

AUTUMN 2009

ARTS & MEDIA UPDATE



IN BRIEF

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COMMENTS

Please contact us with any comments or suggestions.

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ARTS & MEDIA UPDATE

Welcome to our Arts & Media update, in which we hope to bring you up to date with legal developments across this broad sector, as well as focusing on key areas of interest.

Despite the concerns about the general economy, we feel this is a time of opportunity as well as caution. Arts and media organisations are using websites and new online technologies to connect with both existing and new audiences. Through these innovative and forward-looking developments, the public is engaging in new ways with arts and entertainment.

We are seeing a great deal of interest in the notion of crowdfunding and the way in which this can provide a valuable means of accessing new funding and support for a range of different types of projects.

We look at the 2006 Companies Act and, in particular, the changes coming into force on 1 October 2009. In our immigration focus, we outline the continuing fallout from the introduction of the points-based system for immigration and work permits.

There is a review of the Charity Commission's approach in applying the public benefit test to arts charities and when public procurement regulations apply.

And finally, there's a summary of the important distinctions between employer and employees in the arts and some tips on getting the best from your new leases.

I hope you find this update useful and interesting.



Sean Egan

A handwritten signature of Sean Egan in blue ink, written in a cursive style.

TO WEB OR NOT TO WEB?

Arts and media organisations, which are increasingly using the internet to connect to both current and new audiences, need to consider legal issues as well as creativity when going online.

Erica Crump summarises some of the most important considerations for arts and media website owners



Erica Crump

Solicitor

Erica provides commercial advice to film, television and theatre production companies and advises arts charities & social enterprises.

'A dance company showing film footage of its latest performance via its website, should expect to obtain clearances from the director of filming, the choreographer, the composer, the set designer and the dancers'

The web has developed enormously in the last two years. It is no longer enough just to have a web presence, but it is about creating an online strategy that may include audiovisual recordings, sound recordings, blogs, Facebooking, tweeting, Flickrring, podcasting, vodcasting and much more. Media organisations, particularly those in theatre and the arts, are using online innovation as an increasingly important means of connecting with existing audiences and finding new ones, and of ensuring that their work has a high profile.

As part of any online activity you need to appreciate the legal issues that may be involved.

Clearances

Before putting any content on your website, the necessary clearances must be obtained from all the relevant rights owners. This may include web designers, artists, photographers, playwrights, composers, lyricists, designers, directors and any other creators of website content. You should also clear performers' rights, 'moral' rights, obtain relevant clearances from PRS (Performing Right Society) and MCPS (Mechanical-Copyright Protection Society) and rights in musical recordings.

This applies not just to finished works but photographs or recordings of rehearsals, auditions, workshops and any performances. For arts

organisations this may mean obtaining clearances at several levels. For example, a dance company showing film footage of its latest performance via its website, should expect to obtain clearances from the director of filming, the choreographer, the composer, the set designer and the dancers. It is worth considering including specific provisions in standard agreements to allow for online publicity and promotional.

Infringement of third-party rights

Websites are increasingly offering users the opportunity to contribute user-generated content or participate in social networking. The Royal Opera House offers links on its Discover page to Facebook, YouTube and Twitter. West End shows as standard include rehearsal images and have Facebook presences and material posted on YouTube. The National Gallery offers MySpace and Flickr. Other websites provide chat rooms or space for users to contribute material directly to the website.

Although user-generated content is a great way to engage with the public, there is a risk that the material posted will breach other people's rights. Material can infringe copyright, be defamatory, invade individuals' privacy or be otherwise offensive, or abusive. Not only can this create legal liability, but it can be a PR disaster if inappropriate material is posted to your website. Steps are needed to protect

your organisation. This means producing clear Terms of Use regulating users' participation in the website. You need also to consider whether material will be moderated. If it is not, there is a lower chance of you being held to be a publisher or having reproduced infringing content and therefore being liable for it. But, at the same time, if you do not moderate you run the risk of adverse publicity and of being associated with inappropriate material.

Privacy

Websites have become the cheap and efficient way to capture personal information, such as contact details from users, and to add this information to mailing lists. Where users give personal information, it is vital that data protection legislation is complied with. Usually, this means telling website users what the organisation does, how their identifiable personal information will be used and who it will be shared with – and to give users the opportunity to 'opt-out' from you or other organisations contacting them in the future. It is also important to comply with European legislation about 'cookies' and to provide information to users about the types of cookies being used, for what purposes and how to disable them.

Online selling

When selling tickets, publications, membership or other goods or services via an online shop, website owners must comply with the Distance Selling Regulations. The key points to note are that consumers must be given clear information, in writing, about the goods and services being sold, the delivery

and payment methods and the right to cancel orders. The consumer must also generally be given a period of at least seven days, known as the 'cooling-off period' to cancel the order.

Consent and young people

Given the anonymous nature of the Web there are particular issues relating to younger users. When accessing programmes showing adult content via BBC iPlayer, the BBC asks users to confirm that they are over 16 years of age by clicking a tick box. Although this acts as a warning about the nature of the programme, it would, in reality, be easy for any young child to fake consent and click the box.

Website owners need to be careful when using such methods. If a website is considered to be particularly unsuitable for children or if children can be contacted by members of the public through the site, it may be inadequate to simply provide a tick box. The website owner may need to introduce more comprehensive checking processes to ensure users are of an appropriate age. It may also be necessary to provide clear warnings on web pages should parts of the site be unsuitable for children, especially as recent cases have shown that website owners do owe a duty of care to their website visitors and risk legal action should they be seen to have breached this duty. The use of sites by young people also gives rise to particular issues under data protection rules, as the requirement for demonstrating compliance will be more stringent when young people are likely users.

FIND OUT MORE

Sean Egan explains how to avoid the legal pit-falls of allowing web-users to post their own content in his article 'The dangers of user-generated content', published in *ArtsProfessional Magazine*, 22 September 2008. You can read the article on our website here: www.bwbllp.com/Articles/Detail.aspx?ArticleID=286

CROWDFUNDING: A NEW WAY TO RAISE MONEY AND SUPPORT

Crowdfunding can be a successful means of raising finance for innovative and creative projects, by appealing to relatively large numbers of people for relatively small amounts of money.

Sean Egan clarifies the meaning of crowdfunding and examines some of the practical issues



Sean Egan
Partner and head of Arts & Media department
Sean advises on all aspects of the law relating to arts and the media.

Crowdfunding refers to using groups of individuals to invest in or donate (usually small sums) or otherwise support one or more projects. There is a great deal of interest in raising equity finance for films and theatre productions in this way. The principle has wider application and has great potential as a means of creating a 'buzz' for projects which in turn can lead to additional investment and/or support. Though crowdfunding is particularly exiting for arts and media projects it has a broad application to social enterprises and campaigning.

Crowdfunding works usually by accessing information about the project or projects through a website. This has obvious attractions in that payments can be automated and back office functions can be simplified. However, there are a host of legal issues that apply and which potential crowd funders are not necessarily aware.

There is an important distinction at the outset between projects seeking to raise support through an online community, whether by way of donation or other in kind benefits, and those projects that are seeking to raise investment.

In broad terms, for those seeking donations and making sales, the Sale of Goods Act requirements are likely to apply and/or the Distance Selling Regulations, which govern how online contracts are concluded. Genuine donations (i.e. where there is no

material benefit for the donor) can access the benefits of gift aid, subject to satisfying gift aid requirements which should be considered in detail.

Seeking investments online is regulated in the same way as any other investments. The principal regulation is through the Financial Services & Markets Act 2000 though consumer credit regulation may also apply. There is a general prohibition about the carrying on of 'regulated activities', unless the person doing so is an authorised person or an exempt person. These definitions are very broad and if a person is proposing to carry on business, including these regulated activities, then it is likely that authorisation should be sought.

'Raising funds in this way can be made to work, but it is of crucial importance that any such 'offer' is marketed effectively, so that it does not get lost in the tide of competing activity on the internet'

This prohibition also extends to arranging deals investments, setting up and operating collective investment schemes and introducing persons with a view to them concluding deals investments.

Offers of investments to the public are generally governed by the Prospectus Rules, though there is a minimum threshold. For investments under

€2.5m, these rules do not apply, but there are specific prohibitions against public offers.

It is possible to consider offers as not being made to the public in connection with crowdfunding offers but caution needs to be exercised.

Raising funds in this way can be made to work, but it is of crucial importance that any such 'offer' is marketed effectively, so that it does not get lost in the tide of competing activity on the internet. There are websites, such as Kiva and Zopa (both of which are based in the US), that act as a person-to-person portal for raising small amounts, but for projects such as films. It is likely that producers will need to mobilise friends, family and other contacts to generate enough interest.

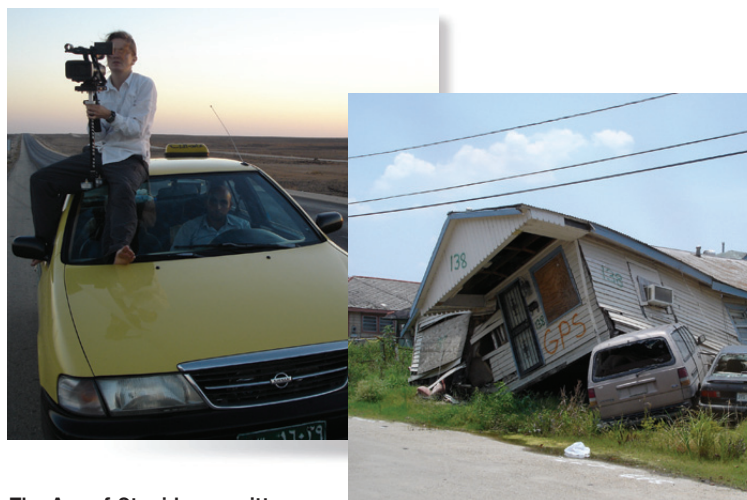
'The Age of Stupid' is a shining example of a crowdfunded film. It was hugely successful in establishing a community of engaged participants, who are investors but also supporters of the underpinning aims of the film, which seeks to convey the very considerable dangers of global warming to the wider public. The film has itself been an important means of publicising its central message and its impact has been considerable. It demonstrates how effective crowdfunding can be, but other projects have been less successful, as a result of failing to ignite sufficient interest.

In my experience, it is crucial to establish a realistic platform for any crowdfunding, rather than to believe that there is an interested public out there waiting to invest in that project.

Investments can take the form of a pro rata participation in the net profits of a film, or other such mechanism to appropriately reward the investors, who often are being asked to take a very substantial risk: generally there can be no guarantee that, for instance, a film will be completed or a particular level of sales achieved. But the benefits need not be purely financial as there will always be the possibility to developing a community that supports a particular project and wishes to be positively involved with it from development to distribution.

FIND OUT MORE

For more information on arts and media funding and production, please contact Sean Egan s.egan@bwbllp.com or Lawrence Simanowitz l.simanowitz@bwbllp.com



The Age of Stupid was written and directed by Franny Armstrong and produced by Lizzie Gillett; it was crowdfunded by over 600 individuals and groups. For UK screening information go to: www.ageofstupid.net/screenings/country/United%20Kingdom

TRADE MARKS AND THE ARTS

Arts and media organisations may have valuable assets in the form of brands that can be trade marked.

Mathew Healey introduces some of the issues to consider



Mathew Healey
Consultant
Trade Mark Attorney
Mathew is a specialist, who acts in all trade mark-related matters including filing and prosecuting trade mark applications in the UK, Europe and around the world.

‘Trade marks protect brands rather than reputations and are far easier to enforce’

We have seen a number of disputes recently involving arts and media organisations and brand protection. The notion of ‘branding’ can be alien to some organisations but others may find increasingly valuable brands as a means of ensuring stable future income. Brands have a number of different points of contact with the activity of arts organisations.

You will probably all be aware of claims of passing off, which arise where a person (i.e. an individual or company) claims that another person is making illegal use of their goodwill, the public are confused and damage is caused. This is a useful protection and can help prevent blatant misrepresentation. For instance, if an organisation traded as Cameron Mackintosh or the BBC in the field of entertainment, there would be clear grounds to ensure such activity stopped immediately. But passing off can be difficult to prove and is particularly costly to prosecute.

Trade marks protect brands rather than reputations and are far easier to enforce. There is, however, a cost attached to registering and maintaining trade mark protection – whether as a UK trade mark or as a Community trade mark (i.e. covering the European Community).

Arts and media organisations need to be aware of trade marks for two reasons: first, to ensure that there is no potential infringement of another person’s mark and, secondly, to consider whether

registration of a trade mark would be worthwhile, whether for the organisation itself or a particular project.

Avoiding other trade marks

Trade marks can be words or images (i.e. logos) and can be registered in up to 45 classes. Each class relates to a range of product types and each mark must specify the goods it covers.

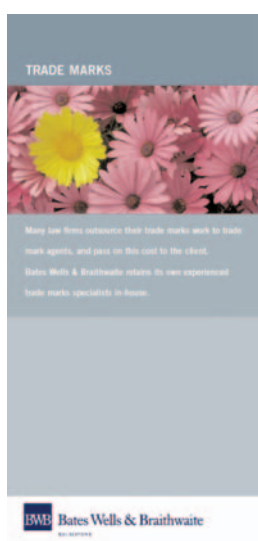
Television broadcasters and media organisations register many trade marks, which cover television formats and programmes and, which also cover live stage entertainment even if no such use has taken place. For instance, the BBC own the Community mark ‘Newsnight’. Playboy Enterprises International Inc has a Community mark for ‘Playboy’ in 31 classes – including education (!).

It is possible to search the UK trade mark registry online for UK and Community marks.

Disputes can arise if the title of a film, programme, show or exhibition or other ‘product’ is the same or similar to products incorporated in a registered trade mark. If your use is identical then you have a major problem even if there is unlikely to be confusion, as enforcement is relatively simple. Even if the title is different, straplines or other references can inadvertently include trade marks and should be checked. If promotional material is printed in advance and includes an unauthorised reference to a trade mark then you may be forced to pulp and/or recall all the material at considerable cost. Even worse, you may have to change the title.

Registering trade marks

'The National Gallery' is registered as a trade mark in 20 classes (including 'edible Christmas tree decorations' and 'magnetic letters'). If you have a brand that has value: whether your name or a particular show, exhibition or other project; and there is a risk that others may seek to cash in, registering a trade mark may be worthwhile – particularly if merchandising or other ancillary exploitation is a possibility.



Trade Marks expertise at BWB

Bates Wells & Braithwaite has a dedicated trade marks department with specialist knowledge in the field of arts and media. We provide advice on trade marks and register UK and Community trade marks. We also maintain a database of marks to aid clients manage trade mark portfolios. For more information please contact Mathew Healey (m.healey@bwbllp.com) or James Brady (j.brady@bwbllp.com).

OnBoard

OnBoard is a governance development, training and support consultancy run by Bates Wells & Braithwaite London LLP. It brings together the firm's legal skills with those of leading governance consultants including Tesse Akpeki, David Carrington and Linda Laurance. It works with charities and social enterprises to dispel misconceptions, demystify trusteeship and enable boards to lead better. OnBoard grew out of a realisation that voluntary organisations need more than good legal support if they are to thrive in today's environment. OnBoard offers a range of services from governance assessments, trustee training, executive coaching, mentoring, mediation and conflict resolution. Requests have come from all parts of the third sector - arts and educational organisations, community interest companies, trusts and foundations, international non-governmental organisations and infrastructure bodies. We also bring

together leading thinkers in the field through regular roundtable dialogues and debates.

OnBoard has launched a series of specialist training sessions aimed at raising awareness of the latest governance developments, equipping boards to deal with the concerns and challenges that confront them. Participants will be guided through the use of tailored resources and templates designed to strengthen their capacity to govern effectively.

For further information, please visit www.on-board.org or contact us at:

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COMPANIES ACT 2006 CHANGES

Arts organisations that are charitable companies or community interest companies should be aware of changes in company law from 1 October 2009

Augustus Della-Porta advises companies to be aware of the changes to constitutions and filing requirements



Augustus Della-Porta
Solicitor

Augustus is a solicitor in the Charities & Social Enterprise department, he advises charities, social enterprises and sports clients on a range of commercial and charity law issues.

From 1 October 2009, there are a number of company law changes affecting charitable companies, trading subsidiaries owned by charities and community interest companies. All Companies House forms will be changing, there will be new and different filing requirements and there will be important changes to what is regarded as a company's constitution. Though many of the changes are cosmetic rather than substantive, it is important that companies are aware of the changes to avoid delays and, potentially additional costs of dealing with the new requirements.

Constitutional changes

The main change is that from 1 October a company's constitution will consist of its articles and any other resolutions or agreements affecting the company's constitution. Importantly, the memorandum of association is no longer to be treated in law as part of the constitution. Companies registered after 1 October will have a much shorter memorandum, which simply records the subscribers' wish to register the company. All other provisions traditionally found in the memorandum, such as objects will now appear in the articles.

But what about existing companies set up before 1 October – will the changes apply to them?

The answer is yes. How this will work is that, with effect from 1 October, Section 28 of the Act treats all parts of the memorandum (other than the details of the subscribers) as being part of the articles.

From 1 October, existing companies can do one of two things – either retain their existing articles and attach an annex setting out those provisions of the memorandum which have become part of the articles, or pass a special resolution to amend their articles to incorporate the provisions from the memorandum. At the moment it seems likely companies will follow the first option until such point as they are

Existing companies can either retain their existing articles, attaching an annex to them, or pass a special resolution to amend their articles. Companies are likely to take the first option, until making other changes to their articles

planning to make other changes to their articles, when it would make sense to follow the second option.

Forms and filing

There will be over 250 new Companies House forms and enhanced procedures for filing electronically. Existing forms will have a new name and look different and many additional forms are being

introduced – imposing requirements for companies to file accompanying forms with certain documents, where previously it was sufficient just to file the documents on their own. Examples include changes to a company's objects and changes to a company's name.

Share companies

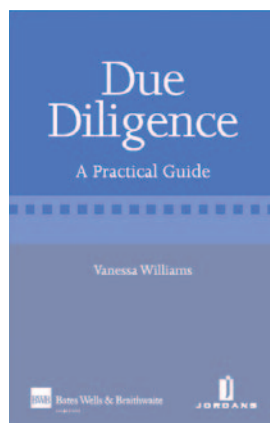
Currently, under the Companies Act 1985, authority is needed in the articles for a number of actions relating to shares: for example, the issue of redeemable shares, and the repurchase of shares. The 2006 Act will reverse this position, so that the action is permitted unless the articles contain a restriction to that effect. The practical effect of this is that if you are registering a share company after 1 October, you should consider adding appropriate restrictions. The new rules will apply to existing share companies, but for wholly owned trading subsidiaries, these issues rarely arise in practice.

FIND OUT MORE

A comprehensive summary of the key changes can be found on our website: <http://www.bwbllp.com/Updates/Detail.aspx?UpdateID=243&Location=1&ID=0>

A list of the new Companies House forms and draft versions can be found at <http://www.companieshouse.gov.uk/forms/formsAvailable.shtml>.

These drafts should not be used – final versions for use will be published on 1 October 2009.



Due Diligence: A Practical Guide

This guide, by Vanessa Williams, partner in the corporate department at BWB, provides a step-by-step manual of the complete due diligence process, from start to finish, for those involved in mergers, acquisitions, management buyouts/buyins and other corporate finance transactions.

You can order a copy at:

www.jordanpublishing.co.uk/Publications/catDetails.aspx?productID=807

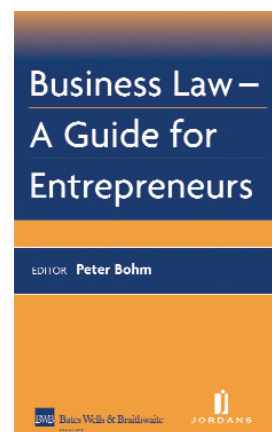
Business Law – A Guide for Entrepreneurs

Business Law – A Guide for Entrepreneurs is aimed both at existing business proprietors and at those thinking of setting up a new business. It will also be of interest to non-specialist legal professionals.

The publication is designed to give a basic understanding of all the legal issues affecting businesses and includes the following topic headings:

The book is edited by Peter Bohm, and written by a team of lawyers representing the broad range of BWB's commercial law expertise.

Business Law – A Guide for Entrepreneurs is published by Jordans and retails at £32.



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March 2007

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IMMIGRATION



Sue Kukadia

UK/US and International
Advisor

Sue is a specialist in
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immigration law, with an
emphasis on corporate
immigration law.

Immigration rules threaten the arts

In November 2008, the Home Office introduced a new points-based immigration system and visa restrictions, which affected international artists and performers coming to the UK for talks, exhibitions, performances and concerts.

The new points-based system includes harsh new controls on non-EU international artists and performers:

- International artists and performers must have an organisation in the UK that is willing and able to sponsor them for the purpose of employment in the UK;
- International artists and performers must either show that they have at least £800 of savings, which have been held for at least three months prior to the date of their visa application or entry to the UK if a non-visa national, or that the sponsoring organisation will maintain and accommodate them until the end of their first month of employment in the UK;
- International artists and performers who are visa nationals coming for any period must now apply for a visa in person and supply biometric data, electronic fingerprint scans and digital photography;

- The sponsoring organisation must keep copies of their passport, UK biometric card, and a history of their contact details;
- If the international artists and performers do not turn up to their place of work, or their whereabouts are unknown, the sponsoring organisation is legally obliged to inform the UK Border Agency.

These measures have already had a substantial negative impact on the UK arts industry – with cancelled concerts, talks, performances and exhibitions across the UK, which are the direct result of new entrance requirements. Though there is some progress in lessening the negative impacts, it is slow and the rules still serve as a barrier to non-EU artists and performers.

There has also been widespread comment that the Home Office restrictions discriminate against artists and performers from overseas on the grounds of nationality and financial resources, and are particularly detrimental to those from developing countries, and those on low income.

‘These measures have already had a substantial negative impact on the UK arts industry – with cancelled concerts, talks, performances and exhibitions across the UK’

FIND OUT MORE

BWB specialises in dealing with applications made under the points-based system. We are happy to discuss your requirements in detail and to provide solutions. Please contact Philip Trott, or Sue Kukadia in the first instance to discuss your matter. Philip Trott p.trott@wbllp.com Sue Kukadia s.kukadia@wbllp.com

EMPLOYMENT

Employment: Should artistic directors be employees?

Looking at the employment situation for artistic directors reveals many of the complex employment issues that will apply to other workers in arts organisations.

Arts organisations engage a range of employees, as well as consultants, freelance staff and casual staff. Those with artistic directors or other artistic leaders do not contract them in a standard way and, as often as not, the basis on which such individuals provide services to the organisation is not clear. A different set of issues can arise when individuals are engaged on a project-by-project basis, which then resembles continuous employment. Organisations need to be aware of their contracting patterns to identify if such a situation is likely to arise

A self-employed person is engaged under a contract for services and this should be contrasted with an employee who is employed under a contract of employment. There are a number of perceived advantages of engaging a self-employed person, as the organisation is not responsible for paying PAYE and Employer's National Insurance contributions and a range of employment law employee protections may not apply, such as unfair dismissal, holiday pay, statutory sick pay and redundancy. The individual may also prefer to be treated as self-employed – they may pay lower National Insurance payments as a result and choose to pay their income tax at a later stage.

However there are potential disadvantages. Where there is some uncertainty over employment status, there is the danger of HM Revenue & Customs retrospectively making claims and so it is important that organisations are clear as to the relevant status and where there is uncertainty seek appropriate advice. This will almost always be a better approach than hoping no issue arises later.

Artistic directors will often have freedom to provide their services to projects outside the organisation and so the arrangement that the organisation has with the artistic director will not be exclusive. There can be non-exclusive employment arrangements but, from the organisation's point of view, if the artistic leader is not always available it needs to be satisfied that it can complete its obligations as set out in funding agreements.

It is perfectly possible to allow for this flexibility within a contract of employment, as it is in a consultancy agreement. For companies receiving public funds and, in particular, funding from the Arts Council, the issue of the relationship with the artistic leader may need to be clarified, as the ability to call on that individual's services could be seen as one of the organisation's principal assets. A clear statement of the position should be seen as an essential element of governance. In addition, the Charity Commission (for charitable arts organisations) will expect trustees to have in place appropriate obligations from key individuals, including artistic directors.



Sean Egan
Partner and Head of
Arts & Media
Department



Sarah Bull
Solicitor
Sarah is a member of
our Employment
department; she advises
charities and
commercial clients on a
broad range of
employment law and HR
issues.

'For companies receiving public funds and, in particular, funding from the Arts Council, the issue of the relationship with the artistic leader may need to be clarified...'

FIND OUT MORE

For employment-related issues, you may wish to refer to the Employment department updates on our website: www.bwbllp.com/Updates/Default.aspx?Location=2&ID=4

In general terms, when the courts look at whether an individual is an employee or is self-employed there are three elements which must be present for there to be a contract of employment:

- the contract must impose an obligation for the person to work personally (i.e. he/she is not entitled to arrange for somebody else to provide those services);
- there must be a mutual arrangement so that, in return for payment, the employee provides work to the employer; and
- the individual submits to the employer's control.

This last is potentially anomalous in the context of many arts organisations, particularly where the company's ethos is to present the work determined or created by the artistic director. This is an example of one of the anomalies between the charity law structure and how charitable arts organisations work in practice.

There are a number of other elements that a tribunal and HMRC will look at when determining an individual's status, but it is important to appreciate that the wording of any agreement will not determine that individual's status. Their status will be determined by what actually happens and, in particular, the extent of control that the organisation has over the individual. In the absence of a written agreement that reflects the reality there is scope for potential dispute and disagreement.

PROPERTY



Mark Traynor

Partner
Mark is a partner in the Property department specialising in leases and other commercial property.



William Scott

Solicitor
William is a solicitor in the Property Dispute Resolution department and advises on property disputes, including lease removals and break notices.

Property: moving offices and negotiating with break clauses

In these troubled economic times many businesses are looking at their overheads and trying to find ways to reduce their costs. Moving offices is one potential way of reducing costs whether or not a lease is due to end. But it may also be possible to reduce costs without moving, particularly if there is a break clause in the lease.

Prospective tenants should push for the most flexible lease terms possible, including periodic rights to break the lease. Ten years ago it would have been rare to find a break clause in a lease but they have now become a common part of negotiations. Tenants are using break clauses as a method to achieve rent reduction, they can also be useful to businesses that are uncertain about

their future property needs, and may need to move to a smaller or larger property.

Some months before the deadline for service of break notices, tenants should look at the current levels of rent in their area and compare it with their own. It may well be that rents have decreased and that the property is now 'over-rented'.

If this is the case the landlord should be approached and a reduction of rent requested on the basis that, if it is not granted, the tenant might break the lease and move, leaving the premises empty. Tenants should leave plenty of time for negotiation in this process.

Although on the face of it, this seems like a win only for the tenant, it is good for the landlord too. They might be accepting a reduced rent, but if other

properties in the area are now cheaper it is likely a new tenant would also be offering less. In keeping a current tenant the landlord avoids having to pay agents' and solicitors' fees and the inevitable rent-free period required by a new tenant. Finally, there is no need to pay empty rates while a new tenant is sought and the premises are empty.

Some landlords are also displaying flexibility and a tenant-friendly approach to rental payments. With many businesses struggling with cash flow, landlords have allowed their tenants to pay their rent monthly in advance, rather than quarterly (although such arrangements may be subject to a penalty charge). While not all landlords are in a position to offer such terms, others have seen the value in retaining in situ tenants.

If on the other hand you are considering moving there are a number of important factors to consider.

You need to establish the notice period required to terminate the current lease. This will depend on the terms of the lease, whether the original term has expired or not and whether or not the lease is a protected tenancy. If the lease is a protected tenancy, you need to ensure the notice requesting a new lease is drafted and served correctly. A minimum of six months' notice is required.

If there is a break provision enabling the lease to be terminated early you need to establish if conditions attach to that break which must be complied with. In this climate landlords are keen to keep tenants in properties and resist breaks so care must be taken: not keeping to time limits can invalidate a break notice and strict compliance to the form of notice is important.

Tenants need to be clear about the obligations on giving back the premises. The standard requirement is that the tenant hands back the property either in the condition in which it was given or better and having complied with all the other tenant's covenants in the lease. This can require the reinstatement of all or any of the alterations made to the premises by the tenant during the term of the lease. Careful consideration must be given to the wording of the repair covenant in the lease to determine the extent of the tenant's liability. It is always advisable to discuss the issue of dilapidations with the landlord and agree the schedule of dilapidations (which will be drawn up at the tenant's cost) as soon as possible, so as to afford the maximum opportunity to resolve the issues as cost effectively as possible, whether by carrying out the works or making a payment to the landlord.

If dilapidations works are required, it is important to determine whether the statutory cap applies. A landlord cannot recover more than the loss in value to the landlord's reversionary interest caused by the tenant's failure to comply with the repair covenants in the lease. In a falling property market this can result in it being more cost effective for the tenant to agree to a financial settlement rather than carry out the works themselves.

It is the best policy to take action and advice as soon as possible when considering moving office as once the tenant has left the premises the options available to resolve issues of unpaid bills, previous breaches of covenant or issues of dilapidations become very limited, giving the landlord an advantage that could have been avoided.

'If the property is now "over rented", the landlord should be approached and a reduction of rent requested on the basis that, if it is not granted, the tenant might break the lease and move, leaving the premises empty'

FIND OUT MORE

Members of our Property and Property Dispute Resolution departments can advise on any aspect of leases, tenancies and break clauses.

For more information please refer to our departmental pages on the BWB website at:

<http://www.bwbllp.com/Departments/Detail.aspx?DepartmentID=9>

Please contact Mark Traynor m.traynor@bwbllp.com or William Scott w.scott@bwbllp.com

SHOULD YOU WORRY ABOUT PUBLIC PROCUREMENT RULES?

Local Authorities need to, the Arts Council and Government Quangos need to, but do you?

Philippa Hart unravels the complexity of public procurement rules



Philippa Hart

Solicitor
Philippa is a solicitor in the Charity & Social Enterprise department specialising in public procurement and state aid issues.

The question will often not have a straightforward answer and for those organisations that receive public support in one form or another it is easy to overlook, particularly in relation to capital projects or even engaging a caterer.

The Public Contracts Regulations 2006 ('the Regulations') govern the purchasing of goods and services by 'contracting authorities'. The definition of a 'contracting authority' is wide and includes:

- organisations which are financed wholly or mainly by another contracting authority; or
- subject to management supervision by another contracting authority.

This means that if you receive 50% or more of your funding from the Arts Council England, local authorities or other public bodies, the Regulations could apply to you.

Principles of Fair Contracting

All organisations to which the Regulations apply must comply with the principles of fair contracting appropriate in the circumstances. The principles include transparency, proportionality, equal treatment and non-discrimination.

This means that where goods or services are purchased by your organisation an appropriate level of advertising is required enabling the market to be opened up to competition. The amount of advertising will depend on the actual scale, nature and circumstances of each

particular case. The greater the interest of the contract to potential bidders from other member states, the wider the (advertising) coverage should be.

The procedures

The Regulations also set out prescribed procedures for the purchasing of goods and services where the contract in question is above certain financial thresholds. The threshold for contracting authorities other than central government is €139,893 (£206,000) for goods and services procured by other public sector contracting authorities (e.g. local government). If the contract you are proposing to enter into is over the threshold, you should seek legal advice about the effect of the Regulations on the contracting process.

Legal challenge – the risks of not complying

These procurement rules and principles should not be ignored as unsuccessful bidders could challenge the procurement decision and seek to prevent the contract from being awarded or claim for damages. Even where the prescribed procedures in the Regulations do not apply an unsuccessful bidder could seek to challenge the decision by way of judicial review and/or claim damages.

What does this mean for arts organisations?

In reality, most arts organisations contracts will be below the thresholds

for most activity so the prescribed procedures in the Regulations will not apply. However, increasing awareness of the procurement procedures and principles means legal challenges are on the increase. We have seen a great deal more interest in challenging procurement processes. There have been recently publicised examples in the Arts which serve as a salutary lesson. We recommend the following:

Organisations should monitor and review annually where their funding is coming from and assess whether they fall within the definition of a 'Contracting Authority'.

Organisations that fall within the definition of a Contracting Authority should, when purchasing goods and services:

- Apply the principles of fair contracting, equal treatment and transparency. In particular they should advertise the contract appropriately given its size and nature; and
- Consider the value of the contract and whether the Regulations apply.

FIND OUT MORE

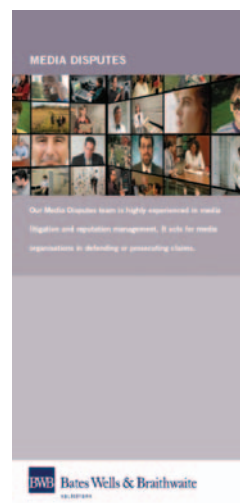
In pursuing these types of issues we find that an authoritative legal opinion can be an effective means of establishing whether there is breach of the Regulations and of great assistance for those defending or making claims or those wishing to object to a procurement process. We have particular expertise in this area. Please contact Julian Blake j.blake@bwbllp.com or Philippa Hart p.hart@bwbllp.com for more information.

Media Disputes

Our Media Disputes team is highly experienced in media litigation and reputation management. It acts for media organisations in defending or prosecuting claims; and for businesses, not for profit organisations and individuals who encounter problems with the media or competitors when their reputations or businesses have been damaged or are under threat of damage. Members of the team have been involved in many famous ground breaking cases, a number of which have created new law.

A few of the significant cases in which members of the team have acted include:-

- The Spycatcher litigation, which established that the Government must prove damage to the national interest to prevent publication of an ex spy's memoirs
- Reynolds v. Times Newspapers, which established the defence of responsible journalism for media reporting of public interest matters
- Ashdown v. Telegraph Group, which tested the limits of a freedom of expression defence in copyright cases
- Takenaka v. Frankl, the first anonymous email libel tracing case to reach trial, in which "Norwich Pharmacal" disclosure orders were obtained against several internet service providers
- Douglas/Zeta-Jones and OK! v. Hello!, concerning publication of unauthorised photographs of the Douglas' wedding, one of most important recent cases on privacy and commercial confidentiality



- North Cyprus Tourism Centre v. Transport for London, a successful challenge in the Administrative Court to TFL's ban on advertising for tourism to North Cyprus
- House of Commons v Information Commissioner and others, in which the Information Tribunal and High Court ordered disclosure of the back up for MPs' additional cost allowance claims. The effects of this hugely significant case is still being felt in Westminster.

The team is led by Rupert Earle and Martin Kramer



Rupert Earle



Martin Kramer

ARTS CHARITIES AND THE CHARITY COMMISSION: AN UPDATE

Last year the Charity Commission issued their guidance on public benefit. This article looks at how those changes are affecting arts clients in practice.

Sean Egan and Erica Crump
look at the impact of the
public-benefit test on the arts

The main areas of concern are the increasing difficulty that arts organisations have in convincing the Charity Commission that they are eligible for registration as a charity and when amending their objects, where the changes require Charity Commission consent. Additional levels of scrutiny are also likely given the new requirements for charities' annual reports, which now must analyse all activities in terms of public benefit.

The Charity Commission has also published guidance on specific types of charities (referred to as 'sub-sector guidance') – the guidance on fee charging and education are relevant to arts charities. There is no specific consideration of arts charities, but there are references in the guidance to arts charities.

Parliament handed the Charity Commission an unenviable task when, as a result of political wrangling, it passed on the responsibility for determining what public benefit means. Prior to the Act, the focus when applying for registration was whether the constitution of the organisation was exclusively charitable. Now organisations must also demonstrate that the activities of the organisation will satisfy the public benefit test. To the extent an organisation has more than one charitable object, as is increasingly common following the Act, it must demonstrate the public benefit activities relating to each object.

On new registrations the practice is for the Charity Commission to ask for increasing amounts of information before being satisfied – this process can go on and on. Given that the public benefit guidance is expressly meant to interpret the current law rather than make new law to my mind this approach is conceptually wrong. Organisations are essentially being asked to prove they will undertake activities that satisfy the test when it is more appropriate for a charity's activities to be reviewed after the event as to whether the criteria have been met. The result has the effect of making the requirements for registration far more stringent.

The types of issues we have seen include:

Private benefits

The Commission is concerned that charities keep in mind their underlying objects when promoting the work of artists so that the charity's 'purpose' is not presenting the work of that artist.

The process for selecting work

This is relevant particularly where there are competitions, open auditions or scholarships awarded which are considered to further the objects of a charity.

Venues

The Charity Commission wants to see performances and exhibitions in less traditional spaces, such as shopping centres, youth centres and schools – attracting new audiences and benefitting as wide a section of the public as possible.

Concessions policy

The Charity Commission will expect that arts charities selling tickets are not unreasonably excluding members of the public, due to financial constraints. Charities will need to have a comprehensive and fair concessions policy – offering free and reduced tickets to those with limited ability to pay.

Intellectual property

The Charity Commission will accept that many artists do not assign their intellectual property over to the charity, but does want to see that trustees realise the importance of protecting their charity's intellectual property and to ensuring the charity has a wide licence to use IP in the future.

You can see from these examples that the issues affect many aspects of an organisation's operation and there are questions as to whether these issues are appropriate. It is not that arts organisations do not satisfy the requirements, but the way in which the issue is approached that is disproportionate.

FIND OUT MORE

BWB has fed in its concerns through its membership of various charity law associations and has raised issues direct with the Charity Commission.

CHARITIES, TRADING AND THE LAW

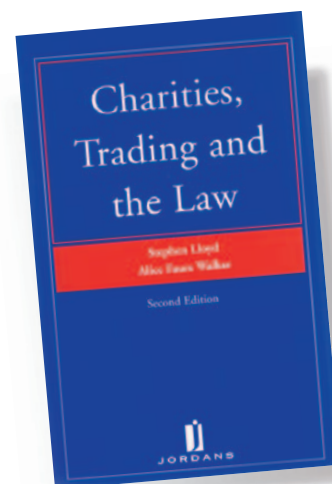
More than 50% of the income of the voluntary sector in England and Wales now comes from trading activity. This means that the publication of the second edition of Stephen Lloyd's 1995 book, *Charities, Trading and the Law*, is particularly timely.

Co-authored by Stephen and Alice Faure Walker, the second edition outlines preliminary charity law and tax issues, and gives a commentary on specific types of trading activity, from primary purpose trading to the sale of donated goods, and from fundraising events to relationships with business. It also covers broader commercial issues as they apply to charities – contracts, intellectual property, insurance and insolvency.

Available from Jordans priced £50 – see www.jordanpublishing.co.uk/Publications/catDetails.aspx?productID=724.

Readers of BWB's newsletter are entitled to a **20% discount**: to qualify for this special discount, you will need to order the book by phone or post, rather than online.

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Comments

If you have any comments and suggestions, requests for other departmental updates, or would like to notify us of any changes to your contact details, please contact Mona Rahman at m.rahman@bwblp.com

The information contained in this bulletin is necessarily of a general nature. Specific advice should be sought for specific situations.

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