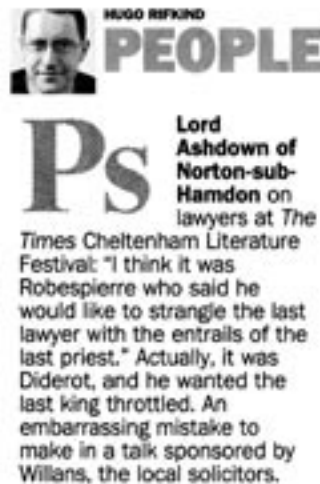




Paddy Ashdown enjoys a joke with Nicholas Upton, Jonathan Mills and Margaret Austen

Glitterati literati

If it's true that all publicity is good publicity then we must thank Paddy Ashdown for getting us this mention in *The Times*. We were pleased to sponsor Lord Ashdown's event at this year's Festival of Literature and to welcome him as a guest. This was our tenth year as 'literary' sponsors and our managing partner, Margaret Austen is currently Honorary Secretary of the Cheltenham Festivals.



Classic employment traps – sick pay and notice

*Employers need to tread carefully when considering issues of sick pay and notice – particularly in respect of less senior workers who tend to have shorter contractual notice periods. A classic trap arises, warns **William Morse** when an employee is given notice by his employer (lawfully, of course, and after taking legal advice) but then signs off sick.*

If the worker's contract entitles him to receive only a week's notice for every year's service (ie the minimum statutory requirement) and no salary during sickness absence, then the employer may be obliged to pay full salary if the employee goes off sick after being given notice.

Because the worker's contractual notice does not exceed his statutory notice entitlement by at least a week, he is entitled to be paid full salary for his period of sickness - assuming he is on sick leave for the period of his notice.

Legal 500 rated

The 2006 edition of *Legal 500*, published in October, recommends us for our work in a number of practice areas. Particular mentions this year are corporate/commercial, debt recovery, commercial property and family law.

U-turn on HIPs

As widely reported in the media, the Government has made a spectacular u-turn this summer over the compulsory inclusion of the Home Condition Report in the Home Information Pack. The packs themselves, however, have not been scrapped in their entirety. Partner Bridget Redmond said: "It remains to be seen whether there will be further u-turns over the remaining content of the packs, or the date they are to be introduced, which currently still stands at 1st June 2007.

All our own work

It was a blow to executive editor Jonathan Mills when a client recently commented that, for a bought-in publication, *Law News* was a "jolly good read." We felt we should put it on record that the newsletter is in fact wholly organic and home-grown. It is compiled and written by our own lawyers to flag up things businesses need to know, without having to wade through chapter and verse.

William Morse says: "Many employers have been caught out by this little bit of small print." The only way to guard against it is to ensure that staff are entitled to more contractual notice than statutory notice, by at least a week.



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'Simplifying' company law

*If enacted in its present form, the Companies Bill (formerly known as the Company Law Reform Bill) will be the largest Act ever passed by Parliament. It is intended to 'simplify' company law although some may say that, with nearly 1,300 clauses and 15 schedules, this behemoth is hardly a simplification. **Paul Gordon** and **Tom Bartley-Smith** look at some of the key provisions.*

Directors to become greener ...

The Bill seeks to put into statutory form exactly what directors' general duties consist of – largely derived from case law. The government feels this change will make it easier for directors to find out about and understand their obligations.

If the Bill is enacted in its present form, there is a real possibility that it will be creating a new duty on directors. It provides that they must promote the success of the company for the benefit of the members as a whole. Currently they are required to act in the best interests of the company, and the law has evolved to provide meaning to this, but that is different from promoting the success of the company – what does this mean?

The Bill gives some guidance on the factors a director must have regard to, including the likely consequences of any decision in the long term, the interests of the company's employees, the need to foster the company's business relationships with suppliers, customers and others and the impact of the company's operations on the community and the environment. It is understood that environmentalists are pressing for a more stringent duty in respect of the environmental provisions.

Paul Gordon of our dispute resolution team has some reservations about setting out directors' general duties in statutory form. He fears there is a risk that it may lead to a degree of inflexibility

and make it more difficult for judges to ensure that the law adapts as the business world evolves. He believes the legislation must avoid imposing any unintended additional duties as a result of imprecise wording. However, with around 14 million companies in the UK, and growing public concern over green issues, an express requirement in such an influential piece of legislation for directors to 'think green' will be welcomed by many.

... but will they know who they are?

The term 'shadow director' was first put on a legislative footing in the Companies Act 1985. They were described as those 'in accordance with whose directions or instructions the directors of a company are accustomed to act'. Professional advisers such as solicitors and accountants were expressly excluded.

The Act, and subsequent legislation such as the Insolvency Act 1986, imposed various duties on shadow directors. They must, for example, have regard to the interests of employees and disclose their interests in contracts with the company (including service contracts and substantial property transactions). They may only receive loans from the company in certain – restricted – circumstances. They can be found guilty of offences such as fraudulent and/or wrongful trading under the Insolvency Act 1986. And they are subject to disqualification for unfitness.

Commercial contracts: agency agreements

*In the last issue of Law News **Simon Brazier** considered some of the legal aspects of appointing agents in foreign territories. This time he answers questions about the alternative approach of appointing distributors to supply goods and services into overseas markets.*

What is the role of a distributor?

Under a distribution arrangement the supplier/manufacturer sells his products to a distributor who in turn sells them on to his customers, adding a margin to cover his own costs and profit. In buying and re-selling the products, the distributor will contract with both the supplier and with his own customer. Ownership of the products will therefore pass to the distributor, then from him. This differs from an agency arrangement in which there is only one contract for sale of the products – made between the supplier/manufacturer and the customer. An agent will not generally have any contractual relationship with, or liability to, the customer.

There are various forms of distributorship; the arrangement can be exclusive, non-exclusive or give sole right for the distributor to re-sell a product within a territory or part of a territory.

What are the pros and cons?

In the supplier/distributor relationship, mutual contractual rights and obligations will be included in a distribution agreement (essentially a variation of a sale of goods contract). The disadvantage for the supplier is that he has less control over the distributor's activities than he would over an agent. For this reason a distributorship may be unsuitable in cases where the supplier/manufacturer requires contact with the end customer (eg bespoke products) or where he wishes to maintain control over the final pricing of the products in the territory.

However, the upside of selling to a distributor is that the supplier passes on a large degree of the risk in the products. The distributor assumes liability in re-selling them. Compared with an agent, he is more exposed in the course of his business and even more so unless he is fully indemnified by the supplier for any claims relating

So who is a shadow director? The courts have considered the question in a number of high profile cases. In every case they took the broad view that the purpose of the legislation is to identify those with 'real influence' in the company's corporate affairs. This influence need not be over the whole field of its corporate activities.

The stumbling block is that a shadow director will seldom be aware he is a 'director' of the company in question. If he is aware, he will be reluctant to advertise the fact that he is exercising improper influence over the board. Consequently the board will (at best) be in default of their obligation to record the shadow director in company returns.

It is therefore slightly preposterous that the Companies Bill seeks to impose its codification of directors' duties on shadow directors. As such, a shadow director would be likely to owe a duty to promote the success of the company, having regard to its 'stakeholders'; 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 his interests in proposed transactions (with failure to make the requisite disclosure constituting a criminal offence).

This issue has caused concern in a number of practice areas, particularly in relation to joint ventures. Potential shadow directors here include a parent company (or one or more of its directors),

private equity fund managers, management consultants and/or lenders or creditors of a company. Indeed, non-professional advisers need to be extremely wary, assessing the risk of becoming a shadow director and, if necessary, complying with the relevant duties.

It may be possible to take steps to minimise the risk of becoming a shadow director. For example, a director of a parent company might ensure any directions or instructions he gives to the directors of a subsidiary have been approved by the board of the parent. He might also ensure he does not personally 'pull the strings' of the subsidiary so that, for instance, he does not control the financial affairs or manage the trading of the subsidiary.

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Tom Bartley-Smith Paul Gordon

to the products themselves. As a consequence, a distributor will generally receive a higher level of remuneration or margin compared with the commission earned by an agent.

As with agency arrangements, the appointment of a distributor avoids the need for a supplier to have an established place of business within the distributor's territory. This reduces the supplier's administrative costs and may also be beneficial for tax reasons.

Are there any EC laws to be aware of?

Unlike agency arrangements, the EC Commercial Agents Directive (and accordingly the UK Commercial Agents Regulations 1993) does not apply to distributorship agreements. Within the UK there is therefore no requirement to pay compensation to a distributor if the agreement is terminated, though this may not always be the case within other countries.

EC and UK competition legislation can affect the terms on which a supplier may be able to appoint a distributor (particularly where the supplier's market share is significant – ie in the EC above 30%). It is important to consider this issue with a lawyer at an early stage.



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Names to conjure with

If you have received an e-mail from us recently, you will probably have noticed more bump at the bottom of the page.

The Companies Bill will repeal the Business Names Act 1985: partnerships with fewer than 21 partners will have to state the names of all partners and the firm's physical address on business letters, written orders, invoices, receipts and written demands for payment. Clarifying this in March, the House of Lords decided that emails and faxes are now to be classed as de facto business letters. The relevant information must appear not only on partnership stationery but also on emails that contain a letterhead and on electronic letters sent as attachments to an email.

No more Viagra jokes!

It is now unlawful to discriminate against a worker on the grounds of their age. The Employment Equality (Age Discrimination) Regulations 2006 became law in October 2006, affecting and protecting not just older workers, but younger ones as well.

*All the evidence suggests that small businesses have failed to prepare for the new regime: earlier this year, The Forum of Private Business even accused small firms of "sleep walking into a legal minefield". It is essential that employers are aware of the new legislation and bring policies, terms and conditions and benefits into line to ensure that there is no discrimination or harassment on the grounds of age. **William Morse** has put some of the key changes into a nutshell.*

Tackling prejudices

The law forces employers to confront a range of age-related prejudices: younger people 'lack the authority to deal with our clients'; a middle-aged woman will 'never fit into our youthful atmosphere'; older men are 'more likely to be off work ill'. Whether these preconceptions are valid is legally irrelevant. The law now requires that each person should be treated as an individual, not assumed to be like other members of the group who may or may not share such characteristics.

Harassment

Employers need to have policies in place prohibiting ageist bullying and offensive jokes about age. Belittling remarks that someone is too young to be able to do their job, or birthday cards suggesting that the recipient has reached an age where they are over the hill, could amount to harassment. The problem for employers is that while some employees might take this as amusing office banter, others might find it degrading or humiliating, especially if it was repeated after it became clear that it was unwelcome.

Recruitment

You cannot now recruit and select an employee on the basis of age, unless it can be objectively justified. As far as requesting dates of birth on application forms is concerned, employers need to consider the extent to which they can sensibly justify asking for this information given that age must not be taken into account in selection.

In most cases, recruitment advertisements will be directly discriminatory if they refer to age as a requirement for the job unless this is justifiable. For example, an ad for 'a young, dynamic individual' is likely to be discriminatory. Depending on the wording of the advert, it could also be indirectly discriminatory.

During employment

Terms and conditions should be reviewed to make sure there is no discrimination during the employment itself. There is an important distinction however between age discrimination and other forms of direct discrimination (eg sex and race discrimination) and that is that employers may discriminate on the grounds of age providing they can show that it is objectively justified.

Service-related pay and benefits should also be scrutinised: length of service is often used as a criterion for pay and benefits such as additional holiday entitlement. This could be indirectly discriminatory as older employees are more likely to receive such benefits. Again, in some circumstances employers are able to justify enhanced benefits, linked for example to length of service.

Redundancy

Employers should tread carefully with redundancy selection schemes where the criterion is based wholly or partly on length of service. These may now be discriminatory.

Retirement

The upper age limit of 65 for unfair dismissal has been scrapped. This means that over 65s who are dismissed for reasons other than retirement now have the right to claim unfair dismissal. If the reason for dismissal is retirement, the employer must follow a complicated procedure of notification and meetings, within a set timescale, otherwise the dismissal could become automatically unfair.

Costly

There is no upper limit on compensation, so getting age discrimination wrong could be expensive. Most highly-paid senior executives in their 40s and 50s who are dismissed for age-related reasons will find it difficult to obtain comparable jobs. Employers could find themselves liable for huge compensation awards covering many years of lost income resulting from the discrimination.

Disability discrimination laws

Bear in mind also the impact of disability discrimination legislation as older employees may be entitled to adjustments to their working practices to take account of disability. It is estimated that around 47% of over-55s have a disability and the proportion is likely to increase.

Employers have learned to their cost how long it takes to change sexist and racist cultures in the workplace. Sensible employers will have robust measures in place now that time has run out on ageism.

To discuss a fixed-fee review of your policies and documentation to ensure you are complying with the new regulations, contact **William Morse** (william.morse@willans.co.uk)



Living is dangerous for your health

*In the last year, the Health and Safety Executive has produced a new publication every month except February. Our personal injury supremo **Nick Richardson**, who acts in many cases of accidents in the workplace, has dutifully read and digested the material and reports on his findings.*

The year's worth of booklets cover such arcane topics as child safety on farms, offshore installations and using electric storage batteries safely. According to Nick, there is a much greater danger with electric storage batteries than he realised – he thought they simply exploded if you threw them in the fire!

Many of the publications, which are available in a mind-boggling 28 languages, are advertised as 'essentials'. This suggests we cannot hope to carry out our daily work without the essential guide to 'elastomeric seals for rapid gas decompression applications in high pressure services'.

"Most sane people would agree that we are over-regulated and would probably cite the proliferation of this type of publication as a good example" comments Nick. "However they exist for a good reason. Employers are not good at keeping up to date with health and safety developments and there are persistent breaches of basic and common sense safety issues in addition to failings in specialist and high tech areas. During last year these failings contributed to 220 fatal accidents, 30,203 major accidents (not involving a fatality) and 120,346 minor accidents.

"Putting these statistics into context, records kept by the European Agency for Health and Safety at work reveal that every 5 seconds an EU worker is involved in a work-related accident and one worker dies in an accident at work every 2 hours."

It is essential for employers to be fully aware of the regulations that govern the business they are involved in, and to put into force and monitor systems designed to ensure compliance with the best practice identified in those regulations. The aim is to make the work place as safe as reasonably practicable while still allowing business to be conducted in a cost-effective way. Striking a balance is difficult but not impossible.

Nick reminds employers that they owe a duty to their workforce. He says: "All too often systems are put in place and recorded in the employer's health and safety manual, but without any attempt to ensure that those things happen. It is not enough for workers simply to be given the manual to read.

"For the human cost in every industrial accident there is a cost to the employer in terms of disruption, lost production and the cost of supporting the injured worker and hiring a temporary replacement. These human and financial burdens could be greatly reduced if care was taken. Accidents will still happen but we must all work towards eliminating those that stem from a failure to take care. All businesses would be well advised to look carefully at their practices, systems and paperwork and seek expert help as necessary."



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Immigration

Points may not mean prizes

*Major changes to the current system for obtaining permits for overseas employees are on the way. The new regime is due to be road-tested next year and will come into force in 2008. Immigration specialist **Jon Harris-Gibbins** explains the impact this may have on businesses.*

Instead of work permits and other visas being applied for from within the UK they will, in future, be handled by British embassies abroad. The present eighty or so categories will be merged into a single application form and a simplified five-tier system is being introduced.

This will be underpinned by a points system, designed to make it easier for highly skilled workers to enter the UK but more difficult for those with fewer or lower skills. The intention is to create a transparent structure that avoids subjective decision-making by the Home Office. British embassies are notoriously poor at making fair and balanced decisions on immigration applications. As the old appeal system is now to be abolished, there are concerns that the new scheme will lead to a glut of judicial review applications.

British employers should be alarmed at the fact that they will have very little control over the application process, which will be made by an employee abroad. Turnaround times will also be affected as businesses are used to dealing with the highly efficient Work Permits (UK) who currently process applications in about five working days.

On an upbeat note, we believe we are the first firm in the UK to bring a rugby union player into the country on a Highly Skilled Migrant Permit. The player involved was a former South African international.



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Righting a wrong

Most people's view about property deals is that they have to be set down in writing. While we would not dream of advising otherwise, a recent case shows that even without a written agreement, all may not be lost.

In Yeomans Row Management Ltd V Cobbe, a developer was awarded a half share of the increase in value of a property after planning permission was granted. Jonathan Mills explains the background.

Yeomans owned a block of flats. The developer James Cobbe spent time and money obtaining planning permission to redevelop the property, relying on a verbal agreement that Yeomans would sell it to him once planning permission had been obtained.

It was agreed that, at his own expense, Cobbe would apply for planning permission to demolish the flats and build six townhouses. When consent was granted and vacant possession obtained, Yeomans would sell the property to Cobbe for £12m. When the development was completed, Cobbe would pay Yeomans an overage payment of 50% of any gross sale proceeds of the houses in excess of £24m. The longstop date by which planning consent was to be obtained was unclear.

There were no formal heads of terms and no solicitors were instructed.

Obtaining planning consent cost Cobbe up to £200,000 and the day after it was granted, Yeomans tried to renegotiate the price. They claimed that the verbal agreement had lapsed, as planning permission had not been obtained by the alleged longstop date.

Cobbe issued proceedings, claiming an interest in the property (or the proceeds of its sale). He argued that he should be granted relief reflecting the enhanced value of the property now that planning permission had been granted. Yeomans denied there was any legally enforceable agreement and argued that Cobbe had undertaken

Dispute resolution

Click and copy for a big bill

Most of us know that copying images from books or magazines infringes the intellectual property rights of the creator. Curiously, when it comes to the internet, most of us will download and copy images indiscriminately without realising the same copyright rules apply, says dispute resolution lawyer Jonathan Kenwright.

Copyright protection is free and automatic. Any work that is original, in that skill and effort have gone into producing it, becomes the subject of copyright and normally its creator owns the copyright. With the internet, it is easy to lose sight of the fact that there is an original creator but it is still the case that any image is usually owned by someone, somewhere. We have come across a number of cases where people have used material from the internet, only to be tracked down by the original owner.

When you copy, say a photograph, from a website, you may not realise that it is probably owned by one of the large image providers, such as Getty Images. Businesses of this sort have access to very sophisticated image tracking technology, which is capable of detecting their images, even where they have been altered or distorted. If they detect that you are using one of their images you may well receive a demand for payment for use of the image. They will usually ask you to pay a licence fee and this can be very expensive, especially if you have been using the image for some time.

One local businessman had his fingers badly burned after using unauthorised images on his website. He legitimately purchased one photo from an image library but decided to download and use a second one unofficially. He was shocked some time later to receive a bill for £2,500 for the second photo. Another business copied two small

images for use on its website and later received a bill for £3,500. In both cases, the sums were based on the fees for the images plus the length of time they had been on the sites and the number of clicks to those sites. Both businesses paid up in full after what they described as 'intimidating' conversations with 'Noo Yoik' lawyers.

It is not just image libraries you need to be wary of. For example if you copy any image from the internet – say to illustrate a PowerPoint presentation or to enhance your website – you may fall foul of copyright rules. It is remarkable how often the owners of an original image find out by coincidence that it is being used elsewhere.

If you are using someone else's images unlawfully the most likely outcome is that he will request a licence fee but there's also a possibility that he could also apply for an injunction or claim for an account of profits. While in practice it is very difficult to establish what proportion of profits derive from the infringement, it is much safer to obtain your images legitimately and avoid the risk.



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the expenses at his own risk. They claimed the negotiations were 'subject to contract' and were never meant to be legally binding.

The courts applied a remedy known as 'proprietary estoppel', a means by which property rights may be affected or created. Simply put, it allows courts to interfere in cases where they feel that to apply strict legal rights would be unfair or unjust. In their view, Cobbe was entitled to half the increase in the property's value due to the grant of the planning permission.

After a lengthy court battle, Cobbe won an award amounting to well over £5m. This may be considered generous since he had to neither risk any capital nor carry out any development.

Jonathan Mills said: "Proprietary estoppel is a discretionary remedy available to the courts but it tends to be used rarely. The case is interesting in that it shows it is possible for courts to err on the side of generosity. However it is certainly not a cure-all: generally speaking claims are hard to prove and unless very substantial sums are at stake, the cost of pursuing a claim would be prohibitive. The case doesn't cause us to change our advice that agreements should be properly documented."



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Access

Members of the public not involved in litigation are now able to obtain copies of all statements of case on the court file in civil proceedings, without having to obtain the court's permission. This change to rule 5.4C of the Civil Procedure Rules came into force on 2 October 2006.

Company/commercial

LLPs and 'catastrophic' claims

The Limited Liability Partnerships Act 2000 heralded a new era for many professional firms. By incorporating as an LLP they could receive favourable tax treatment and at the same time enjoy limited liability – and a huge number seized the opportunity to do so. But is the individual member really insulated against a multi-million pound claim? Six years on, Paul Symes-Thompson and Tom Bartley-Smith re-evaluate the issues.

Several high profile LLPs have recently boosted their insurance cover amid fears that members may find themselves on the hook in the event of a so-called 'catastrophic claim'. The likelihood of such claims materialising has risen sharply, not least because of changes in employment law. For example, the cap on damages has been removed for many offences and increasingly the onus is on employers to prove their innocence – or face severe penalties.

In very many cases the claim will be against the LLP itself, which is a separate legal entity. There are instances, however, when individual members may be held personally liable.

Members should be particularly wary of assuming 'personal responsibility' towards clients. For example, if in his personal capacity a member advises a client and the client reasonably relies on the advice to his detriment, the member may be held personally liable for negligent advice.

Third parties such as banks may require individual members to give personal guarantees to support a loan to the LLP. If the LLP defaults in repaying the loan, the guarantee is likely to be enforced – and members will be required to repay the loan in full. Each member should ensure he is properly advised before giving a guarantee. He should also be aware that his personal assets may be at risk.

Some members have found themselves personally liable after having signed documents which do not contain the correct name of the LLP. It is vitally important that all documents – including letters, emails and cheques – show the full name of the LLP and make clear that its liability is limited (ie it is not a traditional partnership).

Members need to consider carefully whether to continue referring to themselves as 'partners'. If it is not clear they are trading as an LLP, a court could decide that they are a traditional partnership – meaning the loss of limited liability status.

It is important for members to have a firm grasp of the financial performance of the LLP. Those who do not, run the risk of being found personally liable under a claim for fraudulent and/or wrongful trading.

Members must also take care when withdrawing money from the LLP. Taking money out – whether as a share of profits, interest on capital or repayment of a loan, at any time during the two years immediately prior to the winding up, knowing that the LLP was (or would become) unable to pay its debts – may render a member personally liable to contribute towards the assets of the LLP.

There are certain situations where members will never be able to avoid the risk of personal liability. However, in many cases the risk can be greatly reduced by taking greater care with the wording and content of the documentation used in the course of the LLP's business activities, and by getting the LLP agreement (members' agreement) correct from the outset.

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