

## The demise of distress

**T**he new Tribunals, Courts and Enforcement Act 2007 will shortly be abolishing the common law remedy of distress. The current law of distress allows a landlord to take possession of goods from the premises and sell them to raise money to cover arrears of rent. The Act will replace distress with a similar remedy to be known as Commercial Rent Arrears Recovery (CRAR).

CRAR is available in more limited circumstances than the current remedy of distress. It will only apply where:-

1. There is a lease in writing. CRAR will not extend to a tenancy at sufferance or a licence to occupy.
2. The premises are commercial. For mixed use premises, for example, a shop with a flat above, it will not be possible to use CRAR.
3. The landlord is recovering annual rent. Money owed in respect of rates, services insurance etc cannot be recovered by CRAR even if these sums are reserved as rent in the lease.

The Act also provides for a new procedure when recovering money due by CRAR. In order for the new procedure to be exercised:

1. The tenant must be in arrears of rent.
2. The amount of arrears must be capable of being calculated with certainty.
3. The unpaid rent must exceed the amount prescribed in the regulations (not yet decided).

Under the new law it will also be necessary for the landlord to serve notice on the tenant before seizing the goods. This was not required under the law of distress and raises concerns that it may give tenants the opportunity to dispose of the goods during the notice period. Further, the tenant may in certain circumstances apply to the Court for an order that the notice be set aside.

Unlike the current system where a landlord can enter the premises and take goods, only an enforcement agent, holding a certificate of authority from the Court can seize and sell the goods under CRAR.

We do not yet know when the provisions implementing CRAR will be brought into force but there is little doubt that they will be and Landlords will need to be ready for them when they are.

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## The Corporate Manslaughter and Corporate Homicide Act 2007



**T**he Corporate Manslaughter and Corporate Homicide Act 2007 comes into force on 6th April 2008. Organisations are aware of its existence but are not sure how it will affect them, if at all. The Act applies to companies, partnerships, trade unions and employers' associations and charities. It will also allow prosecutions against Government departments, removing Crown immunity. Therefore it follows that it affects virtually every organisation and everyone needs to be aware of it.

Under the old regime, a company could only be convicted of manslaughter if a "controlling mind" of the organisation (a senior individual whose actions embodied the company) was also found guilty of the offence. Prosecutions of large organisations failed because it was difficult to find one such individual who carried sufficient personal blame. Such prosecutions were usually against small companies. This requirement is now lifted and prosecutions will be made easier. Large organisations will be held accountable for management decisions which lead to death.

The new Act provides that an organisation must owe a duty of care to the victim whether that is to employees, visitors, volunteers, occupiers of premises or users of facilities, goods or services. This will encompass most activities carried out by an organisation.

There must be a breach of that duty as a result of the way in which the organisation manages its activities. This so called "management failure" must result in death although it need not be the sole cause. The "management failure" must amount to a "gross breach" of the duty of care.

A breach will be gross if the conduct falls far below what would have been expected of the organisation in all the circumstances. This will be a decision for the jury to make and they will have to consider matters such as failures to comply with health and safety legislation/guidance, seriousness of the failure, risk involved, attitudes to health and safety, policies in force, or work practices tolerated.

If convicted, an organisation will find itself facing an unlimited fine. Indications seem to be that this will be calculated on the basis of the annual turnover which is likely to result in much higher fines. Remedial orders can be made whereby the organisation will be required to correct specified failings. The Act provides for a further sanction called a publicity order to be available, although this provision will not come into force immediately. This will require an organisation to publish details of the conviction and sentence received. The effect of this on an organisation's reputation is likely to be wholly detrimental.

From the above it can be seen that all organisations must be aware of this new Act. In response it is appropriate for organisations to review their management policies or systems to find and correct any areas of concern. Organisations need to be well prepared for this change in the law. The health and safety culture of an organisation, from top to bottom, will be placed under close scrutiny should the worst happen.

Whilst the changes apply to organisations, individual managers remain subject to potential prosecution and liability under general criminal law and health and safety legislation in respect of their involvement in the death.

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*Business*  
**Briefing**  
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**Capital gains reforms – the winners and losers**

**Resolving disputes, there is another way**

**Remedy of distress law abolished**



Dominic Hopkins

# Welcome

## Is a SIPP right for you?

**S**elf Invested Pension Plans (SIPPs) have become increasingly attractive since the relaxation of the tax laws in April 2006.

SIPPs are a personal pension arrangement which allow the member to control the investment of his plan to maximise investment returns. They provide greater investment choice for more sophisticated individuals than an ordinary personal pension plan but may incur higher management charges.

SIPPs now enjoy additional flexibility in relation to increased contribution allowances, a wider range of investment options (though still with some restrictions), the removal of the requirement to buy an annuity and the ability to participate in more than one pension scheme.

However, potential investors should be aware that a SIPP is not appropriate for everyone. SIPPs advisors are now subject to regulation by the Financial Services Authority but some believe that SIPPs have already been sold to individuals for whom a personal pension plan would have been more appropriate with its competitive charges and simple investment choices.

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**Dominic Hopkins**  
Head of Corporate Services



**I**'m delighted to welcome you to our latest Business Briefing which is designed to keep you abreast of some of the key legal issues that are leading the agenda at the moment. Recent economic indicators and concerns about finance liquidity clearly affect perspectives on the prospects for the next eighteen months, but with our multi-faceted global economy there are going to be winners as well as losers despite the projected slow down. We obviously want to help our clients be winners and that is about giving you what you need, when you need it. This publication is part of that effort. So, if there are issues that you would like us to cover in future editions, please do let me know. As it is, there is plenty of interest in this edition, including an item on the Chancellor's revisions on capital gains tax and an article by new arrival to our Regulatory team, Sara Young, on the Corporate Manslaughter and Corporate Homicide Act 2007, which is due to come into force imminently. I hope you find the Briefing both of interest and of value.

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## Selling your company – the preliminaries



**I**n the first of a series of articles in Business Briefing, we detail below the preliminary issues that sellers need to consider when selling their company.

Before a purchaser has been identified, a number of steps can be taken by sellers in preparing their company for sale. The first item to be addressed should be the company's website, as one of the first things a prospective purchaser will do is search for your company on the internet. The company's website therefore needs to be up to date and designed so as to create a good first impression.

As well as looking to update the website, sellers should also be looking objectively at all the company's other documentation to ensure that this too is up to date and complete. Although a time consuming process, a review of all the company's contracts and documents, from those with customers and suppliers to staff and premises, should be completed to identify any gaps in the paperwork which can then be remedied in good time before a purchaser's advisors become involved in reviewing them.

Where a company's operations are particularly reliant on certain assets, it is worth taking the time to ensure that all the questions that a prospective purchaser would seek to raise have been dealt with in relation to those assets. For example, if there is a key piece of

machinery or heavy dependency on IT or intellectual property rights, then a purchaser will focus on making sure that:

- those assets are owned and registered in the name of the company;
- those assets are covered by suitable maintenance agreements;
- that there are sufficient numbers of trained staff to operate such equipment; and
- that the requisite add-on products have been acquired (i.e. sufficient numbers of software licences).

Where the documentation or information is incomplete, you can be guaranteed that a purchaser and its advisors will want sellers to put these right – so you may as well save time now by dealing with these issues.

As part of the general review of the company's documentation, sellers will need to ascertain whether any of the company's key contracts contain "change of control" provisions which entitle the other contracting party to terminate the contract if there is a change in the ownership or change in the control of a company – which will be the case on the sale of the company's shares. If you have any doubts as to whether a contract contains a change of control clause, it would be worth taking the time now to have this reviewed by a lawyer so that this can be determined.

If there are any change of control clauses in any key contracts then you will need to think about how to manage these as part of the sale process. A purchaser's likely view would be to have the sellers obtain the consent of the other contracting party prior to completion of the sale. Although a purchaser may wish to make the sale and purchase contract conditional on such consents being obtained prior to completion, sellers are unlikely to want to approach a supplier or customer (for example) to obtain their consent to the sale until the sale process is nearing completion. The last thing sellers want to do is contact their key business partners to obtain their consent and potentially upset the current business relationship, only to find that a purchaser has decided not to proceed with the transaction.

There is no easy answer to this dilemma. The best advice is to first identify any such contract; second, if those contracts are up for negotiation prior to completion, then try and agree for any such clauses to be omitted; third, wait until the sale process has progressed significantly to reduce the risk of damaging relationships if the sale does not complete.

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# Capital Gains Tax Reforms

**A**t the end of January, the Chancellor Alistair Darling confirmed the proposals of his October Pre-Budget Report (including measures for the "simplification" of the current CGT regime), and published draft legislation which will with effect from 6th April 2008:

- Introduce a flat rate of Capital Gains Tax of 18%;
- Abolish the indexation allowance; and
- Abolish taper relief (currently reducing CGT on the sale of qualifying business assets held for at least two years to 10%).

The changes will not affect the availability of the annual personal exemption, which was £9,200 in the 2007/2008 tax year.

No changes have been announced on the availability of EIS and VCT relief.

## Entrepreneurs Relief

The Chancellor also announced a new "Entrepreneurs Relief", which will be available to certain individuals, partnership members and trustees.

In outline, the relief will allow certain individuals running a business to claim an effective Capital Gains Tax rate of 10% on the first £1,000,000 of gains made on the disposal of:

- All or part of a trading business carried on by that individual, alone or in partnership; or
- Assets following the cessation of a business, which were formerly used in that business and are disposed of within three years of cessation; or
- Shares and securities in a trading company (or the holding company of a trading group) where the individual has been an officer or an employee of that company (or a company within the same group) throughout the period of 12 months before the disposal and owns 5% or more of its ordinary share capital (which must confer 5% or more of the voting rights in that company); and
- The shares or securities have been held for at least one year ending with the date of disposal.

The £1,000,000 limit is a cumulative lifetime total which is not retrospective. Until a claim is made the £1,000 lifetime allowance remains untouched. Claims can be made for disposals on or after 6th April 2008 provided the gains qualify for relief.

## Conclusion

There will undoubtedly be winners and losers as a result of these changes to the CGT regime.

The winners will include those who sell their business assets before they have been held for two years or who qualify for the new "Entrepreneurs Relief".

The main losers will be those selling business assets and realising a capital gain in excess of £1,000,000 where those assets are held for at least two years before the sale. For those individuals their effective rate of CGT upon a disposal of such assets will increase by 80% from April 2008.

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# Revised timetable for Companies Act 2006 implementation

**I**n December 2007 the Department for Business, Enterprise and Regulatory Reform revised the implementation timetable for the Companies Act 2006 and extended the date by which the entire Act would be in force from 1st October 2008 to 1st October 2009.

There are two main implementation dates in 2008: 6th April 2008 and 1st October 2008. The following are some of the key changes:

## 6th April 2008

**1. Company Secretaries** – Companies will no longer be required to have a company secretary. Where a company does not have a secretary, any act required to be done or authorised by the secretary may be done by a director.

**2. Execution of Documents** – A document may be executed by a company either by affixing the company seal, the signature of two authorised signatories or by a single director in the presence of a witness.

## 1st October 2008

**1. Appointment of Directors** – A company must have at least one director who is a natural person. A minimum age of 16 for directors is also being introduced.

**2. Financial Assistance** – The prohibition on the giving of financial assistance by a private company for the purchase of its own shares or those of another private company will be abolished. Private companies will no longer have to follow the "whitewash" procedure when they are to give financial assistance. The prohibition on financial assistance will continue to apply to public companies.

**3. Directors' general duties** – Rules relating to a directors' duty to avoid conflicts of interest and a duty not to accept benefits from a third party are to be introduced. A provision allowing disinterested directors to authorise a director's conflict of interest will be brought in.

**4. Objections to company names** – A new right for an individual to object to a company names adjudicator about another company's name is being introduced. A name may be objected to if it is the same as a name associated with the objector or in which he has goodwill, or where the name is sufficiently similar to such a name that it would be likely to mislead.

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## Compensation Limit Increase

**F**rom 1st February 2008 the following compensation limit increases apply to dismissals where the effective date of termination is on or after 1st February 2008:

- A week's pay for the purposes of the unfair dismissal basic award and statutory redundancy payment has increased from £310 to £330 per week
- The maximum compensatory award for the purposes of unfair dismissal has increased from £60,600 to £63,000.

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## An alternative approach to resolving disputes



**P**oor communication is said to be the cause of most disputes. If not the cause, it is often the reason why many disputes last as long as they do. So, logically, good communication is the antidote.

This is one of the ideas underlying the success of mediation as a tool for resolving disputes.

Mediation is intensive negotiation via a neutral person (the mediator). The focus of the negotiation is not on evidence – it is not a mini trial – but on priorities, risks and solutions.

“Priorities” explore the real commercial interests of the parties, as opposed to the positions adopted for the purposes of litigation. “Risks” explore the wider interests at stake, as well as the potential consequences and cost of different outcomes of litigation. “Solutions” open the scope of discussion beyond the narrow questions to be decided by a Court, and invite thinking out of the box.

Opportunities for combative behaviour are minimised, as nearly all dialogue between the parties is through the mediator.

The neutrality of the mediator means that he never sides with one party against the other.

He is more confidant than judge. What he brings, in addition to his training, is experience, fairness and pragmatism.

No settlement is imposed, and either side can break off at any time.

Despite a high success rate, and other advantages of speedy resolution and the saving of management time and costs, the number of disputes mediated is still a minority. But the culture of a more diverse approach to dispute resolution is developing, and the Courts are increasingly willing to make tough orders to require parties to attempt settlement out of Court. A good supply of mediators already exists. It is to be hoped that the publicising of mediation will further increase demand from the business community.

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*“Poor communication is said to be the cause of most disputes. If not the cause, it is often the reason why many disputes last as long as they do.”*

## Managing sickness absence

**E**mployee absence is a significant cost to 90 per cent of businesses according to research from the Chartered Institute of Personnel and Development (CIPD). An employee absence survey published by the CIPD in 2007 revealed that on average sickness absence costs employers approximately £659 per employee every year. It would appear, however, that there is a light at the end of the tunnel for employers. According to the results of a survey published last year by EEF, the manufacturers' organisation, there has been a downward trend in the number of days lost to sickness from 7.1 days per employee in 2005 to 6.7 days per employee in 2006. EEF believes that this reduction in sickness absence is due to a more pro-active approach to absence management and investment by companies in training for line managers.

### Recent case law

Recent case law has provided some welcome relief for employers with the Court of Appeal's decision in *O'Hanlon v Commissioners for HM Revenue and Customs* and the Employment Appeal Tribunal's decision in *Scottish and Southern Energy plc v Mackay*.

In *O'Hanlon* the Court of Appeal held that employers do not have to extend company sick pay for disabled employees. The Court of Appeal held that, when Mrs O'Hanlon's entitlement to sick pay had been exhausted under her employer's sick pay policy, the employer's failure to continue to pay Mrs O'Hanlon was neither a failure to make a reasonable adjustment nor disability-related discrimination.

Although the Court of Appeal resisted the finding that reasonable adjustments could never include making extra payments, a disabled employee will now find it very difficult to claim full pay during sick leave once any contractual entitlement to full pay has been exhausted, unless, as in the earlier case of *Nottinghamshire County Council v Meikle*, the employer has caused the absence by failing to make reasonable adjustments which would have enabled the employee to return to work.

*O'Hanlon* is a pragmatic decision by the Courts which has been broadly welcomed by HR professionals.

The decision in *O'Hanlon* was followed by the Employment Appeal Tribunal's (EAT) decision in *Scottish and Southern Energy*, where the EAT held that a failure to discuss options for alternative work with a disabled employee on long-term sickness absence was not of itself a failure to make reasonable adjustments.

In *Scottish and Southern Energy* the employer had gone to considerable efforts over several years to assist the employee's rehabilitation into the workforce, including paying the employee sick pay for over two years, seeking medical opinions, arranging for the employee to shadow an alternative position and arranging meetings with the employee. After a period of four years of illness the employee applied for an alternative position with the employer, but the employer considered that the employee lacked enthusiasm and motivation for the position. Further the employer's medical expert reported that he thought it was unlikely that the employee could carry out the position. The employer therefore took the decision to dismiss the employee.

Overruling the decision at first instance the EAT ruled that discussing alternative positions with an employee on sick leave was good practice, but did not amount to a breach of the duty to make reasonable adjustments. However the EAT's decision was not all good news for the employer in that case. The EAT upheld the Employment Tribunal's decision that a reasonable employer would have asked the employee if he was committed to the new role and that the employer's failure to consult the employee meant that the employee's dismissal was unfair.

### Tips on managing sickness absence

It is essential that sickness absence is managed pro-actively and fairly to minimise the risk of claims arising against your organisation and to reduce overall levels of sickness absence.

**Implement a sickness policy:** Ensure that you have a clearly drafted policy in place that supports your organisation's business objectives and culture.

**Manage short-term absence:** Monitor employees' absence levels and patterns and if this is a cause for concern this should be drawn to the employee's attention initially at an informal “return to work” interview. If there is no improvement in absence levels then you should consider whether this is a conduct issue rather than one of capability and deal with it in accordance with your disciplinary procedures.

**Managing long-term absence:** Try to establish the reason for the absence as soon as possible and take the following steps:

1. Keep in regular contact with the employee
2. Obtain medical expert evidence. It is essential that you obtain appropriate medical evidence about the cause of absence, the likely prognosis and whether the Company can do anything to assist in the employee's return. Your contracts and/or sickness procedures may assist by specifying that the Company has the right to obtain such reports, subject to obtaining the necessary consent from the employee.

3. Consider reasonable adjustments. In consultation with the individual and medical expert(s) you must consider whether any reasonable adjustments can be made to enable the individual to return to work in some capacity in the foreseeable future, such as: (a) allowing a gradual return-to-work (b) changing work patterns or management style to reduce pressure and give the employee more control (c) altering the employee's working hours (d) accommodating the employee's mobility (e) assigning the employee to a different place of working or training. The duty to make reasonable adjustments is central to minimising the risk of liability under the Disability Discrimination Act 1995 (“DDA”).

4. Dismissal and the statutory dispute procedures? Dismissal must always be the last resort as dismissals for capability are always very difficult to justify to tribunals, who, not unreasonably, may have sympathy with employees who have been ill, especially if there is any suggestion that they qualify for protection under the DDA. It is, however, still possible to dismiss fairly but it is essential in such situations that a very thorough process is followed, involving full consultation with the employee, and that the employer is able to objectively justify its decision to dismiss. It is always advisable to take legal advice before taking such a step as each case will need to be considered on its own merits and the consequences for getting it wrong are very expensive!

### Conclusion

Effective people management policies are an essential starting point to managing sickness absence in the workplace. In addition to good policies managers need to be trained in understanding sickness absence issues and the importance of proactively dealing with problems as and when they arise. A robust and fair approach in dealing with these thorny issues can have significant benefits for organisations.

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