

Welcome to the November 2007 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
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Capital Gains Tax "tapers off"
Company Commercial

At present, if you hold business assets for at least two years, the operation of taper relief means that the amount of capital gains tax you pay on sale is discounted to 75% of normal rates, in effect, just 10% tax for a higher rate taxpayer, or 5% for a basic rate taxpayer.

The Pre-budget report signals the abolition of taper relief and it will be replaced with a flat rate of capital gains tax of 18%. Indexation allowance for individuals and trustees, but not for companies, is also to be abolished from 6 April 2008. This will simplify the capital gains calculations, but it does not hide the fact that the potential 10% tax rate payable on the sale of businesses will jump to 18% from 6 April 2008.

Therefore if you plan to sell a business or an asset used by a business for example a commercial letting, which you have owned for at least two years, you may save at least 8% tax if you sell before 6 April 2008.

However, the proposed flat-rate is good news for anyone selling a non-business asset, such as a buy-to-let property, or quoted shares. At present a capital gains tax bill for non-business assets can be cut by up to 60% of normal rates, which works out at 24% for higher rate tax payers and 12% for basic rate taxpayers. If you expect to make a large gain on a non-business property, it may be better to complete the sale on or after 6 April 2008 to save at least 6% on your tax rate, possibly more.

It is of course more than likely that this position may change before April 2008 and if you would like any further information on this or to discuss the possible sale of any interest in your business please

do contact us.

[Adam Edwards](#), Partner
Company Commercial Department

Your business and the Companies Act 2006

Company Commercial

Further provisions of the Companies Act 2006 came into force on 1 October 2007 (with more to come on 6 April 2008 and 1 October 2008). Whilst some of the existing Companies Act 1985 provisions have been imported into the new Act largely intact, some of these recent changes are significant. We thought it might be useful to draw your attention to the following areas which you may now need to consider in the context of your company.

1. Directors' duties

Four general duties are now imposed, i.e., for directors to act within their powers, to promote the success of the company, to exercise independent judgement, and to exercise reasonable care, skill and diligence.

There are further factors which must be considered as part of the duty to promote the success of the company, such as the company's reputation and impact on the community. These considerations are not supposed to impose new duties, but instead express what is already good practice. You may, however, wish to specifically reflect these considerations in board minutes and company policies.

2. Members' rights

Written resolutions now require a majority vote (51% or 75% as applicable) rather than unanimity, making them much easier to use. Extraordinary and elective resolutions are no longer recognised by statute, and members can nominate others for enjoyment of members' rights.

3. AGMs

The default position for private companies is now that an AGM is not required, but may be called by 10% (or in certain cases 5%) of shareholders. The notice period where an AGM is called is reduced to 14 days. There are also changes to the AGM requirements for public companies.

Your company's Articles of Association may already include some of these options regarding resolutions and meetings, and in any case your current Articles will remain in force if no action is taken. However, companies now have the option of amending their Articles in the usual way to adopt the above measures, many of which are aimed at streamlining company administration. The final text of the new model Articles of Association is not yet available but a draft has been circulated, and further information will follow as implementation continues.

If you have not already done so, you might also wish to think about increasing your company's use of electronic communications, which is possible under new provisions in force since January 2007.

4. Derivative actions

These actions are now open to members who can seek permission from the court to bring a claim

against a director or other person on behalf of the company. There are a number of hurdles to bringing such a claim and it is not expected that there will be a high number of cases, but you may wish to review your company's insurance coverage in terms of legal costs.

Further significant provisions will be implemented in the coming months, with almost all of the Companies Act 2006 coming into force by 1 October 2008. These further provisions include directors' duties in relation to conflicts of interest, changes to the rules about share capital and financial assistance, and changes to company formation. You might want to think about some of these matters ahead of time so as to make any changes as seamless as possible.

James Lamont, Partner
Company Commercial Department

Employment Law and the Companies Act 2006

Employment

It is worth noting that the new Companies Act 2006, many provisions of which came into force on 1 October 2007 (the rest on 1 October 2008), may well have an effect on the employment of directors and, more importantly, the termination of that employment.

Points to watch out for include:

1. Old section 312 Companies Act 1985 (payment to director's for loss of office) has been extended and revised in section 215 Companies Act 2006 (effective 1 October 2007). It used to be possible to get around the requirement for shareholder consent to provide compensation for directors on the termination of their employment by specifically stating that the compensation/ex gratia payment was being made as "compensation for loss of employment" (not office). Not any more. The expanded provisions of section 215 apply (save as set out in para 2. below) to all payments made in connection with the cessation of employment of a director, any payments in connection with retirement from office, any payments to connected persons (such as wives) and, even more importantly, consideration which does not comprise cash (section 215(2)). That transfer of a company car at book value could, undoubtedly, fall foul of the legislation unless the members approve the transfer.
2. In order for any consideration "payable" to a director as outlined above to be permitted, the shareholders need to have been given a memorandum setting out particulars of the proposed payment and to have approved it (ordinary resolution: 50%). HOWEVER there is no need for such approval where the payment/consideration is either pursuant to a legal obligation to the director or is in settlement of a claim arising in connection with the termination of a person's employment. With this in mind payments under a compromise agreement should be fine, however directors who are not taking the compromise route will need to get shareholders' approval.
3. In relation to fixed term or long notice contracts it used to be the case that any director's service contract which had a fixed term/notice period of over 5 years had to be approved by the shareholders. From 1 October 2007, any director's service contract which has a fixed term/notice period of over 2 years must be approved by the shareholders.
4. Any director's service contract (with the company or even its subsidiary) will now have to be retained by the company for a period of not less than 1 year after its expiry and must be available (both during and for the period of 1 year after its expiry) for inspection by the shareholders. (See section 228) Failure to comply is a criminal offence for all the directors.

5. A contract between a sole member company and a director who is that sole member must be evidenced in writing (either a written contract or a memorandum of the terms) unless it has been entered into "in the ordinary course of business" (section 231). There is no substantive change from the current position and, in any event, one would probably argue that a service contract would be in the "ordinary course of business" of the company. Nevertheless, it is worth advising single member companies, whose member is also a director of the company, to have a written service contract since a breach of section 231 can result in a criminal penalty.

6. For the first time, from 1 October 2007, companies will be entitled to make loans to directors. Loans worth more than £10,000 will require the approval of the shareholders (following the provision of a memorandum setting out the terms of the loan) and credit transactions (such as a company guarantee for a director's borrowings) worth more than £15,000 will also require such approval. Similar provisions apply to loans to persons connected with a director. Hitherto loans to directors have been strictly prohibited.

If you require further clarification of any of these issues please do let us know.

**Suzanne Eva, Partner
Employment**

To LLP or not to LLP: that is the question

Company Commercial

At their inception Limited Liability Partnerships (LLPs) were intended for use by professional partnerships such as solicitors and accountants. Now, however, they are being used in joint ventures, holding companies, investment companies and property developers. So what has made this 'hybrid' form of company so attractive?

Characteristics of an LLP

An LLP is a partnership with an outer shell of limited liability. It can enter into contracts in its own name, survive after losing a partner, grant floating charges over its assets, and there is no restriction on how many members an LLP can have unlike a traditional partnership. Further, unlike a limited company there is no Memorandum or Articles of Association so an LLP is extremely flexible. LLPs must have a registered office and the names and addresses of all members must be registered at Companies House. Applications can be made for this information to be kept secret in special circumstances. LLPs must file audited accounts prepared in accordance with the Companies Act 1985 and generally accepted accounting practice, although some smaller LLPs may file abbreviated accounts and claim audit exemption.

Liability of an LLP member

The liability of a member is limited to their capital in the firm. However, in certain circumstances sums withdrawn in the two years prior to insolvency can be clawed back. Where a claim is made against a member who is personally at fault (for example in a claim for negligence), he should be protected by the limited liability unless he accepted a personal duty of care or a personal contractual obligation.

A Member's Agreement is a must

It is strongly recommended that an LLP should have a members' agreement. This is a private

document and does not need to be submitted to Companies House. If a members' agreement is not drawn up there are default provisions provided in the LLP regulations but these are not appropriate for most businesses. An LLP does not have a share capital and one of the matters that the members' agreement needs to address is the level of capital contributions from members. A member's agreement needs to cover every eventuality and will need to deal with aspects of company law and the Insolvency Act 1986.

Taxation and LLPs

Whilst an LLP is a hybrid, a mix of company and partnership, for tax purposes it is treated like a general partnership, i.e. the members are taxed on their individual share of profits or capital gains. The entity itself is not taxed on its profits.

Flexibility

One of the key aspects is that the internal flexibility of a general partnership is maintained within an LLP. The introduction and retirement of members and alternations of profit shares and capital contributions are very easy to arrange and have minimal tax and legal consequences. LLPs are not restricted to professional firms and are an intriguing and favourable new structure for various business situations. If you wish to know more about whether an LLP is the right vehicle for your business please contact James Lamont or Rachael Taylor.

**[James Lamont](#), Partner
Company Commercial Department**

Voting with your feet

Family

Picture the scene: you and your spouse are happily making some joint investments, and have been buying shares in joint names to show your own views of your equal ownership (the same issues apply to your lover, if you are not married). But then all goes wrong and you separate. What to do about those jointly owned shares, which are such a good prospect? Well, you can continue to own them jointly, in which case since 1st October 2007, unless the company articles provide otherwise, the new companies' legislation provides the first named in the register of members has the voting rights. Or you can provide in a divorce settlement or in a separation agreement for how you will actually exercise your voting rights. In this way you can both continue to enjoy the benefits of your investment, but can regulate, in a bespoke way, how you will each manage that investment. If you do not use this opportunity, then companies legislation is much less flexible and any solution is likely to be more expensive to set up.

**[Hazel Wright](#) and [Conrad Adam](#), Partners
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