

autumn 2009

newsknight

the newsletter of Knights solicitors llp

Companies Act 2006 - October 2009 enforcement

Now that the Companies Act 2006 is finally fully in force there are some new points that all companies should be aware of.

The most significant changes that came into force on 1st October 2009 are in relation to a company's constitution. The memorandum of association, in particular, has been condensed down to a statement by the founders of the company that they intend to form the company and details of their subscriber shares. The objects clause will no longer be obligatory, but if a company does wish to stipulate what its objects are, it may do so in the articles of association. As a result, the articles of association have become the main constitutional document of the company. Any information which is currently included in the memorandum which should for the purposes of the Act be included in the articles will now be treated as already being incorporated in the articles in order to prevent companies from having to adopt new articles of association.

New model articles are also now available and have replaced the old Table A articles of association as the default articles for companies. These are simpler and sufficient to address the new Companies Act 2006 requirements. However, the default articles applicable to a company will still be the articles that were in force at time of adopting the original articles of association unless otherwise specified. Despite all this, at Knights we would always recommend that a company adopts bespoke articles to address its particular requirements.

A capital idea...

Another provision which has been abolished is the concept of having a limit on the authorised share capital of a company. A company may still restrict its authorised share capital in its articles if it wishes to do so, but, an ordinary resolution

of the members authorising allotment of shares in excess of this maximum will be sufficient to remove the restriction without expressly changing the relevant provision in the articles of association. As a consequence of abolishing the authorised capital companies must now submit a statement of capital which must be filed with Companies House on the incorporation of the company and upon any subsequent change in the issued share capital or in the rights attaching to the shares compromised in the issued share capital. This statement should give details of the rights attaching to each class of shares as well as the total number of shares in issue of each class and their nominal value.

Increased privacy

The other substantial change that came into force on 1st October 2009 will be the fact that directors can now provide a service address to Companies House as well as their residential address. Where a service address has been provided, Companies House will keep the residential addresses on a separate secure register. Many directors will welcome this increased privacy with respect to their residential addresses.

Happy to help!

For a summary of all the significant changes that have come into force as a consequence of the Companies Act 2006 please ask for our "Companies Act 2006: A Guide for Private Companies" or for more specific enquiries speak to a member of the Knights corporate team who would be happy to help.

For further information please contact Adrian Rushton.
Email: adrian.rushton@knightsllp.co.uk

Pre-Nups - is it worth having one?

Pre-Marital and Pre-Registration Agreements ("Pre-Nups" as lawyers call them) are agreements entered into before a marriage or civil partnership which set out how the assets of the parties would be divided following any breakdown of the relationship. Most parties entering into such an agreement do so in the hope that it will provide some certainty in the event of the marriage or civil partnership ending.

Over the last few years more people have been entering into these agreements even though they are not strictly binding under English Law. This is because the Court has to take all the circumstances of a case into account, including pre-marital agreements. However there is more certainty now about the effect of a pre-marital agreement following a recent case in the Court of Appeal.

Heiress

A German heiress Katrin Radmacher, estimated to be worth about £100 million, had separated from her husband Nicolas Granatino, a French national. Prior to their marriage they entered into a pre-marital agreement in Germany in which the husband stated he did not want to make any claim against his wife's fortune if they separated. They subsequently married and had two daughters.

The couple had been living in the UK and their divorce was dealt with in the UK under English law. The Court initially decided that the husband should be entitled to receive £5.85 million to enable him to re-house and to have some money to use for his income.

The wife appealed against this decision arguing that the pre-marital agreement should be followed. The Court of Appeal largely agreed with her. Although they awarded the husband a house to live in, he is only to have the benefit of the house until the youngest child is aged 22 and then the value of this is to revert to the wife. He also received £1 million for his own maintenance.

The Court was very clear that in future a pre-marital agreement should be taken into account unless there were strong reasons why it should be disregarded.

Landmark decision

This landmark decision of the Court of Appeal is an important move forward in recognising that on the whole a couple who wish to organise their own affairs before marriage should not have their arrangements upset by the Courts when they divorce unless there is a very good reason for that. Note, though, that the Court did not leave the husband entirely empty-handed.

People who should particularly consider entering into a pre-marital agreement are:

- Where one party is bringing more wealth to the marriage than the other.
- Where one or both parties have been married before (often bringing assets to the marriage retained from the breakdown of their previous marriage).
- Where one party receives sums from a family trust.

For further information please contact Cath Longshaw.
Email: catherine.longshaw@knightsllp.co.uk



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If you are interested in any of the articles featured in this issue of newsknight please get in touch. We would be pleased to hear from you. If you would prefer to receive your regular copy of newsknight via email, please confirm your email address details to mail@knightsllp.co.uk. If you would prefer not to receive any further copies of our regular free client newsletter, newsknight, please write to Yvonne Allen and let her know. You will then be removed from the distribution list. The articles in newsknight cover legal issues which we believe will be of interest to you. Although believed to be correct as we go to press, they must of necessity be broad in scope and not relevant to every case. For further advice and guidance please contact us and we will be happy to help. For these and other news articles visit our website www.knightsllp.co.uk

Knights solicitors llp
The Brampton
Newcastle-under-Lyme
Staffordshire
ST5 0QW

T 01782 619225
F 01782 620410

Eagle Tower
Montpellier Drive
Cheltenham
GL50 1TA

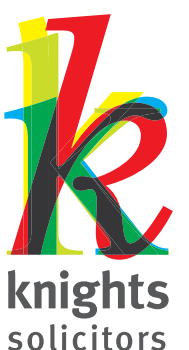
T 01242 524654
F 01242 524590

28A London Road
Alderley Edge
Cheshire
SK9 7DZ

T 01625 586686
F 01782 717821

Editor in Chief:
Chris Bolger

E mail@knightsllp.co.uk
W www.knightsllp.co.uk



How green is your lease?

The chances are at the moment not very.

So what is a “Green Lease”

It is a lease containing provisions requiring or at least encouraging landlords and tenants of a commercial building (including one in the public sector) to reduce the environmental impact of the property let by the lease.

So why is your lease unlikely to be very “green”? This will be because green leases are still very much a new concept in most countries (including the UK). They are not therefore at all widely used and may be avoided more often than not, because of the potential for dispute in negotiations, particularly over the allocation between landlord and tenant of costs involved in implementing improvements to existing buildings. Mandatory, discretionary or just aspirational?

You may not be surprised to learn that there are no hard and fast rules. The degree to which the parties want to commit themselves ranges from mandatory through to merely aspirational, where the objectives can be set out in the lease or in a separate “Memorandum of Understanding”. The property industry refers to leases which contain mandatory provisions as being “dark” green leases whereas those which contain merely aspirational objectives are the “light” green leases. Of course there may be various shades of green in between.

When considering what provisions should be contained in a lease, various factors need to be considered, such as the age of the building, how “green” the building is already, what exactly the aims of the parties are in terms of improving sustainability and how much the parties are prepared or able to throw at the project.

The more usual provisions may deal with:

- Reducing production of waste.
- Improving consumption levels in terms of energy.
- Separate metering.
- Reductions in water usage.
- Recycling.
- Using more sustainable building materials.
- Imposition of conditions on alterations and fit out (to attempt to preserve the building’s green credentials).
- Even the possibility of having tenant and landlord building management committees to discuss (and hopefully agree on) sustainability issues.

What is the “take-up”?

In most jurisdictions, the take-up of green leases in the private sector is still very much the exception rather than the rule. As one might expect currently it is the larger or institutional type of landlord who is more likely to go for this type of lease because they will have adopted environmental and wider sustainability issues as part of their corporate strategy

The main obstacle has been and is still the perceived costs involved with green leases, and undoubtedly the lack of incentive to go for this type of lease is also a problem, given that green leases are not yet the norm in the market. Neither does it help that this type of lease is unfamiliar to most and there is a tendency for most to stick with what they know.

Green Lease Toolkit

In April 2009 the Better Building Partnership (BBP), which is the initiative of the London Climate Change Agency and consists of commercial and public property owners, published its “Green Lease Toolkit: Working Together to Improve Sustainability”.

The Toolkit contains:

- a set of best practice recommendations
- a model form Memorandum of Understanding and
- model form green lease clauses.

Conclusion

The adage that a journey of a thousand miles has to start with a single step very much applies to the take-up of green leases and despite the fact that around the globe this continues to be low, perhaps the fact that there is some take-up already ought to be a reason for optimism. Given the cost implications for landlords and tenants and the current state of the market, it cannot be surprising that the take-up is very low; but then maybe when real green shoots of economic recovery begin to sprout in earnest, a proliferation of green leases will follow.

For further information please contact Melissa Cox.
Email: melissa.cox@knightsllp.co.uk

A Room With a View...

On many occasions we find ourselves having to advise our clients that there is no such thing as a “right to a view”; and in strict terms that continues to be the case.

However the decision of the High Court in **Dennis v Davies** shows that interfering with a view can be regarded legally as an “annoyance”; and if you are protected against your neighbour causing you annoyance then you may be able to save a view from being destroyed.

This particular case concerned a small housing estate next to the river Thames. Planning permission was granted for a three storey side extension to be built on to one of the houses and five of the neighbours objected. Their objection was based on the fact that the construction would partially obscure their view of the river. They argued that to obstruct their view would be in breach of a restrictive covenant affecting the house in question, which was not to cause a “nuisance of annoyance”. The Court decided that although such a situation could not be found to be a legal “nuisance”, it could nevertheless amount to an “annoyance” prohibited by the restrictive covenant.

The test which the Court applied to assess whether or not the restriction of the view amounted to an annoyance was whether: “reasonable people, having regard to the ordinary use of a house for pleasurable enjoyment, would be annoyed or aggrieved”. The test was to be applied using “robust and common sense standards”.

It is fair to say that it will not be in every case that a “view” could be protected by reliance on equivalent wording, as the Court will always look at the particular facts of any given case, but at the same time this decision will be of real concern to many developers because they and their solicitors need to be very alert to this type of restrictive covenant. It will also be a welcome ray of hope to some who do have a view which may be under threat from neighbouring development, provided of course that they have the benefit of an appropriate restriction on the neighbour’s property. The decision obviously also has implications for the drafting of restrictive covenants in the future, where the existence of a view will call for a suitable restriction, in the hope of protecting it.

For further information please contact Zoe Theofilopoulos. Email: zoe.theofilopoulos@knightsllp.co.uk

Off sick? You need a holiday!

The interaction between annual leave and sickness absence has seen a series of important developments recently changing the way in which employers must deal with their employees who are absent through sickness.

Previously it was widely accepted that an employee who is absent through sickness would not accrue annual leave. This appeared consistent with the Working Time Regulations 1998 and the concept of annual leave being a period of rest from work. If an employee was not in work, why would that employee need to take a period of rest and be paid for doing so?

This led many employers to disregard employees who were absent through sickness and had exhausted their entitlement to Statutory Sick Pay. After all once the 28 week entitlement had run out there would be no further cost to an employer. The employee might move on to claim incapacity type benefits and never seek to return to work and the employer might transfer the personnel file into a remote filing cabinet with both parties appearing to treat the employment relationship as no more.

The position has now changed and, in doing so, has created a problem for employers who have employees absent through sickness and also for those who may have a number of “forgotten” employees with the potential now to reappear from the woodwork.

In the recent case of **Stringer**, it was decided that employees who were absent through sickness would still accrue annual leave as if they were in work. As the Working Time Regulations contain a prohibition on carrying annual leave forward to a subsequent holiday year this, on its own, would not cause a huge problem as the maximum liability at any one time would be up to a year’s statutory leave. All the same, the court went one step further and confirmed that an employee prevented by sickness from taking annual leave during a leave year would be entitled to carry over that annual leave to a subsequent year.

This means that employees who have been absent for more than one year could now attempt to claim in the Employment Tribunal that their employer has made a series of unauthorised deductions from pay. For example a savvy employee who has not been to work for 5 years would now be looking at a claim in the region of 5 years’ holiday entitlement, which would equate to around 6 months’ pay.

The position was then further developed in the more recent case of **Pereda**. The court in this case took the principles of **Stringer** one step further by confirming that an employee has the right to choose whether to take annual leave whilst off sick. It is important to note that there is no obligation on an employer actually to allow an employee to take the annual leave until the employee either returns to work or resigns (in which case a payment in lieu would be made), so the choice is only there if permitted by the employer. However if the employer refuses then the accrued leave will simply be ‘banked’ by the employee for a later date, which could be in a subsequent holiday year.

All this does constitute a massive change in the way holidays have been treated until now. A number of grey areas still remain, but there are two certainties. These are that we will see further cases dealing with the issue and that unprepared or ill-advised employers could fall foul of the new law in a huge way.

For further information please contact Gareth Durnall. Email: gareth.durnall@knightsllp.co.uk

New partner

Knights are pleased to announce the appointment of Cath Longshaw as a partner. Cath joined the family unit at Knights in 2001. She is fully experienced in all the issues which arise in family disputes, including divorce, the breakdown of civil partnerships, financial considerations and children matters. She also deals with co-habitation and pre-nuptial agreements.

Cath is a member of Resolution, an organisation of family lawyers who promise to deal with family disputes in a constructive and non-confrontation way. Through that organisation she trained as a collaborative lawyer, becoming one of the founder members of the Staffordshire Collaborative Lawyer group.

Cath currently spends her time between our Newcastle and Alderley Edge offices.



Graduation success

Joy Hancock and Kerry Williamson, who are both members of our real estate department, were admitted to the roll of solicitors on 15 September.

Both joined Knights in 1991 and then, quite coincidentally, began studying for their Legal Executive qualification together in 1996, qualified as Fellows of the Institute of Legal Executives together in 2002 and then, in 2007, started and completed their solicitors conversion qualification at Staffordshire University - involving the Common Professional Examination (graduate diploma in Law), the Legal Practice Course and the Professional Skills Course, and resulting in their qualification this summer.

Managing Partner, Ian White, comments

“Commitment to development of staff has always been at the heart of our firm. That commitment is always two way. We have a remarkable number of staff and partners who have been with the firm for many years. Karen Clulow is one excellent example. We are immensely proud of Joy Hancock and Kerry Williamson who having joined us as graduate secretary and office junior respectively have recently been admitted to the roll of Solicitors. Their efforts which have been fully supported by the firm in a number of ways have been rewarded by their remarkable achievements. I am delighted to welcome Cath Longshaw into partnership. Cath is highly regarded for her matrimonial expertise and for her work in collaborative law in particular. We look forward to continuing to work with these colleagues in the future.”

Celebrating 25 years service

Librarian Karen Clulow recently celebrated 25 years service with the firm.

Karen joined Knights in 1984 as a receptionist/office assistant and then moved into a secretarial role, before returning to our reception. In 2005 Karen became the firm's librarian and now coordinates the daily running of the library, which houses 3,060 publications in various formats.



Balloon travels for 200 miles

Balloons released to celebrate Knights' 250 years in business were found more than 200 miles away.

Stoke City football legend Noel Blake, assisted by members from 15 St Giles & St Georges scout group, released 250 balloons, as the firm's mid-summer garden party celebration drew to a close.

The balloons' progress was plotted on The Sentinel website. "Our balloon race was a huge success," explained Yvonne Allen, Knights' marketing manager "with the winning balloon being found 206 miles away at Emsworth Harbour in Hampshire."

Six balloons had travelled more than 100 miles and two had travelled more than 200 miles.

The sender and the finder of the winning balloon have each received a £25 prize.



ALDERLEY EDGE

We are delighted to announce the opening of a new Knights office at 28A London Road, Alderley Edge, Cheshire, SK9 7DZ.

Our new office is positioned in the centre of what is effectively the high street of Alderley Edge.

The office will be staffed by existing members of our Newcastle team and so, if our new location is more convenient for any of our clients, we will be very happy to see them there.

We believe that our Alderley Edge office is in a region which currently, particularly for private clients, has a significant shortage of really innovative realistically priced legal advice and that our presence will considerably extend the legal choices and quality of service available in the area.

Please call in and see us at Alderley Edge if you would like to take a look!

Christmas drinks

Knights would be delighted to have the opportunity to celebrate Christmas with you at one of its offices:

- **Monday 14 December, 5:00 - 7:00pm**
The Brampton, Newcastle-under-Lyme
- **Monday 21 December, 3:00 - 6:30pm**
28A, London Road, Alderley Edge

Please feel free to join us for a glass of mulled wine and a Christmas buffet. We look forward to your company.

Short cut to victory?

For most people, a claim in the civil courts is best avoided if possible. Uncertainty as to outcome and costs make the prospect of fighting a case to trial unattractive.

Many such disputes are resolved by compromise settlement. This can happen at any time, even after proceedings have started. Knights always make it their business to establish the client's commercial objectives at the outset, and keep these under constant review. Advice on the strengths and weaknesses of the client's position, coupled with an assessment of the likely cost of fighting the case to trial facilitate a considered decision as to whether or not to settle. Ultimately, it is the client's decision, but we will always give practical advice as to which cases are worth fighting and which are not. Not only are we experienced in negotiating direct with the opponent but we also have considerable experience of mediation.

However, sometimes litigation cannot be avoided. If you are a defendant in a claim brought by a determined opponent, who is not interested in settling, what can you do? If you think the claim is strong, the best advice may be to pay up.

A tricky problem...

Sometimes it is the case that someone will persist in bringing against you a claim which you think is weak. You are confident that if you fight the case to trial, you will win. What the claimant is saying is very obviously wrong. You know that trial could be twelve months away; you are going to have to pay your legal fees in the meantime. Although you know that if you succeed at trial, your opponent is likely to be ordered to pay a large contribution towards your fees, you know that this will not be a complete indemnity. You are out of pocket in the meantime and of course, your opponent might not be able to pay your costs - all of which could leave you out of pocket just because somebody chose to bring a hopeless claim against you.

... and maybe how to solve it

For many years, there wasn't much defendants could do in these circumstances except defend the case to trial and take their chances on costs. It has long been the case that the claimant could apply for summary judgment against a defendant who had no real prospect of successfully defending. More recently, this procedure has been extended to a situation where a defendant contends that the claimant has no real prospect of succeeding. If the defendant can convince the court that this is the case, the court can and will strike out the claim. This can take place at a very early stage in the proceedings. It avoids the need for the defendant to fight a hopeless claim against him all the way to trial.

How it works

The burden of proof for the person applying for summary judgment is high. It is not enough for the applicant to show that on the balance of probabilities, they are more likely to win than lose. The applicant has to show that the claim is pretty well hopeless. If the case will stand or fall on the basis of contradictory oral evidence (the claimant saying one thing, the defendant saying another) then unless one side's version of events is manifestly and significantly more credible than the other's, the court is unlikely to award summary judgment. Applications for summary judgment are based on "paper evidence" and where there is a potential conflict of oral testimony, the court will usually take the approach that the case should proceed to trial so that the different witnesses' evidence can be tested by cross examination. Summary Judgment is not lightly granted, therefore, and very careful consideration needs to be given to circumstances where it is appropriate to make such an application - often it is not.

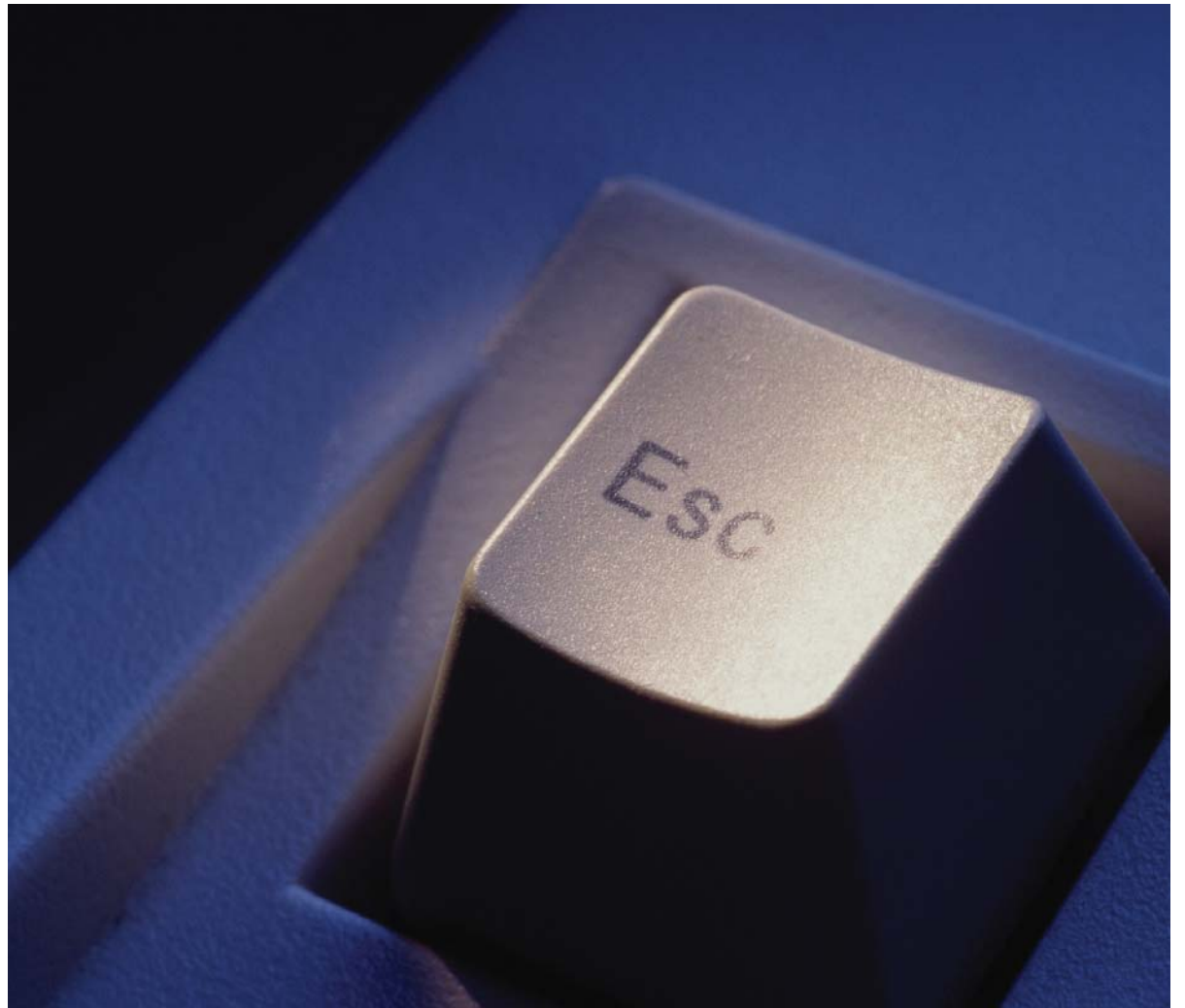
Success!

Nevertheless, a summary judgment application is a useful tool, particularly for a defendant being pursued by a determined claimant with a hopeless claim. Knights have recently acted for a defendant in just such a situation. The claimant was a litigant in person (who was not incurring any legal costs of their own) who was pursuing a bizarre claim against our client. In July 2009, we acted for the client in successfully applying to the court for an order striking out the claim and, having considered the paper witness evidence and having heard the claimant in person, the District Judge granted our client's application and ordered the claimant to pay the costs of that application. By taking this bold step, our client has saved very substantial legal fees and, of course, significant management time.

For further information please contact Richard Jones.
Email: richard.jones@knightsllp.co.uk

Avoiding the pitfalls of social webbing

As social network sites such as Facebook and MySpace increase in popularity, users need to be aware of the law which governs their online actions. Where journalists and writers are accustomed to the legal consequences of publication, the public themselves are now using similar resources with little appreciation of the consequences. However much we like to think that it is, freedom of expression is not an absolute or unfettered right.



As a general rule, what is illegal off the web is illegal on the web. However, global reach is the nature of the web and the ease with which information can be shared means that monitoring misuse can be a challenge. Napster found this challenge too great when it decided to shut down following an order by the US courts obliging it to monitor the use of the site and to crack down on copyright infringement. However, although it is a challenge, it is not impossible!

Anonymity?

Users who think that they have the benefit of anonymity will find that anonymity is now only a thin veil which can be easily removed as courts become more willing to order online social networks to reveal the identity of misusers, with defamation copyright infringement and data breaches being three main areas of concern. Even where a user's identity is revealed without a court order, courts are taking a firm stance against any claims to privacy. In the recent case of **Author of a Blog v Times Newspapers Limited**, the court held that the public nature of blogging meant that bloggers had no expectation of privacy.

Employers and employees

There are further consequences of misuse in the field of employment law. Employers are vicariously liable for their employees' actions if it can reasonably be said that the employees are acting with their employer's authority. Employers are cracking down on misuse by their employees in relation both to what the employee is doing generally on the social network but also to what the employee is doing or saying about the employer. Employers are increasingly reviewing office policies, drafted with only email and website access in mind, so as to make staff aware that they should conduct themselves appropriately and consistently with their contract of employment at all times and not just during office hours or on office equipment.

Misuse - the consequences

The damage of being associated with misuse can be two-fold. There is the potential of a claim by someone who has been subject to a defamatory comment, but there is also the long term impact that misuse can have on a business's brand and reputation. One of the most famous cases of an employer taking action against its employees for misuse is that of Virgin Atlantic dismissing 13 employees last year for gross misconduct after having a discussion on Facebook, which, a Virgin Atlantic spokesperson said, "brought the company into disrepute and insulted some passengers".

Further, employees in certain industries need to be particularly careful about their use of these social networks. For example, journalists should not compromise their integrity and impartiality by stating their political views on Facebook; and professionals, such as lawyers, should not hold themselves out as being more qualified than they really are.

Therefore, whilst, on the face of it, legislation has not changed very much to cover the new issues that come with social network websites, existing law has adapted itself to deal with these problems. Users should be careful not to say or do anything on a social network site that they would not say or do if their identity were known, or in person. Real world consequences are now very much virtual world consequences too.

For further information please contact David Miller. Email: david.miller@knightsllp.co.uk