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Wortley Byers
Solicitors

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PRIVATE ADDRESSES FOR DIRECTORS

Under the current law a director's residential address is easily available to the general public by accessing the company's register. Recent events have led to a reform in the law so that directors are able to keep their addresses private.

The most notable example being the director of Huntingdon Life Sciences Limited who was victimised by animal rights protesters in connection with medical research to the extent that the company was temporarily forced to cease its operations in certain areas of testing.

Currently directors may only protect details of their residential addresses from the public under a Confidentiality Order. With effect from 1 October 2009, directors will still need to file their personal addresses at Companies House. However, they are also able to

provide a service address. The service address will be available to the public and the residential address will, subject to some exceptions, only be made available to select organisations, such as credit reference agencies.

However, the director's address will still be found on historical documents held on the company's register, and so will still be accessible to the public. Therefore if you would like to remove your personal address details, including historical details, from the public register then you will need to apply for a Confidentiality Order.

We can assist directors who seek to keep their address private. If you would like further information on the above please telephone Martin Hughes in our Company Commercial Department on 01277 268391.

CONSTITUTIONS OF PRIVATE COMPANIES – CHANGES TO THE REGIME FROM OCTOBER 2009

October 2009 sees the introduction of new provisions which will change the way companies are incorporated and will function. A company's Memorandum of Association will now merely be a statement of the subscribers' names and it will no longer be possible to amend it by resolution. Rules contained in the Memoranda of existing companies will now be considered as part of the company's Articles of Association.

The objects of all companies will become unrestricted meaning companies will be able to do anything lawful unless its activities are restricted by the Articles. It would be advisable to review your company's Objects Clause if you are in a particular business (for example you may be governed by a professional body) where restricted objects are preferable, or your company is a charitable organisation which must have restricted objects.

New model Articles will also be introduced which will address how to appoint a new director to administer a company's affairs when a sole shareholder who is also the sole director dies. The new Articles will allow the deceased's personal representatives to appoint a new director. It may be useful to consider adopting the new model Articles if appropriate for your business.

We can advise on all issues relating to company formation and for further enquiries, please contact Angela Thompson in our Company Commercial Department on 01277 268317.

DIRECTORS: PERSONAL LIABILITY

In the recent case of *Contex v Wiseman*, the Court held that directors can be made personally liable for the company's debts if they have signed fraudulent written statements regarding the company's financial position.

In this case a director had signed a contract on behalf of the company when he knew that the company was insolvent and there was no possibility of the company being able to pay. The director had signed in the name of the company but not in his personal capacity but the court decided this did not matter and he was found personally liable for the company's debt under the contract.

It was not necessary for the director to give a written promise that the company is solvent. Signing the contract was sufficient as it is implied in signing a contract that you are able to carry out your obligations under it.

The importance of this case is that it gives creditors another chance at recovering money apart from making a claim against a company in liquidation. Creditors would be advised to consider what written assurances they have received and consider obtaining fresh assurances from directors of debtor companies. The case also stands as a fresh warning to directors against continuing to sign contracts where their companies are trading insolvent and unlikely to recover.

If you require further information, please telephone Sue Dowman in our Company Commercial Department on 01277 268355.



NEW CONSUMER CREDIT LICENSING REQUIREMENTS IN FORCE

Businesses offering debt administration or credit information services now need to be appropriately licensed by the Office of Fair Trading.

A new debt administration licence category is now required by those businesses wishing to administer debts under consumer credit or consumer hire agreements on behalf of the creditor.

There are also three new categories available to those wishing to provide credit information services and businesses need to ensure that they select the correct category. Any business carrying out these activities without an appropriate licence, is likely to be committing a criminal offence and could face prosecution.

The Consumer Credit Act 1974 requires most businesses that offer goods or services on credit, for hire or that lend money to consumers, to be licensed by the OFT.

The new categories of licence are:

- **Debt administration (Category G)**

(This does not include collecting debts, which would require the separate licence category F to cover debt collecting)

- **Credit information services excluding credit repair (Category H)**

- **Credit information services including credit repair (Category H1)**

- **Non-commercial credit information services including non-commercial credit repair (Category H3)**

Businesses need 'commercial' rather than non-commercial categories if they or their associates charge a fee or otherwise receive remuneration in connection with the provision of such services and/or in the course of carrying on any consumer credit or ancillary credit activities.

The only types of organisation that are likely to require non-commercial categories are non-fee charging charities or similarly altruistic organisations.

There are other licensing changes taking place which relate to those engaging in debt collection and debt purchasing. If a business collects debts due to others, arising from consumer credit or hire agreements (whether regulated or exempt), it is likely to require licence Category F to cover debt collection.

In difficult times, more customers will ask for credit. Contact us if you need advice on the consumer credit legislation and how to protect your commercial position in general against customers who go out of business.

CHANGES IN PLANNING LAW

Changes to planning laws have come into effect. Owners of terraced properties, for example, can now extend the roof space by up to 40 cubic metres and other properties up to 50 cubic metres without planning permission. However, some of the changes make the law stricter. Planning permission may now be needed for:

- the installation or repair of driveways;
- extensions or conservatories to the side of a house;
- extensions or conservatories to the rear of a house within two metres of a side boundary;
- the construction of any building (shed, garage) within two metres of any boundary;
- decking over 30cm in height;
- installation of side windows to a house.

The new rules relate to house extensions, in particular to roof conversions and rear extensions, which may now in some cases automatically be allowed. However, this is subject to conditions.

Other changes are to reduce flood risks caused by water run-off. New driveways or parking areas over five square metres are only now exempt from planning control if they are constructed using surfaces that allow the water to soak through to the ground. Proposals using traditional impermeable surfaces are not authorised and now require planning permission.

If you have a property law issue contact our property department for assistance and we can guide you through the complex laws in this field.

COMPANY LAW CHANGES

New company law provisions have come into force. These include:

- the general duties of directors in respect of conflicts of interest;
- the new procedure for private companies to make capital reductions supported by a solvency statement instead of by a court order;
- companies now have to have at least one natural person (not a company) as a director - a company cannot be a sole director of another company (some existing companies will have more time before the rules change);
- there is a new minimum age of 16 for directors;
- the restrictions under the Companies Act 1985 on financial assistance by private companies for the acquisition of their own shares have also now been repealed.

Many companies are also updating their articles of association to reflect changes in the Companies Act 2006 such as the removal of the requirement to have a company secretary and the abolition of the rule that companies must have an Annual General Meeting each year.

Some directors are tempted to cut corners in recessionary times. However, directors' duties are now clearly set out in the Companies Act 2006 and compliance with the law is essential.

Contact us if you want more information on how the new company law provisions affect your business.



AID FOR INDUSTRY AND MERGER LAW

Special Parliamentary approval was needed for the bank rescues proposed by the Government this Autumn. Under the Treaty of Rome, state aids are prohibited. Even the earlier Northern Rock nationalisation had to be submitted to the European Commission for approval under EU state aids law. Normally a merger of banks with high market shares would be prevented by the Competition Commission, but again, in the national interest, rules were adjusted to permit transactions that would otherwise not have been allowed.

However, these are rare cases. Most clients do need to take account of merger law. Under the Enterprise Act 2002, where a market share of 25% is created or enhanced, or the value of the assets acquired is over £70 million, there is a risk the merger may be referred to the Competition Commission. The Commission has powers to order the company which bought its rival to divest itself of the assets acquired. For that reason, many buyers insist on prior clearance of the merger in advance, either under the formal 'Merger Notice' procedure or by way of confidential guidance.

There have been a number of emergency/fire sales of assets during the latest financial crisis and it is likely there will be more such transactions during 2009 in recessionary times. Conversely, some deals have not proceeded because of difficulties in obtaining bank finance.

We can advise you on the full range of issues relevant to your business sale or purchase including:

- tax issues, the £1m lifetime entrepreneur's relief which limits capital gains tax for an individual to 10% and the best way to structure the sale to reduce tax
- sale and purchase agreements/asset sale agreements for sales of shares or businesses
- advice on the due diligence process and disclosure letter documentation of the seller
- employment and director service contracts and other employee issues including protected rights for employees under the Transfer of Undertakings Regulations 2006 (TUPE)
- pensions and property issues arising from the sale
- impact on existing commercial agreements with suppliers and customers - where assets of the business are sold, not shares, frequently the other party's consent is required before the contract may be 'assigned'/transferred to the buyer.

If you are proposing a sale of part, or all of your company's assets or shares, contact us for further information on how the competition law rules might affect you, for advice on the most tax efficient way to effect the sale and also for preparation of the relevant sale documentation.



The Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008, have been in force since May last year.

The first prosecutions under the regulations are now starting to come through. One case concerned some Wiltshire traders whose customers had complained of aggressive behaviour and poor quality work.

Wiltshire County Council's Trading Standards Department, with case support from the OFT, became the first consumer protection organisation in the UK to obtain an enforcement order under the Consumer Protection from Unfair Trading Regulations 2008.

The Order ordered the defendants not to breach a range of provisions in the Regulations including not to:

- act in a misleading manner by presenting false information or presenting it in a manner likely to deceive the consumer
- make contracts away from business premises without first notifying the consumer in writing of their cancellation rights
- act in an aggressive manner either in attempting to get the consumer to enter into a contract or by obtaining payment
- act without professional diligence.

They were also ordered not to breach the general rule of law of negligence when providing home handyman services. If the defendants disobey the terms of the Order they face being found in contempt of court which can attract imprisonment, a fine, or both.

The regulations apply to many companies who advertise and prohibit misleading omissions as well as statements made.

Suppliers need to be careful over the following issues (and many others too):-

1. Offering goods as 'free' when they are not.
2. Omitting to tell consumers there are long minimum service term periods before a good deal which is advertised is available.
3. Engaging in viral or buzz marketing including online where they market products without telling consumers the marketing is by a company and instead pretend to be an unbiased individual. This is particularly common on holiday comment websites.
4. Engaging in any of the 31 prohibited practices set out on the schedule to the regulations.

Contact us if you want further information on these provisions.



APRIL EMPLOYMENT LAW CHANGES - LONGER HOLIDAYS!



A number of employment law changes take effect on 1st April 2009:-

- The minimum holiday to which employees are entitled increases from 4 weeks to 5.6 weeks including bank holidays. Some companies

GOING SELF-EMPLOYED

The numbers of people out of work are growing. For those tempted to become 'self-employed' one court decision illustrates the risks where the individual is not regarded by the tax man as no longer an employee.

In this case the individual, Mr Bessel, who was an IT contractor was held to be an employee and now owes more than £99,000 in back tax as a consequence.

only provide their staff with the statutory minimum and may now need to increase holiday entitlement for staff up to the 5.6 week minimum.

- New rules about disputes with employees that simplify procedures come into effect. In an unusual move, the law returns to how it was before October 2004.

Note also some changes last year for temporary workers. The Fixed Term Employees (Prevention of Less Favourable) Treatment Regulations, remove the provision that agency workers working under contracts of fewer than three months' duration are excluded from SSP. Now they will all be entitled to sick pay.

Contact us for information on the new procedures for disputes and dismissals and whether your employment contracts need an update to take account of the new holiday rules and other recent changes.

Mr Bessel, who was freelance, or thought he was, has been ordered to pay the tax as he worked almost exclusively for the AA for three years and just had one other client. He was so involved with the AA's business he was found by the courts to be an employee.

Mr Bessel paid for his own equipment, broadband line and training but that was not enough to classify him as self-employed. There was no express provision in the contract between the AA and the company through which Mr Bessel contracted nor in the agreement between him and that company which would allow him to substitute another person to undertake the work.

Whereas if, say a law firm is hired, it will usually be up to the firm which lawyers they put on the job and they can change them largely at will and the relationship is not one of employer and employee.

The judge said: "Bessel's performance of his duties was subject to a degree of supervision and quality control which went beyond merely directing him when and where to work. In the case of a skilled worker you do not expect to find control over how the work is done. Conversely, in the case of a self-employed worker in business on his own account, you would not normally expect to find regular appraisal and monitoring of the kind attested to".

Control and the right to substitute others to do the work have always been important elements of the so-called 'badges of trade' which help indicate if someone is self-employed or not. We can advise you on whether you are employed or self-employed and seek to ensure that your contractual arrangements reflect the correct working practice under these rules known as IR35 which applied in this case. If you would like us to check your contracts with consultants and employment agencies following this ruling, please contact us.

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