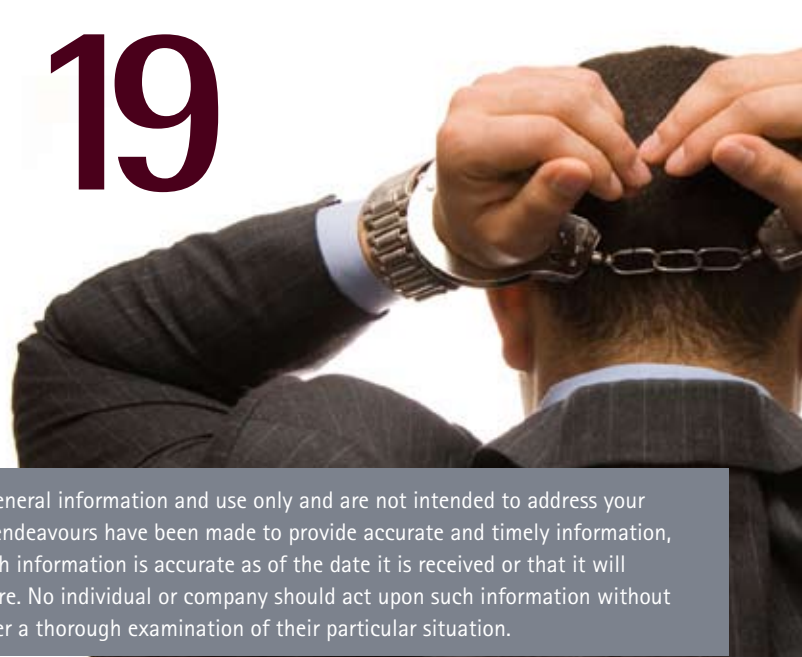
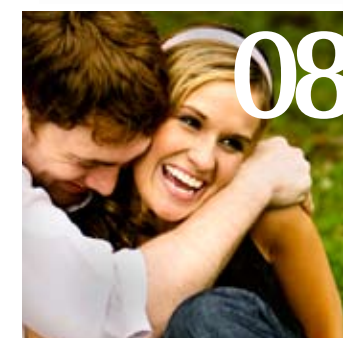
PLUS: MEDIATION...THE IMPARTIAL THIRD PERSON EMPLOYMENT...DO YOU KNOW YOUR RIGHTS?

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Intellectual property

Safeguard your rights

Businesses which have been involved in developing software, a process or other commercially valuable resources, or go into business with someone who has, need to be sure they know exactly who owns the legal rights in it.

Care must be taken to safeguard your rights, and keep your business on firm foundations.

Legal rights in software belong to the developer (or, if he is employed, his employer). If a business wants exclusive use of the software, or to license it to others, the developer must assign rights in the software to the business – and do so in writing – or grant it an exclusive, perpetual and irrevocable licence to do so. It can be complex if the rights are to be jointly owned and/or exploited by several businesses, or several different developers have been involved.

A common scenario is for the business to commission software from a developer, without a written agreement to assign ownership to the business, or a licence agreement giving it the right to use and/or sell the software. If there is a dispute later, and the court has to work out the terms of their agreement from what they said during negotiations, correspondence, estimates, etc, and from the conduct of the parties. Or the developer's standard terms often apply by default, which retain all rights in the software he develops for the business.



Another situation can occur when a developer sets up a business with third party investors and management, to exploit software he has already developed. There is no written assignment or licence in favour of the new business. The new business licenses customers to use the software and/or appoints resellers on the assumption it owns all rights in the software. The developer then falls out with his colleagues and leaves, claiming that he retained ownership of those rights all along.

The developer may have signed a document saying he gives up his rights in the software, or recognises that the business owns it – but, legally, that may not amount to an assignment or a licence. Assignments and licences should be drafted by a specialist solicitor to avoid these pitfalls.

In exceptional circumstances, the court may decide that an oral statement, or the developer's conduct, is effective to assign rights in the software, even though there is nothing in writing. But the court will only imply an assignment if it is 'necessary to give business efficacy' to the relationship, and this is a difficult test. For example, it may be more likely to decide there was an assignment if:

- The developer has been paid a sum equivalent to the value of an assignment.
- It was clear that the business intended to license the software to customers as part of its trade.
- The software is to automate a function specific to the business, so that it cannot be reused by the developer for other clients.

On the other hand, if the business knows the developer may re-use the code in the software, it's unlikely he intended to assign his rights, or grant an exclusive, perpetual, irrevocable licence.

Date of article: August 2007

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Cash is king!

What's your business worth?

The value of a privately-owned business is what someone will pay for it on a particular day. So valuations are opinions, not fact.

Also, factors unique to the buyer will affect what he is prepared to pay. If they have to relocate, service a higher debt and depreciate new plant, machinery or technology, he will offer less. They will also apply his own accounting policies when calculating the business's profits, which can result in a significantly different profit figure from the owner's.

This is the commonest method of valuing a smaller business. An adjusted post-tax profit is calculated, and a multiple applied, to arrive at a value for the business. 'Adjusting' means removing abnormal items in the accounts that won't reoccur, such as costs of an acquisition, and one-off bad debts that have been written off.

The multiple for an owner-managed business is normally between one and three; for a business managed by directors on behalf of non-director owners, or with adjusted profits of up to £500,000, it is normally between three and seven.

High, fast-growing profits, competition among buyers, and trading in a sector that is in vogue, will all increase the multiple. Over-reliance on the current management team, key employees or a few key customers, and high anticipated expenses for the buyer (such as the need to raise pay at some stage because the workforce is earning below market rates), can reduce it.

Asset valuation is appropriate for stable, asset-rich businesses, for example, a successful property business, or a manufacturer with significant premises, plant and machinery. Asset valuations, however, can result in a conservative value, as they do not take into account future earnings.

The 'net book value' (assets less liabilities) in the accounts is refined (for example, property or other fixed assets may need to be revalued, old stock in the books at full value may in fact only

be saleable at a discount; there may be debts to the business that are clearly not going to be paid) to arrive at the asset valuation.

This calculation, based on future cashflow, is appropriate for stable, mature, cash-generating businesses. For example, a publishing house with a large catalogue of titles.

Add up the dividends forecast for each of the next 15 years (at least), plus a residual value at the end of the period. Then calculate the current value of each future dividend using a 'discount interest rate', which takes account of the risk and the time value of money, to arrive at a discounted cashflow value.

Date of article: August 2007

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Steps to take

Make sure there is a clear, written agreement with the developer that records that he has assigned his rights in software, or granted an appropriate licence.

Do not just assume people will be as good as their word – get an agreement in writing. Circumstances change, memories play tricks, and the goodwill which was present in the early days of a relationship can dissipate.

If different parts of the software were written by different developers, make sure all of them assign or license their rights to you.

Particularly, check that anyone from whom a developer sub-contracted work has also assigned or licensed their rights to you, and not to the developer.

If the software is to be owned, or exploited, by more than one business, make sure that the rights of each are clear.

In all cases, ensure that the agreements are in writing, drawn up correctly.

The right to learn our biological origins

Changes to the fertility laws on the horizon?

The birth certificates of children born from donated eggs and sperm would be marked with details of the way they were conceived, under proposals advanced recently by MPs and peers.

A legal requirement to register such births openly is the only way of ensuring that children conceived from donors have the right to learn of their biological origins, a parliamentary committee that is scrutinising fertility reforms said.

The joint Commons and Lords panel said that it recognised "the force of the argument" for including this information on birth certificates, and urged ministers "to give this consideration as a matter of urgency".

It stopped short of backing a legal obligation on parents to tell their children if they are donor-conceived, which it decided would be unenforceable.

The suggestion raises significant privacy issues as birth certificates are public documents. Anybody would thus be able to find out whether any individual had been conceived from donated eggs or sperm.

The committee, however, said that it saw no other way of guaranteeing the right to know. Although people can consult a register when they turn 18 to find out whether they are donor-conceived, and those

conceived after April 2005 will be allowed to trace their biological parents, many never think to do so as they never suspect their origins.

The committee, which was established by ministers to examine draft reforms to Britain's 17-year-old fertility laws also, objected strongly to several of its central elements.

The report was also critical of the Government's plans to ban hybrid embryos made by fertilising an animal egg with human sperm or vice versa.

It also questioned plans about whether a doctor should take into account a child's need for a father before providing IVF. The Government wanted to remove the requirement, but the committee wants it retained with language that makes clear that it relates to the ideal of two parents.

Other recommendations included a parliamentary bioethics committee and reform of the Human Tissue Act.

Date of article: August 2007

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Reducing the risk of personal bankruptcy

Directors are turning to the company

Directors are now able to ask their companies to foot the bill for legal claims made against them. Less risk of personal bankruptcy for directors, but does that leave the company exposed?

Company directors can be personally liable, sometimes for unlimited damages, if they are accused of negligence or other wrongdoing. Legal liabilities lurk in every nook and cranny. Company law, health and safety rules, trading law can all land you in trouble. At worst, a heavyweight legal claim might mean bankruptcy before you even get to court.

Your company can give you peace of mind by indemnifying you in more of these situations - sometimes even when the claim against you is by the company itself.

For creditor, employee or shareholder claims against you the indemnity agreement can state that the company will pay your legal costs as they arise. If you lose, the company can also agree to pay the damages awarded against you, and any of the other side's costs awarded against you.

Alternatively, it can provide that you will get nothing further - and must pay back any money it's already paid towards your legal costs.

If the claim is by the company itself - for breach of your duty to act in its best interests, for example - it can agree to pay your legal costs as they arise, but you must repay them if you lose.

Of course, your company can't indemnify you for its own damages awarded against you, or for any of its legal costs that the court says you have to pay.

The company can pay your legal costs if a criminal case is brought against you, as they arise, but you have to repay them if you are found guilty. You can't be indemnified against fines from regulatory

authorities, or fines imposed if you are found guilty of a criminal offence.

The company has a choice whether and how it will indemnify its directors. If it wants to protect its directors at all, it should:

- Consider indemnities for directors.

- Make sure the company's articles of association authorise the directors to make the necessary arrangements.
- Ensure the directors disclose indemnity arrangements in their annual report.
- Consider Directors' and Officers' Indemnity insurance.

Date of article: August 2007

“ The company can pay your legal costs if a criminal case is brought against you, as they arise, but you have to repay them if you are found guilty. ”



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Financial settlements for cohabiting couples

Law Commission sets out proposals

Cohabiting couples would be entitled to financial settlements if they split up, under proposals from the Government's key adviser on law reform.

A report by the Law Commission says that partners who have been together for two years or more, or have had children together, should be able to make claims.

Under the scheme, courts would have the power to order former partners to sell their home, pay lump sums and even share their pensions to balance out the "pluses and minuses of the relationship". Those making claims would have to prove that they had made "qualifying contributions" to the

relationship, which have resulted in "enduring consequences". They would have to prove that their relationships put them at a long-term economic disadvantage or gave their ex-partners a clear financial advantage. The report authors included data from Australia that showed how rights for cohabitants had little impact on the marriage rate.

The scheme would not apply to all cohabitants automatically, and relates only to the financial contributions made during the relationship. Under divorce law there is an assumption that partners are equals regardless of the financial contribution made and assets and wealth are divided equally.

The courts would be encouraged to rule in favour of "clean break" one-off settlements. The only time maintenance would be deemed appropriate is if it was to pay for childcare. Young people who rented a flat together for a few years would not be deemed eligible and couples would be able to opt out of the scheme formally. The financial needs of either party are not to be taken into account, only the contribution made. There are two million cohabiting couples in Britain and the figure is expected to reach 3.8 million by 2031.

There was no immediate sign from the Government that it would press ahead with the scheme, but the Ministry of Justice welcomed the report: "We will read it with interest and consider its recommendations carefully."

Date of article: August 2007

“ Young people who rented a flat together for a few years would not be deemed eligible and couples would be able to opt out of the scheme formally. **”**

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High Court rules on indeterminate sentences

Justice Secretary acted unlawfully

Hundreds of prisoners given indeterminate sentences could be freed from jail after a court ruled recently that holding them longer than their minimum sentence was unlawful.

The High Court judgment was in a test case brought by two inmates serving indeterminate sentences for public protection (IPPs), under which they should be given a risk assessment on entering prison and then allowed to go on courses intended to tackle their offending behaviour before the Parole Board considers them for release.

But the overcrowded prison system has been unable to provide courses for them all, resulting in more than 100 remaining in jail beyond their minimum term. The two offenders complained that, as a result, the Parole Board could not assess whether they still posed a danger to the public when their minimum terms expired.

The judges granted a declaration that Jack Straw, the Justice Secretary, had "acted unlawfully by failing to provide for measures to enable prisoners serving IPP sentences to demonstrate to the Parole Board, by the end of their minimum term, that it is no longer necessary for the protection of the public for them to be confined".

In the ruling the judges said that IPP prisoners with a minimum term of less than five years were "languishing" in local jails where, according to Anthony Robson, deputy head of public protection at the National Offender Management

Service, there were few offending behaviour programmes.

Mr Robson told the court that it would take at least six months after the completion of a review into IPPs before any practical measures could be implemented and a further 18 months before the system to manage them could be fully operative.

IPP sentences, introduced in April 2005, are for prisoners assessed as dangerous, who have been convicted of one of 153 offences, including affray, assault to resist arrest and riot.

Several offenders confronted Mr Straw with the problem after he agreed to meet them during a visit to Belmarsh prison in southeast London.

He met inmates who had been kept in jail longer than expected under the tariff imposed by their trial judges. They complained that they had been unable to complete rehabilitation courses because of overcrowding in England and Wales.

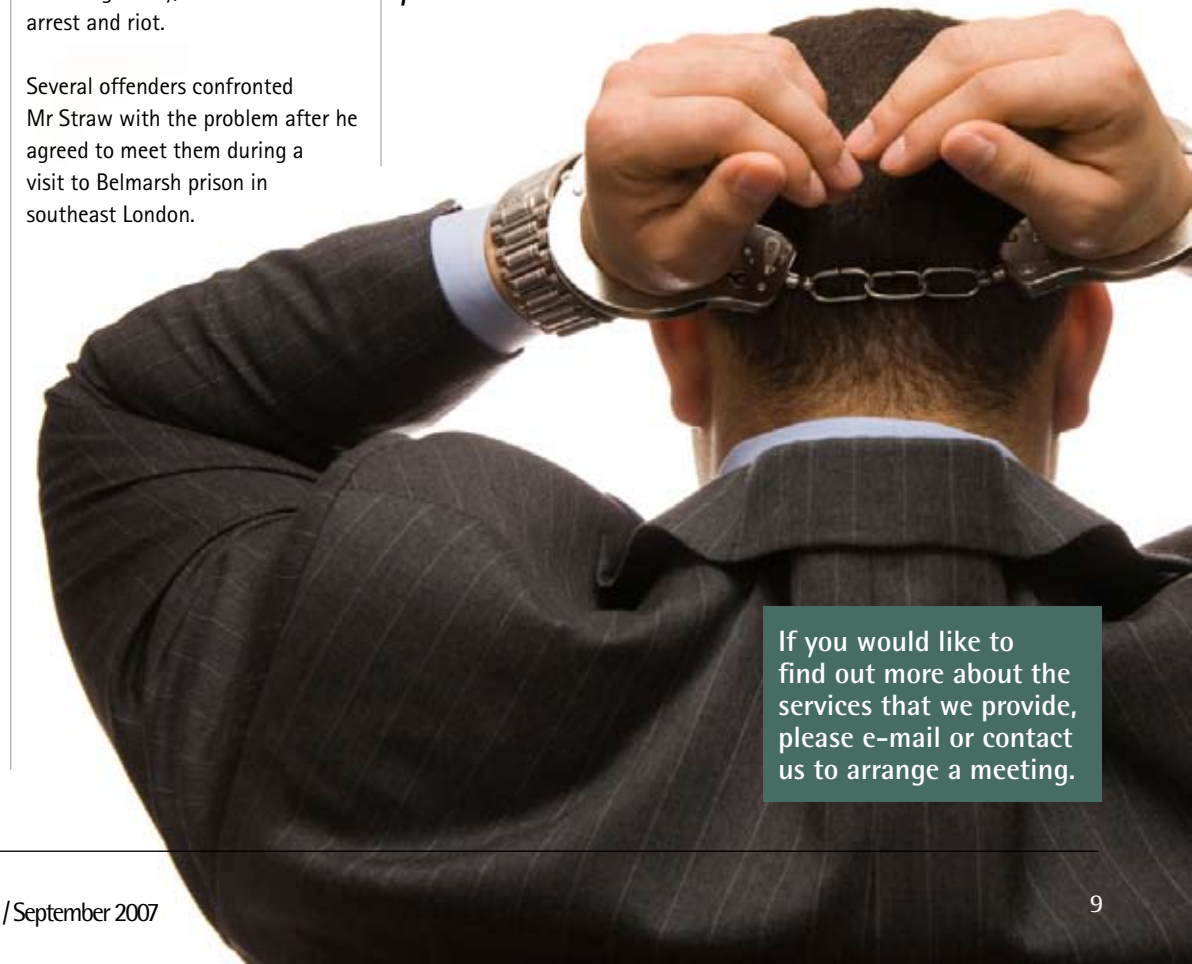
- 3,010 prisoners now serving indeterminate sentences.
- 28 median age of those given the sentences.
- 30 months is the median minimum term.
- 173 prisoners on the sentence were beyond minimum term in May.

How IPPs add up

- Indeterminate sentences to protect public come into force in 2005.

Date of article: August 2007

“ Several offenders confronted Mr Straw with the problem after he agreed to meet them during a visit to Belmarsh prison in southeast London. **”**



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Don't fall foul of poor succession planning

Getting the biggest pay out requires a strategy

It's never too early to work out your strategy for exiting your business. Sellers who haven't prepared typically get less for their businesses than those who do and in the worst of cases a buyer can't be found.

Changes you need to make can't be achieved overnight, so it is crucial to plan.

Firstly, consider your strategy, can you add value to your business when you plan to sell? Should you be aiming to maximise shorter- or longer-term profits? Are you over-reliant on just a few customers?

Next, at what point do you think your business will be worth the highest value, given changes in your supply chain, competitor activity or technological advances?

Then there's the matter of tax. Implementing a tax-efficient strategy to realise your investment in your business can take time to set up. Your company might need to make sizeable contributions to your pension fund for several years. Make sure any tax changes are factored into your plans.

Potential legal disputes should be resolved. If a shareholders' agreement or your company's articles of association states you must offer your shares to other shareholders

before you can sell to an outsider, address this issue to prevent any possible delays. Agree who will take over personal guarantees. If the company leases premises from you, discuss the alternatives. Ensure all key agreements are in place.

Key workers must be retained for a good sale price. Clauses in customer or supplier contracts may give them termination rights if ownership changes - when will you talk to them, to make sure they'll do business under the new owner?

Advice should be taken on the different tax implications of selling

company shares, compared to the sale of company assets - legally, selling shares can be generally a better option for the seller than selling assets.

Make sure management information systems, equipment and premises are in good order.

If you want to keep a stake in the business, you can restructure the company's finances. Increasing bank borrowings and selling some of your shares back to the company is an option.

Date of article: August 2007

“ Implementing a tax-efficient strategy to realise your investment in your business can take time to set up. ”



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Criminals target company identities

What precautions are you taking?

Companies House and the police have warned limited companies that it's easy for individuals to change your company's records at Companies House and run up credit in your company's name.

First the criminal checks your credit rating. If they find what they are looking for the next step is to forge and file documentation at Companies House notifying the appointment of a fictitious new director and a new registered office address for your company.

The Registrar of Companies (who cannot check that all these documents are genuine, and is not obliged to by law) registers them. The criminal is now able to order high value goods and services on credit, using false ID to pretend he is a director of your company. To a third party searching at Companies House, all seems in order. They then disappear without paying.

It's medium sized and smaller businesses that are typically targeted - here are three protective measures recommended by the police and Companies House:

1. Regular checking

Regularly check to make sure you haven't been targeted. Check your company's registered office online on the Companies House website.

2. Proof your filings

Consider pre-empting criminals by signing up to the Companies House proof service, which is an online filing scheme.

This will mean that certain information (including changes in directors and registered office) can only be filed electronically. Paper forms will be rejected. You will be given a user name and password, authentication code and recognised email address to let you file documents electronically.

3. Search service

You could subscribe to the Companies House Direct online search service for £5 per month. As part of the service Companies House can monitor your company (and, if you want, any competitors, customers or business partners) for 50p per company per year, and e-mail you if a document is filed.

If you filed it, ignore the e-mail and there is no charge. If it wasn't, you can download and pay for an image of the document.



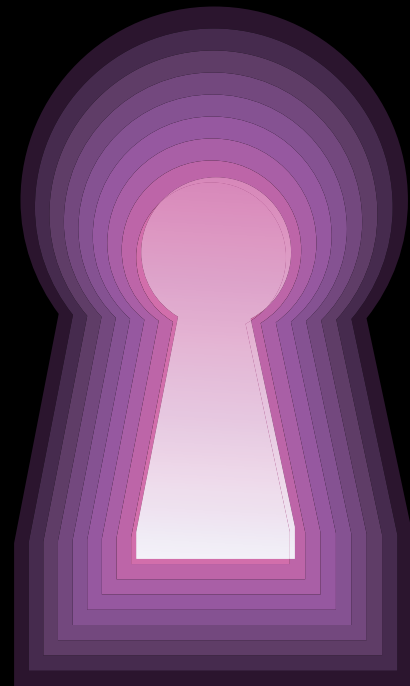
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Date of article: August 2007

Data protection

Is your HR department up to speed?

Over the past three years the Information Commissioner who supervises practices under the Data Protection Act 1998 has issued a code for employers.



The code includes guidance on the use of personal data for employees with their consent. Personal data are defined as data which relate to a living individual who can be identified or from those data and other information which is in the possession of or likely to come into the possession of the employer.

There is a sub category of personal data namely "sensitive personal data" which relates to matters such as race or ethnic origin, political opinions, religious beliefs, trade union membership, disability, criminal record and sexual behaviour.

The Commissioner makes it clear that there are limitations to the extent to which employers can rely on consent to justify processing sensitive personal data.

In the first place there must be explicit consent i.e. the employee has to be asked on each occasion whether or not they consent to the collection and processing of the data in question. Any form of blanket consent given at the outset of employment in the contract of employment or other documentation cannot be relied on.

In addition the consent must be freely given i.e. the employee must have been told what personal data involved and have been properly informed about the use that will be made of them. No penalty should be imposed for a refusal to give consent.

This can give rise to a problem with regard to sickness and injury and absence records. There is a distinction between "sickness and injury" records which contain medical details specific to individual employees and "absence" records

which are no more than a record of the fact that an employee has been present or absent on any particular day. Sickness and injury records constitute sensitive personal data whereas absence records are just ordinary personal data.

“The Commissioner makes it clear that there are limitations to the extent to which employers can rely on consent to justify processing sensitive personal data.”

An employee's explicit consent will therefore be required in order to process sickness or injury records and as will be clear from the above, an employee might not be able to genuinely give free consent to the processing of these types of records because many employers impose potential disciplinary penalties for failure to provide medical certificates.

However, employers can disclose sensitive personal data if other data processing conditions are satisfied, particularly where an employer has to do this to comply with its legal obligations to ensure the health and safety and welfare at work of its workforce, selecting safe and competent workers, ensuring a safe working environment and eliminating discrimination

on the basis of race, sex, disability, religion or sexual orientation. It is also entitled to do this when it is considering reasonable adjustments to the workplace to accommodate workers with disabilities and in connection with the supplying of information on accident in the workplace. It can also rely on this to prevent workers working when unfit through drink or drugs and in connection with its obligation not to dismiss workers when it is unfair to do so.

In practical terms employers also have to comply with the provisions of the Access to Medical Reports Act 1988 in that they have to notify the worker and obtain his or her consent to any request for a medical report.

The code also makes it clear that drug and alcohol testing is unlikely to be justified unless it was for health and safety reasons and random testing in particular is unlikely to be justified except where the worker's job is safety critical. However, in our view testing where the employer has a reasonable suspicion is using drugs or alcohol is more likely to be justified, depending on the circumstances.

The obligations on an employer under the Data Protection Act 1998 are quite onerous and HR Departments need to ensure that they are up to speed with these requirements.

Date of article: August 2007

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New Companies Act

1,300 sections and 16 Schedules set to become law

The Companies Act was passed on 8 November 2006, with some sections in force now, and the rest becoming law in stages in October this year and April and October of 2008, the intention being that every part of the Act will be in force by October 2008.

The Act comprises 1,300 sections and 16 Schedules and while it is impossible to do the whole Act justice, a focus on some key points that will affect corporate transactions may be helpful.

After October 2008 it will no longer be illegal, in most circumstances, for a private company to give financial assistance in connection with the purchase of its own shares.

Currently private companies can give financial assistance, subject to certain "whitewash" procedures. In the new Act, the prohibition on financial assistance only applies to a public company, although it is important to note that a subsidiary of a public company cannot give assistance for the purchase of shares in the public company; nor is it lawful for a subsidiary public company to give financial assistance for the purchase of shares in its private parent.

There will be new rules about Directors and Secretaries, with which everyone will need to become familiar. For the first time, companies will have to have at least one Director who is a natural person (i.e. not a company). Directors must now meet the minimum age requirement of 16 years.

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There will be a new requirement to provide a service address for a Director. A residential address will have to be given but will be protected with rules restricting its availability. This is a reversal of the current position, where a Director has to apply to the Registrar for his or her address to be withheld.

While public companies will still need to have a company secretary (who will still have to meet certain qualification requirements) private companies will no longer need one.

There is no doubt that some aspects of corporate life will be made simpler by the Act, for example, reductions of capital. Today, it is necessary to go to Court to have a reduction approved, which is costly and time consuming.

Under the Act, private companies will be able to reduce share capital by members' resolution supported by a solvency statement. This will be a quicker and cheaper process.

Written Resolutions of shareholders have also been adjusted. Currently, all shareholders have to sign Resolutions. This can cause problems if there are large numbers of shareholders or some are missing. Under the Act, Written Resolutions will only have to be agreed by the necessary majority – a simple majority for an Ordinary Resolution, or not less than 75 per cent for a Special Resolution.

Under the current regime all but the smallest loans to directors are prohibited and breach of this is a criminal offence. Under the new Act, loans to directors will be permitted if the members approve. Small loans will be permitted up to £10,000 (double the current limit) without members' approval.

Date of article: August 2007



Energy performance certificates Reducing carbon emissions

Energy Performance Certificates (EPCs) are to be introduced in phases for residential and commercial property commencing from 2007 to January 2011, the Department for Communities and Local Government has announced.

An EPC – an assessment of a building's energy performance – will soon be required whenever a residential or commercial building or unit is built, sold or let. Each building will be rated from A to G, and recommendations given on how to improve its rating. The aim is to reduce carbon emissions.

For new buildings, the builder or person responsible for construction must obtain an EPC before a completion certificate is issued by the building control inspector. On a sale or letting of property, the vendor or landlord must provide an EPC to prospective buyers or tenants before any contract is entered into. EPCs will have a shelf-life of ten years.

The roll-out of EPCs will be phased as follows:

1 October 2007

- EPCs required on construction of all new dwellings.
- EPC required on sale of residential properties built to 2006 standards.

6 April 2008

- EPCs required on sale or letting of non-dwellings with a floor area over 500 square metres.
- EPCs required on construction of all non-dwellings.

- Display certificates required for all public buildings that are more than 1,000 square metres.

1 October 2008

- EPCs required on the sale or rent of all remaining dwellings.
- EPCs required on the sale or rent of all remaining buildings other than dwellings.

EPC similarities

The government wants EPCs for residential and commercial premises to be as similar as possible, though there will be practical differences.

Limited exemptions

There are a few, limited exemptions, including stand-alone buildings of less than 50 square metres (except for dwellings), temporary buildings with a planned time of use of 2 years or less, buildings with low energy demand, such as barns, and off-plan sales or lettings before the construction of the building has been completed.

Larger public authority or institutional buildings frequently visited by the public will have to obtain and display Energy Certificates, based on actual energy consumption, from 6 April 2008.

Date of article: August 2007

Legal costs

Company directors and shareholders made personally liable

The UK courts have recently extended the circumstances in which company directors and shareholders can be made personally liable for the other side's legal costs if their company loses a court case.

UK law says that in certain circumstances the courts can order a person – usually a director or shareholder – to pay the other side's legal costs if his company loses a court case, even though he isn't personally a party in the case.

One of the requirements has always been that they must have caused the other side to have incurred their legal costs – i.e. those costs would not have been incurred except for their actions.

A new decision has changed the rules. A UK company won a court case but, when it tried to recover its legal costs from the loser (a company registered in Italy), it

found the loser's assets had been transferred to a new company, and the loser had deregistered, so the costs couldn't be recovered. There was no credible reason for the transfer except to avoid paying legal costs if the case was lost.

The 90 per cent shareholder of the Italian company was also involved with the company to which the assets had been transferred. He was not a director of the Italian company (though he was involved in managing its business) and he had not funded the litigation personally. Most importantly, it was agreed that his actions had not caused the winner to incur its legal costs.

But the court said that none of that mattered. The shareholder had arranged the transfers to make it more difficult for the winner to recover legal costs if it won (and hadn't told the court he was doing so), and it was therefore just to make him personally liable for the other side's legal costs, even though he had not caused them.

Winning litigants may now try to recover their legal costs from directors and/or shareholders of the loser more often – particularly if the directors or shareholders have tried to reduce their business's exposure to court costs.

Date of article: August 2007

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Protection from disclosure in court

Court of Appeal provides clarity

A recent Court of Appeal decision has clarified when discussions between an employer and employee, which may take place some time before litigation is started or even threatened, may be protected from subsequent disclosure in court.

An employee brought an action for damages for wrongful dismissal against his employer. The company had sought to terminate his employment early, as it was entitled to do under his contract, on making certain payments in lieu of notice. But it had already indicated its intentions six months before the action was started.

The employee wished to rely on the negotiations that had taken place six months earlier, as part of his evidence that he had been wrongfully dismissed, but the company argued that those were 'without prejudice' and therefore should not be allowed as evidence.

The 'without prejudice' rules says that offers made as part of negotiations when a dispute is underway and genuinely aimed at settlement of the dispute, are not generally admissible in evidence if negotiations fail and the parties end up going to court. The aim is to encourage offers that might result in settlement by removing the fear that they will subsequently be used against you.

The judge at first instance decided that the 'without prejudice' rule did not apply, because litigation had not yet started or been threatened; however, the Court of Appeal overturned that decision, stating that the subject matter of the negotiations, and not the timing of them, was the determining factor; the issue was whether the parties would have been clearly conscious of the potential for litigation if they could not resolve the dispute by those negotiations.

Businesses conducting long-term negotiations with employees should consider carefully whether there is potential for litigation if the negotiations fail. If there is any doubt, take advice on whether they are 'without prejudice'.

Date of article: August 2007

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Monitoring employee correspondence

Is your company policy clearly written?

The Employment Practices Code issued by the Information Commissioner under the Data Protection Act 1998 lays down guidelines for the monitoring of employee correspondence.

The 1998 Act extends to data collected by employers in the course of monitoring employees and will cover not only documentary evidence but video, audio, recorded telephone calls, in vehicle monitoring of driving patterns and other recorded information.

The code makes it clear that employees have a legitimate expectation to keep their personal lives private and that they are entitled to a degree of privacy in the work environment. The code makes the following recommendations:-

Carrying out an assessment of the impact of any proposed monitoring. This will consider looking at what interests the employer seeks to protect. What the effect will be on employees. Consideration of alternatives and whether the interest that the employer is protecting justifies the potential interference?

Have a clear written policy on monitoring set out writing and

provided to all employees which explains the nature and extent of the monitoring as well as the reasons for it and makes it quite clear what will be done with the information collected.

Comply with the data protection principles as in other areas.

Ensure that all those carrying out the monitoring are aware of the Data Protection Act 1998 obligations.

Ensure that the monitoring system is set up so that if any requests are made by employees in accordance with their rights under the Act, summaries of the information can be made available.

Where employers wish to monitor e-mails and other electronic communications there are additional regulations to be observed namely the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 and the Regulation of

Investigatory Powers Act 2000 which deal with the interception of electronic correspondence i.e. between sending and receipt. This would cover the opening of unread e-mails but does not cover checking e-mails which have already been opened.

Briefly it is against the law for a business to intercept an electronic communication on its own or anyone else's system although there are exceptions where there is consent or where it is for record keeping purposes or checking standards or is to prevent or detect crime.

One thing the code makes clear is that secret monitoring of employees will rarely be justified unless there is something going on which is criminal or close to it.

Employers need to be aware of the obligations placed on them and check that their policies reflect those obligations.

Date of article: August 2007

Shareholders agreements

Fill in the gaps for greater equality

Shareholders may think of themselves as equal partners in their company, even though some have fewer shares. But the minority can be shocked to discover how few rights company law gives them if there's a row – for example, if the company changes strategy or money is being diverted to provide salary or benefits to the majority.

The minority have no rights under our company law to control day to day decisions, to insist that profits be paid out to the shareholders or to buy the shares of another shareholder who decides to leave the company.

Worst of all, the majority shareholders can always remove any director, whatever the director's contract of employment says (though it can be expensive if they sue).

The devils in the detail

A shareholders' agreement can vary or supplement the company law rules to give greater equality and fill the gaps which are not otherwise covered.

Key issues to consider include:

- The activities the company will carry on.
- Intended 'exit routes' – trade sale, flotation, etc – and when you aim to exit.
- Dividend policy i.e. the profits to be paid out to shareholders compared to the proportion to be retained to fund the business.
- Who the board and senior management team will be, their remuneration and other terms of employment.
- Future funding (e.g. how much each shareholder will put in, whether third parties will be allowed in and on what terms).

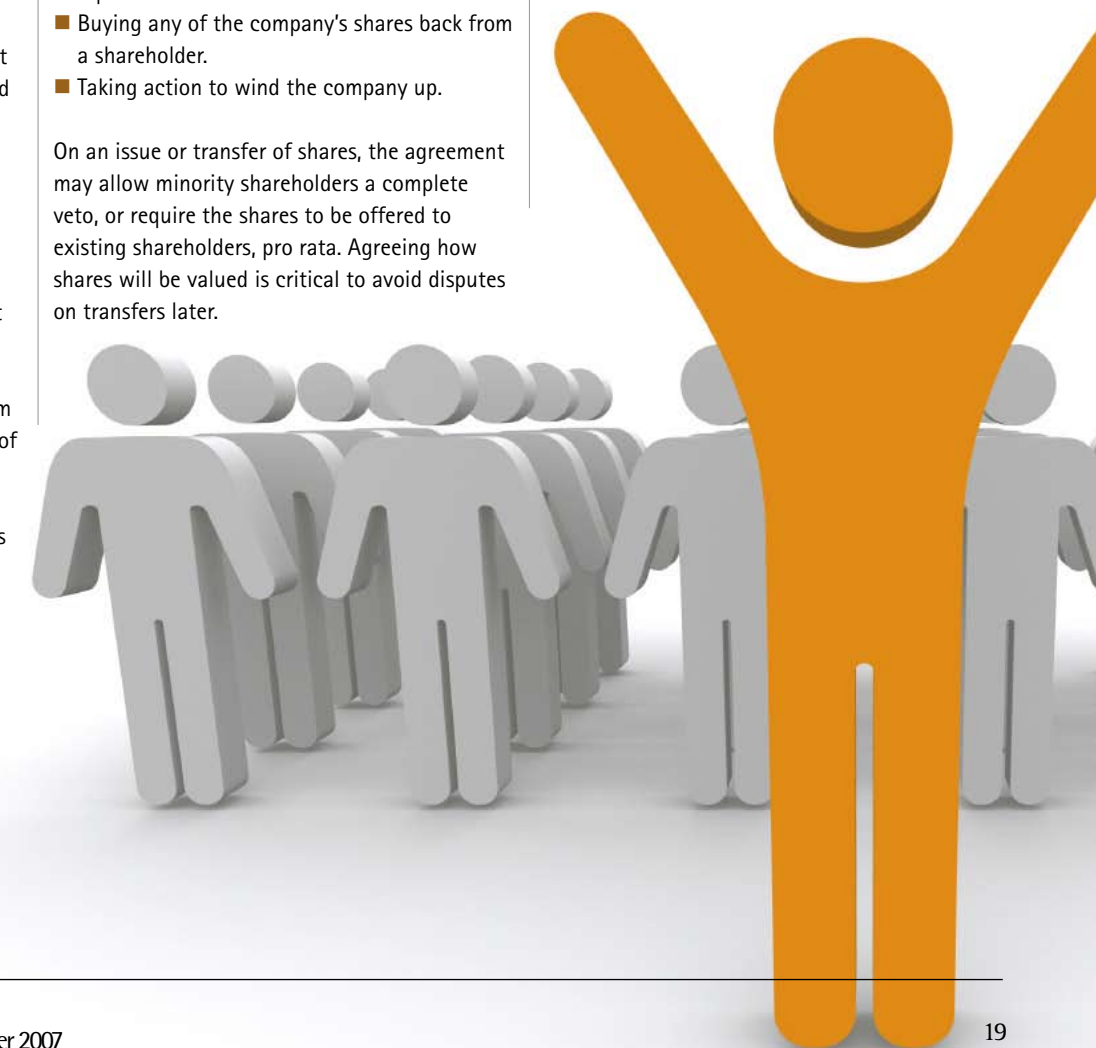
All for one, and one for all

The agreement then binds each shareholder to vote to achieve what you have agreed. It may give each a right to veto important decisions, such as:

- Altering the company's share capital or changing its activities.
- Buying or selling a business, or significant assets.

Agreements may contain a mechanism for resolving disputes, such as referral to a third party expert or arbitrator, or a buy-out mechanism so that, if a dispute can't be sorted out, one side buys out the shares of the other, valued as per the agreement. Agreements can also deal with a wide number of other company issues – for example how profits are to be distributed, protections for the business against unfair competition and 'exit routes'.

Date of article: August 2007



Potential liability to increased claims

New concerns for directors

Among the many reforms introduced by the Companies Act 2006, those that have attracted most attention concern the position of directors and their potential liability to increased claims by both the company and its shareholders.

Previously the law relating to directors' duties largely derived from common law and equitable principles. The Act now provides a statutory statement of directors' duties which codifies and builds on the existing law.

These provisions are due to come into force on 1 October 2007.

The prescribed duties owed by directors to the company are:

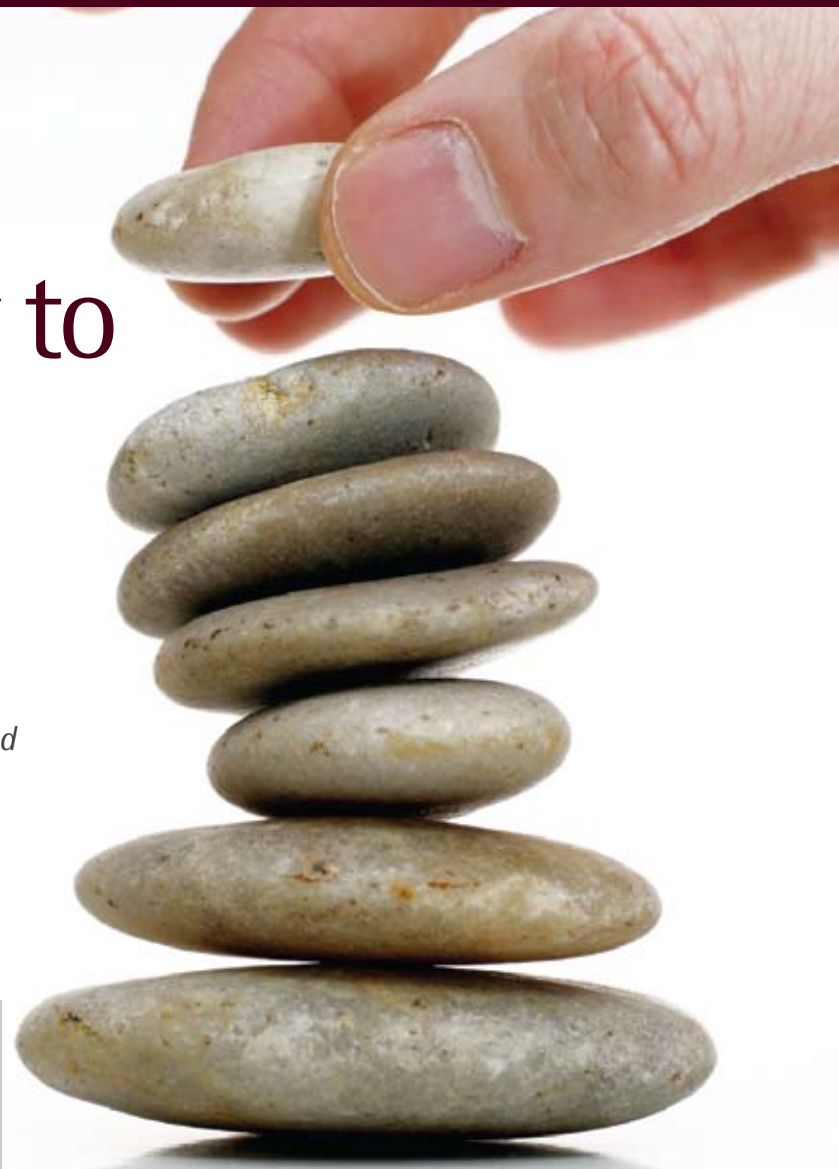
- to act within their own powers;
- to promote the success of the company in good faith for the benefit of the members as a whole. In exercising this duty, directors must take into account factors such as:
 - the likely consequences of any decision in the long term;
 - the interests of the company's employees;
 - the impact of the company's operations on the community and environment;
 - the need to act fairly between members of the company;
 - to exercise independent judgement;

- to exercise reasonable care, skill and diligence;
- to avoid conflicts of interest;
- not to accept benefits from third parties; and
- to declare any interest in proposed transactions or arrangements with the company.

The duty to promote the company's success (and all the factors to be considered) has introduced, at least in principle, the notion of 'enlightened shareholder value' and broadens the factors that directors must reckon with, underpinned by a strengthened regime of shareholder claims against directors (derivative actions).

These derivative actions have often been complex, expensive and limited to cases where there was a potential fraud on minority shareholders.

The Act gives shareholders new rights to bring claims against directors (including former and shadow) for actual or possible negligence and breach of duty or trust. Claims may be brought by minority shareholders (present or future) without board approval.



Activists may try to purchase shares simply to campaign for corporate social responsibility by companies against whom grievances are held.

However, there will be considerable court supervision of any such claim, and courts will be obliged to consider whether shareholders' actions themselves are brought in good faith.

The imminent implementation of these changes to directors' duties suggests that profiles of directors' roles and their engagement letters should be reviewed and amended if necessary.

For key decisions, consideration should be given to the prescribed duties. Time will tell whether it will become common practice to provide a useful paper trail of directors' decision making processes.

Given the re-cast provisions governing when shareholders can bring derivative actions in the name of the company, it is essential that directors are made aware of the new law and that corporate governance is conducted so as to protect directors from the prospect of increased liability.

Date of article: August 2007

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Cutting an inheritance tax bill

It's good to give

Consistently rising house prices over previous years have exposed many ordinary homeowners to a potential inheritance tax (IHT) bill as a growing number of estates exceed the current IHT threshold of £300,000 (2007/08).

If you are in a position to gift or give away some of your wealth, this is one of the more straightforward solutions that is worth considering that could reduce a potential tax liability.

The limits on the amounts that you are permitted to give away without affecting IHT have been frozen for more than 25 years, and so the value of these gift allowances has also been severely eroded by inflation. Everyone can give away £3,000 each tax year to anyone they wish. The limit was last raised from £2,000 to £3,000 in 1981. If it had increased in line with the retail price indices (RPI), it would now be worth £8,319.

Husbands and wives each have their own allowance. You don't have to give away the whole amount to one person – it can be divided among a number of people as long as it does not exceed £3,000. This allowance can be carried forward to the next tax year if it is not used.

There are also a number of marriage gifts that have remained unchanged for even longer. They were set in 1975. Parents can give £5,000 (inflation would make it worth £31,383 now) to the bride or groom in the year their offspring is married. Grandparents or great-grandparents can give £2,500 (£15,691) and other family and friends can give £1,000 (£6,277). You can give away unlimited gifts of £250 to any number of people each tax year but you cannot combine this with one of the other gifts that are exempt.

Some gifts can also be made without any cap being set by HM Revenue & Customs. These gifts can be anything of value – for example, shares, antiques or collectibles as well as cash. Provided you survive for a further seven years, the assets are no longer counted as part of your estate and are known as potentially exempt transfers (PETs). During the seven years, the tax burden gradually decreases. After three years, the tax on the gift is

reduced by 20 per cent. Each subsequent year, it falls by a further 20 per cent until it disappears entirely after seven years. So, by the end of the fourth year it is reduced by 40 per cent, then by 60 per cent after five years, 80 per cent the next year and finally 100 per cent after seven years.

One advantage is that the value of a PET is set at the outset, and so any increase in its value during the seven years is disregarded for tax purposes. But, if the gift is in the form of investments or valuables that have increased in value since they were first bought, you could be liable to capital gains tax (CGT) of up to 40 per cent on your profit.

There is another type of gift you can make which avoids all these restrictions. There is no ceiling on the amounts and they immediately fall out of your estate. These are gifts of regular amounts from your income but they are not allowed to reduce your standard of living.

You cannot give away lump sums from your capital. The amounts must come from the income you receive, perhaps from your pension, savings or investments, and they must be surplus to your requirements. The idea is that you are not allowed to impoverish yourself. People often use them to help with their family's mortgage or school fees.

You can give these sums away monthly, annually or as frequently as you wish, and they will not be counted as part of your estate when you die. Gifts to charities, universities and certain national institutions such as museums are also free from IHT.

Everything left to husbands, wives and civil partners is exempt from death duties. Any assets given to other heirs over the £300,000 limit (2007/08) is taxed at 40 per cent.

When to review

It's risky to think of your IHT planning as 'done'. Review your planning (and your will) annually, or immediately you or your spouse's circumstances change, such as:

- You buy or sell a house or flat.
- You get married, or enter into a civil partnership.
- There are new children in the family or you become a godparent.
- You change from being employed to self-employed, or vice versa.
- You buy a holiday home, especially if it's overseas.
- There is a substantial windfall, e.g. you inherit a property or win the lottery.
- You divorce, your civil partnership ceases, or you separate.
- You lose a member of the family.

Alternatively, if you own a business or business assets, shares in an unquoted company, or a farm, its value is usually reduced for IHT purposes, provided you meet certain ownership conditions. If you haven't already, consider investing in these assets – and take advice to make sure you meet the conditions. The reductions include:

- 100 per cent for your business or your interest in a business (e.g. if you were a partner in a partnership).
- 100 per cent for your shareholdings in 'qualifying' unquoted companies (including those listed on the Alternative Investment Market).
- 50 per cent for land, buildings and certain other assets used in a business you were partner of, or by a company you control.
- 100 per cent for interests in agricultural land, including certain tenancies that started after 31 August 1995.
- 50 per cent for most other tenanted agricultural land.

Date of article: August 2007

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Private limited companies prepare for change

What's new?

The new UK Companies Act will bring significant changes for UK companies – especially private companies – as it is brought into force. The Companies Act 2006 is the biggest Act ever, and will particularly affect private limited companies.

The first changes, in January 2007, included statutory rules for electronic communications between companies and shareholders – particularly, the power to use websites and emails to publish notices and other communications.

Companies that already communicate electronically should consider reviewing their practices to take advantage of the new rules, and those who don't should consider changing their Articles to allow for electronic communications from January.

No dates have been set for other changes, but they include the following:

Companies will no longer have to state what they are set up to do in an 'objects clause' in their Memorandum of Association. Instead, they will be able to carry on any lawful activity – unless they include specific restrictions on their activities in their Articles of Association.

The objects clauses of existing companies will be treated as if they were restrictions set out in their articles. But it is uncertain how the courts will deal with such clauses in a dispute – they will have to construe clauses written to empower the company to act, as restrictions.

Private company shareholder decisions made in writing (without holding a meeting), will not need to be signed by every voting shareholder as now, but may be passed by majority votes, according to the type of decision. Consider whether you wish to retain unanimity or use the new rules.

The requirements to hold an annual general meeting, and to present accounts to the shareholders at a shareholders' meeting very year, are abolished. A company that wishes to hold an annual shareholders' meeting must specifically provide for one in its Articles of Association. Directors must be over 16, and can serve even when over 70, without

the need for shareholder approval. A company may not have corporate directors only – at least one director must be a natural person. Directors may keep their residential addresses confidential by notifying a service address to Companies House, and for the Company's Register of Directors.

They must also supply a residential address, but this will not be available to the public. The company must maintain a confidential Register of Directors' Residential Addresses. Review the composition of your board, and any subsidiaries as the new rules approach.

Directors' duties are 'codified', i.e. set out in the Act, rather than gleaned from decisions in court cases. The overriding duty is to act in the way the director considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. In general, directors' behaviour will be unchanged, although there are specific new rules governing directors whose personal interests

conflict with their company's. This could particularly affect those with multiple

company name on grounds it is too like its own. These disputes will

“ A person wishing to inspect your company's Register of Members must give his name and address, and the purpose to which he will put the information. ”

business interests or directorships. Consider training for directors, particularly in relation to conflicts; review your board procedures to ensure compliance with the codified duties; and consider directors' and officers' liability insurance, and indemnities for directors, in the event of breach of their duties.

Private companies will no longer need to appoint a company secretary. Consider whether to retain your company secretary. There will be a new right for any business, including a sole trader or partnership, to object to a limited

be heard by new 'company names adjudicators'. Consider whether any of your names are liable to be objected to, and whether there are company names you wish to object to.

A person wishing to inspect your company's Register of Members must give his name and address, and the purpose to which he will put the information.

It will be easier for minority shareholders to take legal action against directors on behalf of the company if they think the directors

have breached their duties – to bring what lawyers call 'derivative actions'.

Share transactions will be easier. Companies will not need to maintain an authorised share capital, and directors of private companies with only one class of share will be able to issue shares without needing an authority to do so from the shareholders. It will be easier to reduce issued share capital, and the rules for issuing redeemable shares and buying shares back from shareholders are made simpler.

Directors who refuse to register a transfer of shares to a new shareholder will have to give reasons.

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Date of article: August 2007





Insurance contract law

Proposals to modernise the law

The Law Commission has launched a new consultation into insurance contract law. It is calling for comments on its proposals to modernise the law relating to misrepresentation, non-disclosure and breach of warranty by the insured.

The consultation paper states that the reform is necessary to "strike a fair balance between the interests of insurers and policyholders".

It adds that it does not believe that Financial Services Authority (FSA) rules or the Financial Ombudsman Service (FOS) are adequate substitutes for law reform.

The paper states: "The current position is needlessly complex, confusing and inaccessible, with the potential for cases of real injustice falling into the cracks in the system.

"The law should be brought into line with accepted good practice, and set out in a clear statutory statement of the obligations on both insureds and insurers."

Within consumer insurance, the Law Commission suggests a mandatory regime based largely on

FOS guidelines, while in business insurance it proposes a 'default regime' based on good practice to apply in absence of an agreement to the contrary.

One major suggestion is the introduction of a five-year non-disclosure deadline for life insurance policies.

The consultation paper states: "A cut-off period would not benefit fraudsters directly as it would not apply where the misrepresentation was shown to be deliberate or reckless.

"It is possible that some people may deliberately give false answers in the hope that they will live five years and that any inaccuracies will then be viewed as careless rather than reckless. However, this would be a risky thing to do: they may die within five years, and even if they live longer, their dishonesty may be discovered."

The Law Commission predicts the costs of such a new system in the consumer insurance sector would be minimal as the proposals reflect FSA and FOS rules and practice, with the main impact being for firms that disregard these rules as they would not be able to circumvent the law.

The Association of British Insurers (ABI) commented that they would scrutinise the Law Commission's proposals to ensure that they added real value to the regulatory system and did not distract from the efforts already underway to modernise regulation by being prescriptive.

Date of article: August 2007

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Legislation to cut the cost of making calls from abroad

Mobile phone companies roll out a Eurotariff

British holidaymakers will lose out on cheap calls from abroad this summer because mobile operators are dragging their feet over new European Commission laws on the use of mobile phones abroad.

Orange, T-Mobile and 3, the British mobile operators, are all insisting that their customers will benefit from a new, cheap "Eurotariff" for roaming only from the legal deadline of August 30.

The Commission has launched a special website naming and shaming tardy operators. It aims to those mobile companies who have entered into the "spirit" of the new roaming laws, rather than just the letter, and rushed to enable customers to benefit from cheaper tariffs ahead of the legal deadlines that it has laid out. Brussels estimates that about half of mobile companies in the European Union have already activated the Eurotariff.

The European Commissioner for Information Society and Media, announced plans last year to introduce new legislation to cut the cost of making calls from abroad.

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Date of article: August 2007



“ Orange, T-Mobile and 3, the British mobile operators, are all insisting that their customers will benefit from a new, cheap "Eurotariff" for roaming only from the legal deadline **”** of August 30.

Conveyancing

Understanding the process, the three main areas to consider:

Stage one

The work carried out after agreement in principle is reached, but before the seller and buyer are bound by contract to proceed with the matter.

Stage two

The stage between "exchange of contracts" (when the parties become contractually committed) and "completion" (the day on which money changes hands in return for the keys and transfer of ownership, i.e. the day on which you are entitled to move in).

Stage three

The conclusion of the formal side of the transaction, when any Stamp Duty Land Tax Returns are filed and any tax paid. An application is made to H M Land Registry for the registration of title.

Glossary of terms

Appropriate searches - these searches include a local search which is the search in the registers maintained by the district council in relation to such matters as road charges and planning decisions. The expression includes the enquiries made of different departments of the council to do with a wide range of other matters which may affect the property.

Apart from road proposals affecting land within 200 metres of the property, the local authority search will only give information about the property itself. The search will give no information about other property, for example, the development of neighbouring land. If, therefore, you are concerned about the possibility of development or any matter relating to other property in the neighbourhood, you should make enquiries of the local authority before you consent to exchange of contracts on the purchase.

Other searches also include an environmental search, a drainage and water search and a chancel check. Depending on where the property is situated it may also be necessary to carry out additional searches such as a coal authority search, brine search, hard rock mining search, radon search, London Transport or even a British Waterways Board search.

Completion - the date fixed for transfer of ownership, on payment of the price.

Deposit - part of the purchase price paid at exchange of contracts, normally 10 per cent.

Exchange of contracts - the exchange of one copy signed by the buyers for another signed by the seller. At this point both parties become committed to proceed.

Mortgage - document recording loan of money secured on the property. If payments are not maintained, the lender may have the right to take possession and sell the property.

Preliminary enquiries - a series of questions addressed to the seller, who is expected to answer from his own knowledge about such matters as disputes with neighbours, or work to be done on the property needing building regulation approval, or rights enjoyed over the property.

Protocol forms - these are the standard forms which are completed by sellers at the outset of the transaction and consist of the 'seller's property information' form and fixtures, fittings and contents list. If the property is leasehold then there will also be a 'seller's leasehold information' form. The questions are about the property which sellers should be able to answer without too much difficulty. The fixtures, fittings

and contents list is filled in by the seller in order to indicate which items are or are not included in the sale price.

Registration of title - ownership of unregistered land is proved by showing its recent history as recorded in the "deeds". In all areas of the country title to land now has to be registered in one of the registries maintained by the Land Registry on completion of a purchase.

The register records ownership and all important details of rights and liabilities and any mortgages affecting the property. Nowadays all Title registers are held electronically and "hard copy" Land or Charge Certificates are no longer issued.

Transfer - the document transferring ownership.

Stamp duty land tax - this is a tax on property transactions where the price exceeds £125,000.00 (2007/08 tax year).

The current bands are:

0 per cent up to	£125,000
1 per cent from	£125,001 to £250,000
3 per cent from	£250,001 to £500,000
4 per cent over	£500,000

For residential land and property outside of disadvantaged areas there is no change or on zero-carbon homes up to £500,000.

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Date of article: August 2007

Authority turns to the Protection from Harassment Act

Environmental campaigners restricted

A law introduced a decade ago to protect women from stalkers is being used by BAA to attempt to curb protest action at Heathrow.

The authority is not the first organisation to turn to the Protection from Harassment Act to seek to restrict protests. However, the Act has been used mainly to curb demonstrations and other action by animal rights activists rather than against environmental campaigners.

Several firms targeted by animal rights groups have won "exclusion zones" around premises and employees' homes. But Oxford University lost in an attempt to curb protests in a wide area of the city when a judge called the zone "inordinately large" and "impossible to identify".

Under the Act the courts are able to bar individuals from gathering in specific areas or from targeting

individuals. Anyone breaching the order is guilty of a criminal offence.

The Act created four new offences: harassment, which carried a maximum of six months in jail; putting someone in fear of violence, which carries a maximum term of five years; breaching a civil injunction barring an individual from a particular area, which carries a maximum five years in jail; and breach of a restraining order, carrying the same penalty.

Date of article: August 2007

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Commercial leases

Protecting your position

When entering into a "full repairing and insuring" commercial lease, the repair obligation is one of the most important clauses to consider in order to ensure that your position, whether as landlord or tenant, is protected.

The precise wording of the obligation must be carefully negotiated and understood as liability for repairs is one of the most common areas of dispute between Landlord and Tenant. The case of Janet Reger International Limited v. Tiree Limited clearly highlights this issue.

Janet Reger had a lease of premises consisting of a ground floor and basement for use as offices and retail space. In 2003, the basement started showing signs of damp. For a period of two years the Landlord acknowledged the damp problem and whilst it did not refuse to carry out remedial work neither did it take any steps to rectify the problem.

In 2004, Janet Reger had to move out of the premises and the cause of the problem was identified as the damp proof membrane in the flooring not being linked into the damp proof

course in the walls. The damp proof course was, therefore, not continuous and allowed the water to penetrate.

The repair covenant in the lease stated that the Landlord should "use reasonable endeavours to repair, renew and maintain the structure." As the damp proof membrane was in the floor, and this was deemed part of the structure, Janet Reger commenced proceedings against the Landlord to rectify the problem.

Janet Reger alleged that the Landlord was in breach either of its express covenant to repair the structure or of an implied obligation to remedy any defective part of the structure which would cause damage to the premises which Janet Reger was under an obligation to repair.

A tenant must show that the subject matter of the covenant (i.e. the structure) has deteriorated in order to prove an obligation to repair. The Landlord argued that it had no liability as the structure of the premises, such as brickwork, had not been affected.

Janet Reger's main challenge was to convince the judge that the damp proof course had deteriorated. The judge found in favour of the Landlord; holding that the damp proof course had not actually deteriorated rather it had been defectively installed.

The judge held that Janet Reger would be responsible for the repairs as it was required under the lease to "put and keep the premises in good repair and condition". He held that the word "condition" adds something to the meaning of the word "repair". The damp arising from the lack of an effective damp proof course was a feature of the "condition" of the property and had to be rectified under the tenant's repairing covenant, despite the fact that the premises themselves were not in disrepair.

The judge also dismissed the implied obligation argument stating that the Court would be slow to imply any terms into a complex and highly negotiated legal document such as a lease.

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Date of article: August 2007