

COMPANY LAW

NEW COMPANY LAW REGIME IN FORCE

The *Eighth Commencement Order*, which was made on 5 November 2008, will bring all but two of the remaining provisions of the **Companies Act 2006** (CA 2006) into force on 1 October 2009. The two exceptions concern the deadline for the appointment and termination of proxies on a poll taken within 48 hours (Sections 327(2)(c) and 330(6)(c) CA 2006) which will be repealed at the earliest opportunity and the special rules for the audit of charitable companies (Section 1175 and the associated part 2 of Schedule 9 CA 2006) which have already been superseded by charity law, making them redundant.

The main provisions of CA 2006 coming into effect on 1 October 2009 are as follows:

- Parts 1 to 4: Formation and constitution.
- Part 5: Names.
- Part 6: Registered office.
- Part 7: Re-registration as a means of altering a company's status.
- Part 8: Register of members.
- Parts 10 and 12: Residential addresses.
- Part 18: Acquisition by a limited company of its own shares.
- Part 24: Annual return.
- Part 25: Company charges.

The Order also brings into force the remaining repeals of the **Companies Act 1985**, the **Companies Act 1989** and the **Companies (Audit, Investigations and Community Enterprise) Act 2004** with effect from 1 October 2009.

MEMORANDUM OF ASSOCIATION

With effect from 1 October 2009 for companies formed under the CA 2006, the constitutional information previously contained in the memorandum will be set

out in the articles of association. Also, companies will no longer be required to specify their objects. Any existing company (ie: incorporated before 1 October 2009) that wishes to amend its objects to make them unrestricted going forward, will be able to do so by amending its articles and removing the restrictions on its objects.

DEFAULT MODEL ARTICLES

The final version of the model articles, *Companies (Model Articles) Regulations 2008 (SI 208/3229)* applying to all companies incorporated on or after 1 October 2009 was passed by MPs in December. There are three sets of articles – one for public companies, one for private companies limited by shares and one for private companies limited by guarantee. These will supersede the existing interim articles.

Several changes have been made to the 'near final' version and these include provisions relating to directors' indemnities, directors' and officers' insurance, decision making by directors, conflicts of interest, the termination of a director's appointment, liability of members, chairing meetings, poll procedures and proxy forms. The model articles can be downloaded from www.opsi.gov.uk

GOING CONCERN

The Financial Reporting Council (FRC) has recently issued a consultation paper on *Going Concern and Financial Reporting*. The paper has been produced on the assumption that guidance for directors and disclosure requirements should continue to exist and therefore includes proposals to revise the guidance for directors of listed companies which was originally published in November 1994 and since then has not been subject to any revision.

The listing rules of the FSA require that the annual reports of listed companies include a statement by the directors that a business is a going concern, together with supporting assumptions or qualifications as necessary.

Directors at present can reach three conclusions on a going concern if:

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- * they have a reasonable expectation that the company will continue in operational existence for the foreseeable future; if
- * they have identified factors which cast a doubt on the ability of the company to continue in operational existence for the foreseeable future; or if
- * they consider that the company is unlikely to continue in operational existence for the foreseeable future.

The FRC has proposed adding a fourth that would require directors to disclose if they have ‘identified material uncertainties that may cast significant doubt about the ability of the company to continue as a going concern’ and so additional disclosures are required by International Financial Reporting Standards (IFRS). However, some experts believe that this fourth option is unnecessary and may unsettle investors.

The FRC acknowledges that the Guidance for Directors and the requirements of FRS 18 for a disclosure when the period of review is less than 12 months from the date of approval, is more onerous than the equivalent requirements contained in the IFRS, and it believes that the UK and Irish approach is superior to that of the IFRS and that the Standards should be modified to be brought in line with the UK and Irish requirements.

The FRC also acknowledges that the developments in the international financial reporting regime and in the Markets, mean that the guidance potentially needs to be updated.

The consultation document together with a marked up guidance for directors can be found on the FRC website www.frc.org.uk.

PUBLICATION OF COMPANY DETAILS

The Companies (Trading Disclosures) Regulations 2008 (SI 2008/495) have been made under Section 82 of the CA 2006 and replace the relevant provisions of the **Companies Act 1985** and the **Business Names Act 1985** in connection with trading disclosure requirements. The Regulations which came into force on 1 October 2008, prescribe the standard and manner of disclosures that must be made by a UK company in certain locations, in company documentation and on a company’s website. These Regulations can be downloaded from www.opsi.gov.uk.

BERR has published a set of frequently asked questions regarding the Regulations on its website www.berr.gov.uk which details information as to where disclosures are to be made and the types of disclosures to be made. The trading disclosure requirements are enforced by Companies House and local trading standards officers and non-compliance will result in a fine of up to £1,000 (as at October 2008).

The *Companies (Trading Disclosures) (Insolvency) Regulations 2008 (SI 2008/1897)* have also been published. These implement European Law regarding disclosure requirements in the event that a company enters formal insolvency. They came into force on 1 October 2008 and amend the **Insolvency Act 1986** and the *Insolvency (Northern Ireland) Order 1989*. A company that is in receivership, administrative receivership, administration, liquidation or in respect of which a moratorium from creditors is in force following a director’s proposal for a voluntary arrangement, is required to include a statement to this effect in a number of places, for example on the company’s website, in its electronic form documents, in a prescribed document whether or not the company’s name appears on that document and on order forms.

The Government has recently published draft Regulations (*The Companies Trading Disclosure)(Amendment) Regulations 2008*) (*‘revised Regulations’*) which amend the 2008 regulations (SI 2008/495) and will come into force on 1 October 2009. They include two further exceptions to the trading disclosure requirements; firstly, signs will not be required at premises of a company, the activities of which put its directors at risk of violence or intimidation. In addition, if the company has had a liquidator, administrator or administrative receiver appointed and the registered office, inspection place or place of business is also a place of business of that liquidator, administrator or administrative receiver, no sign will be necessary. These two new exceptions will apply from 1 October 2009.

LIMITED PARTNERSHIP LAW

BERR has published a consultation document on the *Legislative Reform Order* to repeal and replace the **Limited Partnerships Act 1907**. The document, which can be found on the BERR website www.berr.gov.uk, is consulting on the proposal to modernise and simplify the law on limited partnerships in line with recommendations made by the Law Commissions in 2003. In essence the Limited Partnerships Act 1907 will be repealed and new provisions about limited partnerships inserted into the **Partnership Act 1890**.

The proposed changes relate to the establishment, registration and deregistration of a limited partnership, the reliability of a limited partnership to third parties and the rights and obligations of general and limited partners. The aim of the Law Commission in respect of the reform of limited partnerships is to remove doubts about the way in which a limited partnership may operate and to produce a coherent body of law related to it. The consultation closed on 21 November 2008 and the proposed changes to legislation will be made through a Legislative Reform Order under the **Legislative and Regulatory Reform Act 2006** with effect from 1 October 2009.

Companies House

COMPANIES HOUSE TRADING FUND

In August 2008 the Government issued a consultation on its proposal to amend the Companies House Trading Fund.

Companies House has trading fund status which essentially allows the organisation to directly manage its own finances. The Registrar believes that trading fund status has helped instil real commercial focus in Companies House which in turn has stimulated innovation. Companies House believes it has enabled them to respond more quickly to ever changing demands of the customer and gives greater flexibility to pass on efficiency savings to customers in reduced fees.

The Companies Act 2006 creates a single company law regime applying to the whole of the UK. This being the case and with trading advantages in mind, the Government proposes to create a UK-wide Register of Companies through the integration of the Northern Ireland Registry with Companies House. This involves amending the Companies House Trading Fund Order to reflect the change. It will mean that all UK customers have access to the same products and services at the same price and that these products and services could be delivered at a lower cost due to economies of scale.

The proposed system would operate in much the same way as Companies House currently works with Scotland. The Registrar of Northern Ireland would be retained and would be an appointee of the Secretary of State for BERR as is the case for England and Wales and for Scotland; in practice the Northern Ireland Registrar would report to the chief executive of Companies House. The office in Belfast would remain but would use systems, hardware processes and other corporate standards used by Companies House. The Government has not identified any significant disadvantages to this approach. The Draft Statutory Instrument the *Companies House Trading Fund (Amendment) Order*

which is due to come into force on 1 October 2009 is attached to the consultation document which can be found on the BERR website www.berr.gov.uk.

LATE FILING - INCREASED PENALTIES

Figures recently published by Companies House show that late filing of accounts with the Registrar have increased by 25% over the last four years to March 2008. In particular in the last two years, each of which saw late filing increased by 10%. The total number of late filers in 2007 was nearly 240,000.

Penalties for late filing of accounts increase substantially from 1 February 2009. Private companies' accounts filed not more than one month late will incur a £150 fine which increases to £1,500 for accounts filed more than six months late. In addition where there was a failure to comply with the filing requirements in relation to the previous financial year (and that previous financial year began on or after 6 April 2008) the penalty imposed will be doubled. Details of the new increased penalty charges can be found on the Companies House website www.companieshouse.gov.uk

REDUCTION OF SHARE CAPITAL SAME DAY TRIAL

In December 2008 the London and Edinburgh information centres carried out a trial 'same-day' service to process the reduction of share capital using a solvency statement which was introduced under the **Companies Act 2006**. The trial took place over the month and the aim of the trial was to see whether Companies House could guarantee a same-day service for all documents delivered before 3.00pm. The trial was also being carried out to establish the level of demand for the service and the resources required to operate it. The trial did not include reduction of share capital applications using a court order.

BERR proposes that all limited partnerships re-register under the new regime. On re-registration the limited partnership will receive a new certificate but it will retain its identity and its registration number.

OVERSEAS REGULATIONS

BERR has placed a revised draft of the *Draft Overseas Companies Regulations 2008* on its website. The Regulations are due to come into effect on 1 October 2009

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and will impose various registration and filing requirements on companies incorporated outside the UK. They will apply to both overseas companies with an existing UK branch or UK place of business and overseas companies that register a UK establishment on or after the implementation date. The Draft Regulations are long and complex, although, as a direct result of the responses from a recent consultation launched in December 2007, the Government has restructured the order of the provisions, expanded the accounting provisions and confirmed a single regulatory regime for both types of overseas entities registered in the UK.

Transitional provisions have not been included in the draft Regulations and the Government will publish a further draft version of the Regulations later this year when the transitional provisions are finalised. The draft Regulations can be found on www.berr.gov.uk.

SIMPLIFIED BUSINESS RULES

In 2007 the European Commission set out its action plan to reduce administrative burdens on companies in a document entitled *Simplified Business Environment for Companies in the Areas of Company Law, Accounting and Auditing*. Current proposals set out by the Commission include reducing the reporting requirements of companies in the case of mergers and divisions, in particular where shareholders decide that certain reports are not needed, avoiding double-reporting where reporting requirements also result from other EU rules, and introducing the possibility of companies to use the internet and electronic mail in order to publish the draft terms of merger or division to provide shareholders with the documentation required.

In September 2008 the European Commission put forward a proposal for directors that will further reduce the administrative burdens on European public limited liability companies in the area of mergers and divisions. The aim is that these measures will contribute to the objective of reducing administrative burdens on EU companies by 25% by the end of 2012.

DIRECTORS' REMUNERATION

It would appear pay rises for non-executive directors slowed down again last year but still increased substantially. Increases in fees paid to non-executive directors which rose following the Higgs Review in the UK and the introduction of Sarbanes-Oxley in the US have now levelled off. A survey conducted by PricewaterhouseCoopers LLP pay survey unit, Monks, compiled to help remuneration committees review their non-executive terms and conditions, revealed that non-executives directors of companies of all sizes received lower pay rises (15.6%) last year than in previous years.

Average annual fees for a non-executive chairman of a FTSE 100 company stood at £313,000 and £65,000 for a non-executive director. For a FTSE 250 company the fees were £120,000 and £39,000 respectively.

The Association of British Insurers, (ABI) issued a letter to chairmen of remuneration committees in September 2008 confirming that the ABI has decided not to make any changes this year to the guidelines published in December 2007. The letter also raises some important points they believe to be relevant in the current economic climate. For example, the remuneration policy should be fully explained and justified, particularly when changes are proposed, and where a company has underperformed and seen a significant fall in its share price this should be taken into account when determining the level of rewards under share incentive schemes. It states that shareholders are generally not in favour of additional remuneration being paid in relation to succession or retention and remuneration committees should ensure that shareholders have adequate time to consider any proposal for new share incentive schemes.

RIGHTS ISSUE CHANGES

The Rights Issue Review Group (RIRG), was established last summer by Chancellor Alistair Darling to review the equity capital raising process and recommend ways in which it could be made more efficient and orderly. The Group's report was published in November and recommended changes to existing law and practice in order to simplify the process.

Among other recommendations, the Group proposed that the Listing Rules should be amended to allow rights issue periods of 14 calendar days. The Financial Services Authority then issued a consultation paper proposing a reduction in the minimum subscription period for companies undertaking a rights issue from 21 days to either 14 calendar days or 10 business days.

Another recommendation was that the limit of authority to allot shares by directors under section 80 of the **Companies Act 1985** should be increased to two-thirds of share capital for pre-emptive offers.

In light of this, the Association of British Insurers (ABI) revised its guidance and, subject to certain conditions, companies may continue to propose a resolution at their AGM to seek general authority to allot an amount equal to one-third of share capital. In addition, the ABI will now consider a resolution to authorise the allotment of a further one-third.

The RIRG report and recommendations can be found at www.hm-treasury.gov.uk and the revised ABI guidance at www.abi.org.uk

SHARESAVE REPORT CRITICISED

HMRC has recently published a report *Evaluation of Tax Advantaged All Employee Share Schemes*. The report is 131 pages long and can be downloaded from the HMRC website, www.hmrc.gov.uk

HMRC commissioned the National Centre of Social Research to carry out the study which involved telephone interviews with 984 organisations and self completion questionnaires returned from around 2,250 employees in the UK. The aim of the study was to provide survey evidence on the share incentive plan (SIP) and save as you earn scheme (SAYE) as part of the long-term evaluation of these schemes. The subsequent report has been criticised by Nicholas Stretch of CMS Cameron McKenna who believes that although the report gives useful statistics it fails to address the concerns of advisers and employers. For example it fails to examine the 17-year old upper monthly limit of £250 on SAYE savings. He contends that the report also fails to address the SIP requirement for shares to be held for a minimum of 5 years in order to achieve the full tax benefit. Mr Stretch believes that by reducing this to 3 years it would be more beneficial, particularly in today's economic climate.

NEW LLP REGULATIONS

New Regulations for Limited Liability Partnership accounts came into effect on 1 October 2008. The Regulations affect LLP qualifying thresholds and accounts and audits for financial years starting on or after that date. The Regulations bring LLP and LLP Group SME thresholds, the content of LLP accounts and the rights and duties of LLP auditors in line with those for companies. New separate sets of regulations have been introduced; The *Small Limited Liability Partnerships (Accounts) Regulations 2008 (SI2008/1912)* and the *Large and Medium-Sized Limited Liability Partnerships (Accounts) Regulations 2008 (SI2008/1913)*.

New deadlines for filing of accounts by private companies, provisions on calculating the period for filing accounts and revised penalties if these accounts are late were also introduced for LLPs in April 2008 under the *Companies (Late Filing Penalties) and Limited Liability Partnerships (Filing Periods and Late Filing Penalties) Regulations 2008 No 497*. This means that for financial years for LLPs starting on or after 6 April 2008 unless it is the first accounts that are being filed, the time normally allowed for delivering accounts to Companies House will reduce from ten months to nine. For financial years starting on or after 6 April 2008, if it is the LLP's first accounts and those accounts cover a period of more than twelve months, they must be delivered to Companies House within 21 months of the date of incorporation and not 22 months, or three

months from the end of the accounting reference period, whichever is longer.

The Regulations have been revised slightly for the deadline dates for filing of accounts both for companies and LLPs. For example, an LLP with an accounting reference date of 8 April has a period of nine months until midnight on 8 January of the following year to deliver its accounts. However, if the accounting reference date is the last day of the month, for example 30 April, the LLP would have until midnight on 31 January the following year to deliver its accounts, and not 30 January as is the case under the 1985 Act. Penalties for late filing will increase substantially and therefore it is important that any notices received from Companies House concerning filing deadlines of accounts are checked and any electronic diary dates are updated to reflect the new filing deadlines. Information about the changes that affect LLP accounts and the new filing penalties can be found at www.companieshouse.gov.uk on the Companies House website

NEW PROVISIONS IN CHARITIES ACT

Many provisions of the new **Charities Act 2006** were implemented during 2007 with further sections being introduced in March and April 2008. The Charities Commission has recently extended the deadline for the registration of previously accepted charities with an income greater than £100,000 from 1 October 2008 to 1 January 2009. The original date has been extended to ensure that charities can complete the required preparatory work. This extension should also provide additional time to put in place measures to minimise the regulatory impact of the Charities Act on the governing bodies of foundation and voluntary aided schools in England and Wales.

The Act also introduces a new legal form of incorporation designed specifically for charities; the Charitable Incorporated Organisation (CIO). At present charities can be set up with a corporate structure but this means that they normally fall within the requirements of company law as well as charity law. In particular they have to register both with the Charity Commission and the Registrar of Companies at Companies House and provide accounts and returns to both. The CIO will combine the advantages of a corporate structure such as reduced risk of personal liability without the burden of dual regulation. More information can be found at www.charity-commission.gov.uk on the Charity Commission website.

UNLAWFUL DIVIDENDS

In **Re Paycheck Services No. 3 Limited, Revenue & Customs Commissioners v Holland [2008] All ER(D) 319**, the respondents were directors of Paycheck Services

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No. 3 Limited. They operated as a trading company and held 50% of the issued share capital each. The Company held 100% of the issued share capital of two further companies, PDS Limited and PSS Limited. The directors were also directors of those two entities. The companies were known as ‘composite companies’ and relied on an extra statutory concession in relation to the calculation of corporation tax. In April 2001 HM Revenue & Customs claimed they might not be entitled to rely on this concession. The directors took legal advice however, at no time were they advised to stop paying dividends. Proceedings were subsequently commenced. HMRC claimed that the composite companies were continuing to trade and pay dividends to the directors when higher corporation tax was payable which rendered the companies insolvent and therefore they were in breach of their duties as directors. The judge held that on the date that the directors had received legal advice interim accounts should have made provision for the additional tax liability, therefore dividends paid after that date were liable to be repaid. However, any dividends paid prior to that date were allowed.

GUIDANCE ON CORPORATE MANSLAUGHTER

The ICSA has recently issued guidance on corporate manslaughter and homicide. The guidance has been provided to help inform directors about the **Corporate Manslaughter and Corporate Homicide Act 2007** and how it may affect the decisions they make in the boardroom. The new legislation covering corporate manslaughter came into force on 1 April 2008. The biggest change introduced is the removal of the need to identify a ‘controlling mind’, senior manager or director, who could be held ultimately responsible for the negligent action. Organisations may now be charged in their own right. The guidance includes details of the most important definitions in the Act to understand which are ‘relevant duty of care’ and a ‘gross breach’. It also sets out details of the levels of penalties if an organisation is found guilty of the offence. The guidance, which can be viewed and unloaded at www.icsa.org.uk also gives steps that organisations can take to minimise the risk of prosecution of corporate manslaughter.

PROPOSED AMENDMENT TO THE MODEL CODE

The Financial Services Authority has recently issued a consultation paper on amendments to the Model Code to permit persons discharging managerial responsibilities (PDMRs) of listed companies to enter into trading plans, thereby allowing them to deal in both non-prohibited and prohibited periods provided that the terms of the

plans are fixed outside the prohibited period. Under the Model Code there are currently restrictions on PDMRs engaging in long-term trading strategies in relation to shares in the issuer due to the number of closed periods, and the unpredictable nature and timing of being in possession of inside information which creates prohibited periods. The FSA’s consultation paper sets out an amendment to the Model Code to permit such PDMR dealing subject to certain key criteria. For example the arrangements made with an independent third party, including any dealing parameters, must be established prior to the existence of a prohibited period. Any subsequent amendment to the arrangement, including a variation, cancellation or restoration of the arrangement or dealings, would not be permitted as it would constitute a dealing under the Model Code and the existence of such an arrangement and the circumstances of any subsequent dealing under the arrangement must be disclosed to the market.

The proposal provides PDMRs with the ability to plan future transactions at a time when they are not aware of inside information. The FSA hopes this will allow them to trade on a more strategic basis as they will no longer be restricted by having to structure their dealings around prohibited periods. The FSA also believes that the proposal should generate some benefits to PDMRs by providing greater clarity and certainty on how they can plan and structure security transactions. It is believed this amendment may serve to enhance the alignment of management and shareholder interests by making transparent the PDMRs’ long-term commitment to the company through purchases of shares of the company under such a plan.

CORPORATE GOVERNANCE

- The Financial Services Authority (FSA) has recently taken part in an ongoing programme of market abuse work covering the financial services sector generally. In this programme the FSA visited a cross-section of hedge fund managers (HFMs) to review the controls they had in place to mitigate the risk of market abuse. Some of the areas of control that an HFM should consider to manage the risk of market abuse were identified as compliance responsibility, assistance and controls, monitor training, restricted stocklists and Chinese walls, dissemination of information/rumours, remuneration structures, taped telephone lines and PA dealing procedures.
- During the FSA visit, several more general themes emerged. For example, some HFMs felt that their size did not warrant a full time compliance officer but they

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had found it difficult to obtain adequate compliance support. Some HFMs also indicated that some companies inadvertently provide inside information during one to one meetings with HFMs.

- Full details of the visits are included in the FSA publication *Marketwatch issue no. 24*. The FSA also undertook further visits to a wider cross-section of HFMs recently. Findings are detailed in the more recent *Marketwatch issue no. 29*.
- The International Corporate Governance network argues that allowing shareholders greater say in matters such as appointments, dismissals and remuneration would improve mismanagement and reduce the need for regulators to step in with extra regulation. In return for these extra powers, the network shareholders would be expected to recognise and take up more responsibility for the actions of companies they invest in, with particular attention paid to long-term value.
- According to Lord Myners, non-executive directors contributed to the financial crisis by failing to challenge the management of many top banks. He also urges institutional investors to take a bigger role in training and empowering corporate board members. Lord Myners was addressing a conference of non-executive directors assembled by independent auditors, the Corporate Governance Consultancy in November. He urged investor groups such as the ABI and NAPF to improve director training and provide guidance on how best to represent shareholder interests.

AWARDS FOR CORPORATE GOVERNANCE REPORTING

November 2008 saw the launch of the Institute of Chartered Secretaries and Administrators (ICSA) National awards scheme to reward best practice in corporate governance reporting. The awards aim to promote better quality reporting and greater transparency and to encourage companies to consider how their governance arrangements can function better to protect and enhance shareholder value. The inaugural awards ceremony will take place in September 2009. The Financial Reporting Council and the Association of British Insurers have both declared their strong support for the initiative and Hermes Equity Ownership Services has agreed to co-sponsor the scheme with the ICSA.

ACCOUNTING NEWS

The Financial Reporting Council (FRC) has published a paper entitled *Challenges for Audit Committees Arising from Current Economic Conditions*. The purpose of this

document is to assist audit committees by identifying key questions that they may need to consider when preparing for the year-end and in carrying out their role in relation to annual financial statements. The paper does not establish any new requirements. The FRC state the key issues for audit committees to consider include year end planning consideration, liquidity risk and going concern, a reliance on assumptions and models for cash flow and valuation information and significant accounting and reporting judgement. The schedule included in the report also sets out in more detail potential key questions that may be relevant to audit committees as they seek to address these challenges. The report, together with the key questions, can be downloaded from the FRC's website www.frc.gov.uk

In October 2008 the FRC also issued an updated publication entitled *Guidance on Audit Committees* (formally known as the 'Smith Guidance'). This is designed to assist company boards in making suitable arrangements for their audit committees and to assist directors serving on audit committees in carrying out their role. While Boards are not required to follow the guidance, it is intended to assist them with implementing the relevant provisions of the Combined Code. Changes included in the report are:

- Encouragement for audit committees to consider the need to include the risk of the withdrawal of their auditor from the market in their risk evaluation and planning;
- To consider the auditor's annual transparency report;
- Provide more information on the appointment, reappointment or removal of the auditor; and
- Include changes to the guidance on auditor independence to bring it in line with the Auditing Practices Board's ethical standards for auditors.

The updated guidance is available on the FRC website as above.

CHANGES TO ACCOUNTING RULES

The European Union has recently given its backing to the International Accounting Standards' board's proposed emergency changes to accounting rules. The proposed amendments are designed to reduce pressure on institutions whose asset portfolios have plunged in value because of the current credit crisis. Institutions in the EU felt that the US GAAP was more lenient than the IFRS on asset classification. The first amendments relate to the way certain assets and financial instruments are classified. The new amendments were passed unanimously by a committee of EU regulators and also have the support of EU Member States. See the 'Current Project Section' at www.iasb.org

EMPLOYMENT

CONSULTATION ON NATIONAL MINIMUM WAGE

As reported in the last edition of Update, the Government intends to change the National Minimum Wage Regulations so that tips that go through the payroll can no longer be used to discharge an employer's responsibility to pay its staff the minimum wage.

On 19 November 2008 the Government launched a consultation on the proposed legislative changes. The consultation document seeks feedback on two key areas:

- what impact the proposed changes would have on businesses; and
- how to improve consumer awareness in relation to the use and distribution of service charges, tips and gratuities.

The consultation *The National Minimum Wage: Service Charges, Tips, Gratuities and Cover Charges BERR November 2008* (www.berr.gov.uk) closes on 16 February 2009.

EFFECTIVE DATE OF TERMINATION

Under section 97 of the **Employment Rights Act 1996** the 'effective date of termination' (EDT) is either the day on which notice expires or the day on which someone's employment is terminated without notice, where dismissal is summary.

The EDT is important when determining entitlement to bring unfair dismissal claims, both to establish whether an employee has sufficient continuous service and as a starting point of the three-month time limit within which a claim must be brought. Usually there is no doubt about the EDT, but the recent case of **Radecki v Kirklees Metropolitan Borough Council** UKEAT/0114/08/DA shows that the issue can sometimes be complicated.

Mr Radecki was suspended from duty as a teacher following concerns about his skills and experience and his relationships with other members of staff. The parties began to negotiate a compromise agreement which was clearly marked as 'without prejudice' and 'subject to contract'. The draft compromise agreement envisaged that Mr Radecki's employment would terminate by mutual consent on 31 October 2006. However, negotiations continued beyond this date but Mr Radecki was removed from the payroll with effect from 31 October 2006. Negotiations eventually broke down and the Council wrote to Mr Radecki on 5 March 2007 to confirm that his employment had terminated on 31 October 2006. Two days later Mr Radecki submitted a claim for unfair dismissal.

The EAT rejected the Council's submissions that all elements of the employment relationship had been severed by 1

November 2006. It held that as the compromise agreement had never been signed there was no agreement that employment should terminate with effect from 31 October. Further, although Mr Radecki had not been paid after October, there was no effective termination of his employment until the letter of 5 March 2007. His claim was therefore submitted in time.

This case highlights some important practical considerations for employers to bear in mind when negotiating compromise agreements. In particular, given the length of time it can take to conclude negotiations, it is vital that employers remember that the EDT may not be the same as the date envisaged in the compromise agreement.

'NO-SHOW' CLAUSES

Following the decision of the High Court in **Tullett Prebon Group Limited v Ghaleb El-Hajjali** [2008] IRLR 760 more employers may wish to consider including a so-called 'no-show' clause in their contracts of employment for key recruits.

Mr El-Hajjali accepted an offer of employment with Tullett and his contract of employment contained a clause stating that he would pay Tullett a sum of approximately £293,000 if he failed to take up the employment. Mr El-Hajjali decided to remain with his existing employer and Tullett sought to enforce the clause on the basis that it was a liquidated damages clause rather than a penalty clause, which would have been void.

The Court found in Tullett's favour, saying that only an amount which was obviously extravagant compared to the loss caused by the breach of contract would be deemed to be a penalty clause. In reaching their decision the Court took into account the fact that the parties had equal bargaining power because Mr El-Hajjali had expert legal advice throughout the negotiations.

Employers seeking to rely on 'no-show' clauses should:

- try to leave a paper trail showing that the prospective employee had the opportunity to take legal advice on the effect of the contract during negotiations; and
- prepare and agree a schedule of anticipated losses before the contract is signed.

ABSENCE MANAGEMENT SURVEY

The Chartered Institute of Personnel and Development's ninth annual absence management survey found that average absence levels had reduced slightly, down from 8.4 days per employee in the previous year to 8 days. However, the average cost of absence has risen to £666 per employee from £659 in the previous year.

EMPLOYMENT

EXTENSION TO FLEXIBLE WORKING RIGHTS TO GO AHEAD

Whilst there was no mention of it in the Queen's speech, the Government has confirmed that plans to extend the right to request flexible working to parents of children aged 16 and under will go ahead in April 2009.

It had been feared that the extension would be delayed or scrapped following a policy review ordered by the Secretary of State for Business, Lord Mandelson, who was concerned to make sure that no proposed policies would add to the burden of businesses trying to cope with the economic downturn.

Commenting on the news that the extension would go ahead as planned, the Chartered Institute of Personnel and Development's Chief Executive Jackie Orme said, "All our evidence shows that flexible working is good for employers and employees alike."

JURISDICTION OVER DISCRIMINATION OVERSEAS

In **Tradition Securities & Futures SA v X & Y [2008] IRLR 934** the Employment Appeal Tribunal (EAT), held that a tribunal only had jurisdiction to hear complaints of sex discrimination in respect of incidents that were alleged to have taken place in London, not previous incidents alleged to have taken place in Paris.

The claimants alleged they had been subjected to sexual discrimination and harassment over a period of years and argued that the alleged incidents in Paris and London amounted to a single act 'extending over a period'. The EAT did not consider this point to be relevant and determined that as the claimants had only worked in Paris at the time of the incidents alleged to have taken place there, their employment was wholly outside Great Britain and as such the tribunal had no jurisdiction over that part of the claim.

In reaching their decision, the EAT followed the principles set out in the racial discrimination case **Saggar v Ministry of Defence [2005] ICR 1073 (CA)** although the issue of discrimination in more than one country did not arise in that case. It would have been useful for employers if the EAT had considered this issue more thoroughly as it is an issue that is likely to arise again. The best way for employers operating in multiple jurisdictions to deal with the uncertainty is to make sure that they have rigorous policies on discrimination and harassment across all their territories and that they are consistently communicated and enforced.

SUSPENSION WITHOUT PAY

Employers may need to review their use of suspension without pay in the light of the EAT decision in **Wilf**

Gilbert (Staffs) Ltd v Bunn [2008] UKEAT/0547/07.

This case concerned a claim for unlawful deduction of wages made by a betting shop manager. Mr Bunn had an arrangement that he did not work on Mondays but this was not reflected in a subsequently introduced contract of employment. When Mr Bunn was presented with a new rota which showed him rostered to work on a Monday discussions between him and his employer became heated and he was suspended without pay pending a disciplinary hearing.

The EAT held that the statutory dismissal procedures apply to a decision to suspend an employee without pay. The employer should therefore have sent Mr Bunn a 'step one' letter before suspending him without pay to give him the chance to put his side of the case before being suspended.

LEGAL REPRESENTATION AT DISCIPLINARY HEARINGS

Following the decision in **Kulkarni v Milton Keynes Hospital NHS Trust [2008] All ER (D) 21 (Aug)** employers will be able to review their policy documents if they wish, to expressly forbid employees having a lawyer as their companion at disciplinary meetings. Although there is a statutory right for an employee to be accompanied by a union official or colleague the implied duty of trust and confidence may mean it will be reasonable to allow an employee to bring other companions, including lawyers, unless policies expressly prohibit it.

In **Kulkarni** a male doctor accused of examining a female patient inappropriately asked to be allowed legal representation at his disciplinary hearing. The Trust refused on the grounds that this was not permitted under its disciplinary procedures. The High Court held that as the employee had failed to demonstrate that the refusal to allow him legal representation was irrational or unreasonable there was no breach of natural justice or the implied duty of trust and confidence.

ADVOCATE-GENERAL'S OPINION IN HEYDAY

In September 2008 the Advocate-General (AG) ruled against the Heyday challenge to the UK's default retirement age of 65. Heyday is a not-for-profit organisation that is part of Age Concern. The AG was of the opinion that a national rule permitting the dismissal of employees when they reach the age of 65 can, in principle, be justified. The European Court of Justice is due to rule on this case shortly but although it is not bound to follow the AG's opinion, its judges took the same approach in the earlier case of **Palacios de la Villa v Cortefiel Servicios** so it seems unlikely they would take a divergent view now.

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Ultimately, however, it will be for the High Court in the UK to decide whether the default age of 65 is justified. It may not be until 2011 until the matter is finally resolved if the case is appealed so the uncertainty will continue for some time to come.

BULLYING AT WORK

'Bullying at work 2008: the experience of managers' was published by the Chartered Management Institute to coincide with 'Ban Bullying at Work Day' on 7 November 2008. The report presents the findings of a survey carried out in July and August that year which indicates that bullying is a significant problem in many UK workplaces.

The report looks at the effect of bullying on managers and cites Government estimates of the cost of bullying to the UK economy as £13.75 billion per annum. The survey found that 70% of managers had witnessed bullying in their own organisation in the past three years and 70% of respondents cited a lack of management skills as the factor that contributed to workplace bullying.

The report concludes that many employers need to do more to tackle bullying, including reviewing whether they have appropriate policies in place and examining the prevailing management style of the organisation to see whether this is creating an environment in which bullying is more likely to take place.

A separate piece of research from the Equality and Human Rights Commission (EHRC), shows that workers with a disability or long-term health problems are more likely to be treated negatively in the workplace than able-bodied colleagues, sometimes facing bullying, humiliation and physical violence. The EHRC is lobbying Government to do more to protect disabled workers in the forthcoming Equality Bill.

END OF UK'S 48-HOUR OPT-OUT?

In November 2008 a committee of MEPs voted to end the opt-out to the 48-hour week within three years.

The decision has attracted negative comment from industry leaders and politicians, such as Lord Mandelson, who fear loss of the opt-out will be detrimental both to businesses and to workers wishing to boost their incomes by working extra hours.

Unions, on the other hand, have welcomed the decision. TUC general secretary Brendan Barber hailed the vote as 'a common sense compromise on the 48 hour working week' and argued that working long hours is bad for health and productivity.

POSITIVE SEX DISCRIMINATION

The Employment Appeal Tribunal (EAT), has ruled that failing to treat a woman more favourably than a man does not amount to sex discrimination (**Kenney v Ministry of Defence [2008] UKEAT/0614/07/DA**). Commander Dawn Kenney claimed she had been discriminated against by the MoD when they gave the post of captain and medical director in the Royal Naval Reserve (RNR) to a man instead of her.

Commander Kenney argued that the Navy could have used positive discrimination to prefer her to a male applicant if both were equally suitable for the post because the higher ranks of the RNR were so male dominated. Commander Kenney cited provisions of the Navy's equal opportunities plan which had as an objective the 'removal of unfair employment and progression barriers and the development of positive action policies to better support the retention of ethnic minorities and women'. The EAT interpreted this as meaning that structural barriers to advancement would be removed, rather than that positive discrimination would be applied on an ad hoc basis.

The EAT confirmed that positive discrimination may be appropriate in a very limited range of exceptional circumstances, but that failing to take advantage of this opportunity did not amount to sex discrimination.

IDENTITY CARDS FOR FOREIGN NATIONALS

Plans by the UK Border Agency to replace the current stickers in passports with biometric identity cards should eventually make it easier for employers to check whether an individual from overseas has the right to work in the UK.

The first phase of the switchover applies to applicants from outside the European Economic Area who are granted leave to remain in the UK to study or on the basis of a marriage or partnership. Further immigration categories will switch to cards at a later date.

HEALTHCARE BENEFITS COST RISE

According to the pan-European health benefits report published by business consultants Mercer in October 2008, the cost of providing employee healthcare benefits rose by an average of 5% per employee across Europe in 2007.

The companies surveyed cited the need to retain top-performing employees as the overriding consideration when deciding how much to spend on employee healthcare benefits and most respondents expected to maintain their level of spend. The average UK spend on employee healthcare benefits is 7% of total payroll; although this figure is among the highest in Europe, it remains far lower than the US, where 15.4% of payroll is spent on employee healthcare benefits.

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HIGH COURT WIN FOR ASBESTOS VICTIMS

In November the High Court ruled in six combined cases known together as the 'Employers' Liability Policy *Trigger* Litigation'. The cases concerned the issue of when employers' liability insurance is triggered in mesothelioma cases.

Mesothelioma is a cancer of the lining of the lungs caused by exposure to asbestos. The key issue considered by the High Court was whether the insurance policy is triggered at the time of exposure to asbestos, or when mesothelioma develops, which can be up to 40 years later.

In **Bolton MBC v Municipal Mutual Insurance Ltd [2006] EWCA Civ 50** the Court of Appeal had ruled that public liability insurance policies were only triggered by the onset of mesothelioma and this led to a number of employers' liability insurers refusing to pay out on mesothelioma claims.

The High Court ruled that insurers are liable to pay claims for mesothelioma where the employer was insured by them when the exposure to asbestos occurred. This is an important victory for mesothelioma victims, but permission to appeal has been granted.

INCREASE IN COMPENSATION LIMITS

The *Employment Rights (Increase of Limits) Order 2008* was laid before Parliament on 26 November 2008 and will increase a variety of tribunal awards and statutory limits. The increases have effect in respect of events happening on or after 1 February 2009.

The maximum compensatory award for unfair dismissal will rise from £63,000 to £66,200 and the limit on a week's pay rises to £350 from £330.

CLAIM OVER BIN LADEN PHOTO

IT manager, Vinod Rajdev, has made a claim of constructive unfair dismissal, religious and race discrimination against his former employer Civica.

Mr Rajdev alleges that colleagues mocked-up photos by superimposing his face over that of Osama Bin Laden's deputy Ayman al-Zawahiri. Mr Rajdev says he found two such photos on his desk, apparently showing him sitting next to Bin Laden with an AK47 rifle by his side. Mr Rajdev has also claimed that colleagues called him 'Paki' and 'corner shop' and referred to him as an Al-Qaeda terrorist 'mastermind'. Civica are defending the claim, which is due to be heard in 2009.

GENDER PAY GAP WIDENS

The *2008 Annual Survey of Hours and Earnings*, published by the Office for National Statistics in November

shows that the gender pay gap widened between 2007 and 2008. Median hourly earnings for men in April 2008 were £12.5 versus £10.91 for women. The median pay gap has increased to 12.8 % in 2008 from 12.5% in 2007.

'SELF-CERTIFICATION' OF PENSION SCHEMES

In order to reduce 'red tape' the Government has announced that employers will be able, from 2012, to 'self-certify' that their workplace pension schemes meet required quality standards.

The quality standard employers must meet before they can self-certify is that members receive contributions of at least 8% of qualifying earnings, of which 3% must be paid by the employer.

This amendment to the Pensions Bill is aimed at easing the administrative and financial burden of running pension schemes. Whilst industry groups are broadly supportive of the principle of self-certification they fear that the proposed scheme will add to the administrative burden on employers rather than easing it. The Association of British Insurers in particular has urged the Government to work further on the drafting of the proposals to ensure the reforms achieve their objectives.

REVISED DRAFT OF ACAS CODE APPROVED

A revised draft of the ACAS *Code of Practice on Disciplinary and Grievance Procedures* has been approved by the Secretary of State for Business following consultation on the initial draft during 2008.

One of the key changes in the revised draft is that the Code will not apply to redundancy dismissals, or to the non-renewal of fixed-term contracts. Helpfully, the revised draft also provides examples of the 'standard of reasonable behaviour' in most instances. It is a key concept of the Code that employers must behave reasonably and in determining whether or not an action was reasonable, a tribunal will look at the extent to which the provisions of the Code have been followed.

Introduction of the Code is expected to coincide with repeal of the statutory disciplinary procedures in April 2009.

LENGTH OF SERVICE CRITERION LAWFUL

In **Rolls Royce plc v Unite the Union EWHC 2420 (QB)** the High Court ruled that use of length of service as a criterion in a collective agreement can be lawful.

Rolls Royce and Unite had entered into collective agreements in respect of re-deployment and redundancy at two factories. Part of the agreements was an assessment matrix 'designed to ensure that the selection process is fair

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in general terms and fair to the individual.’ Employees could score points under five broad criteria. They then received one point for each year of continuous service. Points were deducted for unauthorised absences and employees were ranked according to their final score.

The High Court considered the collective agreements to be a negotiated compromise and it was in the interests of both parties that any redundancy process was carried out in a peaceable and fair way. This was a legitimate business aim. The criterion of length of service respected the loyalty and experience of the older workforce and protected the older employees from being put onto the labour market at a time when they were likely to find it hard to get alternative employment.

The issue of whether length of service as a selection criterion could be a ‘benefit’ under Regulation 32(1) of the *Employment Equality (Age) Regulations 2006* was also considered. The High Court ruled that awarding points based on length of service was a benefit to those employees who could retain their jobs rather than losing them.

The High Court also indicated that the use of ‘last in first out’ as the only criterion might have been objectionable. We recommend that employers avoid using length of service as a selection criterion until such time as there is more case law on the point. This is the first case to consider the role of length of service in the selection of employees for redundancy and the High Court gave Rolls Royce permission to appeal.

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NEW TRADE MARK RULES

New rules which came into force on 1 October 2008 modernise and replace certain processes and administrative requirements applying to trade marks and trade mark applications (*Trade Mark Rules 2008 (SI 2008/1797)*). Changes include the following:

- The initial opposition period is reduced from three to two months from publication. Parties will have the right to apply for one extension to three months.
- The ‘cooling off’ period after opposition has begun, is reduced from 12 months to an initial period of nine months. It can be extended to 18 months if both parties request it and make certain statements.
- The Rules standardise at two months, the time period in which a number of actions can be taken including altering a registered mark, removing matter from the register and making a classification change.
- The Registrar is given wider powers and greater flexibility. For example, the Registrar may now accept

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late defences where someone applying to register a trade mark fails to file a counter statement on time in response to an opposition.

Copies of the new Rules can be downloaded at www.opsi.gov.uk/si/si2008/pdf/uksi_20081797_en.pdf

IPO BOOKLET

The Business-to-Business Licensing Working Group, set up by the Intellectual Property Office (IPO), as a consequence of the *Gowers Review of Intellectual Property* has produced a free booklet; *How Licensing Intellectual Property Can Help Your Business*. Available for download at www.ipo.gov.uk/licensingbooklet.pdf, it provides a wide range of information on IP licensing, including advice on how to approach and conduct a productive deal.

TRADE MARK FEE REDUCTION

As a consequence of the Office for Harmonisation in the Internal Market (OHIM) building up a €300m surplus, there are proposals to reduce the price of registering an EU trade mark from €1,600 to €1,000. To combat fears from various Member States that this reduction may impact on domestic registrations, OHIM has agreed that renewal fees paid to it and the upkeep of trade marks will be split between itself and the National Offices, to be used by the latter for the purposes of protection and promotion and to combat counterfeiting of trade marks.

SHOPPING CENTRES

In the past, the UK-Intellectual Property Office has generally refused to allow the names of shopping centres to be registered as trade marks in respect of retail services. Some activities of shopping centres have been registrable in respect of logos and brand names but the recent decision in *Land Securities Plc, Capital Shopping Centres and Hammerson v Registrar of Trade Marks (High Court)* confirms that ‘any activities of a commercial character’ in relation to the service of encouraging shoppers to spend money in one centre rather than another are a registrable service’. Activities might include creating ‘ambience’, information services, loyalty schemes, car parking etc.

LIKELIHOOD OF CONFUSION

There have been three recent trade mark cases which involve the likelihood of confusion.

- A trade mark may not be registered if it is similar to an earlier trade mark and is to be registered for identical or similar goods or services or there exists a likelihood of confusion on the part of the public. In *esure Insurance*

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Limited v Directline Insurance Plc (2008) EWCA Civ 842, the Court of Appeal upheld D's opposition to E's application to register a 3-dimensional mark consisting of a computer mouse on wheels for insurance and financial services. The Court found that the Trade Marks Hearing Officer and the High Court were able to make their own decisions regarding the likelihood of confusion. Given that 'confusion' was to be assessed from the average consumer's viewpoint, it was difficult to see what was to be gained from expert evidence where the Tribunal was in a position to form its own view. It seems from this decision that expert evidence will generally only be appropriate in exceptional circumstances, such as where the markets in question are specialised, rather than markets open to the general public.

- The European Court of First Instance has found that there was a likelihood of confusion in Spain between the earlier mark 'Seat' (registered for vehicles and spare parts) and Honda's word mark 'Magic Seat' applied for in respect of car seats (**Honda Motor Europe Limited v OHIM (CFI)**). Although the word seat does not exist in the Spanish language, it had acquired its own meaning in Spanish in so far as it described the car manufacturer and therefore there was a likelihood of confusion.
- The European Court of Justice has dismissed an appeal against a European Court of First Instance ruling that there was a likelihood of confusion between a figurative mark featuring the silhouette of a fir tree (**L&DSA v Julius Samann Limited, Case C – 488/06P**). In this case L applied to register a figurative mark featuring the silhouette of a fir tree in classes covering perfumery and scented air freshener products. S opposed the application, relying on various earlier figurative marks consisting of fir tree silhouettes including a community trade mark and two international marks. The OHIM upheld S's opposition. The prolonged use and well-known nature of the silhouette mark gave it a distinctive character, particularly in Italy. This, together with the conceptual similarity between the two marks, created a likelihood of confusion, at least on the part of the Italian public.

DATA PROTECTION

Jonathan Bamford, Assistant Information Commissioner, has described recent high-profile breaches of data security as "an accident waiting to happen". He says that too many institutions have failed to ensure they have the electronic tools to limit the confidential details they hold and prevent them being copied and that "embarrassing data losses by companies and government organisations were a part of the price institutions were paying for bolting data security

safeguards on as an afterthought rather than designing systems with them in mind." Mr Bamford believes that organisations should invest more in so-called 'privacy enhancing technologies' aimed at minimising the risk of losing sensitive data. During the year to 31 October 2008, companies accounted for 80 of 277 data security breaches reported to the Information Commissioner's Office, ahead of 75 by the National Health Service and other healthcare providers and 54 by Local and Central Government. Almost half the private-sector reports came from financial institutions.

BANNED DOLLS WIN REPRIEVE

Following a landmark copyright-infringement case which banned MGA from selling and making all 40 multi-ethnic dolls in their Bratz line, an Appeal Court judge has now ruled that they will be allowed to remain on sale for the rest of this year.

The makers of Barbie, Mattel, were awarded up to \$100m (£68m) in August last year for the initial infringement case, when they claimed that the Bratz concept had been developed by one of its designers before he left to join MGA. At the time, the judge had ordered that MGA could wait until after Christmas before removing dolls from shelves and destroying them. The judge has left open the possibility that all Bratz sales revenue could eventually be directed to Mattel.

PHARMACEUTICAL COMPANIES

In a preliminary report published in November 2008, the European Commission has accused pharmaceutical companies of blocking generic competitors. The Commission claims to be 'shocked' that originating companies used patent rights and other legal measures to delay entry by generic companies. It claims that innovators used a 'toolbox' of measures against generics to stop them entering the market. These included the filing of many patents for a single medicine, (so-called 'patent clustering'); patent litigation and settlements; regulatory intervention and follow-on product switching. The report concludes that these blocking tactics have kept prices artificially high in EU markets and could have led health authorities paying over €3bn more than if generic drugs had been available.

The tougher stance of the EU Commission has been echoed in a recent decision of the High Court, (**Les Laboratoires Servier v Apotex (2008) EWHC 2347 (Ch) 9 October 2008**) in which a generic manufacturer was awarded €17.5m in compensation against a patent-holder, Les Laboratoires Servier, representing the profits that it would probably have made had it not been kept out of the market

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by an interim injunction that turned out to have been wrongly granted

TRADE MARKS AND CHARITIES

Charitable and non-profit organisations will be encouraged by the recent opinion of the Advocate-General of the EU Court of Justice which confirms that such organisations can seek trade mark registrations to protect their brands. The Advocate-General found that the use of registered trade marks in relation to the activities of such organisations is, in principle, genuine use for the purposes of the Trade Marks Directive. Such registrations should thus be resistant to applications for revocation based solely on the ground that the services in respect of which they are registered are not-for-profit (**Verein Radetzky – Orden v Bundesvereinigung Kamera D Schaft ‘Feldmarschall Radetzky’, 18 September 2008**).

RECENT IP CASES

- In **Crocodile International Private Limited v La Chemise Lacoste (2008) EWHC 2672 (Ch) 8**, the High Court dismissed Crocodile’s application for revocation of a trade mark on the grounds of non-use under Section 46(1)(a) of the **Trade Marks Act 1994**. The claim was dismissed on the basis that Lacoste were making genuine use of their trade mark by including it on the swing tags of their tennis shirts. The fact that the tags were hidden was irrelevant because customers would need to look at the tags in order to determine the price of the shirts.
- The EU’s Court of First Instance has upheld the 2004 EU decision declaring that Lego is unable to trade mark its iconic red plastic bricks. Upholding the decision made after rival Canadian toy firm Mega Brands successfully challenged the registration of the trade mark by Lego, the Court has held that the Lego brick is a functional, technical shape that cannot be the property of one company. Lego has announced that it will be appealing the decision to the European Court of Justice.
- The Court of Appeal has dismissed an application for leave to appeal against conviction for criminal trade mark infringement (**R v Boulter, 7 October 2008**). The conviction related to counterfeit DVDs and CDs bearing the logos of EMI and other companies on the packaging. The Court rejected the defence that the material bearing the trade marks was of such poor quality that there was no likelihood of public confusion as to the trade origin of the goods.
- An EU court has decided that the brewer of Budweiser, Anheuser-Busch, should not have rights to the word ‘Bud’ in the EU. This is the latest stage of a long-running trade mark dispute between Anheuser-Busch

and the Czech brewer Budejovicky Budvar, which contends that it registered the name ‘Bud’ in France, Austria and former Czechoslovakia in 1958. Anheuser-Busch will now have to rely on registering its trade mark in each individual EU Member State.

COPYRIGHT FUTURE

The Intellectual Property Office has published a consultation paper, *The Future: Keeping Ahead of the Game* inviting comments on proposals to reform copyright law (available at www.ipo.gov.uk/c-policy-consultation.pdf). The paper questions whether the current copyright system provides the right balance between commercial certainty and the rights of creators and creative artists. It also invites comments as to whether the current system is too complex and provides the right incentives to sustain investment and support creativity. The consultation period ends on 6 February 2009.

PUBLIC ORDER AND MORALITY PATENTS

In a final judgement, the European Patent Office (EPO) has ruled that inventions concerning products which can only be obtained by the use and destruction of human embryos cannot be patented. The decision is based upon interpretation of the European Patent Convention which precludes patents where the commercial exploitation of the invention is contrary to public order and morality. The decision would bind the EPO unless or until European Law is changed. Accordingly, they will refuse patent applications for use of products derived from human embryos which involve their destruction.

GOOGLE AND PERSONAL DATA

In response to continued pressure from the EU over its privacy policy, Google has agreed to halve the amount of time it stores users’ personal search data. It will now anonymise identifiable IP addresses on its server logs after nine months.

This follows a recommendation by an EU advisory body in April 2008 that search engines should delete personal data within six months. Google currently collects and stores information from each search query, holding information about the search query itself, the unique PC address and details about how a user makes his or her searches. The company says it needs this information to improve its various services and to help fight threats such as fraud, spam and malicious attacks and to aid ‘valid legal orders’ from law enforcement agencies. Google’s action also follows a recent \$1bn copyright infringement lawsuit from Viacom which had ordered the company to provide the personal details of millions of, Google owned, YouTube users.

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IDENTITY FRAUD AWARENESS AND COST

According to a survey by researchers Dynamic Markets, commissioned by the Home Office, 99% of people are aware of identity fraud but 64% have little concept of how to protect themselves. The survey suggested that if the results were extended to a national level, more than 4m UK citizens have been victims of identity fraud. It concludes that the disparity revealed by the survey with office figures may be due to people taking the matter into their own hands with the relevant organisation, such as a bank or retailer, and not reporting fraud to the police. Recent Government figures show that identity fraud costs the economy more than £1bn each year. However, the fraud protection service CIFAS reported only 65,000 cases of identity fraud in the UK in 2007.

In the meantime the All Party Parliamentary Group on Identity Fraud has warned that the 'credit crunch' is causing identity fraudsters to target the bank accounts of existing customers. The Group says fraudsters are finding it more difficult to use fake identities to open new accounts because of restrictions on credit. Since last year there has been a fall in traditional forms of identity theft including 'application' fraud, in which people use stolen or false documents to open an account. There has however been a 'vast' increase in cyber crime where fraudsters use the internet and email to tap into existing accounts or find out credit card details. One scam involves a bogus email from HMRC asking for bank account details to receive a tax rebate.

PROTECTION OF DATA

The Information Commissioner's Office (ICO), has commissioned the Enterprise Privacy Group to provide a report examining how organisations can build-in privacy protection before implementing new initiatives and technologies for the capture of data. This follows the ICO's 'disappointment' at progress by organisations in automatically considering the impact on individuals' privacy when developing new IT systems.

Embarrassing data losses continue. A staff member at PA Consulting Group was suspended in August 2008 after the contractor lost details of all prisoners in England and Wales, along with those of tens of thousands of offenders. According to the Home Office, the data was held, unencrypted, on a memory stick for processing purposes. The loss led the Conservatives to call for legislation to make it a criminal offence for someone to 'knowingly or recklessly' cause a loss of data. This was prior to the more recent report that a computer drive with the private details of a huge proportion of Armed Forces personnel was missing. The Ministry of Defence said that they had been informed by their contractor EDS that they were unable to account for a portable hard drive used in connection with the administration of Armed Forces personnel data.

HEALTH AND SAFETY

HEALTH AND SAFETY EXPERTS

Baroness Vadera, Minister at BERR believes that smaller employers 'can end up taking unnecessary action on consultants' advice that is not required by the law and does not improve workplace health and safety'. This criticism is part of a Government drive to cut by a quarter the administrative burden of red tape on business. The minister's statement follows a report from the Government's red tape agency, the Better Regulation Executive, alleging that smaller businesses are vulnerable to third parties who exaggerate what the law requires. The report suggests that employers in lower-risk sectors, such as finance and retail, could save £140m a year if 20% more of them turned to the Health and Safety Executive or other Government sources for advice. Donna Carr of UK Safety-compliance, a small health and safety consultancy, commented that the Government stance ignored that many small businesses do not have the staff to devote to health and safety and are 'often happy and relieved' to outsource it.

EMPLOYER'S LIABILITY

With effect from 1 October 2008, employers are allowed to display their Employers' Liability Certificate in an electronic format, so long as it remains readily accessible by all employees. In addition, the requirement for employers to retain copies of their certificates for 40 years is now removed. (*Employers' Liability (Compulsory Insurance)(Amendment) Regulations 2008*).

STRESS IN THE WORKPLACE

5 November 2008 was National Stress Awareness Day - promoted by the Health and Safety Executive (HSE) to give a timely reminder to businesses to actively manage the stress of employees at work. Stress is a significant issue for UK business and workers and in 2008 alone, 530,000 people reported suffering work-related stress at a level that was making them ill and 13.8m working days were lost through stress. The HSE has formulated Management Standards as an effective way to manage stress at work. See www.hse.gov.uk/stress. In addition the HSE has published '*Managing the causes of work-related stress: a step by step guide using the Management Standards*', a practical, straightforward guide aimed mainly at organisations who employ more than 50 people.

HEALTH AND SAFETY OFFENCES

The new **Health and Safety Act** which came into force on 16 January 2009 and applies to offences committed

HEALTH AND SAFETY

after this date, means that anyone who is convicted of a safety offence can now be imprisoned as well as being fined. Higher fines are also now possible for failure to meet safety regulations. For most offences there will now be a maximum of 12 months' imprisonment or a fine not exceeding £20,000 in a Magistrate's Court or a maximum of two years' imprisonment or an unlimited fine for more serious cases, tried in the Crown Court.

REPETITIVE STRAIN INJURY AWARD

A 4ft 9in cashier has successfully sued the Co-op supermarket chain after she suffered a repetitive strain injury reaching for a chip and pin machine. She developed a tendon injury in her right arm after the tills were revamped to include a pole-mounted credit card reader. The company failed to take into account her small stature when it redesigned the tills, causing her to overstretch for each card transaction. An investigation by the Forest of Dean District Council discovered that the touch screens and the chip and pin readers breached guidelines set in 2004 by the Health and Safety Executive. The cashier filed a County Court claim for damages against the Co-op and won an undisclosed settlement. The Co-op has not admitted liability.

IMPORTANT ASBESTOS EXPOSURE DECISION

Mesothelioma victims won an important victory in the High Court in November 2008 in their fight for compensation from insurers. In six combined cases, known collectively as **The Durham cases (2008) EWHC (QB) 2692**, the Court ruled that victims could claim against the employer's liability insurance policies in place at the *time of exposure* to the asbestos-related cancer.

Insurance companies had previously argued that victims should claim against the policy in place at the time the cancer developed. The difference is crucial as the gap between inhalation of asbestos fibres and the date the tumour develops can be as long as 40 years. It is estimated that around 9,000 people have died of mesothelioma in the UK up to 2003 and current estimates put the number of deaths every year as between 4,000 and 6,000.

It is believed that the Durham judgement could be applied to employer's liability involving other 'latent diseases' such as industrial deafness or vibration white finger. Kieron West, head of the occupational disease unit at Kennedy's who acted for certain of the plaintiffs, observed that "employer's liability policyholders who have been refused mesothelioma cover by 'run-off' insurers and had been forced to settle the underlying claims themselves, are now free to begin recovery proceedings against the defaulting insurer".

ENVIRONMENTAL LAW

STARBUCKS

Environmental groups have criticised the international coffee and coffeehouse chain Starbucks' alleged practice of leaving taps running all day in thousands of its branches across the world. They accuse the organisation of wasting millions of litres of water each day and say that the firm should look at more water-efficient ways of washing up. In reply, the company says that it uses a 'dipper well' system which comprises a stream of continuous cold fresh-running water 'to rinse away food residue, help keep utensils clean and prevent bacterial growth'. Their spokesman added they were now considering using dishwashers instead of the dipper wells and introducing a more water-efficient way of cleaning spoons.

CONSULTATION ON WEEE REGULATIONS

In December 2008, the Government issued a consultation document on *Proposed Revisions to the Waste Electrical and Electronic Equipment (WEEE) Regulations* which came into force in January 2007, placing responsibilities on producers and distributors for the collection and responsible disposal of 'end of life' equipment. The purpose of the consultation is to seek to streamline the system and to build on, what is seen as, the successful implementation of the existing regulations. Views are sought until 6 April 2009 on a range of issues including simplification of the data reporting process and improvements to the Code of Practice for the collection of WEEE from designated collection facilities.

See www.berr.gov.uk/whatwedo/sectors/sustainability/weee/page30269.html for more information.

COMMERCIAL ISSUES

UNINCORPORATED ASSOCIATIONS

In **R v RL and JF (2008) EWCA Crim 1970**, the Court of Appeal has ruled that individual members of unincorporated associations can be held liable for criminal offences. In this case, the Environment Agency prosecuted the chairman and the treasurer of a golf club after an underground pipe taking oil from a storage tank to the club's boiler was punctured by builders, causing 1,500 litres of oil to leak into a nearby water course. The men were charged with a strict liability offence under S85 of the Water Resources Act 1991.

Neither the chairman nor the treasurer of the golf club was personally to blame for what happened or had done anything beyond being a member of the club which maintained the tank and the pipe. However, the Court held that not only could the club be prosecuted but also any of its 900 individual members. As a consequence of this

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decision, unincorporated associations may wish to consider conversion to companies to protect individual members.

CONSUMER FOCUS

Consumer Focus is a new statutory organisation set up to campaign 'for a fair deal for consumers'. It has been created through the merger of three consumer organisations: Energywatch, Postwatch, and the National Consumer Council and is aiming to announce its first major programme of work early in 2009.

The organisation's legislative powers include the right to investigate any consumer complaint if they are of wider interest; to open up information from providers; to conduct research and to make an official super complaint about failing services. One of its first actions has been to write to the Business Secretary, Lord Mandelson, expressing support for the action taken to strengthen the banking system but urging need for strengthening of supervision and calling for a consumer panel to be created to supervise the Lloyds TSB – HBOS merger, and, in particular, whether branch sales are needed to make the market more competitive.

ADVERTISING LESS THAN SWEET

The Advertising Standards Authority has found that a Maltesers advert misled consumers when it implied the sweets were a low-calorie snack. The Authority also criticised a nutritional claim made for Jaffa Cakes, saying they did not qualify legally as a low-fat product. In the Maltesers case, the advert claimed that each sweet was 'less than 11 calories each', which suggested they were a low-energy food.

This in fact can only be used to describe products with 40 calories per 100g or less. Maltesers contain 505 calories per 100g. Similar objections were upheld for the Jaffa Cake advert which contained reference to the Cake containing eight times less than it does. Such claims cannot be made for solid foods with more than 3g of fat per 100g.

NEW AUTHORITY FOR FRAUD

Following long-standing accusations that failings in laws and institutions in the UK means that we have a poorer record than the US, the Government has set up a National Fraud Strategic Authority as part of a £29m investment in tackling fraud. The Interim Chief Executive Sandra Quinn, on secondment from the Financial Services Authority, says that the Authority will seek to 'to change the culture' of how the public and private sectors deal with financial crime. Her priority will be 'to try to make the public understand that everyone suffers from fraud because of the knock-on damage it causes in areas ranging from people's confidence to inflated insurance claims'. One early focus

will be on mortgage frauds which police say costs the economy at least £700m a year.

A survey of nearly 900 international companies carried out by the Economist Intelligence Unit for Kroll, an international security firm, found that they lost an average of US\$8.2m to fraud during the past 3 years, with 85% of them reporting at least one serious incident in the period.

eBay QUERIES ANTI-TRUST MEASURES

eBay has asked the EU's anti-trust chief to investigate companies that prevent retailers or sellers from offering their goods on eBay or other online commerce platforms. eBay believes 'there may be a number of anti-competitive and abusive distribution agreements that are prohibiting sellers in the EU from offering goods online. The company has cited distributors of perfumes in France, sports goods in Spain, schoolbags in Germany and pushchairs in Britain.

According to recent studies, total e-commerce sales in the EU could reach 5/10% of total sales by 2010. eBay claims consumers in the UK, Germany and France can achieve price savings of about 17% for a range of new products by buying online.

COOLING-OFF AND CANCELLATION RIGHTS

New regulations which came into force on 1 October 2008 have extended the existing law on cooling-off periods and cancellation rights for consumers. They cover contracts made during both solicited and unsolicited visits made by traders to consumers which might take place anywhere from a consumer's or friend's home or workplace or on an excursion organised by the trader away from the trader's business premises in the UK.

A minimum cooling-off period of seven calendar days must now be given, starting with the date of receipt by the consumer of a notice of the right to cancel from the trader. The cancellation rights must be clearly and prominently displayed in any written contract and the right to cancel during the cooling-off period will apply where there is a total payment value of more than £35. The regulations apply to sales of goods and services through 'doorstep selling' and could include home improvement, repair and maintenance service, energy efficiency products or installations and consumer goods and homewear. (*Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008 (SI 2008/1816)*).

UNPRECEDENTED LEGAL COSTS

There have been further judicial pronouncements on the size of legal bills. In **Research in Motion UK (RIM) v Visto**, the judge said that the costs charged by Allen &

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Overy were ‘totally unfamiliar to anyone who has been involved in economically conducted patent litigation’. Now in **Multiplex v Cleveland Bridge**, Mr Justice Jackson has observed that he had ‘never before seen parties so devoted to litigation for its own sake’. The costs of the case came to £22m including £1m in photocopying.

CONSUMER CREDIT AND HIRE AGREEMENTS

Those businesses in the UK that lend money to consumers or offer goods or services on credit or hire out goods must give borrowers or hirers more information during the lifetime of the regulated consumer agreement or consumer hire agreement, under regulations which came into force on 1 October 2008 (*Consumer Credit (Information Requirements and Duration of Licensing and Charges) (Amendment) Regulations 2008*) (SI 2008/1751).

The required new information includes annual statements under fixed-sum credit agreement, notices of sums in arrears and additional information in default notices.

E-SHOPPERS’ RIGHTS

The European Commission has unveiled proposals to give more rights to consumers shopping online across the borders of the 27 nations EU. Among other things, the Commission will be asking EU governments to give consumers a two-week cooling-off period to back out of a sale and a right to a refund for delayed deliveries. Apparently one third (150m people) of the EU’s population shop online but only 30m of them do it cross-border.

INTERNET FRAUD

A report by Symantec, the world’s largest producer of security software, concludes that internet fraud is becoming a ‘recession-proof’ economy, with all the sophistication of a legitimate business model. The report estimates that the industry is worth a potential US\$7bn with stolen bank account information starting at £6.50 per account and credit card numbers selling for as little as 7p each. Fraudsters are selling goods, services and information via internet-based forums, hosted by servers that are constantly changing geographical locations to evade detection. These forums are seen as a genuine marketplace where people can often be playing dual roles of buying and selling.

BRIBERY

The Law Commission has published proposals to simplify the current laws on bribery by replacing existing statute with two general offences that encompass various scenarios. The first offence will be concerned with the conduct of the payer and the second with the conduct of the

recipient. The offences which need not be committed in the United Kingdom, would cover the offer of a bribe by an individual to somebody in an attempt to induce them to do something improper; the employment of an agent to bribe others on a company’s behalf; the making of ‘facilitation payments’ and the charging of individual managers and directors if they consent or connive in the offence of the company. The penalties for these offences would be in line with those for fraud, with the possibility of very heavy prison sentences for individuals. See www.lawcom.gov.uk/bribery.htm for *Reforming Law on Bribery the – Proposals of the Law Commission*.

OFFSHORE FINANCE CENTRES

HM Treasury has set up an independent review of the long-term opportunities and challenges facing the British Crown Dependencies and Overseas Territories as finance sectors. The review panel will be chaired by Michael Foot, ex-managing director of the FSA and Bank of England adviser. The territories to be reviewed are Jersey, Guernsey, the Isle of Man, Bermuda, the Cayman Islands, Gibraltar, Turks & Caicos Islands, the British Virgin Islands and Anguilla. The review, which will report during the course of 2009, will look amongst other things at financial supervision and transparency, taxation, financial crisis management and resolution arrangements, and international co-operation.

67 YEAR OLD LEGAL CASE SETTLED

One of the world’s longest-running cases – 67 years after the initial hearing in 1941 – was settled in November 2008. The case, known as *Re Jahre*, concerned a dispute over the recovery of assets alleged to belong to the estate of shipping magnate Anders Jahre. Jahre died aged 90 before the main trial in 1983. Fifteen English barristers have been involved, along with 10 UK law firms since the case began. Settlement came when the judge allocated to the case which was heard in the Cayman Islands, was arrested on suspicion of misconduct while in public office and the parties decided to settle rather than restart the case with a new judge.

SPAM, SPAM , SPAM AND PROFIT

According to a study by computer scientists in California, spammers are turning a profit despite only getting one response for every 12.5m emails they send. The analysis suggests that such a tiny response rate means big spam operations can turn over millions of pounds in profit every year. The researchers conducted their own spam campaigns to measure responses. They sent about 469 million junk e-mail messages, the vast majority of which were for a fake

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pharmacy campaign. The response rate for the campaign was less than .00001% but the researchers estimated that if these results were to be extrapolated over a full year, an income of approximately £1.28m could be achieved.

CONSUMER RIGHTS DIRECTIVE

The Department for Business, Enterprise & Regulatory Reform (BERR), has issued a consultation document seeking comments on the European Commission's proposals for a consumer rights directive. The Commission proposes bringing together the Doorstep Selling, Unfair Contract Terms, Distant Selling and Sale of Goods and Associated Guarantees Directives into a single horizontal Directive. This can be viewed in draft from at http://ec.europa.eu/consumers/rights/dots/directive_final_en.pdf and the consultation document is available at www.berr.gov.uk/files/file48791.pdf

QUESTIONABLE EFFICIENCY DRIVE

A Department for Transport scheme aiming to cut administration costs by £57m by basing payroll, finance and personal services all on one site in Swansea, has left taxpayers with a bill of £81m! This was the finding of the Commons Public Accounts Committee report which says that the scheme was late to start, was still not fully introduced and was set to make losses. The computer system was distrusted by staff and had at times issued messages in German.

SME PAYMENTS TO BE QUICKER

BERR has launched a new Code of Practice to help increase the speed of payments to small companies. The Code, developed with the Institute of Credit Management and supported by major business organisations, aims to establish a clear and consistent policy in the payment of business to business bills. The Institute will host the Code on its website and will include a facility for suppliers to raise concerns about payers. This initiative, launched in December 2008, follows the commitment by Central Government to pay its suppliers within ten days.

NEW INSPECTION POWERS FOR HMRC

Legislation introduced in the Finance Bill 2008 increased HM Revenue and Customs' powers of inspection likely to affect individuals and businesses who are within the scope of PAYE, VAT, income tax, capital gains tax and corporation tax, and pay tax and make claims.

The new information powers, which are set out in Schedule 36 to the **Finance Act 2008**, give HMRC more power to obtain information and documents and a new power to inspect business premises. HMRC can now obtain information and documents from taxpayers and others, inspect 'business premises' and remove business documents. These powers, which were originally announced in the 2008 Budget, gave HMRC the authority to enter and search business premises with potentially as little as 24 hours' notice. However the amendments made to the Finance Bill have introduced at least 7 days' notice. The extended notice has been welcomed as it enables businesses to be better prepared for visits 'which can be very stressful'.

HMRC now have extended rights regarding access to records that underpin tax returns. This means that officers of HMRC can have access to any computer which has been used in connection with the accounting records (including supporting documents) required of the taxpayer. This is a new development as normally taxpayers would expect HMRC to have access to the records themselves but not the computers on which the records have been prepared or maintained. Information powers and penalties for failure to comply with these obligations will have effect on and after 1 April 2009. Time limits for making assessments and claims will need a transitional period and so will become fully operative on and after 1 April 2010. This means that for most businesses the new rules will have effect for accounting years ending 31 March 2009. Therefore records that are presently being updated for this period of account may be open to inspection. See the HMRC website www.hmrc.gov.uk for more information.

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We have been established as an independent firm of Chartered Secretaries since 1980 and act for companies ranging from small/medium size enterprises to several of the FTSE 250.

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For further information on any of the above, please call and speak directly to a partner:

**David Venus, Douglas Armour,
Martha Bruce or Susan Wallace.**

*For further copies of **Update** or to be placed on our mailing list, please e-mail, telephone or fax:*

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David Venus FCIS is a Chartered Secretary with over 30 years' experience of company secretarial work. Following a career in commerce and industry, gaining wide experience in several companies including subsidiaries of Nestle and ITT, he established the practice in 1980, having recognised a need, particularly among small and medium sized companies and other professional firms, for independent professional advice.

David is primarily concerned with the continuing development of the practice particularly in terms of technical expertise and in forging links with fellow professional advisers. He also acts as company secretary to several listed, private and public sector companies.

Over the years, he has written and contributed to a number of company law reference books and continues as author of Butterworths' *Company Secretarial Procedures and Precedents Manual* first published in 1993 and updated quarterly.



Douglas Armour FCIS joined the practice in 1985 having completed the ICSA professional examinations as a postgraduate student. He became a partner in 1992, since when he has gained considerable experience of companies of all sizes and types in particular start-ups and IPOs. He acts as company secretary to several public and private companies and heads our share registration division, SLC Registrars Limited, which specialises in smaller fully listed, AIM and OFEX companies.

Douglas is a specialist adviser to the ICSA and has written and contributed to a number of books, including two published by the Institute: *The ICSA Company Secretary's Checklists*, first published in 1992 now updated bi-annually and *The ICSA Company Secretary's Handbook*, first published in 1999 and now updated annually.



Martha Bruce FCIS has been with the firm since 1992 having previous experience with Chantrey Vellacott and Morgan Grenfell. She became a partner in 1997, since when she has built an extensive portfolio of clients in all areas of industry and commerce. She acts as company secretary to many listed and unlisted companies and heads our trade mark and health & safety consultancy services.

Martha has written two books *Rights and Duties of Directors* first published in 1998 by Tolley's and now in its 6th edition and more recently *The ICSA's Directors Guide* published in 2003. In addition, she has been a contributing editor to Butterworths *Corporate Law Service* since 1995 and as a specialist adviser to the ICSA, is also responsible for editing a monthly Q&A section in the Institute's monthly professional journal *Chartered Secretary*.



Susan Wallace FCIS joined the firm in 2001 initially on a temporary contract, but quickly became a valuable member of our permanent staff and was appointed partner in 2004.

She gained her initial experience within accountancy and legal practices including Eversheds and more recently KPMG in Hong Kong. Since joining the practice, she has rapidly established her own client portfolio; predominantly large, unlisted private groups. She also has a number of company secretarial appointments and specialises in the setting up of employee share schemes and the drafting of shareholder agreements.

Susan is a regular contributor to the Q&A section for the *Chartered Secretary* journal and has responsibility for in-house staff training.