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Birmingham Law Society
Law Firm of the Year 2008
(under 15 partners)

GROWING TEAM LAUNCHES OUT OF HOURS SERVICE

Sydney Mitchell has appointed two new members to join the growing private client department within the firm. Sue Capstick has been appointed to head up the Shirley private client department, along with Sarah Mochan who joins the team as a Senior Private Client Solicitor.

Sue, who originally joined Sydney Mitchell in 1997 from HSBC Trust Co (UK) Ltd, returns to the firm after an absence of 2 years. She specialises in wills for high net worth clients and complex probate matters as well as estate and tax planning, trusts and advice to elderly clients including court of protection work. As a member of STEP the Society of Trust and Estate Practitioners, Sue brings with her a wealth of experience to the team. Having previously worked for local city centre firms including Edge & Ellison and Lee Crowder, Sarah brings over 11 years experience in all aspects of private client work, with particular expertise in relation to wills for high net worth clients, trust creation and advice as well as estate and inheritance tax planning.



Shown above is the Private Client team, who are from left to right: Jane Smith, Jeanette Bowen, Tracy Creed, Sarah Mochan, Sue Capstick, Derek Cook and Shelly Collingbourne.

To cater for the growing number of clients the department is dealing with, the firm have recently launched their Out of Hours service. Aimed at people who are working and struggle to find the time to make appointments during working hours, the Out of Hours service is open to anyone who may be considering making a will, or updating their existing one. The Out of Hours service is available every first and third Tuesday of the month, when the office will be open until 7pm, making it easier for clients to see an adviser on their way home after work.

The team will be on hand to advise on the preparation of wills and updating or amending an existing will, as well as offering advice and assistance on estate planning, preparing Lasting Powers of Attorney and advice for the elderly, including residential/nursing home care issues. The Out of Hours service is open to all by appointment only. If you would like to book an appointment with one of our specialist legal advisors, please call Lucy Hassett on 0121 746 3300.

RIGHTS OF WAY - LANDOWNERS TAKE NOTE

Landowners who wish to prevent their land becoming part of the public highway should take note of two recent decisions in the House of Lords. The cases dealt with what constitutes a landowner's 'sufficient intention' not to allow their land to be dedicated as a public highway.

Land can become a public highway by being added as such to the Definitive Map maintained by the county council, provided an application is made. The Definitive Map shows publicly accessible bridle ways, footpaths and byways and once entered onto the Map, the status of the highway is conclusively proved. For property owners who do not wish their land to become open to the public, the correct strategy is therefore one of prevention. Until recently, all that was necessary to prevent an application for the Definitive

Map to be altered was for the landowner to write to the council opposing it or to demonstrate some prior right over the land in question (i.e. that it is let to someone else). However, the Lords' decisions mean that this is no longer sufficient. It is now recommended that any landowners who wish to oppose or prevent an application consider taking further measures, such as erecting appropriate signs advising that the land in question is not a public right of way and obstructing paths. Trespassers should be advised that the land concerned is not open to the public.

It is recommended that evidence should be retained of all measures taken. If land is used as a public right of way for 20 years without steps being taken by the landowner to preserve their right to exclusive use of the land, and without demonstrable intent to oppose

dedication of the land as a public highway, the right to prevent the land concerned being dedicated as such will be lost. Says Richard Holland, "Landowners are also advised to review periodically the status of any measures they have put in place (e.g. signs and obstructions) and to repair or replace them as necessary. This will enable them to demonstrate their continuing intention to retain their exclusive rights over the land, should the question arise." Richard can be contacted on



0121 746 3300 or by email to r.holland@sydney-mitchell.co.uk.

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VICTORY FOR LICENSEE IN 'SPECULATION' CASE

Thwaites, the Blackburn-based brewery which owns 400 pubs, has won a victory which will bring cheer to licensees, but may cause consternation for those who live near busy pubs that open well into the night.

It illustrates that objections to extended licensing hours based on the nuisance caused must be accompanied by evidence that this is in fact the case. In the decision in point, the High Court ruled that a decision by magistrates to cut the opening hours of Thwaites' Saughall Hotel in Saughall Massie on Merseyside was not based on evidence. The pub had initially been granted a licence by Wirral Council to open until 1 am on Friday and Saturday and until midnight during the rest of the week. The Saughall Massie Village Conservation Society appealed to the local Magistrates' Court against the decision on the ground that the extended hours would lead to excessive noise and disorder. The magistrates agreed and reduced the hours.

Thwaites appealed to the High Court, arguing that the objection was based on speculation rather than evidence, as there had not been any complaints of noise nuisance, and also that the decision of the magistrates was contrary to the philosophy of the Licensing Act and the restrictions placed on Thwaites were unnecessary to promote the licensing objectives. The judge agreed, reinstating the original decision of the Council. The effect of the decision will be to make it easier for licensees to defeat objections to extensions where these are based on speculation rather than evidence.



The decision is a blow for people living in areas which they feel will be blighted by a decision to allow late-night opening of a pub or club. Whilst there may be other arguments for opposing an application for extended licensing hours, doing so solely on the basis of a nuisance for which there is no evidence is unlikely to be successful. A more successful strategy might involve collecting evidence of existing problems (such as noise or anti-social behaviour) arising from the premises and making complaints to the authorities regarding them. We can advise you as to what action to take to oppose licensing applications, planning applications or other undesirable proposals that concern you. Contact Peter Adkins on 0121 698 2200 or by email to p.adkins@sydney-mitchell.co.uk.



AWARDS CELEBRATIONS FOR SYDNEY MITCHELL

Sydney Mitchell recently hosted two drinks parties in celebration of winning Law firm of the Year (under 15 partners) at the Birmingham Law Society Awards 2008.

The Awards were held at the ICC in Birmingham where the firm was up against other short-listed local firms in the battle to win this prestigious award. The parties were held at Apres, Summer Row in Birmingham, and at Hogarths in Dorridge where over 170 guests from companies based in and around Birmingham enjoyed champagne and toasted the firm's fantastic achievement. Sydney Mitchell arranged the parties to thank everyone for their on going support and loyalty all of which has helped the firm to win this prestigious award.



PERSONAL LIABILITY OF DIRECTORS WHEN FACING INSOLVENCY

If you are a Director of a company and facing the possibility of insolvency, then steps need to be taken to ensure that your duties are undertaken correctly. Kam Majeবাদia, looks into the responsibilities Directors' have when faced with insolvency within their business.

As a Director you may think you have the protection or "shield" of the Limited Liability status, however this is not the case. As a Director of a company you have many duties, which if breached could lead to personal liability both in civil and criminal proceedings.

A Director has a duty to act in the best interests of the company at all times, this is known as a fiduciary duty.

The "General Duties" for a Director have now been set out in the Companies Act 2006, which came into force on the 1 October 2007.

The Act sets out formally the "general" duties of a Director as follows:

- To exercise independent judgement;
- To exercise reasonable care, skill and diligence;
- To avoid conflicts of interest;
- Not to accept benefits from third parties;
- To declare an interest in a proposed transaction or arrangements with the company.

The Act also requires a Director to promote the success of the company with regards to:

- Likely long term consequences;
- Interests of the employees;
- The need to develop business relationships with suppliers, customers and others;
- The impact of the company on the community and the environment;
- Maintaining a reputation for high standards of business conduct;
- The need to act fairly as between the company's shareholders.

In the current economic climate companies may be threatened by insolvency. In these circumstances the focus of the Directors' duties shifts to the interests of the company's creditors. Directors should be careful to then avoid wrongful trading, i.e. continuing to trade at a time when the directors' knew or ought to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation.



In these circumstances the Directors' will be personally liable to pay the deficit arising in the company from the date when the company should have ceased trading to the date when the company actually ceased trading.

When reaching a decision on a wrongful trading claim, the Court will consider the general knowledge, skill and experience that might be expected of a person carrying out the same functions as the Director together with the actual knowledge and experience that the Director has.

If you are faced with a wrongful trading claim it is therefore important to try and show the steps that were taken in consideration of the creditors interests in the time prior to the Insolvency. Some practical steps that should therefore be considered are:

- Is the business viable?
 - Consider drawing up a business plan.
- Professional advice should be sought from Accountants and where appropriate Lawyers.
- Overheads and costs should be considered and where appropriate reduced.
- Minutes of board meetings should be kept.
- Budgets and cash flow forecasts should be updated and reviewed regularly.
- Creditors should be kept informed of the situation.

There will be occasions where there is an understandable desire to trade out of difficulties and so trading is continued to try and achieve this.

Where it can be shown that the decision to continue trading was considered fully and that professional advice was taken it is possible that this could amount to a defence in a wrongful trading claim.

As a Director it is important that as soon as you think insolvency is a possibility professional help is sought and any decisions taken thereafter in relation to the continuance of the company are appropriately documented.

If you are affected by any of the issues above, or would like some advice please contact Kam or Leanne Schneider-Rose on 0121 698 2200.



AWARD WINNING TEAM IN DEMAND AS CREDIT CRUNCH BITES

Following the recent CBI survey, statistics show that 33% of businesses surveyed expect output to fall and only 20% expect output to rise during the credit crunch. These statistics are reflected in the changes in work levels within the Business Recovery and Insolvency team as they are reporting dramatic increases in turnover as the credit crunch bites.

The team which was brought together earlier this year to combine the skills of insolvency, business recovery and debt recovery has seen a 60% increase in turnover. With high demand for the firm's skills following the award of Law Firm of the Year 2008 there has also been an increase in the number of legal advisors. Partner Peter Adkins comments 'There is little doubt that with the tightening of credit facilities businesses are becoming more focussed on improving cash flow, controlling credit and avoiding increases in bad debt'. He added 'Whilst our focus is still on our well established client



Shown above is the Business Recovery and Insolvency team, who are from left to right: Dhani Uppall, Tony Lewis, Khalid Salim, Peter Adkins, Kam Majeবাদia, Leanne Schneider-Rose, Elaine Buffery

base of Owner Managed businesses we are now making strides in acting for the major accountancy firms and financial institutions. It is clear the downturn in the economy is biting and we will do all we can to assist our clients in these difficult times'. The increased respect for the Insolvency team, under partner Kam Majeবাদia, is demonstrated by instructions being received from all levels of Accountancy practices, from the Big 4 top tier, through the middle tier to smaller practices. Mr Majeবাদia says 'When businesses are struggling and time is critical, our approach of immediately focussing on each client's specific needs and addressing those is leading to excellent results with the minimum of delay'.

The team, which also includes partner Tony Lewis and associate Leanne Schneider-Rose is supported in depth by Dhani Uppall, Elaine Buffery and Khalid Salim. Between them they have countless years of experience with all areas of Business Recovery and Insolvency. With the current economic climate as it is and the ever increasing number of companies seeking assistance in the collection of their debts, the development of the combined team has come at the right time.

If you would like further information on our Debt Recovery service, please telephone our Recovery team on 0121 698 2200 or email debt@sydnemitchell.co.uk.

SHARED INTENTIONS DETERMINE OWNERSHIP

The danger of cohabiting without making an express agreement as to how the title to property is to be held has again been underlined by a recent case.

It concerned a woman who had lived with a man for several years in a house which was registered in their joint names and financed by a mortgage. However, there was no document recording the couple's respective shares in the ownership of the property.

The man had paid the deposit on the house from his own funds and also paid the mortgage repayments. He also paid other costs relating to the property, such as rates and utility bills. The couple had children and the woman, who worked, spent the majority of her income on them and the maintenance of the family. The couple drew up wills leaving their estates to one another.

When their relationship broke down, the man argued that whilst he intended that his partner should inherit the property on his death, he had not intended it to be owned in equal shares.

In court the judge decided that ownership of the house should be apportioned by the respective contributions of each party to its purchase. Since the woman had made no contribution, her share was nil. She appealed to the Court of Appeal, asserting that a beneficial joint tenancy had been created with her rightful share being 50 per cent.

The man argued that his intention had been only that she would inherit the property if he predeceased her and they were still a couple on his death. The Court of Appeal found that the judge in the lower court had erred in considering the couple's respective contributions to the cost of the property as representing their intentions with regard to its ownership.

The fact that the property was jointly owned justified the assumption that both were beneficial owners. The ownership split had to be determined

by the intentions of each party and the important issue was that the relevant intention was the intention understood by the other party. Furthermore, the respective contributions of each party could not be conclusive. The man's intentions were not made clear. His argument that his partner's share should be a lesser sum did not rest on logic and he could not demonstrate that the couple had shared the common intention that her share should be other than a half of the total.

In this case, had there been documentation created when the property was purchased to show how it should be owned, there would have been little room for dispute. The fact that there was no evidence of any such agreement made it possible for the case to go all the way to the Court of Appeal.

If you are buying a property with someone else, having the agreed ownership documented when it is purchased is inexpensive and easy to do. Contact Judi Wood on 0121 700 1400 or via email to j.wood@sydnemitchell.co.uk.

