



# Outside the Box

AUTUMN  
2011

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### Articles:

[Endavouring to Satisfy - Page 1](#)

[Directors Duties - Page 2](#)

[Lexcel - Page 2](#)

[Reduction of Share Capital and the Companies Act 2006 -  
Page 2](#)

[The Continuing Rise in Popularity of Solar Power - Page 3](#)

[The New Rules on Cookies - Are You Prepared? - Page 3](#)

[Drains - Sewerage Problems or Sewerage Solutions - Page 4](#)

[Cohabitation Reforms Shelved - Page 4](#)

[Why Make a Lasting Power of Attorney? - Page 5](#)

[Conveyancing Quality Recognised - Page 5](#)

### News:

[Thorndon Stride 2011 - Page 2](#)

[Ben Nevis Climb - Page 3](#)

[5 A-Side Football - Page 4](#)

[Code of Conduct 2011 - Page 5](#)

### Endavouring to Satisfy

Article by David Chapman

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**Imagine a contract requires a party to achieve a desired but uncertain result. Completion of the contract depends upon the result happening. How hard do they have to try? What effort must they put in? What expense must they incur?**

The amount of effort and expense required is often the subject of debate when such a contract is drafted. The most commonly used contractual expressions require the use of "best endeavours" or "all reasonable endeavours" or "reasonable endeavours" - in descending order of effort and expense.

"Best endeavours" requires the most effort and expense. The person under this obligation is expected to act in a determined way desiring the result although may act with prudence and reasonableness having regard to his own commercial interests. There may be an obligation to go to Court and/or through the appeal system to achieve the result - unless to do so would be unreasonable.

"Reasonable endeavours" requires the least effort and expense. The person under this obligation is entitled to take into account all relevant commercial considerations and weigh those against the obligation to the other party to the contract. Commercial consid-

erations include cost, reputation and relationships. Court action to achieve the result is probably not required.

"All reasonable endeavours" is less often found in contracts and is sometimes used as a compromise where parties to a contract cannot agree on best endeavours or reasonable endeavours. The use of the word "all" may imply an obligation to use all available courses of action to achieve the result.

Other expressions used in contracts are "commercially reasonable endeavours", "reasonable commercial endeavours" and "utmost endeavours" but there is little guidance on what these mean.

The use of these expressions can help parties enter into a contract sooner than they might if they had to record every step to be taken and every expense to be incurred - assuming these could be predicted. It does mean, however, that the debate on these issues may merely be postponed if the desired result is not achieved and a spotlight is then turned on the unsuccessful efforts.



## NEWS

### Thorndon Stride 2011

We are delighted to announce that we will be the overall sponsor of this year's Thorndon Stride event in aid of Cancer Research UK and their work into researching and beating breast cancer.

The event takes place on Sunday, 9 October and involves an 8km walk around Thorndon Country Park starting at 11am (registration for walkers an hour earlier).

The Thorndon Stride is a great way to get together and spend time with your friends. By taking part in the walk, you can help us Join the fight for women's survival and raise much needed funds for our vital research into breast cancer. Walkers come from all over the Brentwood area and beyond to stroll through the beautiful Essex countryside at Thorndon.

We would be delighted if you could join us in supporting this worthy charity by joining us on the route and taking in the beautiful Essex woodland. Our Managing Partner, David Chapman, will be leading the firm's contingent of partners and staff on the day. Friends and family are also welcome to attend.

If you would like to register in advance (it's cheaper than on the day!) and enter yourself or even a team then all you need do is visit:

[www.cancerresearchuk.org/breastcancer/events/ThorndonStride/](http://www.cancerresearchuk.org/breastcancer/events/ThorndonStride/)

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## Directors Duties

Article by Nick Traill



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**As a director of a company your main responsibility is to exercise your powers in order to carry on the business of the company. You have obligations to the other directors within the business, the shareholders and also any creditors.**

The overarching duty for any directors is to promote the success of the company. In order to comply with this any action you take must be in good faith. You must consider the long term consequences of any decisions, the interests of any employees, the community and environment within which the company operates, the reputation of the company, fairness between shareholders and the furtherance of any relationships the company may have with its suppliers and customer and others.

You are obliged to only exercise your powers as a director for their proper purpose and you must act in accordance within the memorandum and articles

of association of the company.

Directors must exercise independent judgment and must act with reasonable care, skill and diligence. The test for this is twofold – what reasonable care and skill a director of the relevant standing ought to have and that which he actually has.

A director should not place himself into a position of conflict of interest. This obligation continues even after you are no longer a director, providing you became aware of the relevant information, property or opportunity during your time on the board. Should such a personal interest arise, you are obliged to declare the nature of your interest prior to any transaction relating to this being entered into.

## Lexcel

Article by David Chapman



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**You may have seen the Lexcel logo on our notepad or reference to Lexcel on our website. What does it mean?**

Lexcel is the Law Society's practice management standard. It's only awarded to solicitors who meet the highest management and customer care standards.

As a Lexcel accredited law practice Wortley Byers undergoes rigorous independent assessment. Every year an independent assessor comes to our office and examines our procedures and management and financial information, checks our working practices in every department and interviews a selection of staff and partners.

This summer's Lexcel assessment concluded: "The Practice should continue to be commended for maintaining a high level of compliance against the Standard. Compliance levels have been consistently sustained over recent years and compliance remains a clearly embedded part of the ethos and culture of the Practice".

This success is down to the efforts and focus of all our people at Wortley Byers. The assessor who visited us had a strap line "creating values through people". He's spot on.

## Reduction of Share Capital and the Companies Act 2006

Article by Nick Traill



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**There are many reasons why a company may want to reduce its capital; it may wish to return to its members any capital it no longer needs, it may decide to create a reserve in the accounts which could be used for paying dividends or it may wish to eradicate a deficit on a profit and loss account.**

The 2006 Act introduced a new procedure for private companies (as an alternative to requiring court approval) whereby reduction of capital could be achieved by way of the production of a statement of solvency. The company must provide a memorandum detailing the reduction when it notifies Companies House of the reduction in capital.

The solvency statement procedure enables private companies to reduce share capital without the cost,

both financially and in time, of obtaining court approval. In order to use this procedure, a company must be able to demonstrate that approval has been sought and obtained from the shareholders in the company and that the company is solvent. The test for solvency in this instance is that the company is able to pay its debts for at least a year after the reduction takes place. A special resolution must also be passed and registered with Companies House.

Should you or your company require any further information or advice on reducing the share capital in your company then please do not hesitate to a member of our Corporate Commercial team.



## NEWS

### Ben Nevis Climb

The weekend of the 10th - 11th September saw members of the firm flying up to Scotland to tackle Ben Nevis, the highest mountain in Great Britain.

Whilst enthusiasm for this challenge was undented the weather was not as kind to us as it had been for our ascents of Snowden and Scafell Pike and very soon into the climb full waterproofs were donned, then removed as we walked through the clouds and put back on again as the rainbows came out.



The amazing views decreased as the mist came down, visibility was cut to a few metres and full concentration was needed to keep upright on the wet and slippery shale underfoot.



Maybe shorter, drier walks for next year!

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## The Continuing Rise in Popularity of Solar Power

Article by Michael Callaghan



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**There has been a rise in the popularity of creating energy by renewable sources in the UK. Solar energy is at the forefront of that.**

One of the benefits of this is that any energy generated can be used by the producer directly. It cannot be stored on site. If it cannot be used on site immediately, it can be fed into the National Grid. This has a dual benefit for producers. On the one hand they are using energy which they themselves have generated directly so that will reduce their household bills. In addition they will receive feed in tariff payments from the electricity companies for the energy that they themselves have put into the National Grid.

The feed in tariffs were introduced in April 2010. They guarantee a long term premium price for electricity generated from renewable sources. They are available to everyone, private individuals and corporations, who generate a total of less than 5 mega watts. Most individuals will generate under 50 kilo watts. The scheme will apply for a period of 25 years and once the individual is on a scheme, they will remain on the tariff for the life of the installation.

The initial installation is expensive. Figures in the region of £10-15,000 are commonplace. Not all properties in particular areas are suitable and care must be taken in the initial decision to proceed. No government funding is available for the installation of the equipment. Furthermore the completed system needs to be accredited in order to qualify for feed in tariff and export bonus payments.

Income tax is not payable on feed in tariff payments

received. Planning issues, whilst they can be complex in certain cases, can usually be resolved. The Government needs to hit targets for electricity production from renewable resources over the next few years.

The level of feed in tariff payments are being reviewed. In June 2011 feed in tariffs for larger producers (over 50 kilo watts) decreased. New lower tariffs are now applied to new large scale solar installations after 1 August 2011. Whilst part of this is currently subject to challenge by way of judicial review, in the present economic situation the tariff levels seem destined to go in only one direction over the next few years. That said, this does not apply retrospectively, so those already on tariffs at more generous rates can continue to benefit from those.

We have seen examples of installations where the initial cost has been about £16,000. With 25 year usage and set feed in tariff returns (so that income can be predicted), this gives a payback for the cost of installation in 8.8 years, feed in tariff and export bonus returns of around £1,650 per annum and a saving on the electricity usage at the property. The overall income over the lifetime of the installation is predicted to be just short of £59,000. In the right area and with the right solar paneling, this could be a good deal financially for householders. It is now less attractive for larger scale generators, which appears to be a short sighted decision bearing in mind the Government's targets and when you compare the solar power generation levels the UK to other European countries such as Germany.

## The New Rules on Cookies - Are You Prepared?

Article by Lucy Folley



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**On 26 May 2011 the new rules governing the use of cookies came into force in the UK.**

Cookies are text files that are downloaded on computers the first time a user visits a website. On the following occasions the user visits the website it recognises the user and in some cases remembers their browsing preferences. There are different types of cookies that vary in terms of the level of intrusiveness to a user's privacy and the new rules seek to further safeguard users from these types of cookies in particular.

Until now, under the Privacy and Electronic Communications Regulations 2003, organisations were allowed to use cookies as long as they warned users they were using them and provided a mechanism to 'opt-out'. The major change under the new rules is that a user's consent must now be explicit i.e. users must 'opt-in'; simply including a term in the website's privacy policy will no longer be sufficient.

One exception to the requirement to obtain consent is where the use of a cookie is "strictly necessary" for the user's experience e.g. a cookie to record pur-

chases in a user's online shopping basket. According to the Information Commissioners Office's guidance, satisfying the test to be deemed a "strictly necessary" cookie is very difficult and therefore should only be relied upon in limited cases.

Thankfully, the Government have realised that these new rules reflect a big change to the status quo and so the ICO have stated that there will be a grace period of 12 months for all websites to comply with the new rules.

For now, the ICO recommends that business should consider:

- What type of cookies does your website use?
- How intrusive are the cookies?
- What are the best ways of obtaining user's consent whilst minimising the impact on the user experience?



## NEWS

### 5 A-Side Football

The Wortley Byers football team travelled to sunny Southend on 28 September 2011 to face NatWest in a much anticipated re-match following their game on 18 May 2011.

NatWest dominated much of the play but Wortley Byers showed flashes of brilliance (even with a man down) and fought hard to challenge for the win. Sadly it was not to be, and NatWest ended up claiming the victory.

Team captain Aaron Cane commented after the game "NatWest maintained possession of the ball and capitalised on their chances, it was a shame we weren't able to do the same throughout the game but we had some encouraging moments. Overall we are continuing to improve and will take the positives into our next game".

The Wortley Byers team consisted of David Chapman, Aaron Cane, John Southan and Gurdit Dhesi, all of whom got on the score sheet.

Keep up to date with our team's progress in the next edition of Outside the Box and if anyone would like to challenge the team for a game in the meantime, please contact Aaron Cane on 01277 268398 or email him at

[acane@wortleybyers.co.uk](mailto:acane@wortleybyers.co.uk).

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## Drains – Sewerage Problems Or Sewerage Solutions

Article by Anne Elliss



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**On 1 October this year there will be a fundamental change to the ownership of drains and sewers across England. This may result in resolving disputes between property owners over who is required to contribute (and how much) when sewerage problems occur. This may also mean that your liability for maintaining drains and sewers on your property is reduced or in some cases will fall away altogether.**

Currently there is a system of main sewers which are the responsibility of local drainage authorities. The connections to and from the mains however, is not quite so straightforward. There may be drains which are solely used by your property or sewers which are used by your property and a number of others, and each of these may or may not be located under your land. Under the current system, any of these connections are your responsibility for maintenance and upkeep and may require you to contribute towards maintenance during your ownership.

Once the new legislation is in place however this will all change. Any sewers used by more than one property will become the responsibility of the sewerage authority. In addition, a drain which is only used by your property but which is not under your land will also become adopted by the sewerage authority. The only requirement for maintenance will therefore come where a property has a drain which is solely used by that property and which is under the land for that property.

The increased burden on the sewerage companies will, however, come at a price, as it is likely that there is going to be a substantial increase in maintenance requirements and we suspect that this additional cost will result in an increase in everyone's water bills. Time will tell.

Main sewers are currently shown on plans kept by the drainage authority. Copies of these are made available to solicitors as part of their drainage searches when acting for clients buying any kind of property. However, the private drains running from individual properties or groups of properties into the main are not mapped. Under the new scheme, many of those private drains, or at least parts of them will become public. Due to the sheer enormity of the task of trying to map all of the private drains across the length and breadth of the country, the maps will only be up-dated to show the new public drains under private land gradually, probably as when it becomes necessary to deal with maintenance of a drain from time to time.

What this means for property owners and prospective purchasers is that a property may well have a length of public sewer running under it but, as from 1st October, a drainage search carried out by their solicitor will not necessarily tell them it is there.

Why does this matter? Building over or within three metres either side of a public sewer is not permitted without the consent of the drainage authority under what is known as a "Build Over Agreement". You are much more likely to need a Build Over Agreement when extending residential property or carrying out development after 1st October 2011. The drainage search alone, however, cannot be relied upon to tell you if this is the case. The result of this is that it will become much more important to have a site survey carried out to show the position of any drains on a property, what other properties are served, and where those drains connect into the main sewer. With the benefit of that survey, your solicitor can then advise you further as to your rights and responsibilities.

## Cohabitation Reforms Shelved

Article by Ros Plumb



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**In a statement by the Justice Minister on 6 September 2011 the decision was made by the government not to go ahead for the time being with proposed reforms of cohabitation law.**

The Law Commission has responded with visible disappointment at this decision and have stated that they hope implementation will not be delayed beyond the early days of the next parliament in view of the hardship and injustice caused by the current law.

The fact that cohabitation and the birth of children to couples living together is prevalent the need for reform of the law can only become more and more important over time.

In its 2007 report the Law Commission recommended that financial remedies should be available to cohabitants on separation provided certain eligibility criteria were met.

The existing law is uncertain and because it was not

designed for cohabitants this often gave rise to results that were unjust.

When a cohabitation relationship breaks down there is no question of the court having power to make orders in relation to property on the same flexible basis as if the parties were married to one another and claiming financial relief in divorce proceedings.

Former cohabitants are entirely reliant on the principles of land and trust law to determine any dispute as to the ownership of the property with a few exceptions.

Cohabitants can enter into a Cohabitation Agreement which can provide a degree of clarity as to what the parties intended which may carry some evidential weight should the matter have to be litigated. Until the law changes, however, there is still no guarantee that they are enforceable. Watch this space.



## NEWS

### Code of Conduct 2011

From 6 October 2011 a new Code of Conduct replaces the complex rules which have regulated solicitors for many years. Solicitors will now be bound by ten fundamental principles, six of which are well established rules of integrity and independence. Four new principles relate to the management of our business.

Managing Partner, David Chapman has conducted a series of in-house seminars on the new Code and comments "This is an important change in the way law firms are regulated and I am delighted that our people, systems and procedures have a track record of meeting the highest professional standards and will continue to do so under the new Code of Conduct".

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## Why Make a Lasting Power of Attorney?

Article by Warren Hawkings



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**It is not uncommon for some clients who are considering making a lasting power of attorney (LPA) to conclude: "What's the point?"**

For the fit and healthy it may seem like an unjustified expense: something that can be thought about in the future when it's needed. Unfortunately that time will be too late if a person is mentally incapable of making an LPA. So what are the possible repercussions of not making an LPA?

Let's illustrate this with a case study, based on circumstances many of us will be familiar with when dealing with an elderly relative.

Jim is 80 years old. He is a widower of two years and lives by himself. He has two children and both of them live nearby. He is the sole owner of the home where he lives which is worth £250,000. He has some savings in the bank, a few stocks, shares and bonds, and he receives the state pension and income from two private pensions (one left over from his late wife's employment). He does not drive anymore and finds getting about difficult, but he's very grateful for the help from his son and daughter.

Jim has been diagnosed with dementia and the early onset of Alzheimer's. To his son and daughter the signs are all too apparent. Jim is confused, does not remember names and places and has on a few occasions been found wandering the nearby roads. As his condition deteriorates some difficult decisions have to be made. Jim cannot look after himself and he will have to go into a residential care home.

Because of his assets he will have to pay for his own care. The savings can only go so far. His house is a burden and needs repairs, but because of the circumstance should now be sold. Jim will not be able to return home. The problem is, who can sell the house? Jim's lack of mental capacity means he cannot enter into a contract to sell the house. There are also other financial pressures to encash some of his investments so other bills can be paid. He cannot do any of this himself and there is no legal authority for anyone else to act on his behalf.

As there is no Lasting Power of Attorney someone will have to apply to become Jim's Deputy for property and financial affairs in order to gain control of Jim's assets. To become a Deputy there is a set application procedure. Jim's mental capacity will have to be formally assessed. His personal finances must be disclosed to the court.

The Court fee to apply is £400, with an additional £125 payable if the Applicant is successful. Legal fees would be around £1,000 and the mental capacity assessment is likely to have incurred a fee. There will also be a security bond to be purchased on the Deputy's appointment. So, total costs could be £2,000 or more. In addition, annual returns will need to be filed and usually an annual premium paid for the bond.

The whole application is likely to take around three months. During this time contracts cannot be exchanged on Jim's house and there will be no access to his bank accounts, investments or savings. Jim's family may have to pay the initial costs before being reimbursed.

How would this be different if Jim had made a property and financial affairs LPA?

The costs would be much lower. Registering an LPA incurs a fee of £120 payable to the Office of the Public Guardian. Legal costs will be considerably less than the legal costs of making a Deputy application.

If Jim had registered the LPA at the time he made it, the three month waiting period would have expired by the time the attorneys need it most.

Most important of all, Jim would have peace of mind that if anything were to happen to his mental capacity in the future that his attorneys would have the legal authority to effectively deal with his affairs.

For more advice about making lasting powers of attorney or about making Deputyship applications on behalf of an incapacitated person, please contact a member of our Wills, Probate, Tax and Trusts team.

## Conveyancing Quality Recognised

Article by John Southan



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**At the time of going to press, Wortley Byers is the only firm of solicitors in Brentwood to be accredited by the Law Society under its "Conveyancing Quality Scheme". CQS identifies firms which follow conveyancing protocols with efficient and prudent procedures, showing integrity, good practice management standards and supervision.**

We were put through a rigorous assessment of our conveyancing and management procedures and passed with flying colours. CQS accreditation now

supplements Lexcel accreditation and membership of the Legal 500.

Partner, Anne Elliss says: "We are delighted to have achieved this recognition. CQS accreditation is an official acknowledgement that we follow best practice in residential conveyancing. It assures those instructing us or thinking of instructing us that we will progress their transactions efficiently and keep them fully informed from beginning to end."

This newsletter has been prepared for general interest and it is important to obtain professional advice on specific issues. We believe the information contained in it to be correct at time of print. While all possible care is taken in the preparation of this newsletter, no responsibility for loss occasioned by any person acting or refraining from acting as a result of the material contained herein can be accepted by the firm, the authors or the publishers.

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