

Pictons Commercial

Welcome to the Winter edition of Pictons Commercial, the legal briefing produced by Pictons' Commercial Department to provide information to its clients, contacts and businesses generally in the northern home counties. If you have any questions, please feel free to contact the individuals listed in this newsletter or your usual contact with Pictons.

City Growth



City Growth is a targeted, market-based approach to urban revitalisation which also recognises that sustainable economic development in deprived areas will only be achieved by building a competitive business environment generating jobs, income and wealth opportunities. Private sector led and inspired by a successful American model, its emphasis is to put business at the heart of inner city regeneration.

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In 2004, Luton was chosen (along with nine other areas in England) to roll out the City Growth Initiative. As part of the initiative within the Luton area, 4 key “clusters” were chosen as the primary focus for the future:

- Aerospace
- Airport
- Food and drink
- Information and Communication Technology (ICT).

The clusters meet quarterly to not only identify key issues faced by the businesses within them but, more importantly, to find and implement solutions to those problems.

If you would like further details about the clusters or any aspect of the City Growth Initiative, please either visit the City Growth website at www.citygrowthluton.com or contact Ethel Bangwayo either by email (Ethel.Bangwayo@beds.ac.uk) or telephone (**01582 743938** or **07725 142837**).

Directors and their responsibilities

There are effectively three types of director of a company:

- **Directors de jure** (in other words duly appointed and registered at Companies House);
- **Directors de facto** (people not registered at Companies House but who act as though they

are directors, in a central management capacity);

- **Shadow Directors** (usually majority shareholders “in accordance with whose directions or instructions the directors of the company are accustomed to act”, but excluding professional advisors).

The duties that they owe can likewise be split into three sections:

- **Statutory duties** (such as to maintain accounts) many of which are expressed to apply to Shadow Directors as well as the others;
- **Duties of care and skill** (a standard of care that the Director would show in dealing with his/her own affairs but no higher than could reasonably be expected from a person of his/her knowledge and experience). Such duties apply to all directors;
- **Fiduciary duties** (akin to those of a trustee). The defining features of such a fiduciary relationship are fidelity and good faith. The scope of the fiduciary duties has recently been examined in great detail by High Court judges. In particular, they have looked closely at the rules relating to directors profiting from and conflicts of interest with their companies. In addition

the High Court has recently made clear that the extent of a director's fiduciary duties can be adjusted by agreement, for instance in a Shareholders Agreement to which the company itself is also a party.

This whole area is a minefield; directors are warned to be very careful and to take legal advice before rather than after acting.

One possible bit of good news is that duties of directors are being reviewed as the Companies Bill (the largest single piece of legislation ever to go through



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Parliament) is scrutinised. It is intended that this, when enacted, will spell out precisely what the duties of directors are.

Pictons will be keeping a close eye on the progress of the Bill and will take active steps to advise clients and contacts of any changes that come about.

Lasting powers of attorney

Powers of attorney are useful and flexible documents which delegate authority. It is not unusual, for example, for a seller of a business (as donor) to appoint another person (the donee) to execute a document on his behalf at a completion meeting. The Mental Capacity Act 2005 has introduced key reforms and updates to the existing law in this area and one important change is the introduction of new lasting powers of attorney (LPAs) which will replace enduring powers of attorney (EPAs) with effect from April 2007. One type of LPA will

cover property and financial affairs, the other will cover personal welfare, an area not currently covered by EPAs.

Unfortunately, there are likely to be a number of problems with the new LPAs including the following:

Certificates: Before creating an LPA, a donor needs a certificate confirming that he (or she) is capable of understanding the effect of the LPA and is not under any undue influence. The list of people able to provide the certificate ranges from shopkeepers and librarians to doctors and solicitors.

Ascertaining capacity or undue influence has always been difficult and many doctors and solicitors struggle to identify the correct tests to apply. It is baffling that such a wide range of individuals could, potentially, be made to administer such an important test;

Capacity: There is confusion over which test to apply regarding undue influence itself. The test for lifetime transactions requires that the receiver of gifts show that the gifts were freely made. Conversely, for gifts under a will, such gifts will stand in the absence of actual threats or improper pressure by the receiver of the gift;

Cost: LPAs are likely to be more costly than EPAs. As well as a registration fee for each type of LPA (LPAs cannot be exercised until registered), there is also a potential fee for certificates and a fee for professional advice in relation to creating an LPA;

No warnings regarding legal advice: The current prescribed form to make an EPA stresses the importance of seeking legal advice and emphasises that EPAs are powerful documents – there is no equivalent for LPAs. Bearing in mind that LPAs now cover both personal welfare as well as property and financial matters, the removal of warnings to take legal advice is worrying.



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As EPAs created before April 2007 will remain valid after that date, now would be the time to create EPAs before the new changes come into effect.

Please contact either Roger Talbot or Funke Abimbola regarding commercial law matters, or your usual contact at Pictons.

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