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SOLICITORS

## More Companies Act measures come into effect

This autumn sees the latest raft of Companies Act provisions coming into force. The measures, effective from 1<sup>st</sup> October, are designed to reduce the administrative burden on companies by streamlining procedures.

There are changes relating to corporate directors and under-age directors, general duties of directors in respect of conflicts of interest, declarations by a director of an interest in an existing transaction or arrangement, and new procedures for private companies to make capital reductions supported by a solvency statement instead of by a court order.

Every company will have to have at least one director who is a natural person. However, there will be a grace period until October 2010 for any company that only had corporate directors at the time the Companies Act received the Royal Assent on 8<sup>th</sup> November 2006.

All directors must now be at least 16 years old. Existing under-age directorships will cease. It is not necessary to notify the Registrar but the register of directors will need to be amended to reflect that the under-age directorship has ceased. The change is retrospective and will affect any director who has not reached the age of 16 on 1<sup>st</sup> October 2008.

There are several changes covering the duty of directors to avoid conflicts of interest, not to accept benefits from third parties and to declare any personal interest in proposed transactions. The Act provides private companies wanting to reduce the amount of share capital with an alternative to the existing method of passing a special resolution and obtaining

court approval. They can now proceed with a special resolution supported by a solvency statement from the directors. It's intended that the solvency statement approach will provide a cheaper and simpler way to reduce capital.

However, if company directors make a solvency statement without having reasonable grounds to believe it to be accurate then they could be committing an offence punishable by a fine, up to two years imprisonment or both.

The Act introduces several more changes which are effective from October including measures relating to objections to company names, trading disclosures, control of public donations and the power of the court to grant relief in certain cases.

Measures introduced last April mean that firms no longer have to appoint a company secretary unless they want to and they no longer have to have the signature of two directors to execute deeds. The signature of one director will be enough provided that it is witnessed.

Many of the measures are quite technical and could have a significant impact on the way companies conduct their affairs. There will be more changes coming into effect next year.

Please contact us if you would like more information about the Companies Act 2006 or any aspect of company law.



**No more underage directors**

## Britain to opt in to EU Regulation on contract disputes

The Government has decided that Britain should opt in to new EU regulations for dealing with cross border contract disputes.

Such disputes are currently governed by the 1980 Rome Convention on the Law Applicable to Contractual Obligations. The EU Council of Ministers has now agreed new rules known as the Rome I Regulation.

The existing Convention does not harmonise contract law across the EU but it allows courts to determine which country's law should apply if the parties have not already reached an agreement in advance.

Rome I has several subtle differences. For example, courts would be able to apply the law of the country "with which



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the situation has its closest connection". This could apply even where the parties involved had chosen the laws of a different country.

The UK Government had originally opted out of Rome I but now it says it plans to seek permission to opt in. A statement from the Ministry of Justice said: "The original proposal was clearly not right for

Britain, but the new and much improved regulation will help to ensure that the rules in this very technical area are applied uniformly. This will ensure a level playing field for British business in Europe.

"Rome I will provide clarity over which law applies if a dispute arises over a contract made between people or businesses from different countries, allowing cross border trade to continue with confidence."

The Government undertook a consultation on the issue and says the overwhelming response was that Britain should opt in. Rome I comes into effect on 17<sup>th</sup> December next year. The Government will now seek consent from the European Commission to see if Britain can opt in at the same time.

# Equality Bill could make employers reveal pay structures

The Government plans to create more equality in the workplace by obliging employers to disclose their salary structures so any unjustified discrepancies in pay rates for men and women will become apparent.

It also wants to create more diversity by allowing positive discrimination in favour of women and ethnic minorities. The measures will be part of the new Equality Bill. The Bill is designed to streamline the law relating to equality and in doing so will replace nine other major pieces of legislation such as the Equal Pay Act, the 2006 Equality Act and the Disability Discrimination Act.

The Equality Minister Harriet Harman outlined some of the main points to be covered in the new Bill in a statement to the House of Commons. She said it is impossible to tackle discrimination when it is hidden so she wants to encourage more openness. "I want employers to report on key equality matters, like gender pay. This will put the spotlight on pay unfairness which we all know goes on but which stays swept under the carpet."

She said 80% of people are employed in the private sector where the pay gap is double that of the public sector. The Government will now concentrate on how to oblige the private sector to close that gap. For example, it will use the fact that 30% of all companies do £160 billion worth of business with the public sector. Ministers will consider how public procurement can be used to deliver transparency and change. Ms Harman also outlined other measures. "The

Equality Bill will outlaw clauses in employment contracts which prohibit employees disclosing their pay to each other. Where an employer has been found to have unlawfully discriminated, we will provide for the Employment Tribunal to be able to make a recommendation applying not just to the successful complainant but to everyone in that workplace.

"We need to make further progress on fairness. That's why we will legislate to give more scope for employers, if they want to increase the number of women or black or Asian employees – to take positive action."

It means employers will be allowed to use positive discrimination when choosing between two equally qualified candidates to ensure a more diverse workplace if particular groups such as women or ethnic minorities are under-represented.

## Discrimination by association ruled unlawful

Employers may also have to re-assess their equal opportunities policies following a ruling by the European Court of Justice (ECJ) that 'discrimination by association' is unlawful.

The case involved legal secretary Sharon Coleman and her son Oliver who was born with a rare condition affecting his breathing and hearing. Ms



Coleman claimed she was forced to resign because she was harassed by her employers and denied the right to work flexible hours even though such arrangements were available to other employees.

The ECJ ruled that the EU Directive banning discrimination in the workplace on the grounds of disability did not only protect the disabled themselves, it also extended to those who care for the disabled.

This is a very significant ruling. Employers should ensure their equal opportunities policies are up to date so that they do not discriminate against staff who act as carers for the disabled or the elderly. For example, if they offer flexible working to the mothers of young children then they may have to offer the same rights to an employee caring for a disabled or elderly relative.

## Landlord did not 'discriminate against disabled tenant'

The House of Lords has ruled that a housing authority did not discriminate against a disabled tenant when it sought to evict him because he had sublet his flat.

The ruling could be significant not just for landlords but for employers as well. The case involved Lewisham Borough Council and one of its tenants, Courtney Malcolm. Mr Malcolm suffered from schizophrenia.

In 2002, he was granted the tenancy of a flat and two months later he applied to exercise the right to buy. Mr Malcolm then sublet the flat in June 2004 before having completed his application to exercise his right to buy. Lewisham responded by serving notice on him to quit in August and then began possession proceedings in December.

Mr Malcolm submitted that this amounted



to discrimination under the Disability Discrimination Act 1995 because it was his schizophrenia that had caused him to sublet the property. He lost the case in the county court which made the possession order. However, that ruling was overturned by the Court of Appeal and so the case was taken to the House of Lords.

The Lords have now found in favour of Lewisham. They said the issue under the Act was whether Mr Malcolm had been treated any differently to the way a tenant who was not disabled would

be treated if he had sublet. The answer was that he had been treated in exactly the same way and consequently there had been no discrimination because the possession proceedings did not relate to Mr Malcolm's disability. Lord Bingham said: "Lewisham's reason for seeking possession - that Mr Malcolm had sublet the flat and gone to live elsewhere - was a pure housing management decision which had nothing whatever to do with his mental disability."

The ruling could have implications in other areas such as the workplace and affect whether an employer's decision to dismiss a disabled person is lawful or not. Each case is different, of course, and will depend on the individual circumstances.

All landlords or employers facing difficult decisions like these should seek legal advice before taking any action.

# To buy or lease as credit crunch takes hold?

The demand for commercial property in the first quarter of this year fell at the fastest rate for more than six years, according to a survey by the Royal Institution of Chartered Surveyors.

The upheaval caused by the credit crunch has led many businesses to think that little bit harder about their need for extra space with many deciding to make do with what they have.

In spite of the current financial climate, however, commercial life goes on and many companies, especially start-up businesses, still need premises. They should be able to negotiate favourable deals but they will still have to grapple with the familiar problem of whether it would be better for them to buy or to lease.

The great advantage of leasehold is the flexibility it offers. A firm that sees itself expanding will not want to buy a property that it's likely to outgrow within a few years. By leasing instead it can leave itself free to up sticks and move a few



years down the line, or simply expand within the landlord's existing premises by taking on new units if they are available.

You can negotiate a short lease of say, three to five years, if you think you are likely to want to move to somewhere larger in future. Or if you want longer term stability but are unsure how well your business might perform then you could take out a longer lease with a three-year break clause.

This would enable you to walk away if things don't work out as you hope and the business fails. That might prove an attractive option in these uncertain times. There are potential pitfalls however. If you don't exercise the break clause then you will be tied in for the remainder of the lease.

Leaseholders may also be able to negotiate a rent free period to help cover the cost of fitting out the premises. The landlord may also be prepared to contribute to the cost, especially on a longer term lease.

The advantages of buying are in part the opposite of leasing and will often be the better option for more settled businesses where future growth and development are more predictable.

If you feel you are likely to want to remain in a property on a long term basis then buying may well work out to be more cost-effective. Most landlords work on the general rule of charging an annual rent that is 10% of the value of the property. If you think you are likely to stay in your premises then buying might be a better option because the amount you pay on a lease could be enough to buy the property outright within ten years.

The problem may be finance because in the current climate, banks are unlikely to provide loans of more than 75% of the value of the property.

Many surveyors now tend to value the properties lower than the buyer seeking a loan would like because they are expecting prices to fall. Lenders want to make sure that there will still be enough equity to protect their interests a year down the line when property prices might be even lower.

Banks have money to lend but they are now extra careful about where they place it. Buyers are coming under greater scrutiny by lenders who don't want to risk their money with someone who might soon go out of business.

Your existing bank with whom you already have a rapport might be the most likely to help. Other lenders may even be suspicious of someone who hasn't gone with their existing bank and wonder whether there is a problem with your ability to service the loan.

Given the difficulties and uncertainties in the market, it's likely that we will see more leasing but for those who feel they would be better off buying, there are good deals to be had if you can raise the finance.

## Drinks industry could face a tougher set of regulations

The Department of Health (DoH) is conducting a public consultation which could result in the alcohol industry's current voluntary code being replaced by tougher, mandatory regulations.

The current voluntary code, the Social Responsibility Standards, was introduced in 2005 to coincide with the implementation of the Licensing Act. Its aim is to promote good practice and it has been signed by 16 trade associations. An independent review of the effectiveness of the code was carried out for the Government by KPMG.

The review found that those within the industry felt too much blame was being placed upon them for the harm caused by alcohol. However, those outside the industry saw the code as having little impact because it is not enforceable.

KPMG conducted observation studies over a five-day period of nearly 600 premises in eight different locations across England. The report says: "We have concluded that currently the Standards are not being consistently adopted and applied across the whole of the alcohol industry.

"In the current trading climate the commercial imperative generally overrides adherence. Inducements to people to drink more and faster, to allow under-age people entry to restricted premises, and blatantly



serving intoxicated people are evidence of this conclusion.

"The Standards are currently having negligible impact in either reducing bad practice or promoting good practice on the ground. We have concluded that the Standards should be strengthened and enforced more effectively by Government, industry and other agencies working more closely in partnership at a national and local level."

The consultation proposals put forward by the DoH would oblige retailers to offer drinks in small as well as large measures, restrict happy hours and irresponsible promotions, and display alcohol in separate areas in off-licences – not by the checkout.

They would also need to give point of sale information on units and train staff to recognise and refuse alcohol to underage or drunken customers.

# Private Rented Sector will 'outstrip other types of investment property'

The value of the Private Rented Sector now exceeds that of all privately-owned commercial property, according to research carried out for the Association of Residential Letting Agents (ARLA).

The researchers estimate that the sector is worth £500bn – that's more than the combined total of all privately-owned commercial property including offices, shops, hotels, factories and leisure facilities. Their report forecasts that rents will rise significantly in the short term and the sector will continue to outperform other kinds of investment property. The research was carried out on behalf of ARLA by Michael Ball, Professor of Urban and Property Economics, at Reading University.

The report says residential property investment is driven by the prospect of capital gains. "Capital appreciation has been good over the long term. Real house prices rose by 4.2% a year on average between 1981 and 2003, while capital values for commercial property fell by 1.2% by the same measure."

Meanwhile, an ARLA survey shows that more people are looking to the private rented sector as a good investment and many existing investors are just as active and busy as ever as they respond to changing market conditions. Some are taking advantage of the drop in house prices to add to their portfolios.

Of course, while buy to let is holding firm in an uncertain economic climate, it is not without its pitfalls. Investors need to be careful where they place their money and make sure they choose the right



properties in the right areas. They should also remember that there are numerous legal requirements landlords have to meet such as obtaining licences for some houses in multiple occupation, fulfilling all their obligations to tenants and entering into tenancy deposit schemes. All landlords run the risk of sometimes having to deal with problem tenants. Some may fail to keep up with the rent or not treat your property as well as they should. In these circumstances, you may need to take legal advice so you can take action to recover rent arrears or to recover your property.

As the figures show, buy to let remains an attractive proposition for both small and large investors as long as they are prepared to plan carefully and follow the correct legal procedures at all times.

## Manufacturer takes legal action to protect its trademark

A manufacturing company has successfully taken legal action to protect its trademark against infringements by another firm with a similar name.

ALM Manufacturing had registered ALM in respect of household goods which it made and sold. It then discovered that another company was advertising household and garden products under the name ALM Imports and Exports Ltd.

None of the goods sold by this second company were marked as ALM but its

letterheads and business cards did display the name ALM in one way or another.

ALM Manufacturing applied for a summary judgment to prevent the second company using the trademark. The second company defended the case saying that none of its products carried the brand name ALM and so therefore there was no infringement of trademark.

It also said that it had never heard of ALM Manufacturing and so even if it did

infringe the trademark, it was entirely innocent in doing so. The court, however, held that whether or not the infringement was intentional was irrelevant. The main issue was whether or not an infringement had taken place.

The second company had used ALM prominently on its literature and so in the court's view it had no realistic prospect of defending a claim brought against it for infringement. Summary judgment was therefore granted in favour of ALM Manufacturing.

This newsletter is intended merely to alert readers to legal developments as they arise. The articles are not intended to be a definitive analysis of current law and professional legal advice should always be taken before pursuing any course of action.

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