

# NEWSBRIEF

SPRING 2009

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## New regime has familiar look

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WRIGHT HASSALL  
SOLICITORS



*The White Hassall Regency Run: intrepid athletes and fun runners were not put off by the snowy conditions at last year's event which attracted 2000 competitors.*

## Regency Run aims for record crowd

The Wright Hassall Regency 10km run is back for its fifth year – and organisers are hoping to smash the £100,000 fundraising barrier.

The run through Leamington attracted the maximum of 2,000 entries last year, so a further 200 places will be available.

The extra runners should generate in excess of £25,000 for local charities – meaning that the total amount raised since 2004 will surpass £100,000.

"The event has grown in strength and popularity

every year and it's fantastic that the money generated is set to reach such a high total," said Russell Hall from race organiser Leamington Round Table.

The run takes place on Sunday, April 5. Those wishing to enter can download an entry form at [www.wrighthassall.co.uk](http://www.wrighthassall.co.uk) or [www.regency10k.co.uk](http://www.regency10k.co.uk). Forms for sponsorship are also available on the website. Entry costs £12 for club-affiliated runners or £14 for non-affiliated. All proceeds are donated to local charities.

## Share and share alike

**Businesses frightened of losing staff because they cannot afford to give pay rises or bonuses have been urged to offer share incentives instead.**

Wright Hassall's John Dormer says companies should consider creating share incentive schemes in order to retain their key employees and increase their motivation during the financial crisis.

The Financial Services Authority has said that long-term incentives for staff (as opposed to annual cash bonuses) are more likely to give firms prolonged stability and will help businesses to stay strong during the credit crunch.

"In the current climate where money is tight, it is difficult to keep staff morale high through traditional ways of salary increases and bonuses," he said.

"Share incentives offer companies the opportunity to reward their employees for meeting



*John Dormer*

longer term business goals and also offer them a potential stake in the businesses they work for.

"There are significant tax breaks available for well-designed incentive schemes so there are savings to be made financially, along with the improvement in employer-employee relations."

John, who is an employee incentive specialist, has also warned that doing nothing could put already vulnerable businesses in jeopardy of losing the very people who can help them through these times.

"Most businesses are enduring a period of instability because of the markets, so the last problem they want is key staff leaving.

"It's not just a problem because of the hassle and cost of recruiting, it's the bedding-in period any new starter will need before performing properly.

"That is why an incentive scheme is invaluable at present because it secures and motivates key staff for the long-term and will ultimately help businesses to recover when the financial crisis is over."

For more information about employee incentive schemes, contact John on 01926 884626.

## Experienced duo step up to the helm

Wright Hassall has appointed Nick Abell as senior partner and Richard Lane as managing partner.

The pair – who have more than 45 years experience with the Leamington firm – are succeeding Peter Beddoes, who has led Wright Hassall since 1991.

Nick, who heads the Wright Hassall property department, will have responsibility for external affairs while Richard will oversee the internal management of the firm.

Peter will continue to work for the firm as a partner for three days a week.

He said: "I believe I am stepping down with Wright Hassall in very good shape. These are testing times for all sectors of industry but we have built a strong team across all disciplines.

"I think we are ideally placed for the future and, over the years, I believe we have created one of the strongest firms in the country and certainly one with an outstanding reputation."

Richard was born and raised in Birmingham and trained with William Bache in West Bromwich before joining Wright Hassall in 1990. He was made partner two years later and is a former head of litigation at the firm.

Nick, a former captain of Stratford Cricket Club, was articled at Wright Hassall and spent four years at London law firm Nabarro Nathanson before returning in 1986 to set up the commercial property department.

"Peter is possibly the longest serving managing partner of a major law firm in the region, and the rise of Wright Hassall is a testament to his leadership and his ability as a lawyer," said Nick.

"Richard and I are delighted that he is remaining with the firm and will be there to give any advice and guidance we might need."

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# Crunch time for everyone

Law firms, just like every other business, family and individual, are feeling the impact of the recession. At Wright Hassall we can't claim to have a recipe for surviving the downturn, but we can offer some guidance based on how we are working with clients and internally to deal with the current economic climate.

## Step 1 - Manage cashflow

Banks are no longer going to be so accommodating with requests for increased overdraft or loan facilities and may well look to reduce their exposures, so anything you can do to control your net cash position will be vital.

One client we recently advised saw orders to a big national retailer actually increasing – but then learned that its credit insurer was restricting cover. With the customer pressing for ever bigger deliveries and ever longer settlement periods it took courage to follow our advice to cut back on shipments and demand advance payments – but when the company went into administration the client was better protected than many others.

*“Despite all that’s going on around us, we continue to hear from plenty of entrepreneurial clients that the global financial difficulties have not had a significant effect on their business.”*

## Step 2 – Cut costs

The temptation may be to draw up a cashflow forecast based on soaring sales and increased margins – but in the present climate you may find no-one, least of all your bank, ready to believe such optimism unless it's matched by real attempts to trim unnecessary overheads. We have worked with some clients to negotiate better deals from suppliers while others have explored outsourcing non-core functions.

When we got a call from a client saying that the warehouse where he kept virtually all his stock had gone under – right at the start of the pre-Xmas trading period – our insolvency and commercial teams worked jointly to secure the release of several lorry-loads of inventory within two days. We also negotiated an alternative distribution facility with proper recognition of the property rights in our client's stock

## Step 3 – Maintain marketing

Many successful companies know how to improve their competitive position by controlling costs, improving performance in key areas of their business and enhance their abilities to compete and win. Or in other words – “don't cut back on marketing in a downturn”. From what we are seeing, the trick is to invest your marketing efforts in developing the way you offer your goods or services to better suit the climate customers face right now, thereby not only retaining your market share but more than likely winning business from competitors.

With that in mind, across all the services Wright



**STEVEN JANES doesn't claim to have a magic formula but here he offers practical advice on how to face up to what is expected to be a challenging year.**

Hassall can provide, we are making sure that every job we do is done to a pre-agreed budget. In fact, as often as not, our business clients know we are working to fixed or capped costs.

## Step 4 – Build relationships

It's important that your business doesn't just focus on strengthening the bottom line and completely overlook investment, whether in plant, better technology or improved strategies to secure and expand your customer base. Our view is that now is the time for building customer relationships. While the credit crunch continues the way a business is perceived by its customers can be of huge value. Customers are feeling uneasy and the changes all around can be disconcerting. This makes reinforcing customer relationships more critical than ever.

At Wright Hassall we are making significant new investments in technology, in people, and in achieving energy efficiency in all that we do. For an up-to-the-minute flavour of how we are getting on, why not try out our increasingly dynamic website.

## Step 5 – Seek opportunities

Despite all that's going on around us, we continue to hear from plenty of entrepreneurial clients that the global financial difficulties have not had a significant effect on their business. Many see increased opportunities, with the economic climate creating opportunities to acquire businesses or key assets at lower costs, to broaden their customer bases, and to exploit gaps to enter new markets created by the financial uncertainty.

Wright Hassall's corporate team has more than held its position despite the economic downturn, posting an increase in business, winning new clients and recruiting several significant new lawyers. We are seeing strong growth in work for the financial services sector, in restructuring and asset protection work, and in large-scale outsourcings. Company and business acquisitions have also held up extremely well as buyers snap up businesses at bargain values. We finished 2008 by adding to the team specialists in corporate immigration and in employee incentives/corporate tax.

Of course, we couldn't have done any of this without the most important factor – our clients. All the partners, lawyers and staff right across the firm will be working hard throughout 2009 and beyond to make sure that we pull through challenging times together.

[steven.janes@wrighthassall.co.uk](mailto:steven.janes@wrighthassall.co.uk)

## Free legal health check

Keeping track of your customers and suppliers and protecting, developing and growing your business in an economic downturn is a challenge.

Wright Hassall's commercial team is inviting you to bring your concerns to the table and take our free advice in connection with any commercial / contractual concerns you may have within your business. The free advice will be given at meetings at our offices during the week commencing 27 April.

On hand will be our commercially-minded lawyers who advise daily on writing, interpreting and negotiating business and consumer contracts.

So, if you would like to:

- know if your terms of trading apply to all your sales and purchases;
- tighten up your terms of trading;
- put in writing any 'oral' contracts you currently have;
- find out the merits of claiming under any particular contract; or
- discuss the consequences of cancelling contracts with customers/suppliers

then come and see us for some free practical and legal guidance.

Each free meeting will last up to one hour, or longer at our discretion. Please remember to bring any relevant papers with you. Recent offers such as this were taken up very quickly. Early booking is essential.

Our commercial team advises clients ranging from start-up businesses and sole traders through to PLCs in connection with website compliance, business contracts, intellectual property and regulatory issues (including data protection, financial services, consumer credit). The team delivers commercially-focused advice at fixed rates agreed in advance.

For more information please contact Lucy Caruana on 01926 884696.

## Bad debts helpline

Our insolvency and property litigation teams have set up a dedicated insolvency helpline. The helpline is open for advice to landlords who are faced with rent arrears from tenants and to creditors facing bad debts or whose debtors have entered into administration, liquidation or bankruptcy. The helpline number is 01926 883007. The team can also help commercial tenants looking to reschedule their rent payments.

## A word from our sponsors

Their ads used to encourage us to "say it with flowers", but these days businesses like Interflora often prefer to use the internet to talk to us and like many others, the company now trades online. However, it wasn't a bouquet which Interflora put in the post recently to one of its online rivals, but rather a High Court claim.

The exponential growth in UK businesses' online advertising expenditure over the past few years (which overtook traditional newspaper advertising spend in 2006) has spawned new forms of net-based marketing, such as 'sponsored links'. When a particular 'keyword', is entered into a web search engine, advertisements for businesses which have paid the search engine provider to be associated with that term appear in a separate 'sponsored links' section of the search results page. Operators of search engines, such as Google, allow businesses to buy or 'sponsor' these keywords, to allow them to be used in the links advertising the sponsors' websites and products – even if the keyword in question happens to be a registered trade mark of one of the sponsor's business competitors.

Interflora has registered the word INTERFLORA as a trade mark in the UK. The High Court case arose when Interflora discovered that typing their mark, or a similarly spelled word, into Google returned not only the usual search results but also a sponsored link. And this was not just any sponsored link – this was an M&S sponsored link . . .

Interflora's claim against M&S concerns M&S's sponsoring of the words 'Interflora', 'Inter-flora' and 'Intaflora' as keywords. Interflora alleges that the defendant's use of its registered mark (and variants of it) in this way constitutes an infringement of Interflora's rights in the mark in terms of sections 10(1) and 10(3) of the Trade Marks Act 1994 (the TMA).

This is a still developing area of trade mark law, but a case came before the High Court last year which dealt with similar, though not identical, facts. In that case, *Wilson v Yahoo and Others*, the court found that the search engine company's use of the word 'spicy' as a keyword which triggered sponsored links to other traders' websites (including Sainsbury's) did not infringe the claimant's registered mark MR SPICY.

The judge ruled that this was not a 'trade mark' use of the word and hence not a breach of the trade mark owner's rights under the TMA.

However, the applicability of the MR SPICY judgment as a precedent is limited. The case was decided very much on its facts – for example, the



**Interflora has taken Marks & Spencer to the High Court claiming an infringement of their trade mark name. STUART SKELLY reports.**

keyword in question was the normal English word, 'spicy', not the MR SPICY mark itself. This distinction would not, however, apply in relation to non-generic words like 'Interflora'.

Aside from the importance of sponsored links as a new source of revenue for the search engine companies and advertisers who use them, the Interflora case will also be followed closely by those who advise businesses for the following reasons. First, despite the ruling in MR SPICY, there is still an active debate in the business community over whether the sale of registered trade marks as keywords for use by competitors of the owners of the registered marks to promote their own sites and services via sponsored linking is lawful.

Second, the Interflora case involves two major companies, each with the resources to pursue a judgment to the highest courts in the land (e.g. the Court of Appeal or even the House of Lords) if they

think it is justified. This means that the final judgment, when it is delivered, will be an authoritative and more generally applicable statement of the relevant law in England and Wales, which will hopefully dispel this legal uncertainty.

And third, it offers a valuable opportunity for a superior UK court to reconcile an inconsistency which appears to have opened up in the law on this point between states within the EU – specifically between the courts of the UK and Germany, and those in France (where infringement has been found in several cases involving keywords). Trade mark law was intended to be harmonised throughout the EU by the EU Trade Mark Directive (89/104/EEC), which was implemented in the UK by the TMA. The internet is also, by its very nature, no respecter of national borders so all the more reason why an entirely web-based marketing technique should be treated consistently by the courts across different jurisdictions, especially within the EU.

However, the wheels of justice grind slowly so it is likely to be many months before we find out which side, Interflora or M&S, is garlanded by the court. We will be monitoring the case with interest. For more information, please contact Stuart Skelly on 01926 880782 or via email.

[stuart.skelly@wrighthassall.co.uk](mailto:stuart.skelly@wrighthassall.co.uk)

## Know your limits as time waits for

**Time limits prevent legal actions being started after a certain amount of time but these rules are fraught with difficulty, as demonstrated again by two Court of Appeal cases reported in late 2008. Either you have a right to sue or you are too late: there are no half measures, which is why clients need to be aware of the issue.**

When a contract is breached there are six years from the date of breach to enforce the contract or seek damages. That is usually straightforward, as it is for personal injury, where the rule is three years from the date of injury because the injured party generally knows that they have a cause of action for breach of contract or personal injury.

In negligence there are six years from the date on which the cause of action accrued, which means from when the claimant suffered actual damage, but this can cause great difficulty if the financial loss only occurs some time later. When did the claimant suffer the damage; when the negligent advice was acted on or when the financial loss revealed itself?

### *Pegasus v Ernst & Young (2008)*

In *Pegasus B* sold a business and was advised by E&Y as to how to minimise his capital gains tax liability. They advised setting up a Luxembourg company to trade in the UK and invest in qualifying trades, taking advantage of reinvestment relief. B used about \$150 million to subscribe for shares in Pegasus, a new company set up for that purpose, on 26 March, 1998. Pegasus started to trade from October 1999 but in October 2002 Pegasus discovered that by only buying shares in target companies rather than the underlying assets Pegasus was exposed to an increased CGT liability. On 10 November, 2005 Pegasus and B issued proceedings against E&Y claiming that, had they been properly advised, this additional CGT liability could have been avoided.

The court found that B was barred from bringing a claim because over six years had passed from the date the scheme was set up, 26 March 1998. At that date B suffered a loss because his tax position was irretrievably altered. Although the shares in Pegasus were worth the

## Risk assessment a must

Many companies are falling on hard times as a result of the economic climate. Directors of companies that are experiencing adverse trading conditions should consider the risks that they may encounter when making decisions about trying to keep their company in business. Those risks can include incurring personal liability and even disqualification and committing a criminal offence.

If a director knows that there is little prospect of the company avoiding going into insolvent liquidation, he or she may be liable for wrongful trading and may be liable to contribute towards the assets of the company. The general knowledge, skill and experience of the particular director, as well as the general knowledge, skill and experience that might reasonably be expected of someone carrying out the same function as that director, are all relevant and there is no need to show dishonest behaviour.

It is a defence that, notwithstanding that there is no reasonable prospect of avoiding an insolvent liquidation, the director took every step to minimise the potential loss to the Company's creditors.

If any business has been carried on with the intent to defraud creditors or for any fraudulent purpose a director, or any other knowing party may be liable for fraudulent trading. As with wrongful trading, the person in question may be required to contribute towards the assets of the company but fraudulent trading is also a criminal offence.

Being involved in wrongful or fraudulent trading can also result in being disqualified from acting as a director. The minimum period for disqualification is two years and the maximum is 15 years. It is a criminal offence to act in contravention of a disqualification order and doing so can result in personal liability for any relevant debts.

The burden of proof for wrongful trading is much lower than that required to prove fraudulent trading as the burden of proof for wrongful trading is on the basis of the balance of probabilities. Various measures can be taken by directors in order to reduce the risk. These measures include: holding regular board meetings; circulating board minutes promptly; ensuring that financial information is kept as up to date as possible; creating financial milestones; and avoiding incurring substantial new liabilities.

Other offences that directors should be wary of include breach of common law and statutory duties, misfeasance and breach of fiduciary duty.

It is important that companies on the brink of insolvency seek professional advice before proceeding to take any major decision and that the details of that advice together with the reasoning behind any decisions which are taken are recorded and that careful board minutes are taken.

For more information or advice, please contact Mark Lewis on 01926 880700 or via email.

[mark.lewis@wrighthassall.co.uk](mailto:mark.lewis@wrighthassall.co.uk)

## WH help save Denby pottery

Wright Hassall has played a key role in securing a £30 million deal to save Denby Pottery.

WH acted for private equity firm Valco Capital Partners which funded the management buyout led by the managing director, Gary Biggs. Hundreds of jobs have been saved at the 200-year-old company and the board now has the scope to place the company's finances on a sound footing.



Robert Lee

The deal, which was completed in just six days, will see half of Denby's £72 million debt written off and will provide working capital to help the business combat the financial downturn.

Robert Lee, head of the corporate finance team advising Valco, said: "We are delighted to have played a part in saving one of the Midlands' most iconic companies. The speed with which we were able to complete the deal is an indication of how determined all the parties were to secure Denby's future.

"This historic firm can now capitalise on its recent strong trading position which had only recently, like so many others, been knocked off course by the unprecedented economic conditions it faces."

## For no man, woman or legal action

\$150 million that had been paid for them, so there was no financial loss at that point, there was a loss in legal terms because B's position had been altered against his interests.

*Watkins v Jones Maidment Wilson (2008)*

Another recent case, Watkins, also supports this somewhat unpalatable position. On 6 August 1998 the claimants, on legal advice, waived a clause in a building agreement that allowed them to terminate the contract and use expert determination to settle any dispute. A costly dispute between the claimant and their builder ensued. The claimants issued a claim against their solicitor on 26 August, 2004 arguing that they were badly advised in waiving the termination clause because they later wanted to rely on that clause and their true losses only arose when an NHBC certificate was issued in September 1998.

The court found that the claimants had altered their position to their detriment by terminating the agreement on 6 August, 1998 because they lost their chance to rely on the termination/expert clause. That was an immediate

loss even though the financial consequences only became apparent in September 1998, hence the claim issued over six years later was out of time.

The apparent injustice in these two cases stems from the fact that the damage in legal terms, which triggered the start of the six-year period, was not an immediate financial loss. Nor was it known about by the claimants until some time later. The courts have examined all sorts of diverse types of damage such as mortgaging a property, buying a house jointly but without long leases for separate shares, loaning money based on a misrepresentation, or employing someone without an effective restrictive covenant. In all these cases the damage occurred when a contracting party failed to obtain the rights or benefits they expected, even though the financial consequences of the damage were in some cases contingent and didn't reveal themselves for years.

A claim might be saved by the provision in the Limitation Act that allows claims to be brought within three years of the date of knowledge that a claim exists. Perhaps the Pegasus claim might better have been issued

before the relevant date in October 2005, within three years of the discovery that the tax scheme was flawed, rather than a matter of weeks later in November 2005.

What the case law makes abundantly clear is that each case turns on its facts and the enquiry as to when actual damage occurs is very tricky indeed. It is not as simple as time running from when negligent advice or misstatements are acted on, but is a matter of careful legal analysis of the facts to find out when actual damage occurred.

In Watkins the claim was only issued a matter of 20 days too late. It is not apparent why the claim was not issued earlier, but with such a difficult area of law the prudent course surely has to be to take legal advice as soon as you are aware of a potential problem. For more information on the issues raised, please contact Susan Hopcraft on 01926 884675 or via email.

[susan.hopcraft@wrighthassall.co.uk](mailto:susan.hopcraft@wrighthassall.co.uk)

# Simplifying charitable status

The Charity Commission and the Office of the Third Sector have recently published the long-awaited consultation paper in relation to Charitable Incorporated Organisations (CIO).

## Existing methods of forming a charity

There are three existing charity structures:

1. An unincorporated association
2. A trust
3. A company limited by guarantee.

Limited liability and the ability to hold property mean that companies limited by guarantee are becoming increasingly popular. The CIO will be an alternative means of incorporation.

## What is a CIO?

It will be a new corporate structure, registered and regulated by the Charity Commission, which specifically applies to charities. It will be an alternative to incorporation under the Companies Acts and will not require regulation under both company law and charity law.

## The advantages of a CIO

1. It will only need to be registered with the Charities Commission and not the Companies Registry.
2. Reporting requirements will be straightforward: only an annual report will be required, not a directors' report.
3. One annual return only will be required (charitable companies have to file annual returns to both the Charity Commission and the Companies Registry).
4. The filing requirements will also be more straightforward as accounts and other returns will have



**Setting up a charitable body could be made less taxing with the introduction of Charitable Incorporated Organisations. MARK LEWIS reports on the recent consultation paper.**

to be filed with the Charity Commission only.

## How to become a CIO

There will be a variety of routes available.

1. Setting up as a CIO from scratch.
2. Converting an existing charitable company using the procedure set out in the legislation.
3. Transferring the assets and liabilities of a trust or unincorporated association to the newly formed CIO – in the case of trusts and unincorporated associations there is no automatic conversion mechanism.

## The disadvantages of a CIO

1. More information will need to be made publicly available than with unincorporated charities.
2. Unincorporated associations and trusts are simpler to set up.
3. Third parties, such as funders, will be less familiar with CIOs than companies.
4. All CIOs will have to submit their accounts and annual returns even if their income is less than £10,000 per annum.

## Consultation issues

The Charity Commission and the Office of the Third Sector are consulting in relation to a number of issues which are yet to be finalised, these include:

1. The minimum age to be a charity trustee.
2. The relevant duty of care which should apply to charity trustees of a CIO.
3. How to deal with decision making when charity trustees may benefit.
4. The requirement to maintain registers.
5. How information is made available by the Commission to the public.
6. The procedures for amending constitution documentation.
7. Accounting provisions.

## Conclusion

It is expected that the consultation exercise will be completed by March 2009, with regulations laid before parliament by the summer and these coming into force by the end of 2009.

We believe that many charities will be interested in the simplicity of the model afforded by the CIO and that the straightforward method of converting will prove attractive.

We are keeping a very close eye on developments and will be advising our charitable clients on the best way forward so that those wishing to convert can do so quickly and efficiently.

For more information on charitable incorporated organisations, please contact Mark Lewis on 01926 880700 or via email.

[mark.lewis@wrighthassall.co.uk](mailto:mark.lewis@wrighthassall.co.uk)

## Green future for leases

The commercial property industry has had to cope with various changes in recent times emanating from an increased focus on carbon emissions. Planning policy imposes green travel plans on the larger development schemes; building control imposes increasingly more stringent requirements for energy efficiency; energy performance certificates have also been introduced and there will soon be compulsory inspection of air conditioning systems in commercial premises.

A further development is likely to come in the form of the "green lease" for commercial premises. Although there is no industry recognised standard for such a lease, it is generally accepted that a green lease will be one containing additional responsibilities for reducing carbon emissions. For example, this may require landlords to factor in carbon efficiencies when replacing communal plant and machinery. The provision of onsite recycling facilities is another possibility.

New lease obligations might in future require tenants to reduce energy consumption year on year including discussions with the landlord on opportunities for further reducing energy consumption and emissions. Authorities might have to employ only energy efficient contractors in delivering the communal site services.

However, green leases are likely to have immediate drawbacks – not least the cost of implementing some of the provisions which may not benefit a tenant where

the lease term is relatively short. In addition, without the added impetus of supportive legislation, they are bound to evolve slowly and to be of limited effect.

Government is unlikely to introduce legislation for mandatory green provisions in leases at the moment – not least as there is currently no meaningful and sufficiently mature concept of green leases. However, we would anticipate this changing when the economy starts to emerge from the recession and the green agenda gathers momentum. More informally, however, the London Climate Change Agency (a forum for large commercial and public property owners in London) is currently formulating a set of principles with some best practice recommendations for sustainable lettings. This will lead ultimately to a model memorandum of understanding and standard clauses for green leases.

On a more positive note, green leases bestow immediate benefits such as reduced energy consumption and cost. Carbon reduction is synonymous with corporate responsibility and this is an increasingly important factor for both the private and public sectors. These factors will ultimately provide sufficient incentive to embrace this brave new world. For more information, please contact Mark Miller on 01926 880736 or via email.

[mark.miller@wrighthassall.co.uk](mailto:mark.miller@wrighthassall.co.uk)

# Making provisions for your family's future

Death and taxes, as Benjamin Franklin wrote more than 200 years ago, are certainties in an uncertain world.

Although it is a subject that has limited appeal for most of us forward planning is the only way of guaranteeing tax-efficient arrangements for the benefit of your family.

So what should you do? Before taking any professional advice, you can do some worthwhile preparation by asking yourself two questions:

- For whom am I responsible?
- What do I own?

1. Obviously most of us can readily identify our spouse (or partner) and children. However, what about other dependents such as stepchildren; a



**Nobody likes to contemplate their own mortality but when it comes to estate planning, it is wise to prepare for the inevitable. CHARLES MCKENZIE reports.**

partner's own children; or any grandchildren?

2. In addition to obvious assets such as a house, contents, cars, investments and savings, you may also have business assets. Different legal entities will need different approaches to estate planning and legal documents, other than a will, may be needed such as a partnership agreement or a shareholders agreement. There are valuable inheritance tax reliefs for the businesses. What about holiday homes in the UK or abroad (where different succession and tax rules may apply), your life cover and pension arrangements?

There is sometimes confusion over jointly owned assets and property. Under English law there are two types of joint ownership which do not have much practical difference whilst both joint owners are alive, but do have significant differences in the event of a death. The first type is a joint tenancy and, in the event of death, the asset automatically passes to the surviving owner. The provisions of a will or the rules of intestacy have no bearing on assets owned as joint tenants. There is no need to obtain a grant of probate and legal title passes on production of a death certificate.

The second type is a tenancy in common and on the death of one owner, his or her half share passes in accordance with a will or the rules of intestacy.

A joint tenancy would typically be appropriate for a married couple if they are satisfied that the survivor will provide for their children on the second death. However, it may not be appropriate for a couple (married or unmarried) without children or couples who have children from previous marriages or relationships whom they wish to protect. For example with a tenancy in common you can leave your half share in your house in trust to your spouse or partner and then, on his or her death, to your children. An up to date will is essential in this case.

Turning to life policies, given that you will not benefit from them, you need to consider with every life policy whether it should be written in trust for your spouse/partner or children. The main exception is for policies which are taken out to provide funds to pay off a loan or mortgage in the event of death. Often people forget how many life policies they have. The main issues to review are: amount of life cover; monthly premiums; term of policy or its maturity date; purpose for which it was taken out; whether on your life alone or joint lives of yourself and your spouse/partner.

Pensions can sometimes be as confusing as life policies. You need to list your pension policies, including your membership of any occupation pension scheme run by your employers. The main issues are: value of fund; what happens to the fund if you die; and monthly premiums. Death payments under pension policies are normally outside your estate for Inheritance Tax purposes and often nominated in favour of a spouse/partner. With larger sums, however, it often makes sense to nominate them in favour of a specific trust for the benefit of your family to keep the value of the funds outside the estate of your spouse/partner for IHT purposes but with a power to lend the funds to him or her interest free.

If you own a holiday home in a civil law country, such as Spain or France, the succession rules normally dictate to some extent who will inherit at least a proportion of the property. As English Courts do not normally assume jurisdiction over foreign, it is sensible to make a separate foreign will to cover assets in that country. However, it is most important that the will is restricted purely to assets in that country and that it does not accidentally revoke an existing English will. Your English will can then exclude assets in that country.

For more information please contact Charles McKenzie on 01926 880723 or via email.

[charles.mckenzie@wrighthassall.co.uk](mailto:charles.mckenzie@wrighthassall.co.uk)

## Employers hit hard by 'unfair' holiday ruling

A ruling which entitles employees on long-term sick leave to full holiday pay could have 'hard-hitting' effects on businesses, a Warwickshire solicitor has warned.

The European Court of Justice ordered that workers on sick leave for the whole of an annual leave year are entitled to a period of four weeks paid holiday, despite having not actually worked.

What's more, workers who are on sick leave when their employment is terminated are also entitled to any holiday they would have otherwise accrued.

But Suki Harrar, of Wright Hassall, says the decision is 'very unfair' on already hard-pressed businesses.

"This is extremely harsh on employers who will have already lost a member of staff for a year and will now receive an extra financial burden," she said.

"The business is not receiving the benefits from the employee during their absence and is now being left with another costly expense.

"This is a common problem and companies in the Midlands which manage long-term sickness cases are going to be seriously affected.

"For some employers it may be a cost they quite simply cannot afford in the current economic climate.

"In general, companies are quite fair on this type of matter but a ruling like this forces them to review how they deal with contentious issues."

The ruling means that an employee returning to work after a year's absence is allowed four weeks paid holiday from the previous year along with holidays they are entitled to for the year ahead.

Also, if a worker quits or is made redundant while on sick leave, they will receive a lump sum payment in lieu of holiday time accrued but not taken.

Around 2.6 million people in the UK claim incapacity benefits, many of whom have been signed off work by their doctors. Sick leave is estimated to cost the economy £100 billion a year.

## When costs dwarf damages

A case came before the Court of Appeal recently in which two parties were disputing a matter of a few thousand pounds but had run up costs at trial of almost £100,000.

In *Peakman v Linbrooke*, Lord Justice Goldring roundly condemned the trial judge in the Sheffield County Court for allowing costs to rise so dramatically.

The normal rule is that if you win at trial the other side pays a substantial proportion of your costs. A trial judge has discretion to award costs as he sees fit and the appeal courts are generally reluctant to interfere. Peakman was unusual in that the Appeal Court did amend the trial judge's costs order.

Mr Peakman, a self-employed cable joiner, claimed damages of about £2200 from a sub-contractor, Linbrooke, for work he had carried out to join multi-strand cables to junction boxes along railway lines in the Vale of Glamorgan and Blackburn areas. Linbrooke claimed just over £3000 from him, the cost of putting right the work he had done, and counterclaimed for what they alleged was lost business arising from his poor work. The counterclaims were substantial and pushed the case into the multi-track instead of the proper place for claims of a few thousand pounds, the small claims court.

Mr Peakman was ordered to pay £265 damages to Linbrooke after the trial and each party had to bear their own costs. Mr Peakman appealed against the costs because he felt he should not have to bear his own costs of the trial given that it had been allocated to the more expensive trial track as a result of counterclaims that did not

succeed and, in all probability, should have not have been made at all.

The Court of Appeal granted Mr Peakman 50% of his trial costs, amending the trial judge's discretion on costs. In particular they expressed as close to judicial dismay as you are likely to find about the way the trial had been conducted. Lord Justice Goldring said: "What happened in this case exemplifies much that is wrong with our civil justice system. The costs involved dwarf the damages. The trial took far too long . . . I am afraid that it is clear that overall the judge failed to exercise that degree of control over these proceedings which he should have."

The effective control of litigation is crucial to keep costs down at every stage of every case. The Civil Procedure Rules governing the conduct of litigation have an overriding objective clearly stating that the court must deal with a case proportionately to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party.

Primarily the parties' legal advisers should control costs by effective case management and use of alternatives such as mediation, but where that is not possible the court certainly should exercise control and no doubt the judiciary has taken note of Lord Justice Goldring's comments.

For more information on the issues raised, please contact Susan Hopcraft on 01926 884675 or via email.

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## Musical Hall Green

Wright Hassall's Andrew Potts has helped teach an old dog track new tricks.

Andrew has obtained a new licence for Hall Green Greyhound Track in Birmingham to enable it to host music events up to six times a year.

Potts, who has worked with the track for more than 20 years, was asked to obtain the new licence so that the venue could host a BRMB road show event, which attracted 3000 people to the stadium.

"I've had a strong working relationship with Hall Green stadium over two decades and helped them



Andrew Potts (left) with greyhound Needless To Say and trainer Bob Hall

with their on-going expansion plans," Potts said.

"Originally I did the work for the greyhound track but since then I've worked on the banqueting, hospitality and hotel parts of the complex.

"It was quite an interesting location - licensing the middle of a greyhound track is a first for me - and will add yet another service to their list and one that, judging by the road show, they are already successful at doing."

Hall Green Stadium opened in 1926 and is one of the country's best known greyhound tracks. It has undergone a £20 million modernisation programme in recent years and now has an on-site hotel, snooker club and restaurant.

## Cash delivery for Zoe's Place

A local baby hospice has had a fundraising boost thanks to Wright Hassall.

Wright Hassall's staff raised almost £3,300 for Zöe's Place, a charity which will run the Midlands' only baby hospice from a soon-to-be built centre in Coventry.

Building will start on the site of Exhall Grange school in Ash Green during April. The project will cost £700,000 and will help families across the Midlands.

The charity's new building will offer short-term palliative, respite and terminal care for babies and young children.

Colette Perkins, of Zöe's Place, said: "It's important for us that big local firms are supporting us - because we will be helping families in their community. Wright Hassall has raised a huge amount for us and we're extremely grateful."



Richard Lane, managing partner of Wright Hassall, with Rebecca Mushing (Wright Hassall - middle), Colette Perkins (left) and Vicki Partridge from Zöe's Place.

"The centre will be our third hospice in the UK and will hopefully be ready for April 2010."

Wright Hassall has chosen Myton Hospice as its charity for 2009.