

one step ahead

PENGILLYS

S O L I C I T O R S
& M E D I A T O R S

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MIDAS - corporate debt recovery service



Pengillys is pleased to offer business clients a new corporate debt recovery service. Named after Midas the legendary king of Asia Minor famed for turning base

metal into gold, this service is designed to convert your bad debts into cash at minimal cost to you.

By way of example, for debts up to £500.00 we will agree a fixed -fee of £100.00 for which we will take all steps up to obtaining a default Judgment.

In the event that the claim is defended, we will advise you accordingly, and may be prepared to represent you in Court also at a fixed-fee. Where necessary, we will assist you in the enforcement of a Court Order to obtain your money.

Our litigation team has an unrivalled reputation for being pro-active, successful and delivering a quality service. We maintain an excellent working relationship with the Local Courts and we have the expertise and resources necessary to provide an efficient, inexpensive and quick solution to your bad debt problems.

For more information or to obtain a copy of our brochure contact the Partner responsible for the Debt Recovery Department Mr T Glover on 01305 768888 or by e-mail Midas@pengillys.co.uk.

new rules for executing documents

Getting your contracts and documents right is crucial. Many a legal dispute is won because one side had a good contract. This is one area where lawyers have much to add to a transaction.

How a document is signed may not seem the most exciting topic in the world but if getting it wrong means it is invalid then the consequences could be immense. The new Regulatory Reform (Execution of Deeds and Documents) Order 2005 came into force on 15th September.

The new rules remove some uncertainties. The Government describe the existing law as a "complicated mosaic of inter-acting statutory provisions". Although most documents are just signed on behalf of a company some more formal documents are

known as deeds and special rules must be followed to make them valid.

Some companies have a company seal and use it for executing deeds whilst others have two directors or a director and company secretary execute deeds without the use of the seal. Many of our local clients will find it wise to have solicitors look over their standard documents particularly if they have deeds of variation or for assignment of rights. The main changes are:

- merely sealing a document will not make it a deed;
- they allow a third party can rely on the signatures of two directors to attest a company seal on a deed, as well as the signatures of one director and the company secretary, and similarly with other corporations.
- directors and secretaries of more than

company entering into a deed will have to sign separately for each company they represent.

- companies will be given the same flexibility as individuals to complete the formalities of signing a deed in advance of being bound by it.
- third parties will be able to rely on a solicitor having authority to complete a transaction in all transactions not just when land is being sold.
- companies will have power to delegate the task of execution.
- third parties can rely on the attestation of companies acting as director or secretary of another company when that company executes a deed. Get your contracts and documents checked. Contact us for assistance.

using staff from agencies



Many local businesses particularly in busy holiday periods use staff from agencies. The Court of Appeal has held that an agency worker was not employed by the employment agency that supplied him with work but with the company for whom he did the work.

In *Bunce v Potsworth Ltd (t/a Skyblue)* the Court of Appeal considered whether Mr Bunce was an employee and therefore able to bring a claim for unfair dismissal. Mr Bunce had brought his claim against the employment agency (Skyblue) that provided him with work on a regular basis, mainly for a rail company but also for other companies.

In the Court of Appeal, Mr Bunce argued that he was an employee of the agency because he had an overall “umbrella” agreement with them. He also said that each time he was sent on an assignment, a further contract between him and the agency existed. Although the Court of Appeal did not accept Mr Bunce’s arguments worked in his case, the Court did say that such contractual arrangements could exist. However, this was not the main point. Even if there was such a contract, it may not be an employment contract.

When looking at this issue, the Court emphasised that day-to-day control over what the worker does and how they do it is the key factor. The Court said it was clear that the end-user had such power and control. This is a worrying point for clients of employment agencies. This is the same test the tax authorities have always used – control. With your employees you tell them where and when to work and they cannot send an alternative person in to do the work. Your self employed plumber, for example and by contrast, however fixes when he works and could send a deputy to do the work instead.

We can advise you on how to protect yourself. You could include an indemnity in your written contract with the employment agency for example, that they will pay all employment costs etc, arising from any decision that that person is later deemed to be your employee.

public sector contracts

Many local businesses supply schools, hospitals, the local authority and other public bodies with their goods or services. Large value public contracts are subject to very strict rules. The “public procurement” rules are set for a big shake up next year when new EU directives in this area are made part of English law. The changes to public procurement rules should make things easier for businesses. Only large value contracts fall within the rules but even so there are quite a large number of local contracts at that level put out to tender each year.

The European Commission has just published a document which helps to explain the new rules and the British Government is consulting on the UK regulations which will bring the new directives into force here. The new directives will make electronic public procurement much easier too which should save costs. The objective is to enable any business with a PC and an internet connection to bid for public contracts electronically anywhere in the EU. That means a local business here could be bidding for a contract up for grabs in Latvia or any of the other 25 EU member states. The new EU document covers all stages of the contract award procedure that can be computerised, as well as the new instruments and purchase techniques.

competition law and licensing: Microsoft to change Windows in the EU

Most readers will remember Microsoft’s big fine for infringement of the EU competition rules – Article 82 of the Treaty of Rome for bundling software together.

Microsoft says it will adopt all of the main changes demanded by EU antitrust regulators for its stripped-down version of Windows sold without the Media Player programme. Changes to the Windows programme will include deleting references to Media Player from product documentation, boxes and help files. Alterations also include creating a software package that allows consumers to put back the programmes and settings that were removed from the Media Player-less version, which EU regulators demanded Microsoft to offer consumers.

However discussions between Microsoft and the EU were continuing at the date of writing as Microsoft is unhappy to disclose patented information which the ruling also required. It is rare that the competition authorities have required those who own intellectual property rights to grant a license of those rights to a third party.

However the case is not without precedent. A Mr Magill before the European Court of Justice was able to force the BBC and ITV to license him with copyright in lists of TV programmes so that he could bring out a combined TV guide in the days before such guides were available by using Article 82 of the Treaty of Rome.

If in your business you require a license of another business’ intellectual property it may be worth taking legal advice on whether you can use the EU or UK competition rules to require that a licence be granted to you, if the owner of the rights is in a dominant market position.

Clean Neighbourhoods and Environment Act 2005

Worried by anti-social behaviour, vandalism and crime and disorder in your local area? The Clean Neighbourhoods and Environment Act 2005 may help.

The Act gives powers to local authorities, the police, fire services and others to take anti-social behaviour affecting the local environment into account in setting their crime and disorder reduction strategies.

So offences such as fly tipping and nuisance vehicles are relevant.

There is also a new gating order restricting public rights over minor highways - for example if that area is being used by local thugs it could be blocked off. Where a local business or residents are bothered by anti-social behaviour it will now be possible to block off or gate access points to the highway such as by using metal gates.

There are new powers to remove abandoned cars from the streets right away without notice. It is also illegal under Section 3 of the Act to leave a car in a public place with a notice inside saying it is for sale. Nor can you mend cars for pay on a public highway.

Litterbugs are also caught. It is an offence to drop litter anywhere in open land including private land, rivers, ponds and lakes so, for example, landowners who must allow ramblers their "right to roam" over their land could prosecute if those exercising those rights drop litter.

Anyone operating stalls, street vending and the like can be required to clear up after them. It is also now made entirely clear that chewing gum and cigarette ends are litter.

Other useful measures include rights for local authorities to restrict free leaflets/flyers being distributed which can end up as litter so if your business uses that means of marketing then you should take legal advice.

There are many other provisions too such as Part 5 – waste. Illegal disposal of waste can lead to a fine of up to £50,000 or 5 years in jail for persistent fly tippers. You can be stopped en route to your illegal tipping and questioned. All in all it is an interesting new Act.

Direct sellers consumer code of practice

The Office of Fair Trading has approved a consumer code of practice from the Direct Selling Association (DSA).

Direct selling is defined by the DSA as the sale and supply of goods and services through independent direct sales people. This is often face to face contact such as at people's homes or work places. It is different from mail order, direct mail, TV home shopping or internet sales - none of which involve contact with a sales person. People can be more easily misled or conned by a direct salesman in their home.

The new code gives:

- a 14-day cooling-off period during which consumers can cancel the contract (the statutory minimum provides a seven-day cooling-off period for unsolicited visits only);

- a consumer guide to shopping at home;
- guidance and training to direct sellers to ensure that they act with integrity and do not use misleading, deceptive or unfair practices;
- a free independent arbitration scheme; and
- regular compliance audits and consumer satisfaction surveys with a disciplinary committee to deal with members who do not comply with the code.

DSA members comprise companies involved in about 70% of all direct sales in the home will now be able to display the OFT 'Approved code' logo on marketing material. The Code does not cover sale of financial products and services. DSA members will not therefore be able to market such products or services under the OFT Approved logo, except for routine credit arrangements related to the sale of goods. If you need advice on any aspect of direct selling, please do get in touch.

licensed premises



In some areas of the country only one in five of those who sell alcohol have applied for the new style licences for which application was required to be made by 6th August 2005. If you have not applied you should urgently seek advice on what to do.

Existing liquor, public entertainment, theatre, cinema and late night refreshment licences all disappeared and were replaced by a single system.

There are now two main types of licence:

- a premises licence and
- a personal licence.

Local councils have become the Licensing Authorities and the courts now no longer administer liquor licensing. The new rules also abolish fixed licensing hours.

The new licensing rules come into force on 24 November 2005. The Licensing Act 2003 contains the law and local businesses have therefore had lots of notice. Anyone not licensed on time will be acting unlawfully and could be prosecuted. Maximum fines for those trading without an appropriate licence are £20,000 and/or imprisonment.

Even if your existing licence does not need updating you must apply. Existing licences expire on 24th November. Managers and senior staff have to hold a Personal Licence too. Some chains of pubs are having to send managers of every branch around the country on courses.

The implications of the legislation are huge and yet many businesses seem completely unaware of them.

electrical equipment recycling



Anyone involved with electrical equipment needs to consider the EU Directive on Waste Electrical

and Electronic Equipment (WEEE Directive). This sets out criteria for the collection, treatment, recycling and recovery of waste electrical and electronic equipment.

Many local authorities recently have introduced better means of recycling, brown bins for cardboard and garden waste and the like.

The UK has decided to bring the WEEE directive into force in 2006. That does not give businesses which are affected long to prepare. There is

another relevant law too - the Directive on the Restriction of the Use of Hazardous Substances (RoHS Directive) which facilitates the dismantling and recycling of waste electrical and electronic equipment by restricting the use of hazardous substances used in their manufacture. It is due to be in force from 1st July 2006.

The DTI says "The Government has received many representations from businesses and others saying more time should be taken on the practical implementation in order to get it right. Several other major EU Member states now appear to be planning their practical implementations on a similar, deferred timetable".

According to the new timetable, Regulations implementing the RoHS Directive and the WEEE Directive will be available soon. Key parts of the WEEE Regulations, including the producer responsibility obligations for household and non-household WEEE and the retailer/distributor take back obligations, will not come into force until 2006. Contact us for further information.

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divorce settlements

The Court of Appeal has ruled that a man married for 1,000 days must pay his ex wife £5m. The man, Mr Miller, has a fortune valued at £30-£36 million. His ex wife had been earning £85,000 a year but stopped work when they married. Lord Justice Thorpe said that by marrying her, Mr Miller had given his wife an expectation of a significantly better standard of living. He also said it was significant that the marriage had broken down because Mr Miller left her for another woman, whom he had since married. He was ordered to pay his former wife a lump sum of £2.7 million, and to pay off the £500,000 mortgage on their £2.3 million former matrimonial home in Chelsea and give it to her. There were no children, although she did suffer a miscarriage. The case has been seen by family lawyers as a test case for short, childless marriages involving wealthy people.

For information about this or any other aspect of divorce/family law, please contact us.

handling personal data

Every business holds lots of information about employees and customers. Sometimes the information is very confidential such as financial information or information about employees' health.

The Data Protection Office has now issued a first complete volume of the Employment Practices Data Protection Code, consolidating all four original parts into one, a very welcome development. It provides guidance for employers when dealing with data protection issues affecting workers. It has also issued guidance on data protection law and taking photographs at school sports day – which it says is acceptable (some schools were worried about DPA issues).

If you would like us to check your current practices to ensure you are compliant with data protection law contact us for further information.

Gillette ruling on trade mark

Using a competitor's trademark can be effective and legal in advertising. EU law allows comparative advertising as long as it is honest and necessary to describe the product concerned.

In one recent case the court looked at a dispute between Gillette and al LA-Laboratories Ltd Oy of Finland about unauthorised use of the trade marks "Gillette" and "Sensor" in a label attached to LA-Laboratories' razor blades. The label said: "All Parason Flexor and Gillette Sensor handles are compatible with this blade" – Parason Flexor being LA-Laboratories' own brand.

Gillette sued, alleging that the label created a connection in the mind of consumers between the products marketed by LA-Laboratories and those of the Gillette companies, or gave the impression that that company was authorized to use the Gillette and Sensor marks.

The European Court did not agree. The Trade marks directive and indeed the UK Trade Marks Act 1994 states that a trade mark owner may not prohibit a third party from using the mark in trade where it is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts, provided such use is made in accordance with honest practices in industrial or commercial matters.

Contact us if you need advice on your advertising and the law.