

# LEGAL BULLETIN



**PRINCIPLE LAW** LTD  
Solicitors & Higher Courts Advocates (Civil)

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Welcome to  
another Issue of  
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Legal Bulletin

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## Commercial Agents

### Compensation Rights for Commercial Agents

If you engage a self-employed intermediary to go negotiate the sale or purchase of goods (Commercial Agent), the relationship is governed by EU Directive which gives the agent substantial rights to claim compensation or an indemnity on termination of their agency agreement and implies other terms in their contracts.

An important decision in the case of *Lonsdale v Howard & Hallam Ltd*, brought significant changes to the calculation of the compensation for commercial agents.

This case rules around the financial awards that are involved when a contract is terminated between a self-employed sales agent and the company using his services.

Under Commercial Agents (Council Directive) Regulations 1993 there are two ways of determining a payout—indemnity or compensation. If the agency contract does not specify indemnity, the agent is entitled to compensation, unless there has been a fundamental breach of contract by the agent.

In the past, compensation was assessed by the “two year” approach.

Since the judgment, compensation is to be assessed by way of a business valuation of the value of the agency to the agent at the date of termination by presuming a hypothetical buyer and a hypothetical open-market sale.

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### Companies Act 2006 Director's Duties

Companies Act 2006 brought significant changes into company law. One of the most significant part of the Act is Part 10 “*Duties of company directors*”. For the first time, duties of the directors, known at common law, are codified in the Act.

The codification of directors’ duties is momentous. Under the Act, directors must act in a way to promote the success of the company for the benefits of its shareholders as a whole. They will need to have regard to the interests of the stakeholders, the community and the company’s reputation.

The general duties specified in the Act as owed by a director of a company are:

- ❖ Duty to act within powers
- ❖ Duty to promote the success of the company
- ❖ Duty to exercise independent judgment
- ❖ Duty to exercise reasonable care, skill and diligence
- ❖ Duty to avoid conflicts of interest
- ❖ Duty not to accept benefits from third parties
- ❖ Duty to declare interest in proposed transaction or arrangement.

### Formation of a Company

Major changes have also been introduced in relation to the formation of a company.

From **October 2008**, the Memorandum of Association will become a historic document simply recording the facts stating that the subscribers wish to form a company under and agree to become members of the company and, in the case of a company that is to have a share capital, to take at least one share each.

As to the Articles of Association, new companies will profit from new model Articles

	<p>which will substitute existent Table A Articles that are much clearer and simpler. Existing companies can also choose to take advantage of these new streamlined model articles in whole or part.</p> <p>There will be no requirement in the future, either in the Memorandum or the Articles to state companies' objectives. Thus, companies will not be restricted in what they do, unless they choose to be restricted.</p>
<p><b>Director</b></p>	<p>From <b>October 2008</b>, a company must have at least one director who is a natural person and cannot have companies acting as directors.</p> <p>A person may not be appointed a director of a company unless he/she has attained the age of 16 years. An appointment made in contravention of the minimum age provision will be void. All existing directors who will not satisfy the requirement of the minimum age limitation on or after October 2008 will cease to be directors.</p>
<p><b>Company Secretary</b></p>	<p>From <b>April 2008</b> a private company is not required to have a secretary, unless the company chooses to do so. If a company does have a secretary, the secretary will have the same rights and responsibilities as he/she has now.</p> <p>A public company must have a secretary</p> <p>In the case of a private company without a secretary anything authorised or required to be given or sent to, or served on, the company by being sent to its secretary may be given or sent to, or served on, the company itself, and if addressed to the secretary shall be treated as addressed to the company. Furthermore, anything else required or authorised to be done by or to the secretary of the company may be done by or to a director, or a person authorised generally or specifically in that behalf by the directors.</p>
<p><b>Transfer of Undertakings (protection of Employment) Regulations 2006</b></p>	<p>Transfer of Undertakings (protection of Employment) Regulations 2006, commonly known as TUPE Regulations came into force on 6 April 2006.</p> <p>TUPE Regulations 2006 apply to “<i>relevant transfers</i>”. For the purposes of these Regulations, “<i>relevant transfer</i>” can occur in two cases:</p> <ul style="list-style-type: none"> <li>❖ “<i>Business transfer</i>” - a business, undertaking or part of one is transferred from one employer to another as a going concern.</li> <li>❖ “<i>Service provision charges</i>” – when a company engages a contractor to do work on its behalf, or reassigns such a contract, including bringing work in-house.</li> </ul> <p>By way of broad guidance TUPE 2006 applies to:</p> <ul style="list-style-type: none"> <li>• Mergers;</li> <li>• sales of a businesses by sale of assets;</li> <li>• a change of licensee or franchisee;</li> <li>• the gift of a business through the execution of a will;</li> <li>• contracting out of services;</li> <li>• changing contractors;</li> <li>• where all or part of a sole trader's business or partnership is sold or otherwise transferred.</li> </ul> <p>However, TUPE 2006 does NOT apply to:</p> <ul style="list-style-type: none"> <li>• transfers by share take-over;</li> <li>• transfers of assets only (for example, the sale of equipment alone would not be covered, but the sale of a going concern including equipment would be covered);</li> <li>• transfers of a contract to provide goods or services where this does not involve the transfer of a business or part of a business;</li> <li>• the supply of goods for a clients use, for example, supplying food to a client to sell in its staff canteen, rather than a situation where the contractor runs the canteen for the client;</li> </ul>

- transfers of undertakings situated outside the United Kingdom (although these may be covered by the regulations of other member states).

Under the DTI Guidance, main changes brought under the TUPE Regulations 2006 are:

- A widening of the scope of the Regulations to cover cases where services are outsourced, in sourced or assigned by a client to a new contractor;
- A new duty on the old transferor employer to supply information about the transferring employees to the new transferee employer (by providing employee liability information);
- Special provisions making it easier for insolvent businesses to be transferred to new employers;
- Provisions which clarify the ability of employers and employees to agree to vary contracts of employment in circumstances where a relevant transfer occurs;
- Provisions which clarify the circumstances under which it is unfair for employers to dismiss employees for reasons connected with a relevant transfer;
- The rights and obligations in the 1981 Regulations remain in place, though the 2006 regulations contain revised wording at some points to make their meaning clearer, as well as reflecting developments in case law since 1981.

With regards to the new duty on the transferor ('old employer') to the transferee ('new employer') the general guidelines are as follows:

If a TUPE transfer applies, all terms and conditions of work and continuity of employment should be preserved. This principle applies to all employees who were employed in the entity transferred immediately before the transfer; and those who would have been so employed if they had not been unfairly dismissed for a reason connected with the transfer.

Subject to a one year qualifying period, such a dismissal will be automatically unfair for a reason connected with the transfer unless it is for an '*economic, technical or organisational*' (ETO) reason.

#### **Consumer Credit Act 2006 – Changes to the Rules**

The Consumer Credit 2006 Act establishes a fairer, clearer and more competitive market for consumer credit, updating consumer credit legislation.

The Act applies to all consumer credit licence holders including financial services companies, banks, building societies, hirers, and pawnbrokers in England, Wales and Scotland. **From 6 April 2008**, the rules will also cover debt administrators and those providing credit information services in England, Wales and Scotland.

The first set of reforms introduced in April 2007 brings in:

- ❖ a new test of unfair relationships to replace the existing credit bargain test;
- ❖ an extension of the jurisdiction of the Financial Ombudsman Service to consumer credit disputes; and
- ❖ the abolition of provisions for the automatic unenforceability of improperly executed agreements.

From April 2008 the upper limit of £25,000 for CCA regulated loans will be abolished and some FSA regulated loans become subject to dual regulation under both the FSMA and CCA.

This bulletin does not provide a comprehensive or complete statement of the law relating to the issues discussed nor does it constitute legal advice. It is intended only to highlight general issues. Specialist legal advice should always be sought in relation to particular circumstances.

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