

Welcome to our February 2008 **Cumberland Ellis News Bulletin** which provides a brief overview and update on topics which may be of interest to you in your business or personal life.

I trust you will find the legal news and press set out below both useful and informative. If you would like any further information on any of the issues raised below or concerning a specific situation, then please do not hesitate to contact the writer of the article or your usual contact at Cumberland Ellis.

[Neil Turner](#) – Senior Partner, Cumberland Ellis LLP

Announcement:

The arrival of 2008 has seen a busy start to the New Year at Cumberland Ellis with the launch of our dedicated website for the Family Law Department www.divorce-london.co.uk, further details of which can be found in the article below. Also congratulations to Graeme Fraser, an Associate in our Family Department, who has successfully attained accreditation by [Resolution](#) (the specialist family law association) as an expert in complex financial settlements for married couples, civil partners and cohabitating unmarried couples. Achieving accreditation puts Graeme in distinguished company as Hazel Wright, Head of our Family Department, is also a Resolution accredited specialist with regard to complex financial settlements and in matters relating to children.

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Directors Duties and Derivate Actions

Company Commercial

The phased implementation of the Companies Act 2006 continues, with more of the new law on directors' duties coming into force on 1 October 2007. There are five core duties in s171 CA 2006 (to exercise independent judgment; to exercise reasonable care, skill and diligence; to avoid conflicts of interest; not to accept benefits from third parties; and to declare an interest in any proposed transaction or arrangement).

In addition, there is a new requirement for directors to act in a way which they consider in good faith would be most likely to promote the success of the company for the benefit of its members as a

whole (s172 CA 2006). In fulfilling this duty, directors must have regard to, among other things:

- the likely long-term consequences of any decision;
- the interests of the employees;
- the need to foster the company's relationships with suppliers, customers and others;
- the impact of the company's operations on the community and environment;
- the desirability of maintaining a reputation for high standards of business conduct; and
- the need to act fairly as between members and the company.

Directors must continue to have regard to general equitable principles and common law rules in interpreting and applying their duties. The other key aspect of the new law relates to conflicts of interest, and these provisions will come into force in October 2008.

One likely outcome of the new regime is that risk-averse directors will want to record the reasons behind all their decisions, resulting in a box-ticking exercise to record that they considered the factors set out (even if those factors were then dismissed). Likewise, board minutes are likely to be longer and more detailed. There is a feeling that, despite the duty on directors to exercise reasonable care, skill and diligence, these well-intentioned changes will simply result in more formulaic procedures and ever-longer paper trails.

Alongside the changes to directors' duties, shareholders now have an expanded statutory right to sue directors in derivative actions. A derivative action may be brought in relation to an actual or proposed act or omission involving negligence, default, breach of duty, or breach of trust.

Significantly, a derivative action is now expressly available for a director's breach of his or her duties (which have been broadened as discussed above). This is so even if the director has not benefited personally from the breach, and shareholders need not have been members of the company at the time of the misconduct of which they complain.

There are, however, certain procedural safeguards, and it remains the case that any action must be brought in the name of the company and only the company can be awarded damages in the event of a successful claim. In theory, directors will be exposed under the new law to greater risk of claims, but we will have to wait and see how this plays out in practice.

Rachael Taylor, Solicitor – Company Commercial Department

Can I Take My Contacts With Me?

Employment

If an employee leaves a company, can he copy his list of contacts (e.g. from Outlook)?

The answer is that e-mail address lists which form part of the employer's IT system will always belong to the employer (even if the list is not confidential). This was confirmed in a recent case, where an employee copied his Outlook contacts before setting up a competing business. Although the judge ruled that he could remove personal contacts, it was held that all the other contacts remained the property of the employer. Three lessons seem to emerge:

- If you want to stop employees setting up competing businesses, then draft suitable

restrictive covenants preventing post-employment competition (rather than having to rely on non-copying of contact lists).

- Have well drafted confidentiality provisions in your contracts of employment- although there is an implied term protecting an employer's confidential information in all contracts of employment, express ones can protect so much more.
- Employers should have a clear e-mail list policy and that policy should be communicated to staff. Encourage staff to separate their personal contacts from business contacts, and so make it easier to legally enforce non-copying.

Suzanne Eva, Partner – Employment Department

Are We Insolvent?

Company Commercial

One area that is left untouched by the new regime of directors' duties is the responsibility of directors when they believe the company is facing insolvency. This has long been a tricky area, but CA 2006 does not clarify directors' duties in this regard.

The starting point is that if the company is solvent then the standard directors' duties apply (under s171 and s172CA 2006). However these new duties are expressed to be subject to any enactment or law requiring directors in certain circumstances to consider or act in the interests of creditors of the company (s172 (3)). Thus if it is believed that the company is facing insolvency the existing duties on the directors to consider or act in the interests of creditors take precedence. In practice, the difficulty is recognising when the duty switches from being owed to the company to being owed to the creditors.

Note that the issue of determining whether a company is insolvent remains unaltered from the prior position. England has two independent tests for determining insolvency: the cash flow test (i.e. company cannot meet its debts as and when they fall due), and the balance sheet test (i.e. company's liabilities exceed its assets). The need for directors to obtain specialist advice as to the financial position of the company remains as crucial as ever. If the company is insolvent, the director's duty is owed to the creditors under s172(3), but if it is not insolvent then the duty is owed to members under s171. The problem is that there is no neat dividing line, or clear guidance, as to how directors should assess that situation. If a director concludes (or ought to conclude) that there was no reasonable prospect of avoiding insolvent liquidation, but then continues to trade, then the director may be personally liable for further debts incurred. The reality, of course, is that directors should err on the side of self-preservation if there is even the smallest possibility that they could face personal liability. The end result is that directors may be encouraged to decide too early that they owe their duty to creditors as opposed to shareholders. On the other hand if the directors act too hastily, they may leave themselves exposed to a claim by shareholders that they have not fulfilled their duties under s171 and s172! Something of a balancing act.

As discussed above, we are therefore likely to see increasing focus on comprehensive minutes and formalised note-taking processes to show the considerations and decision-making processes of directors.

Jeremy Lederman, Partner – Commercial Dispute Resolution Department

Do They Need To Know That?

Employment

The Information and Consultation of Employees (ICE) Regulations already apply to employers with at least 100 employees in the UK. That figure reduces to those with at least 50 employees as from April 2008.

There are three categories of information that have to be supplied (and perhaps consulted on):

- Recent and probable developments of the business's activities and economic situation: there is a requirement to provide information (but no requirement to consult).
- Information on the situation, structure and probable development of employment within the businesses, and on any anticipatory measures (in particular where there is a threat to employment): once again, there is a requirement to provide information, but also a requirement to consult.
- Decisions likely to lead to substantial changes in work organisation or in contractual relations (including collective redundancies and business transfers): again, there is a requirement to provide information. In this instance, there is more than a mere requirement to consult – instead there is a requirement to consult 'with a view to reaching agreement' (similar to the well-known collective redundancy consultation requirements).

Employers should be aware of these Regulations not least so as to ensure that they minimise the threat of an employee stirring things up under the banner of these Regulations.

Mark Shulman, Partner - Employment Department

Family Department Launches Dedicated Website

Family

We are delighted to announce the launch of a dedicated website for the Family Law Department www.divorce-london.co.uk. Whether you have a legal question yourself or have a friend, colleague or client in need of guidance, do take a look as you may find the answer on the site.

**For more information do call one of the family team on the dedicated telephone line:
020 7674 0580**

Fair Shares For All: the fair division of assets on divorce

Family

If it were only a case of dividing the assets by two, and giving each of the separating couple 50% of the total, then accountants not lawyers would be the specialists to consult. The law is more complex. We have now had further guidance for the Courts on the current approach to financial settlements. We need to work in 3 steps:

- 1 the assets and general financial position of the couple must be determined
- 2 the couple and their advisors (or in default, the court) have next to decide how the property should be shared between the couple, sharing equally unless there are good reasons to the contrary
- 3 then the task is to decide whether the result produced by the application of the sharing principle meets the needs of the couple, generously interpreted.

Only if, at this point, the assets don't meet the needs can a greater share be given to one of the parties. If they are greater, that does not automatically mean a departure from sharing equally.

Reasons for a different distribution include special contribution either to the welfare of the family or to the assets (particularly in a short marriage) or the existence of a properly arranged pre-nuptial agreement.

This only applies to married couples, or those in a civil partnership. Unmarried couples have a completely different legal regime.

Hazel Wright, Partner (mediator and collaborative family lawyer) – Family Department

Landmark Ruling Opens The Way To Deliberate Assault Compensation Claims

Private Client

On 30 January the House of Lords delivered judgment in six appeals in which the claimants were seeking damages following sexual assaults. In each case, many years had passed since the assault(s) took place. The best known is *A v Hoare*, involving the so-called "lotto rapist"; the other five, which include *Young v Catholic Care*, are child abuse cases. The Lords reversed their 1993 decision in *Stubbings v Webb*, deciding that the relevant period for a deliberate assault is three years (and not six) because s.11 of the Limitation Act 1980, and not s.2, applies.

This brings the limitation period applicable in personal injury claims based on assault into line with that based on negligence, nuisance and breach of duty, so that in all these instances the period can be extended by the court under s.33 of the Act where it would be equitable so to do. The result is that the claimants in the five cases can now proceed with their claims, which the Court of Appeal had held were statute barred because deliberate assaults had been regarded as being subject to a six year, non-extendable, limitation period.

While *A v Hoare* with its dramatic scenario received most publicity, the main significance of the

decision concerns claims brought by victims abused as children, who may not have formed an understanding of psychological damage resulting from the abuse until many years after reaching adulthood. A large number of such claims, where the defendants will often include those claimed to be vicariously liable for the assaults, such as schools, local authorities and religious organisations, are now expected to proceed. However, in view of Lord Brown's comments in the judgment, it is likely that in many cases the court will not exercise its discretion under s.33 in favour of the claimant and extend the limitation period because a fair trial would be impossible after a long delay.

Richard Collier-Wright, Associate – Private Client Department

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