



IP Litigation to become more cost effective...

No matter how large the turnover of a company is, intellectual property is a key asset to any business and one that should not be neglected or overlooked.

With the advent of entrepreneurial initiative and technology growth, companies are becoming increasingly aware of the value of their own intellectual property rights ("IPR"). At a time when competition is at its highest, businesses should protect their brands, ideas and inventions to ensure that they maximise their share of the marketplace. Historically, IP litigation is viewed as being expensive, time consuming and uncertain. Until now, one of the major criticisms of the English judicial system has been that litigation is far too expensive. This is despite the importance of pre action conduct and the growth in mediation and other forms of ADR. As a consequence, small and medium sized enterprises (SMEs) are often not financially strong enough to protect themselves and enforce their IPR. The government has recently unveiled plans to make it easier for SMEs to protect their IPR. It is intended that the process will be streamlined to be more cost effective and accessible.

The Patents County Court will be renamed as the Intellectual Property County Court, because it now deals with more than just patent cases. This will mean that any Intellectual Property claim can be brought in this Court including trademark infringements, passing off actions, copyright and design right infringements. The Court will become more cost effective for lower value and less complex claims and will be a credible alternative to High Court litigation.

The principle changes applicable to all IP disputes include:

Requiring parties to adhere to provisions regarding pre-action conduct;

Early identification of the issues;
Getting the parties to treat their statements of case as significant documents to enable the Court to manage the case effectively;
Extending the timetable for exchanging statements of case;
Active case management by the Judge, including allowing the parties to seek determination of the matter at the case management conference;

A trial of no longer than 2 days, which will significantly reduce the associated costs;
Limits on costs recovery; *and*

A £50,000 cap on costs against the losing party if the proceedings go to trial. If the case is resolved at an early stage, the winning party will only recover the maximum cap up to the point of settlement. There will be capped recoverable costs at each stage in the litigation process.

These changes will have a significant impact on the way that intellectual property disputes are dealt with. Litigation will be easier and more cost effective for both SMEs and larger companies who may have previously been more selective about which claims to bring to Court. In the past, SMEs would have been reluctant to litigate lower value cases because of the time and cost involved. If companies do now elect to bring claims in the Intellectual Property County Court, they can do so, knowing that the worst position will be to only incur their own legal fees and any exposure to adverse costs in the sum of £50,000 for their opponent's costs. This will also make it easier for companies to obtain litigation insurance and the premiums

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will be determined by the prospects of success or defence.

These reforms are a welcome move in the world of IP litigation and companies will now be able to enforce their intellectual property rights effectively and without substantial legal costs. Should you require any further information regarding these impending changes or the extent to which you may need to protect and enforce your intellectual property rights, please contact Diane Pearce.



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Growing your business through franchising

Does your business have what it takes to become a franchise operation



There is no legal definition of franchising but a franchise is a contractual relationship where the franchisor usually:

- allows a franchisee to use its trade name, marks, brands and business 'system';**
- exercises continuing control over a franchisee;**
- is obliged to provide training and assistance to a franchisee; and**
- requires a franchisee to make an initial and continuing payments to the franchisor.**

Fast food chains such as McDonalds, Burger King, KFC and Dominos Pizza are well known examples of franchised businesses. However there are in fact over 1,250 franchise brands, representing 200 business categories within the UK. If you have a successful business that is capable of replication elsewhere, franchising can be a very effective way of growing it. Instead of having to finance additional outlets from your own capital, it entails working together with independent franchisees who pay you for the opportunity and your support.

Franchising, if done properly and ethically, can bring long-term financial reward for all parties.

It is not a quick fix to boost profits, however, nor a rescue strategy for a failing business. The franchising process takes considerable time, effort and money. It is therefore important to determine at the outset whether or not franchising is indeed the right format for your business expansion.

You should bear in mind the following considerations:

Is your existing business successful?

No one will want to buy a franchise from a business that doesn't make any money. The franchised business will need to be profitable enough to generate revenue for both you and for the franchisee. You will need to be able to offer potential franchisees the opportunity to participate in a proven and sound business model and demonstrate to them that there is significant demand for your product or service.

Can your existing business be replicated?

With training and ongoing assistance, your franchisees should be able to operate your business model from different locations. You will need to create an operations manual containing all the practical detail they need to set up and run the franchise. Bear in mind that it may be difficult to franchise a business which involves very complex systems, processes or a high level of skill from individuals. To demonstrate that the business model works, you should ideally run a pilot operation, perhaps with an existing employee acting as your first "franchisee".

What can you offer franchisees?

Franchisees will want a business system that is worth paying for as opposed to simply setting up on their own. They will look to you for a recognised brand name, a tried and tested business model and ongoing training and marketing support. Branding is all-important to franchising, so it is important for you to consider at an early stage protecting your brand - your intellectual property rights in particular. This will almost certainly involve registering your business name as a trade mark.

Do you have the resources that franchising demands?

Do not underestimate the demands that franchising will place on you. If you have limited financial resources, for example, or are already working flat out running your business, you may not be ready or able to pursue the franchising route. Alternatively you could consider licensing someone else to manufacture and sell your product, using an agent to sell your product on your behalf, or selling your product to distributors who then sell it on to their own customers. So what are the advantages and disadvantages to franchising your business?

Financial benefits

The financial benefits can be significant - after all, you expand by utilising the manpower and resources of others, and each franchisee finances the set up of their own business. You then typically receive an upfront, initial fee followed by ongoing royalty fees from the franchisee. Your potential exposure to risk is therefore reduced and you may be able to expand more quickly than might otherwise be the case.

Reduced management time

As the franchisee runs their business themselves (*albeit with your support*), the level of your required management time is lower than with a company-owned outlet. Good franchisees are likely to be more motivated and committed than employees, with a commitment to increasing the turnover of their franchised outlet and so making your life easier.

Collective power

There can be additional benefits as your franchise network grows. Your increased purchasing power for example, may allow you to negotiate substantial discounts from suppliers. Each franchisee may also contribute to a central advertising fund, allowing you to raise awareness of the brand as a whole, to everyone's advantage.

Recession proof?

Franchising is considered to be one industry which actually seems to prosper during a recession. Many prospective franchisees are choosing to get into franchising as they are disillusioned with the lack of secure employment

currently on offer. With thousands of people throughout the UK being made redundant, many of those fortunate enough to receive redundancy payments or have capital available for investment are giving serious consideration to entering self-employment by purchasing a franchise. In addition, the "tried and tested" model of an established and successful franchise is a more appealing lending prospect to banks. Natwest and RBS have this year pledged £100m to the franchise sector with the aim of kick-starting growth and creating jobs.

Potential disadvantages

Recruiting good franchisees and then managing them can be easier said than done. You will need to invest time, money and energy in this vital process, because a poor franchisee has the potential to damage your brand's reputation and therefore your core business. You will need to control your franchisees, which is done through the terms of your franchise agreement - a comprehensive document which needs to cover what happens when things go wrong. With less risk, comes potentially less reward. Company-owned outlets (*even taking overheads into account*) may be more profitable than franchised outlets. You may also feel a loss of ownership as you share your concept and product with your franchisees, who will be business owners in their own right.

Despite such potential drawbacks, franchising continues to be a very popular method of business expansion, especially during tough economic times. It can offer small business owners the opportunity to compete with the big players within their industry on a national, and sometimes even international, level.

Paris Smith LLP can assist franchisors in the following areas:

- Preparing the franchise agreements and supporting documentation such as confidentiality agreements, terms and conditions of business, and software licences
- Brand protection
- Ensuring franchise agreements conform to legislative changes and EU/UK competition law changes
- Franchise re-sales
- Franchise disputes
- Franchise property issues

We also offer a fixed fee franchise agreement review service for prospective franchisees.



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Limitation of Liability

Do your contracts go as far as you think?

Many commercial contracts exclude a party's liability for "indirect or consequential loss". A recent High Court case provides a timely reminder that such exclusion may not provide you with the protection you expected.

In *McCain Foods GB Limited v Eco-Tec (Europe) Limited*, McCain bought a system for removing hydrogen sulphide from their waste water to enable them to use it as fuel. The system turned out to be defective and McCain claimed damages for the following:

- Replacement equipment;
- Purchase of auxiliary equipment and civil works from third party;
- Purchase of auxiliary equipment from Eco-Tec;
- Additional Utility Costs;
- Lost revenue;
- Contractors, site managers and health and safety personnel;
- Employee time;
- Third party experts and laboratory testing; *and*
- Attempted mitigation.

The contract excluded Eco-Tec's liability for "indirect, special, incidental and consequential damages". Eco-Tec accepted that the cost of replacing the system was a direct loss but argued that all other losses were indirect and therefore excluded by the contract. The judge disagreed and held that they were all the type of damages that arise naturally from the breach and therefore were all direct losses. The exclusion clause did not reduce McCain's claim at all.

Contracts often seek to exclude indirect and /or consequential losses. The Court of Appeal has often ruled that these terms mean the same thing. They have defined the difference between direct and indirect loss as follows:

A direct loss is a loss arising naturally in the ordinary course of things. The direct losses must be foreseeable and not too remote.

An indirect loss is a loss likely to arise from a special circumstance of the case. If the parties were aware of the special circumstances when the contract was made, indirect losses are foreseeable and recoverable. If not, they are too remote.

When looking at whether a loss is direct or indirect the courts will look at the facts of the case. What may be an indirect loss in one case could be a direct loss in another. It will all depend upon whether that loss arose naturally from the breach.

...There is no "one size fits all" exclusion clause...

Clauses which exclude or limit liability may be the most important clauses in your contract. As the McCain case highlights, such clauses will often not achieve the desired result, particularly if they are not carefully drafted. There is no "one size fits all" exclusion clause. To achieve the desired result these clauses must be carefully thought through, considering the unique circumstances of the contract. Consider what might go wrong, what losses may ensue and which party should bear each category of loss. Once this has been agreed the clause must be carefully drafted to ensure each exclusion and/or limitation is properly recorded.

Considering a potential breach and what the consequences may be with a new client or customer at the outset may not be the most positive way to build a relationship but, if you want clarity and certainty regarding your potential liability, it is probably the only way.



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Residential planning for elderly care crisis or opportunity?

The UK, as with many other European countries, is an ageing society. In 2009 16% of the population were aged 65 and over. The fastest population increase, however, has been in the number of those aged 85 and over. By 2034 it is forecast that the number of people aged 85 and over will be 2.5 times larger than in 2009, reaching 3.5 million and accounting for 5% of the total population.

Although we are living longer, we are generally leading more healthy and active lifestyles than previous generations, and our society now demands more choice in housing and care options. The number of traditional residential homes/care homes has dwindled in recent years due to rising costs and changing care standards, thus making it more difficult for elderly people to access such facilities.

Against this background, traditional models of elderly care in care homes or sheltered housing has given way to a whole spectrum of different care models involving the provision of essentially purpose - built accommodation in which varying amounts of care and support can be offered and where some services and facilities are shared.

Retirement villages, (also known in the business as *continuing care retirement communities*), are one such example of these new models of elderly housing. Still relatively new to the UK, retirement villages are generally large-scale developments (over 100 units), and characterised by the following features:-

- Self-contained flats or bungalows designed to allow residents to retain independence for as long as possible. Some CCRs also include close/extra care units comprising communal accommodation with a greater level of care and support and separate nursing homes.
- Provision of a care package, tailored to meet the resident's individual needs
- Catering facilities
- 24- hour staff care and support available on site
- comprehensive and extensive range of facilities such as restaurants, lounge, activity room, library, gym, medical room
- wide range of social and leisure activities
- mobility and access assistance

The emphasis is for older people to lead independent and active lives but with a high level of care and social support on-hand (*catering, leisure activities, hairdressers, library, gyms, medical rooms etc*). Planning Authorities are gradually getting to grips with dealing with these developments, however, due to their diverse nature, development proposals tend to be complex requiring a careful and balanced consideration of a wide range of factors.

The main planning considerations include:

- whether the development meets the strategic and/or local elderly housing "needs" of the area;
- whether the development has a sustainable location (*many villages are in semi-rural areas and must demonstrate green credentials to promote non-car forms of transport*);
- what is the landuse classification of the development? ie whether the development falls within a dwelling-house use class (C3) or a residential institution (C2). Certain land use classifications will determine which planning policies apply, and particularly whether or not social /affordable housing is required;
- Whether the development provides a mix of accommodation and tenure (*to ensure a balanced mixed community*);
- the type and level of care; proposals must meet the CSCI standards (*National Minimum Standards for Care Homes for Older People*).
- details of the community facilities and whether or not they are available to the wider community, in order to enable integration with the wider community and prevent the creation of "gated communities";
- External design features such as drop off points in front of main entrances, the availability of accessible parking, level and covered walkways, access to local transport, lighting schemes, security and privacy for residents and amenity space.

There are many benefits of retirement villages for its residents, the local community and the local economy alike in that they provide security and freedom from stresses of family care; help maintain independence and contribute to physical and mental well-being of residents; job creation; reduced demands to local health and social care; and provision of facilities for the use of the wider community; and freeing up general needs housing.

It is likely that retirement villages will be viewed as a growth market and a way of providing flexible care and accommodation for our ever-growing elderly population.

Ruth Harding recently joined Paris Smith's Planning Consultancy with a wealth of planning experience spanning over 20 years in the Public Sector. She has considerable knowledge and experience of health care developments, including new retirement villages, re-development of hospital sites, new private care homes /dementia units (*and extensions to existing establishments*) and is able to provide advice on a broad range of issues within the health care sector.



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Paris Smith's Planning Team encompasses experienced planning consultants and planning lawyers and offers specialist in-house planning and development control advice to a wide range of clients, both private and commercial. The team comprises 2 Chartered Planning Consultants, (*both Members of the Royal Town Planning Institute*) and other team members offering additional support and advice on planning issues, including:-

- How to influence Development Plan Documents within Local Development Frameworks; representation at LDF and Core Strategy Inquiries
- Feasibility studies
- The formulation of development proposals
- Management of schemes through all stages of the planning process, including Environmental Assessment
- Negotiation with Local Authorities
- Preparation of Planning Agreements (*Section 106 Agreements*)
- Representation at Planning Appeals including legal representation and expert planning witnesses.

This article examines the recent removal of the national default retirement age of 65 and the associated Statutory Retirement Procedure. Below, the article explores the current transitional provisions in force and examines the scope for employers to retire employees in the future.

Planning for Retirement **So can we still retire people then?**

The Employment Equality (Age) Regulations 2006 which came into force in 2008, prohibited discrimination on the grounds of age. However, a key derogation to this was the ability to lawfully force employees to retire at the age of 65.

Under these provisions, in order to lawfully retire an employee, the employer had to follow a specified process, the Statutory Retirement Procedure. If followed, it offered the employer an absolute defence to claims for either unfair dismissal and/or age discrimination.

In summary, the procedure which had to be followed was:-

- 1 Between 6 and 12 months before the intended retirement date, the Employer must notify the employee of (a) the date of their intended retirement, and (b) their right to request to continue working.
- 2 A request to continue working must be made by the employee between 3 and 6 months before the intended retirement date.
- 3 The employer must hold a meeting to discuss the request and must inform the employee of the decision as soon as reasonably practicable thereafter.
- 4 The employee will have a right of appeal and if an appeal is made, the employer must hold an appeal meeting and must inform the employee of the decision.
- 5 If the employer grants an extension, the extension could be a maximum of six months after the original intended date of retirement.

Transitional provisions

Under the transitional provisions, no new notices can be issued after 5 April 2011 and therefore, unless a notice has already been issued in accordance with the procedure (as above), employers can no longer rely on the Statutory Retirement Procedure to lawfully retire an employee.

However, on the basis that a notice has been issued, there has been some confusion over the latest date an employer can retire an employee under the transitional provisions. The safest answer would appear to be 3 October 2012.



This date is arrived at as follows:-

If the notice was issued on 5 April 2011, the latest retirement date would be 4 April 2012 (*i.e. 12 months after 5 April 2011*). However, as an employee has the right to request an extension of employment under the procedure, the employer can extend the employee's employment by up to 6 months after the original IDR, that is to say that if the original retirement date stated in the notice was 4 April 2012, the final date of employment could be 3 October 2012.

The timings applied are crucial. The key issue for employers is that the IDR can only be extended by six months, any longer and the employer may not rely on the notice issued. As a result, if an employer wishes to retain an employee who has been issued with a retirement notice, provided a request for an extension has been made in accordance with the statutory procedure, it may extend employment by up to 6 months whilst still lawfully dismissing the employee in accordance with the Regulations..

What happens when the statutory retirement procedures are gone?

If an employer wishes to adopt a blanket retirement age for its employees, it will need to demonstrate that enforced retirement on the grounds of age is a proportionate means of achieving a legitimate aim.

This test has recently been considered in a number of cases. In these cases, employers have used various arguments to justify a company compulsory retirement age including that such an age limit is necessary for workforce planning and that by adopting a company retirement age it encourages younger employees to strive for promotion. However, whilst the case law has been slightly conflicting on the subject, the key message is that a blanket policy will be difficult to defend. Therefore, if an employer wishes to do so, it will need to provide robust evidence to demonstrate that such a policy is justified. As a result, employers will need to reassess their workforce practices, as

'retirement' in the traditional sense could become virtually obsolete.

The most likely impact is that, if performance deteriorates with age, employers will need to address such issues through performance management. As a result, employers should now reconsider their performance management processes and ensure that they are workable and importantly, followed. However, this is likely to cause employers difficulties as, traditionally, many employers have struggled with managing their employees' poor performance. In addition, the sad reality is that employers will no longer be able to dismiss older employees with dignity via the well trodden path of retirement. Instead, those employees who do not opt to leave voluntarily are likely to be taken through performance management which is, both stressful and unpleasant.

In addition, the sad reality is that employers will no longer be able to dismiss older employees with dignity via the well trodden path of retirement.

One additional and important provision in the new regime is a new exemption which allows employers to withdraw certain insured benefits for employees who are 65 and over. This will please many employers, as the cost of these benefits can increase substantially once an employee reaches the age of 65 and as a result, this will hopefully make it slightly easier to continue to employ employees after they reach 65.



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Preparing your company **for sale** legal checklist

As entrepreneurs and owner managers grow their businesses they often fail to take time to look into the long term and prepare and execute an effective exit strategy. Whatever stage of the life cycle your business is at, there are a number of questions you should consider to determine whether any action needs to be taken now to maximise the price you will receive upon an ultimate exit.

In addition to financial and tax planning you should review some important legal considerations.

These include:

What are the exit plans of your Co-Shareholders?

If you have a shareholders' agreement between you and your co-shareholders, you may have already discussed your plans for exit. Shareholders' agreements, together with the company's Articles of Association, can cover a wide range of exit arrangements including:

- entitle majority shareholders to force a minority to sell;
- allow for a partial exit (*such as a share buy back or demerger*);
- give a minority shareholder the right to "tag along" with any sale. This provides that in the event that the majority shareholder(s) sell their shares, the buyer will be required to buy the minority holder's shares on the same terms; and
- require a sale of shares to the remaining shareholders (*or their nominee*) upon the death of a shareholder.

Will you obtain Entrepreneurs Relief?

Entrepreneurs Relief can result in a shareholder paying a capital gains tax charge of 10% (*rather than the usual 28%*) of any sale proceeds. To obtain this relief however, qualifying criteria must be satisfied. It may be too late to satisfy those criteria if their requirements are only considered at the time of sale.

Who owns the Intellectual Property?

If intellectual property is valuable to your business, a buyer will want to ensure that it is owned by the company or properly licensed. The law in this area is not simple and it is not unusual for a company to discover upon a potential sale that valuable IP is owned by a consultant or other third party. By undertaking an IP audit you could ensure that not only is the IP owned by the correct party but that such ownership is clearly documented.

Have you given any Personal Guarantees to Banks/Suppliers?

It is always prudent to have personal guarantees released as soon as possible. If your company's financial position has improved since the guarantees were given, you should apply to the beneficiary of the guarantee for their release. If they are not willing to do this it is sometimes possible to refinance with another supplier who does not require a personal guarantee.

Who should own the Business' Real Estate?

It may be that a potential buyer for the business will not want to purchase any real estate and it may therefore be worth placing any property into a separate company. In addition, some owners place properties into pension schemes or retain them for separate sale. To do so tax efficiently will require some planning.

Would Due Diligence unearth any problem/uncertainties which may deter a buyer or reduce the sale price?

Prior to purchase a buyer will always undertake some sort of financial, legal and commercial due diligence. This often includes a review of:

- all legal contracts,
- ownership of assets,
- employment issues,
- any pension scheme,
- licenses and permits
- litigation or investigations,
- insurance,
- any anti-competitive practices,
- health and safety, and
- bribery and corruption policies.

Paris Smith is able to help you to undertake your own legal due diligence on a regular basis to highlight any areas which need some attention. By undertaking this process at regular intervals you can help ensure that your eventual exit is efficient and successful.



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Owners of nightclub held to owe guests a duty of care for the criminal acts of third parties

The recent case of *Everett v Comojo (UK) Limited* will be of interest to owners and managers of licensed venues such as nightclubs, bars and pubs as well as their insurers.

On 18 January 2011, the Court of Appeal heard the appeals of Mr Everett and Mr Harrison following the dismissal by the County Court of their personal injury claims arising from a knife attack in a nightclub, the Met Bar. The Met Bar was owned and managed by Comojo.

The Met Bar was part of a hotel and only hotel guests, club members and their guests were permitted access. The premises had CCTV cameras and door staff.

On 8 November 2002, Mr Everett and Mr Harrison visited the Met Bar as guests of a member. Whilst they were stood with a group, there was an incident involving a waitress and a member of the group. This was witnessed by another guest who was offended on her behalf. He called his driver, who later arrived at the club. The waitress who had been involved in the earlier incident was concerned that there might be a confrontation between the driver and members of the group. She went to her manager who was in his office next to the bar. As the waitress returned to the bar, she heard a disturbance. The driver was in the process of attacking Mr Everett and Mr Harrison and stabbed them nearly killing them both. The driver was sentenced to life imprisonment for the crime.

Mr Everett and Mr Harrison brought claims for compensation against the driver's employer, the Met Bar's security company and Comojo, but for various reasons only the claim against Comojo ended up in court. To be successful in recovering damages against Comojo, Mr Everett and Mr Harrison had to show (*amongst other things*) that Comojo owed them a duty of care and breached that duty of care. In the County Court, Comojo argued that there should be no duty of care on the manager of a nightclub to protect guests from other violent guests; if there was such a duty, then it should be very restrictive.

The Court of Appeal held that -

1. The management of the Met Bar owed its guests a duty of care for the actions of third parties because -

■ The relationship between the management of a nightclub and its guests was sufficiently close to justify the imposition of a duty of care on the management. The court expanded on this by saying that a close relationship was demonstrated by the fact that the management were in control of the premises, they wanted guests to spend their money in the nightclub (*so there was an economic relationship between the management and guests*) and guests were entitled to expect that they would be safe;

■ The fact that there was some risk that one guest might attack another was foreseeable "to any licensed hotelier". The Met Bar's own risk assessment acknowledged such a risk. The court went on to say that the degree of risk would vary between establishments and would dictate the precautions that would have to be taken;

■ It was fair, just and reasonable to impose a duty of care. The court said that "It would be surprising if management could be liable to a guest who tripped over a worn carpet and yet escape liability of injuries inflicted by a fellow guest who was a foreseeable danger - for example in that he had previously been excluded on account of his violent behaviour and who on this occasion had been allowed in carrying an offensive weapon."

2. The scope of the duty also had to be fair, just and reasonable. There was no justification for restricting the duty by imposing a higher degree of foreseeability than was established under the Occupier's Liability Act 1957.

The court was unable to define precisely when the duty of care would be breached; this would depend on the circumstances of each case.

On the facts of this case, the management was not found to be in breach of its duty of care. The court held that the waitress had acted reasonably in going to speak to her manager; whilst she was concerned about a confrontation, there was no evidence that a confrontation was imminent - indeed the

incident which triggered the attack had happened some time earlier. The assailant was not known to be violent, nor was he known to be carrying a knife.

The implication of this judgment is that owners or managers of licensed leisure venues could now face the possibility of civil claims for compensation from guests injured by third parties who have nothing to do with the venue.

So what should you do if you are an owner or manager?

The good news is that if you already comply with existing health and safety legislation designed to ensure the safety of employees and others likely to be affected by your business (*such as guests*), then you will have a very strong chance of batting off a civil claim.

You should be taking steps such as -

1. Undertaking a suitable and sufficient assessment of the risk of violence;
2. Putting in place suitable security precautions to eliminate the risk of violence or to reduce it to the lowest level possible;
3. Training staff on procedures;
4. Regularly reviewing the risk assessment and security precautions in the light of changing information or incidents.

If you do not have risk assessments or procedures in place, then in the event that someone is injured at your venue you are vulnerable not only to a civil claim, but also a criminal prosecution.

If you need further advice on this subject, or a review of your health and safety policies, then please contact Sarah Wheadon.



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Corporate Manslaughter

A great deal of press coverage has taken place following the conviction of Cotswold Geotechnical Holdings ("Cotswold") for corporate manslaughter in February of this year.

The successful prosecution is the first of a company under the Corporate Manslaughter and Corporate Homicide Act 2007 (*"the New Act"*), and has been trumpeted by the prosecution authorities, as an example of how the New Act works in obtaining a conviction.



However, all is not exactly as it seems.

Cotswold was a small company, and not one of the large multinationals or diverse UK companies that the New Act was specifically designed to prosecute. In fact, the case is little different from that concerning Active Learning and Leisure, following the Lyme Bay canoeing disaster of 1995. In that case following the death of students who were accompanied by inadequately trained staff, and where the Managing Director was very hands on, both the MD and the company were successfully prosecuted under the then existing legislation.

The situation is very similar in Cotswold, in that the Managing Director of the Company, was very hands on and was also responsible for Health & Safety. As a consequence it was easy to identify the failings, and the person who was ultimately responsible. The reason why the MD was not prosecuted individually in this case, was by virtue of his ill health and not to do with any lack of evidence.

In essence, whilst the New Act has had its first success, this is a prosecution that could have easily taken place under the pre-existing legislation, which would have undoubtedly obtained the same result.

Whilst Cotswold had a Health & Safety policy and a risk assessment for the work it was undertaking, the MD had not updated his risk assessments or undertaken a periodic review. Indeed Cotswold was not actually complying with its own risk assessments and practices and procedures in any event, and nor was it encouraging its employees to do so.

...it was easy to identify the failings, and the person who was ultimately responsible...

If Cotswold had taken all the steps that it should have done in terms of policies and risk assessments, reviews and audits, then two things are likely to have resulted; first being that a young person would not have lost his life, and secondly Cotswold would not have become the first prosecution under the New Act.

It may be slightly ghoulish to suggest that a true test for the New Act will come with the next Herald of Free Enterprise or the next Paddington rail crash, but that is really the situation. A true test of the New Act will be where although there is somebody responsible for Health & Safety, they are so far removed from the scene of the incident or the circumstances causing the incident, to be considered too remote under the old legislation, and therefore right for the new Act to come into play.

However the overriding principle from the prosecution, is that provided that amongst other things your risk assessments and policies are up to date, practiced, enforced and reviewed, then the onus on you is no different than it was prior to the inception of the New Act.



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The information in this newsletter is intended to provide guidance only and is not to be relied on as legal advice in specific cases. For further information or advice please contact us.



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