



## Why apply for a job you don't want?

A recent case may prompt employers to be on the alert for the so-called 'serial litigant', reports **Trula Brunson**.

In the employment context, these are often people protected by some form of discrimination legislation, for example they are from an ethnic minority or have a disability. Typically, they apply for a job by submitting two CVs or forms. The first application will contain their genuine details. In the second version, any indication that the applicant falls into a protected group will have been removed, eg by changing a name that points to the person's real ethnic origin to a more 'British' sounding name.

If the 'edited' application succeeds in obtaining an interview but the 'genuine' version does not, the applicant will briskly submit a tribunal claim for discrimination. This often pays off as many employers will simply settle the claim. Clearly employers must not discriminate on any grounds that are protected by law but these individuals are abusing laws which were designed to protect them and others.

In *Keane v Investigo and others*, such an attempt was foiled. Margaret Keane is a 50-year old, experienced accountant. She applied for many jobs that were plainly aimed at recently qualified accountants and for which she was overqualified. In 21 cases where she failed to get an interview, she brought claims for age discrimination.

With a good dose of common sense, the tribunal found that her applications were not genuine and that she had no real interest in the jobs. She

would not therefore have suffered a 'detriment or disadvantage' even had there been age discrimination, so her claims must fail. They failed anyway because the tribunal found there had been no age discrimination.

Ms Keane argued that she had brought the claims to make a point about age discrimination. The tribunals accepted that, while this may have been a contributing factor, she had also made the claims to seek compensation. Her claims were found to be 'misconceived and an abuse of process' and costs were awarded against her.

*Trula acts for claimants and respondents in claims for unfair dismissal, constructive dismissal, breach of contract and discrimination and advises on compromise agreements, policies and procedures. She is a member of the Employment Lawyers' Association.*



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## Charitable Christmas

The £750 we saved by not sending you a greetings card last Christmas has gone to the National Star College to help boost their £1.5 million appeal to build new facilities.

## WITHOUT PREJUDICE... WORKING THE SYSTEM



### 'Whistleblowing' changes

*Changes affecting whistleblowing claims come into effect in April. Employment tribunals will have new powers to pass on information about public interest disclosures to relevant industry regulators where the claimant consents. For the employer, the potential for a spurious claimant to practice commercial blackmail will become just that little bit greater, says **William Morse**.*

The changes will affect claims (or amended claims) arising on or after 6 April. Claim forms will now include a box for the claimant to tick, giving express consent for the employment tribunal to pass copies of the form (or extracts) to the relevant regulator. The claimant can opt for confidentiality or, if he prefers, he can go directly to the relevant regulator himself.

One consequence of the change is that a whistleblowing employee will now be able to increase leverage against an employer with the aim of obtaining a settlement. In reality, many claims are spurious and without merit. In consequence, many groundless complaints will be passed on to third party regulators such as HMRC.

Take, for example, a situation where an employee has been dismissed and, in order to strengthen a claim against the employer, later suggests that he has disclosed that his former employer took an

improper approach in relation to tax. Not only will the employer have to deal with the employee's claim but also with what may be a subsequent investigation by HMRC.

*Partner Will Morse is experienced in areas such as high value executive compromise agreements and termination settlements, complex discrimination cases, large scale redundancies and sensitive, high level employment negotiations. He is a skilled tactician who is known for getting results.*



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### Holidays at short notice

*A recent ruling may affect the way requests for holiday are treated by employers, reports **Trula Brunson**.*

Under the Working Time Regulations, statutory holiday must be taken in the holiday year it is due. Contracts often require staff to give reasonable notice before taking holiday. Even if their contracts say nothing, statute allows employers to insist on advance notice that is twice the length of the requested holiday.

In the case, Mr Lyons was a security guard for Mitie Security Ltd, working at various sites. Approaching the end of his holiday year on 31 March, he had nine days' holiday in hand. His contract stated that it had to be taken during the holiday year and could not be carried over or be paid in lieu. Employees were required to submit holiday requests at least four weeks in advance wherever possible but the contract said requests at shorter notice would be considered on their merits and subject to staffing levels.

As Mr Lyons had no work scheduled for the rest of the month, he contacted Mitie on 6 March, asking them to treat nine days during March as holiday. When he later found he had not been paid for this leave, he raised a grievance and subsequently resigned.

He argued that his entitlement to statutory holiday was absolute and nothing could take away his right to it. Mitie argued that employers

must be allowed to require employees to follow a procedure when requesting holiday, including advance notice, otherwise how could they monitor staffing levels and ensure they were not undermanned.

The EAT agreed with Mitie. They said there can be situations where leave will be lost provided that the procedure operates during the whole leave year and an employer does not act "unreasonably, arbitrarily or capriciously" when operating notice provisions.

If leave is requested at short notice and it is not possible to accommodate it, the employer does not have to agree to the request. Care must be taken to avoid unfairly exercising discretion over such requests. That could lead to a successful claim, not only for the lost holiday pay but also on the grounds that the employee's contract had been breached and that he has been constructively unfairly dismissed. As always in employment law, a careful path has to be trodden through the eggshells!

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### 'Fit' for work?

**William Morse** has been following the progress of the imminent new 'fit notes' scheme. Significantly, the main priority appears to be the interests of employees who are off sick. Scant account seems to have been taken of the difficulties of running small businesses in the face of frequent absenteeism and the ever-present spectre of claims under the Disability Discrimination Act.

The Social Security (Medical Evidence) and the Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2010 are still on target to come into force on 6 April 2010 despite concerns that there is not sufficient time for affected parties to familiarise themselves with the new notes.

The new 'fit note' will list common changes which could be made to an employee's work role or environment to enable them to return to work. The doctor can make additional comments if he considers another option to be more appropriate.

The old 'fit for work' option becomes 'you may be fit for work taking account of the following advice'. This is intended to reflect the fact that it is often not the doctor but the employer, in consultation with the employee, who is best placed to decide whether it is possible to make changes to assist a return to work. The maximum duration of a medical statement reduces from six months to three months during the first six months of a health condition.

If the employer is unable to accommodate a suggested change or adjustment, there is no requirement for a revised statement: the existing one will serve as evidence that the employee's health condition prevents him from carrying out his job.

The government has promised that adequate advice and guidance for individuals, employers and health care professionals will be available shortly and there are plans for a campaign to raise awareness of the changes.

We foresee that the scheme could simply add another layer of difficulty for employers when considering issues arising from absent staff and potential claims of 'disability'.

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## Property

### Beware of bargains

*Property being sold on behalf of insolvent owners can be a good buy for cash-rich investors and developers but you need to do your homework says*  
**Susie Wynne.**

Insolvency practitioners (IPs) will not usually give warranties or replies to pre-contract enquiries on the property so you will have to rely on your own investigations and enquiries to local authorities, utilities etc. There will be no come back against the IP if you discover something disastrous after completion and any warranties and statements made by the insolvent seller will be worthless. Any potential liability must therefore be reflected in the purchase price. If necessary, you can negotiate a reduction or retain part of the purchase price until any particular issue has been resolved.

If the property is an unfinished development site, there will be questions to ask. If planning issues have not been dealt with at the correct time or conditions have been breached you might have to obtain retrospective planning consent to rectify any problems. There may be difficulties in dealing with contractors and sub-contractors if the building work is unfinished. Neither the insolvent seller nor the IP will give a covenant to complete the work, nor to enforce compliance by the contractor or the professional team. If money is owed to the contractors, it will have to be paid before they will agree to any assignment or novation of the building contract.

You also need to consider whether the seller's insolvent status has any impact on contracts

affecting the property, such as leases or agreements for lease. These could be a problem on investment properties if the tenant has the right to terminate in the event of the landlord becoming insolvent.

Outstanding liabilities (such as planning obligation payments or unexpired rent-free periods) need to be taken into account in the price being paid. If an administrator is selling an empty property, he has statutory exemption from business rates but that does not stop time running on any rate-free period for vacant property. You may end up having to pay rates from the day of completion if the rate-free period has already expired. It is also important to check that it is the IP, not the insolvent owner, who is selling the property so as to be sure that the transaction cannot later be set aside.

The IP will be keen to sell the property as quickly as possible at the best achievable price. Smaller properties are often auctioned, giving no opportunity to negotiate contract terms or control anything but the price you are prepared to pay. In any event, there will be pressure on a buyer to make decisions fast.

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## Closing the stable door

*Selling to a developer can be a good way of getting money from land that is not required by its owner. But both parties should know exactly what they are signing up to and how it will affect both the development land and that retained by the owner.*

*Often, developers enter into option agreements with land owners: the developer agrees to apply for planning consent and the owner agrees to enter into any necessary planning agreements (commonly known as 'S106 agreements') with the local authority.*

In one recent case (*Nirah Holdings Ltd v British Agricultural Services Ltd and Hanson Building Products Ltd*) there was a dispute over whether the land owner was entitled to refuse to enter into the S106 agreement required by the local authority. Planners had agreed to grant outline permission for a fresh water visitor attraction and science park, subject to a S106 agreement. A shuttle bus service route had to be agreed with them before the development could be opened to visitors.

Unfortunately, Hanson, the land owner, refused to approve the S106 agreement. Hanson claimed that the developer had not given them enough details about the route of the proposed bus service. They could not, therefore, assess whether the route would be detrimental to the future use of the land they were retaining. The decision went against the land owner. The court held that Hanson had been given sufficient information and it was unreasonable to withhold approval. The developer was awarded an order for specific performance that required Hanson to enter into the S106 agreement.

This case shows some of the difficulties that can arise. The option agreement had been negotiated carefully to strike a balance between both parties' aims. It contained several important safeguards designed to protect the interests of both the owner and his retained land. But when the court interpreted the agreement, the owner found he had less control than he had wanted.

Owners should consider issues that are particularly important, such as future plans for the land they are retaining and exactly how much control can they have during the planning application process (too much and the developer may end up with an unworkable development: too little and the owner may get a development that has some adverse effect on his retained land). What rights and benefits need to be given to the development land and also reserved for the benefit of the retained land? The potential impact of these needs to be carefully assessed before the option agreement is entered into.

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## Downturn creativity for landlords

*In the present economic climate, its no surprise that more tenants are defaulting or using break rights to terminate their leases. Firms in difficulty will try to restructure in order to salvage the remains of a good business rather than sink without trace. To avoid being left with expensive, empty properties, landlords may need to adopt a more creative approach. **Susie Wynne** offers commercial landlords ideas to consider.*

With pre-pack administrations now in common use, be prepared to negotiate with administrators and new companies. Also assess whether a tenant's situation is temporary or terminal and the cost implications to you of having an empty property if the lease is forfeited.

When an insolvent tenant could no longer pay the rent, traditionally the landlord would forfeit the lease. But when new tenants are scarce, you could be left paying insurance and business rates on an empty building—plus potentially the cost of any vandalism, squatters or security. By keeping the lease in place and negotiating a reduced rent or rent-free period, the tenant will be obliged to pay for all other outgoings relating to the property and to keep it secure and in a good state of repair.

Any revised rent payment terms should be for a definite period of time and should be agreed in writing. It should be made clear that you are not waiving your right to forfeit the lease in general, and also that you have full rights to forfeit if the tenant breaches the revised agreement.

If you or your managing agents discover that the tenant has breached the lease, do not send any rent demands or accept any payment of rent (even if they relate to a period before the breach occurred) until the new revised agreement is put in place.

It is important that you don't inadvertently lose your rights and remedies under the lease (including forfeiture) as these may give you a stronger negotiating position, either with the tenant or any insolvency practitioner who subsequently becomes involved.

Instead of offering a rent reduction or rent-free period, particularly to tenants in the retail sector, you might vary the rent arrangements in the lease by linking the payment of rent to the turnover of the business. The rent will automatically reduce when business is slow, but rise when turnover goes up: thereby benefiting both parties. There are various ways of calculating a turnover rent, and we are happy to advise on these.

Plainly, it is vital that landlords manage their properties proactively and keep in touch with their tenants. At the first sign of trouble, the landlord is then in a position to act swiftly to reach a mutually beneficial agreement without compromising his own ability to take back the property if necessary.



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## Buying bust businesses

*Based on previous post-recession trends, business failures are likely to go on rising for some time to come with an increasing number of insolvent businesses up for sale at knock-down prices. If you have the funds to buy and the business fits with what you want, you can make a good deal. **Rob Ridd** looks at some of the practical and legal issues.*

After initial contact with the insolvency practitioner (IP) of a distressed company, the first step is usually some form of confidentiality agreement. Its terms will probably be quite stringent, for example including comprehensive non-solicitation provisions in relation to staff and customers.

Often, the due diligence material provided by the IP will be very thin, due to lack of time or knowledge. Buyers will probably get much less assurance by way of information than they would expect in a non-distressed sale. It is generally accepted that the longer a business is run by an IP, the more its value deteriorates. The IP will, therefore, be keen to complete the sale as fast as possible so as to maximise value for the company's creditors. There is a potential advantage here for the prospective buyer who can move quickly and is willing to accept a lower level of due diligence.

On the other hand, for a number of reasons, buyers still need enough time and information to conduct a proper evaluation of the relevant assets before completing. For instance, there will probably be a much lower level of warranty cover than in a non-distressed transaction—representations and warranties are almost never provided in such sale agreements.

Beyond merely avoiding liability, IPs often add what have now become standard extensive exclusion clauses covering such issues as the

condition of the transferred assets and an exclusion of the IP's personal liability. Buyers may also be asked to provide wide indemnities where there is any chance of the seller suffering post-completion loss (eg where there is some risk of a time lag in the assignment of a contract and the seller retains any liability).

The IP may go even further and insist that the buyer provides a guarantor to cover the risk of substantial post-completion exposure. A great deal of the risk that a seller would normally be expected to take is, in this way, often offloaded onto the buyer.

In short, in the right circumstances, there can be worthwhile commercial returns in buying a bust business but it is also much more risky than a normal acquisition.

*Rob Ridd trained with top international law firm Reed Smith. He joined us last year from a Nottingham firm where he handled a wide range of commercial work, including mergers and acquisitions.*



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## Small print

Sections of the Companies Act 2006 relating to a company's constitution came into force on 1 October 2009. Companies incorporated before that date are not obliged to change their articles but there are potentially some advantages to be gained by doing so. Useful simplifications introduced by the Act, allow a company to:

- dispose of its objects clause, allowing greater flexibility in how it operates
- dispose of its maximum authorised share capital, allowing for greater flexibility in attracting investment
- dispose of the requirement to have a company secretary, which can be a somewhat redundant role in smaller organisations

In addition, amending the articles to use the new 'model articles' as a base rather than the old 'Table A' under the Companies Act 1985, ensures that the company is fully in line with current company law.

## VAT changes hit charities

Recent changes to the VAT regime could have a big impact on charities wishing to acquire or construct buildings. **Rob Ridd** summarises some of the changes.

If a charity acquires or constructs a new building to be used solely for 'charitable uses', it will be zero rated for VAT purposes. The same principle applies to the renting of property for such uses. Currently, HMRC interpret 'solely' as a minimum of 90 per cent of the building being used for charitable purposes but from July, this will rise to 95 per cent.

Charities could suffer significant loss if they cannot prove that their non-qualifying business use of the building will be at 5 per cent or less. Some will struggle to comply with this low level which may make some charity building projects or current leases unviable.

There is also a requirement to monitor the use of the building for a period of at least 10 years. If a charity originally acquired or constructed a building free of VAT they have to repay it if the 5 per cent threshold is breached.

Charities planning to acquire, construct or lease buildings should take great care and seek professional advice.

*For more information, visit the 'Charities' sector service on our website.*

### Think dispute, think ADR

ADR is alternative dispute resolution - a range of options for resolving disputes without going to court. ADR includes mediation, adjudication, arbitration, conciliation and ombudsman schemes.

In recent years, there has been a growing trend towards resolving disputes by methods other than via the courts. Even so, disputing parties often fail to consider ADR—or consider it far too late, by which time costs have spiralled, leaving no realistic chance of out-of-court resolution.

The courts are keen to encourage the use of ADR and any business already involved in a dispute or likely to be, needs to be aware of the consequences of ignoring this. There are many different directions and protocols governing pre-action conduct, the most recent of which came into force last April. These make it clear that the parties must consider ADR and failure to do so may result in an adverse costs order.

Parties are reminded that they need to consider the possibility of reaching a settlement 'at all times', both after proceedings have commenced and up to any trial or final hearing. Following the case of *Birchall v Bullard*, courts can penalise a party who ignores an offer to mediate at the pre-action stage.

The preamble to allocation questionnaire forms (normally provided to parties after statements of case have been filed and served) states that: "the parties should make every effort to settle their case before the hearing. This could be by discussion or negotiation (such as a round the table meeting or settlement conference) or by a more formal process such as mediation. The court will want to know what steps have been taken. Settling the case early can save costs, including court hearing fees."

That said, there are some circumstances in which it is reasonable to refuse to mediate or refuse a certain type of ADR. For example, there may be no real prospect of success; your opponent may have seriously misjudged the facts; or may be behaving extremely irrationally; or the costs of pursuing mediation would be disproportionate. Something else to be aware of is that a disputing party can discharge his obligations under the rules provided he considers at least some form of ADR. For example, if he refuses one particular type of mediation and the court believes a different option would be a viable way of resolving matters, he should not be penalised in refusing to mediate.

The shift towards the increasing use of mediation and ADR generally is likely to continue. In his final report on civil litigation costs, Lord Justice Jackson has called for a serious campaign to raise awareness of the benefits of ADR.

### A matter of jurisdiction

Litigating in a foreign jurisdiction can be inconvenient, uncertain and generally unattractive. **Paul Gordon** gives a run down on the regulations, known as Rome I and Rome II, recently introduced with the aim of harmonising the rules that determine what law is applied to disputes.

#### Contractual obligations

Rome I sets out the rules for determining which country's law should be applied when resolving contractual disputes. The provisions apply to all contracts concluded on or after 17 December 2009. It closely follows previous law, namely that in the absence of party choice, the applicable law is the law of the country where the party performing the service categorised in the contract has his habitual residence. While it is not a revolutionary change, it clarifies the rule and continues to respect the parties' freedom of choice.

#### Non-contractual (tortious) obligations

Rome II sets out the rules for determining disputes arising in 'civil and commercial matters'. It is the general rule that the applicable law is the law of the country in which the damage occurs (or is likely to occur). This will be the country where the harmful physical impact occurs, irrespective of where the event giving rise to it occurs or where the indirect consequences of it are felt.

Until now, under English law, non-contractual obligations were generally determined under the law of the country in which the wrongdoing itself occurred. Now the emphasis has shifted

from the place of the event to the place where the damage occurs.

One of the key changes brought about by Rome II is that the parties can now agree contractually on which law will govern their non-contractual obligations. Previously, it was not clear to what extent English courts would take into account a pre-agreed choice of law by the parties. Rome II therefore brings some clarity. Allowing the parties to choose a governing law for their non-contractual obligations provides them with much greater certainty as to the precise nature and scope of their legal relationships, which can be hugely valuable.

Businesses will want to ensure that their terms and conditions are in keeping with these changes. Any jurisdiction clause needs to ensure as far as possible that any disputes will be determined applying the law and in the jurisdiction that are most convenient.

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### Software development – avoiding the bugs

*As well as being expensive in terms of time and money, developing customised software can be a legal minefield, particularly in relation to copyright and ownership. How can you make sure you establish the legal right to what you have paid for?*

As far as ownership is concerned, the general rule under the Copyright Designs and Patents Act is that the author of the work is the first owner of any copyright in it, subject to various provisions in the Act.

One important exception to this rule is the provision relating to employers. Essentially, this provides that, when an employee develops software in the course of his job, his employer will own the copyright in that software (unless otherwise agreed).

It follows therefore that such employees must have appropriately drafted employment contracts. This will ensure that their employee status is made clear, along with the nature of their duties in relation to the work, and will help to avoid disputes about ownership later on.

The legal position regarding contractors is different. If you instruct a contractor to develop software then he will be the author of the work and will own the copyright (subject to any agreement to the contrary). A proper contract must therefore be in place before work starts.

Ownership of the intellectual property rights, including the copyright, must be clearly set out. It is surprising how many businesses commission the development of software without covering ownership issues in a contract. Now and again the courts have ruled that ownership of software lies with the party who commissioned it, but generally they are loath to take that view.

The case of *Griggs Group Limited v Evans* is a good example of how things can go wrong. Griggs, the owners of the famous 'Doc Martens' footwear mark, commissioned a design company to redesign their logo, which in turn employed a freelance designer Ross Evans to do the work.

Neither Griggs nor the design company ever mentioned the word copyright. The result was that Griggs found their company logo was vested in Ross Evans who proceeded to make the Doc Martens logo available to Griggs' main competitor in Australia.

Questions of confidentiality and competition also need to be considered. Regardless of whether the developer is an employee or a contractor, he will have access to confidential information about your business and the performance of the software, both of which may be as valuable to a potential competitor as they are to you.

The courts have set out tests for confidentiality. Any contract should work around these principles to ensure that the information obtained during the development process is confidential and that those doing the work are aware of their obligations.

It also makes sense to anticipate what might happen if key people in the development team leave in the future. To avoid competitors benefiting from their knowledge of the software, it may be advisable to impose restrictive covenants within the relevant employment or development contracts, and these need to be drafted with great care if they are to be enforceable.

Before deciding to develop your own software, it may be worth investigating other options such as off-the-shelf products or licensing options to use existing software. Certainly, if you decide to develop your own, then it is wise to get legal advice first to ensure that ownership and rights in that software are clear and that steps have been taken to prevent your competitors from benefiting from your original work.

*Litigation partner Paul Gordon regularly advises on high-value disputes involving commercial contracts, copyright and intellectual property. He is accustomed to dealing with complex High Court litigation as well as lower-value matters.*



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## Contact

For advice on any of the issues covered in *Law News* or any other area of law, these are the people to contact in the first instance.

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## Dispute resolution

### Change may be ahead for the enforcement of charging orders

At present, an application for an order for sale to enforce a charging order against a debtor carries no minimum threshold. However, the government is currently consulting with the Ministry of Justice with a view to imposing one. The proposed changes seem only to relate to debts incurred under the Consumer Credit Act 1974.

The move appears to have been prompted by growing concern that more and more people are at risk of losing their homes for relatively low levels of debt. The MoJ is seeking views as to whether a minimum value should be imposed.

If you are likely to want a charging order in relation to a consumer debt, you should keep an eye on the consultation process, which is due to run to the end of April. Obviously, any changes could have an impact on your ability to enforce your charge. Lenders should also be aware that the government

is looking to tighten legislation in a way that will oblige them to provide better warnings and explanations in unsecured credit agreements about the risks of borrowers losing their homes.

*Charlotte Mitchell is a former barrister who went on to qualify as a solicitor. She specialises in dispute resolution, handling a broad range of contract, commercial and property disputes and general advocacy work. She also prosecutes for the RSPCA in animal cruelty cases.*



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## Client news

We are currently acting for **Brooks Inspection Solutions Ltd**, a subsidiary of the US-based R Brooks Associates Inc. The company, a market leader in remote robotic visual inspection technologies, serves major power and utility companies. Simon Brazier is advising on a range of commercial contracts and agreements.

Jonathan Mills has completed the lease on another shop for **Weird Fish**, this one in Weymouth. The fast-growing company now has eight dedicated shops in Cornish seaside towns as well as outlets in Bath, Ilkley and Trentham Retail Village in Staffordshire.

Acting for **Spirax-Sarco**, Susie Wynne has completed the sub-lease of a building in Rutherford Way. By coincidence, the premises were formerly used as the HQ for **Freedom Sailboards Ltd**, trading as **Weird Fish**, for whom we recently acquired larger premises.

In March, Jonathan Mills completed the purchase of the former **Dowty Sports & Social Club** in Hatherley Lane on behalf of our client, **Christian City Church – Cheltenham**. The organisation is part of a worldwide movement of churches, under the banner of Christian City Church International (C3i).

We are pleased to be providing a range of advice to **1st, The Exchange**, leading providers of technology solutions to the financial services market, who are part of the financial services division of **Vertex**.