

# directors' responsibilities – a good time for some new year's resolutions?

Towards the end of last year the final parts of the new law in this area came into force. At the start of this New Year, we would recommend that all companies take a look at how they can benefit from their directors complying with the new law more effectively.

One of the many changes in company law under the Companies Act 2006 is to provide a statutory statement of directors' duties. The new provisions came into force in two main stages, the last being on 1 October last year.

The Government's aim was to make the law on directors' duties more easily understood by codifying the existing common law in this area.

There are now seven statutory duties of directors: **to act in accordance with their powers;** **to promote the success of the company for the benefit of members having regard to various factors;**

**to exercise independent judgement;** **to exercise reasonable care, skill and diligence;** **not to have outside interests which could reasonably be regarded as likely to give rise to a conflict of interest;** **not to accept benefits from third parties; and to declare interests in proposed transactions with the company.**

There is no maximum amount for awards of damages for breach of these statutory duties. Directors and companies can face other consequences for breach (in addition to monetary damages) for example injunctions.

## What about conflicts of interest?

There are many situations which could put the interests of a director in conflict with the duties they owe to a company.

Often these arise where a director is a shareholder of a company or a director of another company which is a supplier or competitor of the company. The new law puts the onus on directors to actually avoid these conflict situations rather than simply adopting procedures to manage conflicts.

The new legislation allows boards of directors in certain circumstances to authorise conflicts of interest, but only if the articles of association of the company allow for this.

## What should companies be doing now?

Companies should be looking carefully at practical steps to ensure compliance with directors' duties and to minimise the risk of directors incurring liability

These should include ensuring board members are fully briefed on their new legal duties; reviewing indemnity provisions in the company's articles of association; reviewing board procedures and documentation relating to board decisions and D&O insurance policies. In addition, directors should consider making changes to their articles of association in order to allow the board to authorise conflicts.

**Angela Boland is a senior lawyer in the Commercial Unit. Contact Angela on 01423 543127 or AngelaBoland@berwin.co.uk**



# COMMERCIAL newsbrief

no ordinary lawyers

issue 1 2009

## welcome

The current economic situation – which will be different whenever you read this from how it is as I write this – provides us with some extraordinary and unprecedented challenges. How are we going to address these challenges?

We all have to be extraordinary, and what was good enough before – in management, service, product, marketing, training, technology – may no longer be good enough. When Berwins set itself an aspirational goal to be "No Ordinary Lawyers", we could hardly have expected how "No Ordinary" we would all have to be. We have been working hard, though, to be extraordinary, and to deliver ever-better service to our clients.

Do we succeed? We'll never be satisfied, but we hope you'll be thrilled; we want to work with you in your success in business



Paul Berwin

## upcoming events at Berwins legal know-how and networking for your Business

Following on from our successful programme of Autumn Seminars we are pleased to invite our readers to the following Breakfast Seminars. This is a great opportunity to brush up on your legal knowledge to support you in your business, connect with other business owners and advisers and talk to our lawyers in an informal environment.

### Technology Businesses

– Berwins' Masterclass on IT Issues  
Friday 20 February 2009  
Innovation Centre,  
York Science Park, Heslington, York YO10 5DG

### Making it Stick

Breach of Contract and your Options when it all goes wrong  
Monday 23 February 2009  
The Yorkshire Hotel,  
Prospect Place, Harrogate, HG1 1LA

### Survival of the Fittest: Business Progression from Credit Crunch to Recession.... And back to Normality!

(With Armitage Corporate Solutions)  
Tuesday 24 February 2009  
The Yorkshire Hotel,  
Prospect Place, Harrogate, HG1 1LA

### Technology Businesses

– Berwins' Masterclass on IT Issues  
Tuesday 3 March 2009  
The Round Foundry Media Centre,  
Foundry Street, Leeds LS11 5DG

These seminars will have a start time of 8.00 am for coffee, pastries and networking and an approximate seminar running time of 8.30 - 9.30 am.

**We are expecting a high demand for places at all these seminars so contact Sarah Beales on 01423 542779 or email SarahBeales@berwin.co.uk without delay to reserve your place.**

## commercial agreements - don't neglect the basics

first place, than have to rescue you after you've got it wrong. Business is hard enough without self-inflicted neglect.

One such area is in rights in software and website developments – a particular speciality at Berwins, and one for which we are Legal 500 recommended. Even some of the bigger software companies whose contracts we have reviewed have had inadequate protection for their intellectual property rights, and without an appropriate licensing model they are at risk of losing ownership and control of their key properties. When you put so much into your products, your people and your marketing – don't throw it away by skimming on the essential underlying documentation. Let's work together to protect your success.

**Paul Berwin is Berwins' managing partner and head of Commercial. He has been recommended in the prestigious Chambers and Partners for intellectual property and IT work, with a commendation for 'his expertise with superb customer service'. His entry goes on to read, "Paul Berwin has an impressive understanding of IT" and is "very pragmatic in his take on things."**

**Contact Paul on 01423 543101 or PaulBerwin@berwin.co.uk**

Many businesses don't regard as important one of the key building blocks of any enterprise – minimising vulnerability to not being paid, to being sued, to losing control of key elements of their business. Why's that? Because they don't look at what commercial agreements they need to underlie the business – their terms and conditions. Often these are copied from another business –

and often they don't fit. As a result, there might (for instance) be inadequate cover for payment terms; retention of title if the customer gets into difficulties; ownership of intellectual property rights, proper termination rights. We have seen numerous cases where clients simply can't enforce a contract, and this can be catastrophic for a business. We'd rather help you get it right in the

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**We can provide this Newsbrief free of charge in a different format for people who are visually impaired. To get a copy call 01423 542779 or e-mail SarahBeales@berwin.co.uk**

## new faces at Berwins

Berwins have recently appointed two new lawyers, David Hall and Natalie Saunders. David hails from the Midlands originally but joins Berwins' four-strong Dispute Resolution Team from Zermansky and Partners in Leeds.

Natalie studied law at Magdalen College, Oxford and qualified at Freshfields Bruckhaus Deringer in September 2000.

She is an experienced lawyer who established a Legal 500-recommended employment department of a mid-tier firm in Leeds. She can advise not only on the full spectrum of UK employment law issues but also helps her clients put their practical obligations into a strategic context by looking at the ways in which their business strategy drives their HR and reward issues.

Natalie is heading the Employment Unit at Berwins.



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**and Natalie on 01423 722568 or NatalieSaunders@berwin.co.uk**

Chris Newton and David Hall

## making the Break – bringing business leases to an end

In current economic difficulties, both landlords and tenants more than ever need to know the circumstances in which a tenant can walk away from their leasehold responsibilities.

The first step is checking out the lease for break clauses.

Some leases contain a tenant's break option. This can often only be exercised on a fixed date and subject to giving a certain amount of notice. If a tenant fails to exercise the break within this notice period then they lose this right. The right may come with other conditions attached and landlords can refuse to accept a break notice if a tenant has failed to comply with any of these conditions.

Usually, a tenant can transfer his lease subject to the landlord's consent. The lease will set out the requirements for any transfer. This will involve satisfactory references being provided for the incoming tenant and it can require that the tenant guarantees that the incoming tenant will pay the rent and otherwise comply with the lease. This guarantee is provided for the remainder of the term of the lease or until the incoming tenant assigns the lease to a third party and gives landlords an welcome layer of protection if the incoming tenant fails to pay the rent.

Initially, where tenants are struggling both parties should turn to the wording of the lease and speak to us.

**Berwins have once again been recommended in the Legal 500 and Chambers and Partners for their Commercial Property expertise. Head of Commercial Property, Rachel Dunlop appears in Chambers and Partners again and "has a keen eye for detail and the ability to prioritise requirements to best serve our needs," according to clients.'**

**Sophie Barton is a senior lawyer in the Commercial Property Unit. Contact Sophie on 01423 543102 or SophieBarton@berwin.co.uk**

## is your business fit to face 2009?

In these times of low confidence in the economy and regular reports of business failure, now is the time to review the credit control and debt collection procedures employed by your business.

Our clients and customers are of course the life blood of our businesses and tact is therefore required so as not to damage future relationships. But we also have to keep in mind that if you are not going to get paid, there is no point chasing the deal, and a customer who doesn't pay is simply not worth having.

Many clients have benefited from 2 or 3 hours spent with us simply reviewing current procedures, discussing shortcomings and how the procedure can be improved. Different ideas and approaches can be discussed including the different methods of collecting aged debts and the effectiveness of insolvency procedures. This review is offered for a fixed fee so there is no need to worry about the clock.

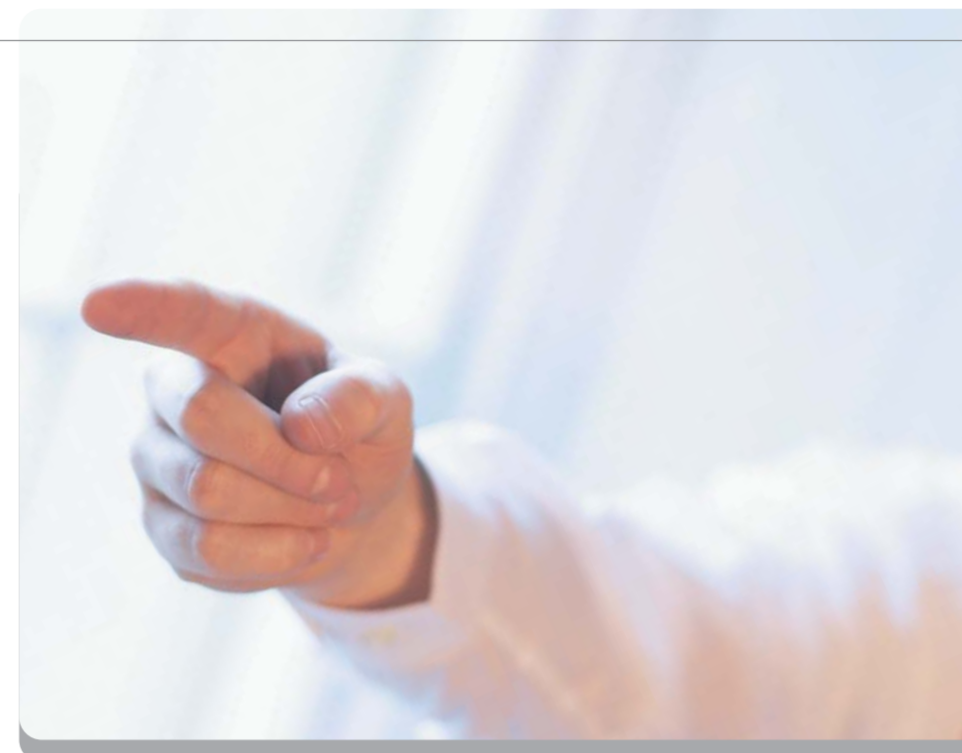
Customers are the lifeblood, but more particularly it is their cash that will keep your business alive. Investing in making your procedures more healthy will certainly help your business survive the current storm that we are in.

**Chris Newton is a partner in Berwins and Head of the Dispute Resolution Unit.**

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## treat them mean, keep them keen?

Some employers may feel this is the way to motivate, especially in the current financial climate, but it is hardly the best tactic to employ to attract, then keep, a good workforce. It is a bit of a cliché to say that any firm or organisation's biggest asset is its employees, but like most clichés, there is more than a grain of truth to be found there. Keeping them keen requires chunks of management time and effort which should never be undervalued. All too often, issues deemed to be "H R" are given a low priority and seen as far less important than issues "at the coal-face".



**The basic rule is very simple – communicate, communicate, communicate!**

Communication should always be a two-way process, encouraging openness and ideas to flow both up and down the organisation. No-one likes to be kept in the dark – employees like to know what changes are coming and will be more efficient and productive if they are not spending time wondering and speculating. Uncertainty is a de-motivator and even bad news is better out in the open. Little things can mean a lot and make a big difference – just remembering to say "thank you", often, is hardly rocket science, but is often undone.

Is there a forum for your employees to feed back ideas to the top? Would they feel comfortable making suggestions for change and would those

ideas be acknowledged and valued and possibly rewarded? Do you communicate your expectations and targets clearly and give an opportunity for feedback and re-direction if necessary?

Maybe it is time to make that New Year's resolution to overhaul your recruitment and staff protocols?

**Berwins has Investors in People accreditation and is proud to be sponsoring Employer of the Year at the Ackrills Business Awards 2009. Berwins' Julie Jewers was short-listed for employee of the year at the 2008 Awards.**

**Sue Blake is Berwins' Staff partner and Head of Residential Property. Contact Sue on 01423 543125 or SueBlake@berwin.co.uk**

## staying out of the tribunal – getting it procedurally right

In the current climate, Performance Management can be essential not only for a business to thrive but maybe even survive. Employers should be keen to manage performance of their employees properly. Best practice for performance management is to have in place a clearly defined and written Performance Management Procedure, usually involving the Employers Disciplinary Procedure.

If an employee's performance results in the Employer contemplating dismissing or taking certain disciplinary action against the employee, the Employer must, at the very least, comply with the "Statutory Minimum Procedure" which involves, broadly, :-

- Step 1 -** the Employer writing to the employee inviting them to a meeting and setting out the reasons why the Employer is contemplating dismissal or disciplinary action;
- Step 2 -** the Employer holds the meeting and discusses the issue with the employee before coming to a decision as to whether to dismiss or take any disciplinary action; and then notifies the employee in writing of the decision and gives the employee the right of appeal; and
- Step 3 -** if appropriate, an appeal meeting and the Employer notifies the employee of the decision.

Claims to the Employment Tribunal are costly, demotivating and potentially embarrassing so let our Employment Unit advise you on "performance management" and preparation of a fair and reasonable Disciplinary Procedure.

Berwins are co-presenting with North Yorkshire CIPD A half day Mock Employment Tribunal Hearing, "Unfair Dismissal - Avoid the Procedural Pitfalls" This will be a mock hearing of a typical performance management dismissal case.

The event is to be held at The White Hart Hotel and Conference Centre, Cold Bath Road, Harrogate, HG2 0NF and registration will be at 12.30 pm for a Buffet Lunch and Informal Networking, followed by a 1 pm start for the mock tribunal and finish for 4.30 pm approximately.

**To make a booking contact: northyorkscipd@hotmail.com**

This is a joint initiative with CIPD and so there is a cost for attendance of £25 CIPD Members and £40 non-CIPD Members. This event is likely to be over-subscribed so please reserve your place quickly.

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