

# Business Law

Edition 1 Business Law Eshot

## The Independent Company

Not for the first time, politicians and pundits have been talking about family and owner-managed businesses as the bedrock of our economy. Probably not for the last either. But what are the management issues which will have a significant impact on their performance? A group of directors, advisers, and financiers brought together by Barlow Robbins shared their thoughts at a round-table discussion. Please download a copy of our report ['The Independent Company'](#).

## Companies Act 2006: A Guide for private companies

The Companies Act 2006 has made a number of changes to the way in which companies should run their business. Most of the amendments made have been with small to medium sized businesses in mind to ease the administrative burden faced by such companies. Although the Act was passed in 2006, it was only on 1 October 2009 that it came into full force and effect.

Whilst the Act repeats most of the provisions in the Companies Acts 1985 and 1989, the more substantive changes have been made to allow private limited companies more flexibility in the manner in which they operate. The Act has also codified the duties owed by directors to the company.

Some parts of the Act will apply to companies automatically, such as reducing the time for the filing of accounts by private companies from 10 months to 9 months, but other parts will require companies to make changes to their Articles of Association if they wish to take advantage of such provisions. Such changes include:

- removing the need to hold Annual General Meetings
- removing the requirement to have a company secretary
- reducing the period of notice for calling general meetings from 21 days (in some instances) to 14 days

Directors can also now provide a service address to Companies House in addition to their home address. The service address will be the address to which official communications will be sent.

To read more about the key changes, [click here](#).

The above information only outlines the key changes which may be of benefit to you. It cannot be a substitute for taking legal advice on your company's situation. Should you have any queries in relation to the changes made by the Companies Act 2006 and how it affects your company, or if you wish to make changes to your Articles of Association, please contact the [Corporate Team](#) on 01483 562901.

## Contents

- 1 The Independent Company**
- 1 Companies Act 2006: A Guide for Private Companies**
- 3 Bad news for trade mark holders but good news for Google as the Advocate-General delivers opinion in Louis Vuitton Adwords case**
- 3 Terms of business: Lessons from the OFTs hunt for Foxtons**
- 4 Workers on Long-Term Sick Leave: Claims for Holiday Pay**



Welcome to the first e-shot edition of Business Law which I hope you will find informative and helpful. Our aim is to provide you with useful pointers to changes in the law or recent cases which may affect the way you run your business. But we can of course give you specific advice tailored to the needs of your business. I will be pleased to receive your [feedback](#), and always welcome suggestions for ways in which we can improve our service to you.

The Barlow Robbins business client base is focused on successful owner managed businesses. Many of our clients have been with us for a very long time and some we have seen from their start, through growth, to a successful exit for the owners. Some owners even do it all over again! M&A activity has been much quieter in the whole of the UK economy this year and this has been reflected in the number of transactions we have handled. Still, we have been involved in a number of business sales and acquisitions, as well as the merger of some independent preparatory schools. Next year we envisage that there will be increasing opportunities for companies to acquire “distressed” businesses as the latter struggle as we (hopefully) come out of recession. We would be delighted to talk to you about your plans and if 2010 is the year you plan to sell your business and to “ride off into the sunset”, again, we would like to hear from you.

Earlier this year, in association with Decision Magazine, we brought together an impressive group of directors, advisers and financiers to talk through the management issues affecting the performance of owner-managed businesses. This followed an earlier report featured in Decision about the issues affecting this sector, [the report](#) details those who took part and their deliberations. If you would be interested in joining one of our round-table discussions in future, [please do let me know](#).

You will see that we feature changes brought about by the [Companies Act 2006](#) in this Business Law. Most of the amendments made have been intended to ease the administrative burden faced by small to medium sized businesses. If you would like some help in amending your company’s constitution to simplify matters, please get in touch.

Do remember – we are only a ‘phone call or [e-mail](#) away!

Christine Goodyear  
Head of Business Services



# Bad news for trade mark holders but good news for Google as the Advocate-General delivers opinion in Louis Vuitton Adwords case

Fake goods have always been easy to find on the internet, a simple internet search engine site makes it easy to seek them out. Previously search engines have claimed that they had no direct involvement in the selection of the results, but use of Google's Adwords service prompted Louis Vuitton to take Google to court to find out whether the Adwords service infringes well known registered Louis Vuitton trade marks by promoting fake Vuitton goods through keyword advertising.

The Adwords service allows Google's customers to sponsor keywords typed into the search engine to show sponsored links to their goods or services. Customers are able to sponsor the trade marks of third parties as key words. Whilst the trade mark itself will not appear in any sponsored advertisement, it is still being used to trigger a sponsored advertisement. It is been a useful money generator for Google, but brand owners have been less than happy about lesser known brands or entities taking a free ride off their trade marks.

Google changed its Adwords service in the UK and in Ireland to be more inline with the services it offers in the rest of the world in May 2008. This caused uproar amongst many brand owners, including Interflora who sued Marks & Spencer and Flowers Direct Online for trade mark infringement, who were concerned that their brands might be used to trigger advertisements for their competitors.

As a result of the Vuitton case, the French Courts decided to refer the question of whether Google's Adwords service was infringing use of a trade mark to the European Court of Justice ("ECJ"). The final answer is expected in early 2010; however, on 22 September 2009 the Advocate-General delivered his interim opinion.

The Advocate-General has stated that in providing the Adwords service, Google are not infringing any trade marks. In order for the Adwords service to infringe

trade marks a consumer would need to be confused over the origin of the goods or services displayed. The Advocate-General has said that although the display of the sponsored adverts creates a link between keywords and the sites which are selling goods or services similar to those covered by the trade marks, the mere display of these adverts is not enough for a consumer to be confused over the origin of the goods or services advertised. Instead it will be the content of these adverts (for which Google is not responsible), which may create confusion.

The Advocate-General's opinion is clearly good news for Google but is less positive for trade mark holders. However, the Advocate-General's opinion is not the final say on the matter. The problem with the opinion seems to be that it focuses mostly on the essential function of a trade mark being an indicator of origin rather than considering a trade mark's other functions, such as its advertising function. It may be that when the ECJ come to deliver their verdict on the matter they take a more balanced view.

## Terms of business: Lessons from the OFTs hunt for Foxtons

On 10 July 2009, the High Court declared Foxtons' letting terms unfair.

If your reaction is gleeful schadenfreude, enjoy the feeling, but think again. The relevant laws that hurt Foxtons impact on all businesses which use standard terms and conditions.

It may come as a surprise, but these laws:

- (a) imply terms into contracts, particularly as to the quality of the good or service;
- (b) mean liability cannot be excluded or limited unless certain standards of fairness or reasonableness are passed;
- (c) criminalise the use of some terms;
- (d) require some terms to be "fair", others "reasonable" and others in "plain intelligible language" (and some to be both "fair" and "reasonable"); and
- (e) demand that some terms must be brought to the attention of the customer more obviously than others.

...continued on page 4

This area of law is byzantine and creates shields and daggers for your customers to hide behind or to attack you with.

If your business uses terms which have not been reviewed in the last two years - worse, if you have copied a competitor's terms in the hope that the competitor has got it right - there may be trouble ahead. A timely review of your terms could help, as it would have helped Foxtons, to secure your future income and avoid disputes with customers.

Please contact [Mark Lucas](#) on 01483 748512 for further advice as to how to protect your business.

## Workers on Long-Term Sick Leave: Claims for Holiday Pay

The judgment of the House of Lords in the long-running case of *Stringer and others v HM Revenue and Customs (HMRC)* will be a blow to many businesses struggling to survive in the current economic climate. The Law Lords have overturned the decision of the Court of Appeal and found in favour of the employees.

The case concerned HMRC employees who had been off work for substantial periods without pay but who remained employees, for example on account of long-term sickness.

On 16 July 2009 we [summarised the decision of the House of Lords](#). We now consider the practical effect of the decision and offer guidance to employers.

- Employees on sick leave accrue statutory paid holiday even if they are on long term sick leave lasting the entire holiday year or longer. This was decided by the European Court of Justice (ECJ) in January 2009. The ECJ also ruled that it is for the national courts to decide whether workers on long term sick leave may take paid holiday during a period of sickness absence.

- The ECJ held that at the end of a holiday year a worker on sick leave who has been unable to take holiday must be allowed to carry it over. Under the Working Time Regulations 1998 (WTR) it is not permissible to carry forward the statutory holiday entitlement from one holiday year to the next. It is arguable that the WTR are not consistent with the provisions of the EC Working Time Directive. If so, the WTR will need to be amended.

- The right to be paid for accrued but untaken holiday at the end of the employment relationship applies even if the worker has been on sick leave throughout the entire holiday year.

- In *Stringer*, the parties reached agreement on the effect of the decision of the ECJ in relation to the facts of that case and the decision of the House of Lords was therefore limited to one issue. This was whether holiday pay may be treated as wages so that a claim for a failure by an employer to make payments for holiday (including at termination of employment) pay may be treated as a claim for unlawful deduction of wages under the Employment Rights Act 1996 (ERA). The significance of this is that under the WTR there is a 3 month time limit for such claims (from the date on which it is alleged that payment should have been made) whereas claims under the ERA enjoy a much more generous time limit. Under section 23 of the ERA a worker may bring a claim within 3 months of the last of a series of deductions and there is no time limit on how far back the claim may go. The House of Lords held that such claims may be pursued as wages claims under the ERA.

- The House of Lords did not decide whether paid leave may be taken during a period of sickness (if the employee is off sick at the end of the holiday year) or whether it should be carried over to the next holiday year. As things stand, the WTR state that workers must take a minimum of 5.6 weeks' holiday in each leave year and a payment in lieu of any untaken statutory entitlement is not permitted except on termination. (The minimum leave set out in the EC Working Time Directive is 4 weeks). It will therefore require further case law or a change in the law to resolve this issue. However, what is clear is that a worker's right to paid statutory holiday accrues during a period of sickness absence, even if this lasts for a full holiday year or longer.

- Employers may consider allowing their staff to take paid holiday during a period of long term sickness absence, upon request from the employee. Otherwise, the employee could build up a large bank of untaken holiday which the employee will be entitled to be paid for on termination of employment. It is also possible that the employee may be entitled to take all the holiday on return to work in a subsequent holiday year if a change is made to the WTR.

- If employers allow employees on long term sick leave to take paid holiday whilst on long term

sickness absence (following a request) they may then seek to argue that employees do not have the right to carry forward any untaken holiday into subsequent holiday years even if they have been off sick for the entire year. This would avoid a potentially large build up of holiday entitlement. However, it may be preferable to wait for further guidance from the Courts when future cases are decided or the WTR are amended.

- A further complication arises if the employee is in receipt of PHI benefits whilst on long term sick leave. What should an employer pay such an employee who requests paid statutory holiday? The potential for significant payments to the employee will arise if the employee is in receipt of PHI benefits for a number of years. This in itself may act as a deterrent for certain employers who are considering the possibility of introducing a PHI scheme.

- If the WTR are inconsistent with the EC Working Time Directive (in terms of allowing accrued statutory leave to be carried over into subsequent holiday years) it is arguable that private sector employers may nevertheless rely on the provisions of the WTR until such time as they are amended. However, public sector employers would not be able to rely on this argument since European directives have direct effect.

- Any rights of accrual in respect of holiday entitlement over and above the statutory minimum will depend of the terms of the employee's contract of employment.

- Employers should ensure that they manage sickness absences effectively since the cost of retaining an employee who is on long term sickness absence may now be significant.

For further information on the above article please contact [Joanna Lada-Walicki](#) or any member of the Barlow Robbins LLP [Employment Team](#).

The contents of this article are intended for general information purposes only and shall not be deemed to be, or constitute legal advice. We cannot accept responsibility for any loss as a result of acts or omissions taken in respect of this article.

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