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Consumer Credit Act

Do you offer credit to customers who are consumers?
If so you may be affected by the new Consumer Credit Act 2006. The Act is the biggest shake up to consumer credit law in 30 years.

Under the new Act consumers will be entitled to take their complaints about lenders to the Financial Ombudsman Service, challenge unfair credit agreements in court and receive more information about the state of their account to help identify potential problems.

There will be a more flexible licensing system with licences targeted at their particular area of business for lenders, a new indefinite licence removing the need for renewal and accompanied by more proportionate monitoring of their activity which should reduce regulatory burdens a bit; and a reformed appeals system, where lenders can challenge decisions of the Office of Fair Trading (OFT).
The current system whereby those offering consumer credit must register and be approved will continue.

The Act will be brought into force in stages and the DTI is consulting on implementation at present.

If you are uncertain about current or future consumer credit legislation get in touch with us for further information. We can also advise on other changes to consumer law such as in the area of marketing and business practices. There is also a new EU directive on unfair business practices due to come into force by the end of 2007.

Anyone who sells goods to consumers need to ensure that their standard conditions of sale reflect consumer law in a number of areas. If sales are made from a web site there are special rules on "distance selling" and electronic communications which need to be followed too.

Please call us for advice in this field.

House of Lords decides divorce cases

On 24th May the House of Lords decided two 'big money' divorce cases. Both cases concerned wives who had give up work and then were divorced.

The Miller case concerned a marriage of less than three years to a wealthy man. Mrs Miller was granted £5m of her ex-husband Alan's £17.5m fortune. In the other case of a longer marriage, Mrs McFarlane gave up a career as a solicitor to bring up her family and held to be entitled to £250,000 a year maintenance from her ex-husband Kenneth for life - not just for the five years decided by the Court of Appeal. In addition she was paid half the couple's assets which were not big enough to achieve a clean break (she was paid £1.5m for this). For couples who can afford it like Mr Miller, a once and for all clean break is possible with no on-going payments.

In most divorces there are not enough assets even to achieve a clean break split, but the decisions do provide some useful guidance for anyone involved in a divorce. The court did not agree with the lower court's decision that Mr Miller's conduct was relevant. He had become involved with the woman who later became his wife.
This and his own wife's conduct was held not to be relevant except in very extreme cases. That is consistent with earlier rulings. Mrs Miller had only been married for 2 years 9 months , but the court regarded marriage as a partnership and she married with 'reasonable expectation' of a future wealthy lifestyle which she was entitled to on divorce. England and Wales are now out of line with divorce law in much of the rest of the world. Scotland has different rules which are examined in detail in the judgments.

The courts have held that marriage is a partnership and if the wife or husband gives up work to look after the children, (even if that work was low paid), their contribution to the family is just as valuable as that of the working spouse.

In divorces where both spouses continue their work, have children but no career sacrifice has been made to bring up a family, the law remains unclear.

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does your letterhead comply with the law?

Do you comply with the Companies Act 1985 and business names legislation in how you display your corporate information on notepaper?

If you trade as a sole trader then you must show both your personal name and the trading name. Limited companies have to show the limited company number and if they give one director's name they must display them all. The registered office address must be given as well and the full company name and place of registration. Anyone with a web site must comply with the law specific to electronic commerce too and show information such as their VAT number and details of any regulatory body to which they belong.

Now is a good time to be looking at this issue as Ofcom has published its review of the UK telephone numbering plan described below.

Ofcom's Plans

The telecoms regulator Ofcom is concerned the UK is again running out of telephone numbers. Londoners have had to cope with moving from 01 up to 0207/0208 which has led to many shop and other signs needing to be changed over the years.

The main proposals are:

1. The introduction of a new '03' nation-wide number range. This would be provided for organisations requiring a national presence, but which do not require the revenue sharing functions provided by '08' numbers and which would be charged at the same rate as calling a geographic number. The intention is to create a business number range the pricing of which can be easily understood, and thus to encourage consumer trust;

2. The creation of a new '06' number range for personal numbering services. This would replace the current '070' prefixes, which are frequently confused with mobile numbers;

3. Simplification of the '08' range. To ease pressure on these number ranges, OFCOM wants prefixes organised on a two digit (e.g. '082') rather than three digit (e.g. '0845') basis, to increase the numbers available by a factor of 10. Additionally, ranges would be allocated to services in order of price to equate the prefix used with the rate charged to the caller (i.e. '080' will be free, '082' will cost less than '089' and so on);

4. A similar rationalisation, for consumer clarity, of the '09' range to equate particular prefixes with particular services, e.g. '098' for adult, '092' for charity; and

5. Consideration to be given to charging for number allocation on '01' and '02' ranges, and the allocation of smaller blocks of numbers, to incentivise efficient number use. OFCOM is only proposing this in relation to oversubscribed number areas, and it anticipates that this will only be required for 5 years. Ultimately, pressures on numbers will ease with the introduction of services such as telephone calls via the internet.

company law reform bill

Anyone running a company needs to keep an eye on the Company Law Reform Bill. The Bill is working its way through parliament and will become law in due course. It makes some very interesting changes including:

(1) Forming a company

There will be separate model articles of association for private companies. These will contain the minimum key rules on the internal workings of the company and will be shorter and clearer.

(2) No requirement for a company secretary – it is proposed to abolish the requirement for private companies to have a company secretary.

(3) Directors

The general duties that a director owes to the company are currently just set out in case law. The Bill includes a statutory statement of directors' general duties both to make the law in this area more accessible and to change the law where it no longer corresponds to modern business practice.

(4) Directors' addresses on the public record - directors will automatically have the option of filing a service address on the public record (rather than their private home address).

(5) Resolutions and meetings

Private companies will not need to hold an annual general meeting unless they positively opt to do so. It will be easier for companies to take decisions by written resolution rather than holding a meeting, as such resolutions may in future be carried with a simple or 75% majority of eligible votes, rather than requiring unanimity as at present. Companies will be able to make greater use of email for communications with shareholders.

(6) Accounts and Reports

The provisions on accounts and reports have been restated to make them much easier to understand for small companies and their advisors. There will still be a right for small and medium sized companies to file abbreviated accounts with Companies House. The deadline for private companies to file their annual reporting documents will reduce from ten months after the year-end to nine.

(7) Financial assistance and capital maintenance - the rules on providing financial assistance to potential or actual shareholders, which limit the circumstances in which companies can provide assistance for the acquisition or purchase of their own shares, are very complex and largely irrelevant to the majority of private companies, so the Government is abolishing them. They are also making it easier for private companies to make capital reductions.

Contact us if you need advice on any of these important changes or information on progress relating to the bill.

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OFT Guidance on sale of IT goods and services to consumers

The Office of Fair Trading has published its guidance for businesses selling IT goods and services over the internet and by other methods at a distance such as by telephone.

The 73 page document deals with compliance with the Distance Selling and Unfair Terms in Consumer Contracts Regulations. It reflects minor changes to distance selling rules in force from April 2005. The guidance sets out the type of terms that the OFT regards as potentially open to challenge. These include terms that:

- allow suppliers to exclude or limit liability for damage to property or personal injury arising from the use of faulty goods;
- require consumers to incur charges (e.g. carriage charges) for rejecting faulty or mis-described goods;
- exclude consumers' rights to reject faulty software;
- interfere with consumers' rights to cancel contracts for purchases made at a distance;
- withhold a cash refund and provide only for the issue of a credit note upon rejection of faulty goods;
- do not allow consumers a reasonable opportunity to inspect the goods for damage; or
- allow suppliers to unilaterally increase the price of goods once an agreement has been concluded. The OFT suggest businesses should include links to your "About us" and "Terms and conditions" pages from the homepage of your site. Do not tell consumers to tick a box saying "I have read and understood the terms and conditions" – as the consumer may not have read or understood them. Instead, ask them to check a box indicating that they accept the terms and conditions – and highlight the importance of reading them.

Don't insist that goods are returned 'as new' or in their original packaging when consumers exercise their cancellation rights; instead, insist that consumers take 'reasonable care' of the goods and help them understand what you consider to be 'reasonable.'

Keep product warranties reasonable: allow a transfer of a warranty with a sale of the product as second-hand; don't suggest that printer warranties are invalidated if the consumer uses a third party ink cartridge. Do not put a clause in your conditions saying, for example, "the parties submit to the jurisdiction of the Courts of England and Wales." Instead, say: "We both agree to submit to the non-exclusive jurisdiction of the English Courts."

no pay in lieu of holiday!

A surprisingly large number of people do not claim their annual leave/holiday. Some employers pay them extra wages in lieu of this but the European Court has stamped down on this practice.

A group of shift workers who demanded the right to payment during holidays instead of notional extra hourly pay took their case to the European Court of Justice. The workers won as the current system was held to breach the EU working time directive. The court said: "The entitlement of every worker to paid annual leave is an important principle of community social law from which there can be no exception. Holiday pay is intended to enable the worker actually to take the leave to which he is entitled."

The construction, education and manufacturing sectors where shift work and short term contracts are popular are likely to be affected the most. If you would like advice on how this may affect you, please contact us for further information.

data protection and outsourcing personal information

Many companies are not registered under the Data Protection Act 1998 when they should be, or are unaware of their obligations under that legislation in general.

In particular, when they 'outsource' which is common in many business areas. The Information Commissioner's Office has published a Good Practice Guidance relating to the Data Protection Act 1998 when outsourcing the processing of personal information. The guidelines deal with when the business which owns the database has become insolvent, bankrupt, closing down or being sold. Normally even then the sale of data cannot take place without consent. The guidance says that personal information can only be used for the purposes for which it was collected and about which the individual was informed when it was collected. So the seller must make the buyer aware that he can only use the personal information for those purposes. Any uses must be within the reasonable expectations of the individual. It is best to specify these in the sale of assets agreement or in some other manner and obtain an obligation to that effect. The seller must ensure that the personal information is used properly by the buyer. The guidance says that as soon as is practicable after a business sale, the buyer should inform all of the individuals, whose personal data it now holds, of the change in ownership and the owner's contact details. The buyer should also confirm that the personal information will be used only for the purposes for which it was collected. If the buyer wishes to use the personal information for other purposes it must obtain the consent of the individual. So for example, if the buyer wishes to use the personal information for marketing purposes, either the individual must have agreed to receive such unsolicited communications or it can be said that those communications were within the reasonable expectations of the individual.

We can draft your privacy policy or notices to new customers, employees, clients and other persons which set out how data will be used and which are given to people when they provide their data to you.

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legal update

no personal guarantee by email without signature

The High Court ruled that an email address was not a "signature" sufficient to make a personal guarantee binding.

Special laws on personal guarantees compared with ordinary contracts which do not need signatures at all applied.

A Portuguese company wanted to wind up a UK company Bedcare because debts had not been paid. An email apparently from Bedcare's director N Metha offering a personal guarantee was sent to the Portuguese company. The guarantee was £25,000 and would apply if they would adjourn the hearing for seven days. It also set out a schedule for repaying the debt over six months. By telephone this was accepted but no money was paid and no documents signed and then Bedcare was wound up.

The Statute of Frauds and Perjuries 1677 requires signature of personal guarantees. The Electronic Communications Act 2000 has not led to amendment to the 1677 legislation to allow signature but that may not be necessary.

An earlier Law Commission report said that statutes requiring signatures could be satisfied in most cases by a functional test: whether the conduct of the would-be signatory indicates an authenticating intention to a reasonable person. "Digital signatures, scanned manuscript signatures, typing one's name (or initials), and clicking on a website button are, in our view, all methods of signature which are generally capable of satisfying a statutory signature requirement".

The court said that if someone had typed his name in the body of the email, that would satisfy the signature requirements of the Statute of Frauds. That had not happened here. All there was Mr Metha's email address at the top of the email which the judge thought was just like giving a fax number and was not the same as a signature, even though it gave the name. "It is well known that the recipient of a fax will usually receive a copy that has the name and/or number of the sender automatically printed at the top together with a transmission time. Can it sensibly be suggested that the automatically generated name and fax number of the sender of a fax on a faxed document that is otherwise a [document covered by the 1677 Act] would constitute a signature for these purposes?"

What was missing was a name. Even initials or a pseudonym might have sufficed, reasoned the judge "providing always that whatever was used was inserted into the document in order to give, and with the intention of giving, authenticity to it. Its inclusion must have been intended as a signature for these purposes." Judge Pelling did not have to consider automatic signatures that email software might be set to attach to every outgoing message which in fact many emails do. However he examined a House of Lords case in 1867 in which Lord Westbury said, "if a signature be found in an instrument incidentally only … the signature cannot have legal effect and force".

So if an email is sent to form a personal guarantee and the sender added "John Smith" below the email that could be binding, whereas if nothing is added at the end (which is unusual) then it would not.

The court said that that 'incidental' in this context means "where the name or signature just happens to appear somewhere". The inclusion of an email address "is a clear example of the inclusion of a name which is incidental in the sense identified by Lord Westbury in the absence of evidence of a contrary intention."

It would be interesting to know the effect of an automatic footer.

database rights

Most businesses have or use databases but not all of them know the legal rules in this area.

Most databases are protected either by copyright, or if they comprise no intellectual creativity, just by a 15 year database right.

In December 2005, Attheraces won a case against the British Horseracing Board (BHB) about database right. The court said BHB had abused its dominant position in the fees it charged Attheraces. This followed a decision in the European Court of Justice in 2004 about what is protected by database right under EU law. The court found that the business practice here was an "abuse of a dominant market position" and ruled that, possibly for the first time, that a proposed price or licence fee is illegal because it is excessive.
It was also the first time a national court anywhere in the EU has applied the controversial 'essential facilities' doctrine, which requires owners of key assets or intellectual property to make these available to avoid distorting competition".

Separately the European Commission's evaluation of the protection EU law gives to databases following adoption of the Database Directive is now available.

If you need advice on how to protect or use your databases contact us for further information.