

# one step ahead



winter 2007

## Wortley Byers

The business minded law firm

### Mid Essex Business Awards 2007 John Southan



A great night was had by all those that attended the awards presentation dinner on 21 September 2007, including those from Wortley Byers (photo inset) as well as by the other judges, finalists and winners. Jane Winfield and Sue Dowman, who acted as the firm's judges in the sponsored

Community category proudly awarded their winners, praising them for their dedication and hard work in providing charitable services or helping the needy and vulnerable in the mid Essex area.

### Rugby World Cup!



Jane Winfield (Commercial Property Partner), Anne Elliss (Residential Property Partner) and Sue Dowman (Intellectual Property, Information Technology and Corporate Commercial Associate) pictured,

soaking up the atmosphere before the match at one of the England games in Paris in September. Wortley Byers was delighted to be able to attend three of the matches with clients.

We are pleased to welcome John Southan, a new Assistant Solicitor into the Commercial Property Department.



John joined the firm in October and is assisting Partner David Chapman.

He will be acting in matters such as sales, purchases, leases, secured lending and development sites.

John is from Chelmsford and since 2004 has been gaining a wide range of experience in commercial property work. He comes from a small commercial practice in Havering, before that John also spent 18 months as a paralegal in Limehouse. John studied for his degree at Hull University, which included a year in the Netherlands, taking a Certificate in International & Comparative Law.

Head of Department Brian Spencer commented: "We are all delighted to welcome John on board. I am sure John will be making a big contribution to the life and development of the firm in the future."

### Energy Performance Certificates and commercial property

As part of the Government's attempts to meet its Kyoto obligations, the Energy Performance of Buildings (Certificates and Inspections) Regulations 2007 are being introduced in England and Wales.

The Regulations seek to encourage owners and tenants to improve the energy performance of buildings they already occupy and to choose energy efficient buildings when moving. Very soon, this will no longer be an issue just for new buildings.

Public authorities and public service providers (except hotels and retail outlets) whose floor area is over 1,000m<sup>2</sup> will be required to display an annually renewable Display Energy Certificates showing the building's actual energy usage from October 2008. By January 2011, all air-conditioning systems over 12kw will require regular inspections.

Of more relevance to owners and occupiers generally, from April 2008, Energy Performance Certificates ("EPC") showing the building's energy efficiency, level of carbon emissions and potential performance will have to be provided by owners to all prospective

tenants or buyers for commercial properties with a floor area greater than 10,000m<sup>2</sup> and for all new residential properties being built. Developers will need an EPC before completion certificates can be obtained when a building is erected, converted or its use changes.

This will apply to the construction, sale or rent of all commercial premises with a floor area greater than 2,500m<sup>2</sup> from July 2008. Only accredited Energy Assessors will be permitted to issue EPCs, which are valid for 10 years. EPCs will also be accompanied by a recommendations report.

Then, from October 2008, EPCs will be required for all residential and commercial buildings being sold or rented to new tenants and on the construction of all remaining commercial premises. This is clearly going to be an important issue for everyone in the commercial property sector. The deadlines noted above are subject to change over the coming months as the Government continues to review this new area of law.

## LPA's and advance directives



One of the changes introduced by the Mental Capacity Act 2005 is that from 1 October 2007 the Enduring Power of Attorney (EPA) has been replaced with a revised type of power called a Lasting Power of Attorney (LPA). However, EPAs made prior to 1 October will continue to be valid.

An LPA allows a donor to nominate one or more attorneys to make decisions should they lose the mental capacity to do so themselves. Unlike the EPA, an LPA will need to be registered with the Court of Protection before it may be used by the attorney(s).

A person can make two types of LPA, one dealing with financial matters (as do EPAs) and one concerning personal welfare.

A Personal Welfare LPA can be used to set up an 'advance directive' regarding giving or refusing medical treatment in circumstances where the donor has lost the capacity to make such decisions themselves. The Personal Welfare LPA is legally binding if it is valid and applicable to the treatment proposed. This new power has caused anxiety for some people, who worry that making a Personal Welfare LPA might allow a relative to 'pull the plug' when they themselves might not wish that to happen.

No matter what the Personal Welfare LPA states, the final decision regarding any treatment given will rest with the responsible clinician. The Personal Welfare LPA cannot compel treatment to be given which is contrary to medical advice.

There are considerable legal safeguards built into advance directives, which in any event will only apply when the person creating the directive no longer has mental capacity. Where there is genuine disagreement about the existence, validity or applicability of an advance directive, those providing care or treatment will be able to apply for a ruling from the Court of Protection.

If you need advice on how to deal with your affairs, or those of a family member, in the event that mental capacity is lost, please contact us.

## watch what you say!

The Electronic Commerce Directive (Terrorism Act 2006) Regulations 2007 are now in force.



They set out when a foreign company can be brought to justice in the UK over blog postings that encourage terrorism.

They follow the Terrorism Act 2006 which, amongst other things, gives those hosting web sites and ISPs 2 days to

take down material encouraging terrorism from the time they are made aware of it.

If you need any advice on this area, or want some guidance on what to write in employment handbooks or staff policies about blogging and members of staff, please contact us for further information.

## de-regulation and private companies

In addition to changes relating to directors' duties mentioned on the front page, the Companies Act 2006 provisions relating to private companies and administration are now in force.

These include:

- no requirement to have a company secretary although companies may choose to continue to have one.
- Private companies (as long as not subsidiaries of public companies) may give financial assistance for the acquisition of their own shares.
- A simpler method for private companies to reduce their capital without court approval.
- A majority vote to pass a written ordinary resolution and a 75 per cent majority for a written special resolution.
- Private companies are no longer required to hold an AGM, although they may choose to do so.

In addition, larger companies need to include in their annual accounts an expanded business review each year which will set out:

- main trends and matters likely to affect its future business;
- information about the environment, the employees of the company, and social and community issues; and
- information about people with whom company has contractual or other arrangements essential to its business (this has become known as the supply chain provision), unless seriously prejudicial to that person or contrary to the public interest.

Some companies are choosing to revise their articles of association where they were incorporated under the old Companies Act to take advantage of some new provisions and a review now may be wise.

Call us for any advice needed on the Companies Act 2006.

# Corporate Manslaughter and Corporate Homicide Act 2007

On 6th April 2008, the new laws on corporate manslaughter come into force. They create a new offence of corporate manslaughter (corporate homicide in Scotland), which would allow organisations to be prosecuted for management failures that lead to the deaths of employees and others.

The 2007 Act changes the basis on which companies are liable for prosecution for manslaughter. Gross failures in the management of health and safety, causing death, will be liable to prosecution as corporate manslaughter from April 2008.

An organisation is guilty of the offence if the way in which its activities are managed, or organised, causes a death and amounts to a gross breach of a relevant duty of care to the deceased. A substantial part of the breach must have been in the way activities were managed by senior management.

Until April 2008, organisations could only be convicted of manslaughter if a "directing mind" at the top of the company (like a director) was also personally liable. This however, is not how most companies reach decisions so the law has been changed.

The new offence allows an organisation's liability to be assessed on a wider basis.

The Act applies to:

- companies incorporated under companies legislation or overseas
- other corporations including:
- public bodies incorporated by statute such as local authorities, NHS bodies and a wide range of non-departmental public bodies;
- organisations incorporated by Royal Charter;
- limited liability partnerships
- all other partnerships, and trade unions and employer's associations, if the organisation concerned is an employer
- Crown bodies such as Government departments & police forces.
- The position of individuals

The offence is concerned with the corporate liability of the organisation itself and does not apply to individual directors, senior managers or other individuals. Nor is it possible to convict an individual of assisting or encouraging the offence (section 18).

However, individuals can already be prosecuted for gross negligence manslaughter/culpable homicide and for health and safety offences. The Act does not change this and prosecutions against individuals will continue to be taken where there is sufficient evidence and it is in the public interest to do so, the Government says.

Please contact us for further information.

## copyright and privacy – protecting your image



Do you use pictures of members of staff on the company web site or brochures? If so, do consider the

legal implications of this. In many cases, consent should be obtained first from the individual to ensure compliance with the Data Protection Act 1998.

Although the photographer (or his or her employer if they are a direct employee) of a person owns the copyright in the image (unless the parties have agreed otherwise), that does not mean it can be freely used. In a recent case, *Murray v Express Newspapers*, the Court had to look at this issue.

The Court held that where someone is engaged in ordinary activities in public, such as walking down the street, then there is, under English law, no right nor expectation of privacy and so their photographs can be taken, even if they are famous people.

The case concerned a photograph taken of the child of J K Rowling and her husband, when their son was 18 months in a public street in Edinburgh, without his or his parents' knowledge or consent. It was published in the *Sunday Express Magazine*.

The judge held that the Human Rights Act 1998 in English law, did not recognise any right of confidentiality or privacy in relation to a person's appearance in a public place. Although, the right to respect a person's private and family life was protected under article 8 of the European Convention on Human Rights, scheduled to the 1998 Act, this did not apply to photographs taken in the street. That right was balanced by article 10 which set out the right to freedom of expression, enjoyed by the press and media.

In another case (*Campbell v MGN Ltd*), the court identified the test to be applied under article 8 - whether the person had a reasonable expectation of privacy.

Since the *Campbell* case, the European Court of Human Rights in another case, held that individuals will have some privacy protection when on private holidays and sporting activities. However, the English court said walking in the street was not the same and there was no protection.

The claim for compensation under the Data Protection Act 1998 was therefore dismissed on the ground that the photograph did not amount to unlawful or unfair use of personal data relating to the claimant. Permission to appeal was granted and the defendant was awarded £40,000 interim costs against the claimant pending the outcome.

If you want any help on copyright issues or questions relating to the Data Protection Act, please contact us for further information.

## compensation for injuries



If you have been injured in an accident, or through exposure to dangerous substances at work, contact us for information on whether you might make a successful compensation claim.

Usually, where the employer is at fault, compensation is possible. However, in one recent case, *Johnston v NEI* the House of Lords, rejected claims relating to asbestos on complex legal grounds.

The employees had 'pleural plaques' on their lungs which caused no symptoms, but did cause individuals considerable anxiety and some suffered depression as a result. The plaques indicate asbestos is in the lungs that may develop later and cause injury, but until that occurred and was proven, there was no claim.

This decision should not deter employees who are injured at work however from seeking compensation in appropriate cases.

Contact our specialist personal injury lawyers if you want advice in this area, or if you are an employer worried about employees' claims.

## trade marks

Many of our local clients use innovative names for their businesses and products. Some protect these by registered trade marks.

Now new rules for trade marks have come into force. The new rules provide that the UK Intellectual Property Office (IPO) will do less checking. It will still examine trade mark applications to see if the mark is distinctive and suitable for registration as now, but they will no longer check if someone else has the same or similar name. This means unless trade mark owners are watching out for new registrations by competitors and others they may find someone registers their name as a mark.

However, companies can oppose an application for registration of their own name or a similar name - but only if they notice it is going through. This makes the UK system like that applying in the other 26 EU states which are part of the Community Trade Mark system.

Many UK trade mark owners also apply for Community Trade Marks which provide one mark protecting them in 27 EU states. Under the CTM system 25% of marks which are applied for are opposed but only 5% currently in the UK. It is likely that oppositions will rise in the UK under this new system too.

However the IPO will notify applicants if it notices an overlap with an existing marks. There is also a system where existing owners can pay to use notification services. Contact us if you have any trade mark or similar issues or internet domain name disputes.

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## age discrimination

Unlike other forms of discrimination legislation, age discrimination is allowed where it is justified, as a proportionate means of achieving certain aims. In one recent case in the UK, a partner in a City solicitor's firm (Freshfields) who claimed £4.5m for age discrimination lost his claim. The pension scheme changes imposed on him when he left the partnership in a shake-up, were found to be discriminatory but they were justified.

In a separate case, the European Court of Justice (ECJ) has looked at whether a country's laws requiring employees to retire (if the employer chooses) at a fixed age are discriminatory and found that Spain's 65 year retirement age was lawful. This was because the discrimination was an acceptable means of achieving the social aim of promoting full employment and access to the job market.

The aim which the ECJ accepted as legitimate was the social policy objective of creating employment. This is not the same as the aims the British Government has used to justify the UK's current 65 default age - the employer's need to plan its workforce and the impact on pensions and other benefit schemes of abolishing retirement ages.

The ECJ may have a different view on the UK's position and Hey Day (Age Concern) is bringing a UK test case on this.

Meanwhile, it is open to any employer to let staff continue to work after age 65 if they choose to do so in any event, rather than forcing them out because they reach an arbitrary birthday.

If you want advice on age discrimination law, please contact us for information.