

Summer 09

# law bites

## for Care Providers

## Super CQC?

The third independent social care regulator in the past seven years, the Care Quality Commission, opened for business on 1st April 2009. Care providers are sceptical whether this “super regulator” is capable of meeting their expectations given that it also has responsibility for health and mental health.

Barbara Young, CQC Chairman has said “There is no possibility that social care will play second fiddle to health in our activities”. Inevitably there has been a hiatus period in the demobbing of CSCI and the cranking up of activity at CQC, and it is far too early to say if this assurance is going to be met.

Providers are understandably worried that it is too large an organisation, which will be spread too thinly, and only end up being split up in a few years time as yet another restructuring takes place.

CQC has announced an ambitious programme for its first year. It will:

- continue with quality ratings of care homes and home care provision
- carry out an annual assessment of NHS organisations that provide services
- carry out assessments of commissioning - primary care trusts and local authority adult social services departments
- contribute to the Comprehensive Area Assessment process which will report on how well PCTs and councils are working together to commission services

**“There is no possibility that social care will play second fiddle to health in our activities”**

- develop a new registration system for health and adult social care to be introduced from April 2010
- take action where the quality of services is inadequate.

For social care it will also examine, as part of a programme of special reviews:

- the healthcare needs of people in care homes
- meeting the physical health needs of people with mental health problems and learning disabilities in hospitals and residential homes

In the run up to the launch of CQC, placing authorities have been taking a much more active role in carrying out full inspections (rather than simple monitoring) of care services and making use of the extensive powers that they have in their pre-placement agreements with providers (acting beyond their powers in several recent cases we have dealt with). Whilst their duty of care has come much more sharply into focus since cases such as Baby P, and they want to ensure value for money, this shift appears also to signal a lack of confidence in the current inspection regime.

It is perhaps no surprise that placing authorities look to go beyond simple

### What's new:

**01: Regulating care - the CQC opens for business**

**02: How business is reacting to recession**

**03: When Insolvency strikes - options open to business**

monitoring rather than rely mainly on what may be only a three yearly inspection by CQC of a care service, yet such a dual inspection scenario adds considerably to a provider's administrative burden and costs.

With all this in mind, and CSCI's last report indicating that a third of care homes in England are rated poor or adequate, CQC's real impact in the social care sector may well be seen more in its use of tough new enforcement powers than in its stated primary aim of a collaborative approach to encouraging improvement.

In this context the need for care providers to obtain specialist legal advice is even greater. We recommend that you obtain our advice before signing up to pre-placement agreements as well as when issues arise which may constitute a breach of that agreement or which might expose you to enforcement action by CQC.

Giles Gillingham  
Head of Howell Jones Care Providers  
Legal Team  
giles.gillingham@howell-jones.com



# Recession proof your business

In the ideal world it's best to be prepared for difficult times well in advance, however given the speed of the current economic downturn many businesses are being forced to be reactive rather than pro-active.

Here are some suggestions for "recession-proofing" your business (which in certain circumstances will be constrained by the terms on which you care for publicly funded clients).

- Always have a contingency plan - things do go wrong
- Cash is king - manage your cash flow as simply and effectively as possible.
- Develop the best possible relationship you can with the bank - keep them abreast of your current situation.
- Take a new approach to tax - question what can be done to improve tax cash flow and ease payments
- Price properly - don't over-react to market conditions, understand whether demand is price-sensitive and don't give profits away

All sensible and pragmatic points, but what most business-people want are simple actions they can actually put quickly into place and that will make them feel like they are actually doing something, rather than just talking theoretically.

## Tighten up your terms and conditions

The terms and conditions on which you do business with your clients and suppliers have never been so important. For example:-

- Have they been properly incorporated - are you sure you are dealing on your terms not your client's/suppliers?
- What terms do you have in place to limit your liability if there are problems

- On what grounds can the contract be terminated?
- What are your payment and default terms?

## Manage your Debt Collection

All businesses know "cash is king", but how good are you at getting what you're owed?

- What is your debt collection process? - When does a debt become bad and how do you escalate the process?
- How much time, energy and money is it appropriate to use to chase a bad debt?
- What is the most appropriate method to use and are debts worth chasing?

## Your People

It pays to be well prepared

- Have you complied with legislation in respects of contracts for your employees?
- Do you know their key terms of employment?
- Have you reviewed your teams and recognised who are the essential members?
- Have you considered short term re-negotiation of staff contracts or re-training to help control costs whilst times are hard?
- If you have to deal with redundancy, do you understand the process?

Contact Nick Richardson, Head of Business and Commercial team on 01483 302000 or email [guildford@howell-jones.com](mailto:guildford@howell-jones.com)

## Quality delivered as standard

We value you as a client and aim to deliver a first class service at all times. To help us achieve this we have compiled this list of service standards which we will endeavour to meet at all times.

- We will act with integrity, honesty and openness in everything we do for you and will respect absolutely the confidentiality of our working relationship.
- A specific member of our staff will be responsible for your work at all times and available to answer your queries whenever possible.
- A partner or consultant of this firm will have overall responsibility for your file and may be contacted should you have a query which cannot be satisfied by the member of staff handling your case.
- We will endeavour to deal with your communications promptly and courteously. We will strive to meet agreed deadlines, and tell you if this will not be possible.
- We will seek to deal with your matter in the most cost effective way, whilst maintaining our commitment to quality.



# Corporate Insolvency explained



The threat of insolvency is unfortunately a subject that is becoming all too familiar to many businesses, both small and large. With luck your business will never be affected, however it is as well to have some grasp of the basics.

## Your options

When a company finds itself in difficulty there are usually three options

- Liquidate immediately - this can either be a voluntary arrangement by the shareholders or may be a compulsory winding up by your creditors.
- Return to profitable trading through an arrangement with creditors - you may reach an informal agreement with your creditors, or there is also the more formalised Company Voluntary Arrangement (CVA). This is however quite administratively onerous and costly and is most appropriate for businesses with substantial debts.
- Bring in an Administrator as an "external manager" - an Administrator can either be appointed by the court or by the company if the company is not already in liquidation. When appointed, they must act in accordance with the following objectives:-

## Consequences for Directors

It is also important to note that the liquidation itself may not be the final issue as far as the directors are concerned. There are a number of circumstances where a director can incur personal liability as a result of their behaviour in the period before the insolvency occurred:-

- Wrongful trading
- Fraudulent trading
- Risk of Disqualification
- Claw-back claims

The conclusion here being, for all directors to act in good faith at all times and not to ignore or try to hide the threat of insolvency from the shareholders until it is too late.

## Help is available

This is an unashamedly whistle-stop tour through the process of corporate insolvency. It provides you with some very basic background for the processes and their application. It may never apply to your business, but hopefully this article will leave you with two very clear messages. If liquidation is a genuine possibility, don't wait until it's too late, seek professional advice early and secondly, don't try to work around the system. The courts have seen it all before and the long term consequences can be severe!

# A Helping hand onto the Property Ladder

## Family Bites

With the view that the property market may be heading towards its lowest level, as a parent you may be thinking of helping your children get on to the property ladder. This may be by way of a loan or giving them money, there are some things you need to consider:

- Is the money to be a loan or a gift?
- How would you feel if your child married or cohabited and that partnership came to an end and their ex-partner sought to claim an interest in that property to include the monies you had gifted your child?
- How would you feel if you fell out with your child and they then reneged on your verbal agreement that the money would be repaid?

When entering into a 'family arrangement' people never consider or indeed like to consider the possibility of future problems but they can be a reality. By taking advice and having a clear well drafted document recording the agreement reached this provides clarity and minimises the opportunity for future disputes.

For more information contact Samantha Jago either by email [Samantha.jago@howell-jones.com](mailto:Samantha.jago@howell-jones.com) or direct dial on 01483 540551



# An update on Transfer of Undertakings - TUPE

Whether you're a buyer or a seller, if a business or part of a business is being transferred to a new owner, then you need to be aware of The Transfer of Undertakings (Protection of Employment) Regulations 2006, known as TUPE. These in effect provide protection for the employees of the affected business and put in place a number of "hoops" that both the seller and buyer have to jump through.

TUPE can even apply when a business stops or starts using a third party to provide certain services, or if the business changes which third party provides those services.

By following these steps, these regulations provide everyone with a manageable process for the transfer of employees. However if the process is not followed, then there are potentially severe penalties for the party at fault.

## Key Principles

TUPE introduces three key concepts into UK Law:-

- Protection for employees from dismissal in connection with a TUPE transfer
- The principle that the buyer inherits all the rights, obligations and liabilities in relation to the transferring employees
- An obligation to inform and consult with the representatives of the affected employees

## Other considerations

The legislation around TUPE transfers can be quite involved and there are a number of potential pitfalls for the unwary around managing the consultation process and managing any employee dismissals that may legitimately arise due to redundancy, for example. It is also important to note that whilst TUPE does not apply to the sale of shares of a company, the new owners will of course inherit the existing workforce and all their associated rights and obligations.

If you would like to meet to discuss your particular transaction, then we would be happy to do so or we could provide you with our handy "ready-reckoner" covering the key TUPE issues for both buyer and seller.

If you feel you need to find out more about this and how it can affect you please contact Richard Brown on 01483 302000 or email [richard.brown@howell-jones.com](mailto:richard.brown@howell-jones.com) for an informal chat



## Our approach

We are all reluctant to spend money on professional services but the right advice at the right time can save you money.

We offer practical guidance, coupled with commercial and professional advice.



## In particular we can help you with:

- Buying a Care Home/business
- Selling a Care Home/business
- Retirement/exit strategies
- New build projects
- Employment contracts/ disputes
- Registration and compliance issues
- CQC reports and investigations
- Care standards tribunal cases
- Residents and supplier contracts
- Corporate refinancing

If you have a colleague who would like a copy of the Howell Jones law bites newsletter please let us know. Email us on: [post@howell-jones.com](mailto:post@howell-jones.com)