



UK corporate killing laws now in force

Rona Jamieson, health and safety partner with Paul & Williamson, explains the implications of the new legislation.

The much anticipated corporate killing legislation has now become law in the UK.

From 6 April 2008, any organisation found liable for a death at work is at far greater risk of prosecution for corporate manslaughter or corporate homicide, in addition to proceedings under general health and safety legislation. The level of fines likely to be imposed where a death has occurred is expected to increase dramatically, with multi-million pound fines for larger organisations becoming the norm.

The Act creates one identical offence with two names: Corporate Manslaughter in England and Corporate Homicide in Scotland.

The Offence

The offence occurs where, in the opinion of the jury, an organisation's activities are managed or organised in a way which:

- (a) Causes a person's death;
- (b) Amounts to a gross breach of a relevant duty of care; and
- (c) Senior management failure is a substantial element of the breach.

Senior management failure requires to be an element in any chain of events causing the death, but not necessarily the immediate cause which, it is recognised, will normally

be some act or omission of an individual. The jury is entitled to find sufficient management failure where an organisation fails to anticipate a foreseeable act of individual negligence or take effective steps to prevent it.

For the offence to arise, the relationship between the organisation and the deceased must be such that a relevant duty of care was owed to the deceased under general laws of negligence. A duty of care will generally be owed by employers, occupiers and suppliers of goods and services, to employees, customers and others likely to be affected by their business activities.



Senior Management

For the offence to be committed there requires to be an element of senior management failure. It follows that not every management failure ought to trigger the offence. Whether a manager is a "senior manager" is a question of fact in each case to be determined by the jury. It includes the policymakers as well as those responsible for actual management. It will depend on the structure of the organisation in each case. Guidance suggests that it is likely to include regional or divisional management in multi-site or multi-disciplined organisations. There is no requirement for the risk of death to have been readily foreseeable by the organisation's management. In particular, the prosecution is not required to prove that those responsible for the management failure, knew or ought to have known, that their failure or cumulative failures would create a risk of death.

Territorial Application

The Act applies anywhere in the UK and its territorial sea. It applies beyond the territorial sea to the whole of UK Continental Shelf in relation to offshore activities and on British registered vessels (including certain mobile installations) anywhere in the world. It is the place where the harm leading to death occurs which is relevant not the location of the organisation. Accordingly, foreign organisations are subject to the provisions of the Act in the same way as those based in the UK.

Penalties

The penalty on conviction is a criminal fine. There is no limit to the level of fine which

can be imposed. It is intended that any fine for corporate homicide be significantly higher than any fine for a breach of health and safety legislation.

The Sentencing Advisory Panel for England and Wales recently published proposals in relation to the level of fine for corporate manslaughter in England and Wales. They propose that annual turnover be used as the measure of an organisation's ability to pay a fine. They suggest that a fine amounting to 5% of the offender's average annual turnover during the three years prior to sentencing would be an appropriate starting point, with any aggravating or mitigating factors driving the fine up or down as appropriate. This would produce a range of fines between 2.5% to 10% of average annual turnover. 10% was selected as being comparable with competition offences.

To put these proposals into context, the highest fine handed out to date in a fatal case is £15million. That represented less than 1% of the relevant organisation's annual turnover. The proposals are expected to be issued as formal guidelines in the autumn. If implemented, fines of tens of millions could become commonplace. The Sentencing Advisory Panel Guidance will not apply directly in Scotland but the Scottish Judiciary is entitled to have regard to it and it will no doubt be argued that there should be consistency between both UK jurisdictions.

The other penalties available under the Act are a remedial order, where the prosecution may apply to the Court for an order specifying further measures which the organisation must take to remedy defects in its safety

management system and a publicity order, where the Court orders the organisation to publicise, in a specified manner, the conviction, details of the offence, the amount of any fine and the terms of any remedial order made.

Individual Liability

The new offence is one in respect of which only an organisation, such as a limited company or a partnership, can be convicted. It should be noted however, that a director or senior manager can be convicted under Section 37 of the Health and Safety at Work Act 1974 in relation to the same incident. The 2007 Act expressly permits an organisation to be charged under both the 1974 Act and the 2007 Act in respect of the same incident. The sanction for a breach of Section 37 of the 1974 Act is generally a fine. If however the breach is related to a failure to comply with an improvement or prohibition notice, imprisonment would be an option.

The Required Management Standard

It is essentially a matter for the jury to decide whether or not the standard of management of organisation was sufficiently poor as to amount to a gross breach of their duties. The Act contains some guidance on the factors the jury should take into account in assessing that. Existing health and safety legislation and relevant guidance also play a part in this.

The Meaning of Gross Breach

A breach is a "gross breach" where the conduct falls "far below" what can reasonably

be expected of the organisation in the circumstances. The test is based upon the English common law test for "gross negligence", which is described as "negligence which is sufficiently gross that it is regarded by the jury as criminal". Perhaps not surprisingly it has been argued that such a test gives very little guidance on the matter. It may be that there will be a challenge under Human Rights legislation in due course. Until then, it is entirely a matter for the jury to decide in each case, whether in their view, the negligence involved was so gross that it should amount to a breach of the 2007 Act and not simply a breach of the 1974 Act. Since it is a question of fact for the jury, rather than one of law, any decision will be very difficult to appeal.

Factors for the Jury

In order to provide the jury with some guidance on the sorts of matters they should consider when deciding whether a breach is sufficiently serious as to amount to a gross breach, certain factors for their consideration are specified in the Act. In particular, a jury may consider whether there were "attitudes, policies or an accepted practice" within an organisation which encouraged or produced tolerance of the safety failure. Accordingly an organisation's general safety culture will be relevant. The jury is also entitled to consider what health and safety guidance says in relation to the activities involved in the death. The final factor which the jury may take into account is "any other matters they consider relevant". There appears to be no restriction on this. Earlier drafts of the legislation suggested that it would be relevant to consider the motivation of the organisation, particularly whether there had been any desire for financial gain. It would probably include information about previous warnings or other opportunities to have identified the relevant risks prior to the incident.

Increase in prosecutions

It is a prerequisite of the new offence that there has been a breach of health and safety legislation. In practice, organisations are likely to face charges under both the Health and Safety at Work Act 1974 and the Corporate Manslaughter and Corporate Homicide Act 2007. A prosecution under the 1974 Act will generally follow in any case involving a death at work. It is too early to say whether it will become standard to charge organisations under the 2007 Act in addition. Prosecutors may argue that a failure to prosecute under

the 2007 Act for any death is effectively usurping the function of the jury, since it requires a judgement on whether a breach is sufficiently gross.

The UK Government undertook a regulatory impact assessment in relation to the new offence and estimated that there would be between 10 and 15 prosecutions for corporate manslaughter or corporate homicide a year. They thought that the legal costs associated with each prosecution would be in excess of £500,000. Insurance cover is generally not available in the UK for a criminal penalty. Although most employer liability policies cover costs in relation to the defence of criminal proceedings, some may be subject to a limit or ceiling. Organisations and insurers should consider whether the provision available under current EL and D&O policies is sufficient to cover the costs of mounting a defence where the consequences of conviction are so serious.

In light of this, it would be prudent for all organisations to assume that there is now a significant risk of prosecution for corporate homicide in relation to any death at work.

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Rona Jamieson

Rona Jamieson has co-authored a book to coincide with the Corporate Manslaughter and Corporate Homicide Act 2007. The book, called 'The Corporate Manslaughter and Corporate Homicide Act 2007' will be published at the end of April 2008. It features a comprehensively annotated version of the new Act and explains the implications this legislation holds for organisations. The book will be useful for anyone practising in this area as well as having a wider readership of senior managers, health and safety managers and other related professionals.

North Sea attracts Canadian investors

Oil and gas partners, Robin Clarkson and Bruce McLeod, were invited by Fraser Milner Casgrain LLP recently to speak to Canadian investors looking to expand into the UK energy sector. The seminar, held at the Calgary Petroleum Club, provided an overview of the current market along with information on legislation, tax and infrastructure issues.

Last year the majority of the exploration wells in the UK were funded at least in part by Canadian companies. Recent changes to Alberta's royalty structure and Canada's Income Tax Act have left many Canadian companies contemplating investment overseas. This continuing trend is being driven by the junior independents who are interested in smaller leases and licences which are commercially viable for their business model and have the potential to lead to wells producing considerably more volume than in other parts of the world.

Robin and Bruce explained the different regulations and laws, such as negotiations around access to infrastructure, the codes of tariffs that are payable in the UK, the regulatory regime and some of the key points from a commercial prospective.

Find an interview with Robin and Bruce in the Calgary Herald at:
<http://www.canada.com/calgaryherald/news/calgarybusiness/story.html?id=59066b57-e6b8-414e-9784-014833c22e41>

Special thanks to Fraser Milner Casgrain LLP for organising such a successful and well attended event.

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Robin Clarkson

Web 2.0 and Social Networking Sites

Lester Cameron, intellectual property and information technology partner, summarises some of the key concerns and risks which are emerging out of the extensive use of social networking sites such as Bebo and Facebook.



Web 2.0 is commonly accepted “shorthand” to describe the metamorphosis of the Internet from a one directional, publisher to user, medium into a more completely interactive two-way medium – with increasing emphasis on user generated and contributed content. Whilst social networking in the business context can be beneficial, as always, the downside should not be overlooked.

Background

Those completely unfamiliar with this territory may wish to look at the Information Commissioner’s website (www.ico.gov.uk) (click on the character on the left hand side of the home page) for the Information Commissioner’s advice guidelines which, although aimed at teenagers, give a useful introduction to the world of social networking sites – and their implications. The need for advice was born out of the startling results of a survey commissioned by the ICO¹ which, amongst other things, indicated that:

- Nearly 1/3 of those surveyed never read privacy policies on websites they sign up to; nonetheless 95% would be concerned about the ability of such websites to use their details (which commonly include DOB, email address, mobile phone number etc.) to target advertising at them and most wouldn’t want a College, University or potential employer to conduct an internet search on them unless they could first remove content from social networking sites.
- 66% have accepted someone on a social networking site, who they didn’t know personally, as a friend – a finding rather corroborated by another study by leading Internet security firm Sophos² that 41% of Facebook users were prepared to disclose personal information to a complete stranger called “Freddi Staur”³ (crossword experts will already have worked this one out).

“Whilst social networking in the business context can be beneficial, as always, the downside should not be overlooked.”

Concerns

A whole raft of dangers for individuals will be self-evident from the points listed – identity theft, increased spam or other unwanted marketing, threats and risks to privacy and even personal safety – all stemming from careless posting of information which you lose the ability to control once it has left your computer. Following the guidelines produced by organisations such as ICO and Sophos (in particular the correct use of privacy settings) will reduce these risks.

Placed in the business setting the risks and downsides are equally worrying:

- The sheer wastage of working hours through time spent on social networking sites.
- The lack of control exercisable over site content. Regrettably many sites are havens for bullying and harassment – particularly prevalent in the teacher/pupil school environment but just as damaging to the image of an employer whose business or one or more employees is the subject of unjustified criticism, abuse or insult.
- The risk of data leakage (with Data Protection Act and confidentiality implications) and network damage through viruses or hackers as well as heightened risk of cyber crime – bearing in mind that employees may well post employment and other business details on a site (enabling fraudsters to guess network passwords etc.).

Action Points

As always, in the workplace, matters are best regulated by a clear policy (part of your overall technology policy, in turn forming part of the employment contract) on the do’s and don’ts of using external Web 2.0 services. However, faced with the added work, time and

responsibility which this involves, businesses can scarcely be blamed for taking the view that banning workplace access to social networking sites is the more certain alternative – and this is exactly what the firewalls on many school networks do. Clearly however, this is only part of the story as the use of mobile phones or home PCs cannot be controlled in this way.

Until the social networking phenomenon is overtaken by some other advance in technology (as it undoubtedly will be) businesses would do well to tighten up network security and minimise the risk of financial or reputational damage through a combination of appropriate technical measures and rigorously enforced workplace rules on appropriate Web 2.0 usage.

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¹ Topline Report – Oct. 2007

² www.sophos.com

³ anag. “ID Fraudster”



Richard Goodfellow

Milestone for international legal network

TAGLaw, a global network of distinguished legal firms, of which Paull & Williamsons is a member, is celebrating its 10th anniversary this year.

The annual report, which has just been published, details the significant growth of the organisation in that time. The organisation now boasts a total of 152 member firms in 92 countries. In the last year, eight new members have joined TAGLaw including firms in Azerbaijan and the Ukraine as well as Latin America, United States and Europe.

Richard Goodfellow, a partner at Paull & Williamsons, explained, “We have successfully used the TAGLaw network to extend our international reach and assist our clients in North America, Europe, the Far East and Australia. It is enormously helpful to be able to call upon the assistance of quality law firms throughout the world with whom we have developed close relationships and which have an in-depth knowledge of the local marketplace in which they operate.”

In 2007, the organisation also established TAG Academy, a virtual classroom with weekly webinars on topics such as accounting, firm management, marketing and business development designed to enhance the skills of member firms. Drawing upon the network’s international know-how, a series of international business courses are also offered. The courses are geared to a variety of skill levels from Junior Associates to Senior Partners.



Lester Cameron



RECENT DEALS



PSL Energy Services Group
Acted for the shareholders in the sale of the company to Halliburton



Hydrasun Group
Acted for company management in sale to Barclays Private Equity, and subsequent partial reinvestment.



Dominion Technology Gases
Acted for shareholders in sale of company to management, backed by venture capitalists Graphite Capital



Energy Cranes International Limited
Acting for LMS Capital plc, institutional shareholder; in sale of share capital of the Company to Close Brothers Private Equity



Poseidon Maritime UK
Acted for vendors in sale of Poseidon Maritime UK Limited to Noble Denton Group



Enviroco Limited
Acted in acquisition of trade and assets of Advanced Waste Management Limited from Crestvalley Trading Limited



Norson Group
Acted for shareholders in sale of company to BJ Services, the major US-listed oil services group



KCA Deutag Drilling (a subsidiary of Abbot Group plc)
Acted for company in sale of wireline and well services divisions to QServ Limited



Acteon Group
Acted for company in purchase of various oil service companies (Seatronics, IIMS and Chainco) from the Craig Group



Aberdeen Asset Managers Growth Capital
Institutional investment in Almida Group Limited



ATR Group
Acted in management buy-in of ATR Group, backed by Aberdeen Asset Managers Growth Capital



CHC Helicopter Corporation
Acted for Heli-One (UK) Limited in sale of share capital of Survival-One Limited



Lime Rock Partners
Acted for company and other investors in purchase of KRI SA, a Polish distributor of natural gas



Vroon Offshore
Acted for company in purchase of Nomis Shipping Limited, a major vessel operating company supporting the offshore oil and gas industry



Noble Drilling
Acted for company in sale of their North Sea oil platforms business to Seawell Holdings UK Limited



Viking Supply Ships
Sale of the share capital of Viking Offshore Services (Holdings) Limited to Vroon Offshore B.V.



TWMA Group
Acted in acquisition of majority interest by Lime Rock Partners



Shell
Agreement for the transportation and processing in the UK Segal system of gas from the Norwegian Gjøa/Vega fields



Royal Bank of Scotland plc
Acted for Royal Bank of Scotland plc in supporting Triton Group in acquisitions of PerrySlingsby Systems (UK and US), Sub Atlantic Limited, Subco Underwater Equipment Limited and UK Project Support Limited



Clydesdale Bank plc
Acted for Clydesdale Bank plc in the provision of acquisition and working capital facilities to JP Knight Group for acquisition of Klyne Tugs of Lowestoft



Barclays Bank plc
Acted for Barclays Bank plc in the provision of specialist equipment purchase facilities to CTC Marine Limited



Stewart Milne Group
Development of new offices and workshops at Westhill Business Park for Red Spider



Subsea 7
Acquisition of a 12.2 acre site. Subsea 7 will construct the development which will house around 1000 staff



Halliburton
Construction of a new £20million office complex and warehouse facility on land already owned by Halliburton



Bank of Scotland plc
Acquisition and working capital facilities for Optima Solutions



Royal Bank of Scotland plc
Acted for Royal Bank of Scotland plc in provision of acquisition finance facilities for Synergy Group in acquisition of Production Geoscience Limited and Floyd & Associates Limited



The Stewart Group Limited
Acted for shareholders in sale of share capital to R.S. Platou A/S



BP
Continuing work for BP in relation to the completion of new offices and ongoing use and subsequent disposal of existing properties in Dyce



Petrofac
Advised on development and lease of office space at Consort House



ASCO Group Limited
Acquisition of the Trinidad and Azerbaijan logistics businesses of CSM Group

Pensions issues for the M&A market

Iain McClay, senior pensions lawyer, looks at the implications of recent and future changes in pensions law on the M&A market.



Iain McClay

As all those involved in the mergers and acquisitions fields are aware, the position of pensions schemes has become increasingly important over recent years. It has been a very busy mergers and acquisitions period in the energy sector and companies need to be aware of the potential issues surrounding pensions schemes. Summarised below are some of the most significant issues to have arisen recently.

First FSD Results in Multimillion Pound Support Order

The Pensions Regulator has, last year, issued its first financial support directive (FSD). This was issued to a Bermuda based company – Sea Containers Ltd – who were the owners of subsidiary companies within the UK. This directive was appealed; however the company subsequently dropped their appeal. The amount involved is not trivial; the effect of the directive is that Sea Containers is required to financially support two UK pension schemes to the amount of £133million. This should be of interest to those involved in mergers and acquisitions as the fact that the Pensions Regulator has now issued a directive may embolden them to do so again. If you are involved in a corporate transaction, have a final salary scheme you sponsor, or if there are any subsidiaries or other companies within your group which sponsor final salary schemes, then you are potentially liable to the imposition of a financial support directive. This could conceivably include parties who take shares in a company as part of a debt equity swap, banks may wish to take advice on this.

Pensions Regulator Appoints Independent Trustees

The Pension Regulator has, in October last year, appointed independent trustees to the Telent Pension Scheme (formerly Marconi

Pension Scheme) as a result of an approach by the existing trustees because of concerns they had surrounding the potential purchase of the scheme sponsoring employer by a company known as a pensions buy-out specialist. The regulator, as a result, appointed three new independent trustees to the scheme who will be likely to take a more stringent approach to any proposed transaction which will impact the scheme; indeed the new trustees were initially given sole control of the scheme for six months. This is of relevance as it shows the regulator is willing to take action to change the composition of scheme trustees should they believe it is necessary to protect the scheme's position. They are able to do this in any situation, not just with reference to a merger or acquisition. It is understood that parties involved in this transaction are considering an appeal concerning the regulator's actions. The potential purchaser has acknowledged that it should have spent more time with the Pensions Regulator explaining what it was doing – a potential lesson to all those involved with purchases.

Are Some More Equal Than Others?

As those involved in pensions will recall, the Barber case at the beginning of the 1990s required that pensions schemes equalise the provision of benefits to ensure there was no discrimination on the grounds of sex. It was thought, aside from issues around guaranteed minimum pensions, that this issue was resolved. However a number of recent disputes have called into question whether all schemes that were required to equalise did so correctly. If your scheme was one that required to do so you should consider asking lawyers to confirm that you have no issues. The time limits for taking action against your then scheme legal advisers, other advisers or providers, should you find a discrepancy, are rapidly expiring. This could be relevant in a

sale as a failure to incorrectly equalise could mean the scheme has higher liabilities than was previously thought.

Changes to the Debt on the Employer Regulations

At the time of writing this article the changes to the debt on the employer regulations have not been issued. For those unfamiliar with the regulations, they deal with what happens to the pension scheme if certain events (cessation events) occur. If these events occur, a debt on the employer is triggered. Unlike the situation with an ongoing pensions scheme where the scheme funding levels are determined on a continuing basis, where a cessation event occurs the debt is treated as a debt due immediately before the cessation event. This debt is calculated on a buy-out basis making it more expensive to the company than any contributions it was due to pay on an ongoing basis. While many schemes are currently well funded on an ongoing basis they are likely to be under funded on a buy-out basis.

The government has been concerned for some time that changes were needed to these regulations. This concept was triggered by the poor take up of the withdrawal arrangement route, leading to more immediate payments of debt being necessary in transactions. Schemes have increasingly looked at debt apportionment as a way of negating the need for immediate payment.

The first draft of new regulations was published last year. This initial draft attracted much comment from a variety of interested parties, the result of which is that the government went away to think about what the new regulations were aimed at achieving and, it is anticipated, substantially rewrite them.

It is anticipated that the regulations will lead to

an increase in the use of apportionment agreements or withdrawal agreements when a debt is triggered. This should mean it is less necessary to find the money to pay for the employer debt at the point of sale, which will be good news for the sellers.

The final draft is expected shortly although no timeframe is available for this. The regulations were expected to be issued in December last year so it is very much a case of waiting.

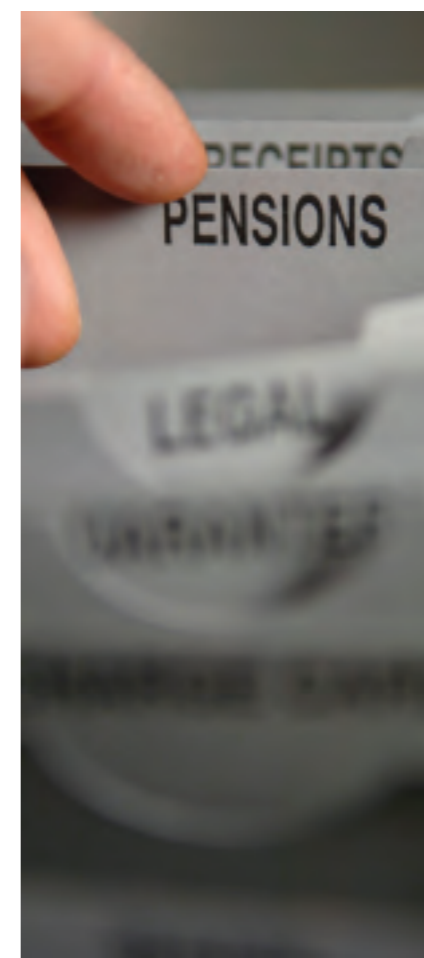
Conflict of Interest

The Pensions Regulator in February 2008 issued a consultation paper seeking views on the issue of conflict of interest within pension schemes. The draft suggests five key principles for trustees to consider. It furthermore suggests that schemes should instigate a formal conflict-management procedure including the prompt declaration of conflicts. The Regulator has also emphasised the need to obtain legal advice in difficult situations. Consultation on the draft guidance remains open until 30 May 2008.

You may believe your scheme has no potential conflicts; however is it possible some of the management of your company are also trustees? That your company's legal and actuarial advisers are also the advisers for the schemes? There may be more potential conflicts than you know. Once the consultation period is complete it's likely to become necessary for pension schemes to comply with these proposals.

Pensions Accounts – the 2008 Pensions Act

There will be yet another pensions act this year – it seems these days like there is one every year. The main idea introduced by this act will be Pensions Accounts (although it's believed this name is likely to change). While the new pensions accounts are not due until 2012 the legislation is being put in place now. It is expected that Pensions Accounts will require compulsory membership and compulsory employer and employee contributions. The only exception will be either if the employee is exempt by reason of already being a member of pensions provisions which meet qualifying exemption which are yet to be confirmed or the employee chooses to opt out. The unions are already lobbying to ensure that employees will be protected from coming under undue pressure to opt out. It is very much a case of waiting and seeing what happens with the accounts at this stage. The impact on employers is unsure but some observers are suggesting this will be an added burden to



those employers who do not currently provide pensions for their employees.

Money Purchase Schemes

The Pensions Regulator has said several times since its inception that it intends to look more closely at occupational money purchase schemes; could this be the year they find the time?

2008 is likely to see further change in the way pensions schemes impact on mergers and acquisitions and other substantial changes which may impact on the provision of pensions.

What should not be forgotten is the importance of pensions to the recruitment and retention of staff. Where there is a difficulty in recruiting and retaining skilled staff a good occupational pension scheme can be a very attractive means of doing so. While pensions provisions has become more complicated recently it is not as difficult as is imagined to run a good occupational scheme which benefits the staff and is not an undue burden to the employer.

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Raising standards within real estate law

Our expertise within the commercial property sector was recognised recently when the Firm was invited to sit on the committee of a groundbreaking accreditation for the legal sector.

Colin MacLaren, head of the firm's commercial property team, was a member of the committee charged with developing an assessment process for The Signet Accreditation, a new standard set up for Scottish solicitors by one of the country's most historic and respected legal organisations, The WS Society. Signet Accreditation allows lawyers who successfully pass a rigorous assessment process to be recognised for high standards in both legal knowledge and client-focused skills, such as communication and commerciality.

Colin said: "We are delighted that the firm was asked to participate in what is a new and valuable accreditation process. The scheme will identify lawyers who have committed to particular areas of expertise and demonstrate a high level of ability within that specialism. The accreditation will give clients looking for legal support, guidance on which firms and individuals they should engage for advice in particular sectors."

The first lawyers were recognised at an awards ceremony in January at The Signet Library in Edinburgh. Members of the committee, including Colin, also received the award in recognition of the skills and expertise which they brought to the creation of the programme.



Colin MacLaren



Paull & Williamsons' property team is geared up for international reach

Paull & Williamsons was able to highlight its international status by attending a key commercial property event in Cannes, France, in March this year.

Richard Goodfellow and Colin MacLaren, who are commercial property partners with the firm, were among thousands of commercial property experts at MIPIM 08 – the world's premier real estate summit.

They were joined by lawyers from five other firms from the UK, Europe and the US, which are all part of the TAGLaw commercial property group, an organisation that provides a global network of legal and accountancy services.

Through its connection to TAGLaw, Paull & Williamsons has been able to represent clients throughout the UK and Europe and anticipates that demand for this will grow as people increasingly look further afield to invest. Among the deals it has been involved with through the organisation are: advising the Stewart Milne Group during its acquisition of a business in England, advising a developer during the initial stages of a deal in Berlin, and a highly publicised dispute over a racehorse in Ireland.

Richard Goodfellow said: "This event was a

great opportunity for us to showcase the huge benefits our association with TAGLaw can bring to the Scottish property sector. Through our firm, we can oversee a range of international activity without the investor or developer having to engage their own legal team in each country. The network also gives us access to some of the best accountancy advice available and access to offshore vehicles for property transactions.

"As Scottish property prices continue to soar and interest rates make deals more and more unattractive, we're seeing an increasing number of people looking outwith the country to invest. Whether it's individuals looking for a second home, smaller operators looking to buy shares in a deal or larger developers wanting to complete on a deal outright, there's a clear need for this joined-up approach both across borders and between the legal and financial sector."

Despite the global repercussions from the mortgage crisis in the US last year, the firm has seen a growing increase in people wanting to pick up a bargain across the Atlantic.

"Although there's a certain level of risk involved in investing in the US market, developers can see the huge potential that exists. I would expect to see more and more people looking west to develop their property portfolios."

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Other global property hotspots include Asia and India as well as emerging EU nations.

MIPIM 08 took place on 11-14 March. An estimated 26,000 people attended the event, which also saw the largest ever delegation from Scotland.

The summit gives industry decision-makers the chance to develop long-term relationships and showcase their services and projects.

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For further information about the event visit: www.mipim.com

Working time regulations employment tribunal judgement

After an 8 week hearing, the long-awaited Judgement of the Employment Tribunal regarding the application of the Working Time Regulations (WTR) to the offshore sector was issued at the end of February 2008.

The Judgement concerned sample cases taken from the drilling and catering sectors. In all of these cases, the individuals by and large worked an equal time rotation offshore and their contracts had no specific provisions about annual leave or at best stated that there was no entitlement to annual leave beyond normal field break arrangements.

The Claimants were supported by two different unions, OILC and Amicus who presented their arguments in different ways. All Claimants were seeking to have their offshore working time reduced by 28 days being what they claimed was their entitlement under WTR ie 4 weeks' annual leave.

The first issue determined by the Tribunal was the OILC argument relating to working time. This was the most controversial aspect of the litigation. This argument was to the effect that all time spent offshore is working time with the consequence that offshore workers can not take their daily rest entitlement when on the installation. If this argument succeeded, it would have had a potentially devastating effect on the whole sector as the limitation on working time (an average of 48 hours per week) would be materially exceeded on any meaningful working rotation. Indeed, in order to comply with that limitation, rotations would, in practical terms, need to be reduced to 7 days on, followed by 21 off. This argument was soundly rejected by the Tribunal and a clear decision given that offshore workers can take their daily rest entitlement when offshore. Furthermore, the Tribunal also found that travel time from home to the installation is not working time.

With respect to the second argument put forward by Amicus, the Tribunal ruled that annual leave entitlement under WTR in order to be "real" and "meaningful" had to be taken from time that would otherwise be an obligation to

work. The employer's primary argument was that field break in essence was annual leave (beyond any weekly compensatory rest entitlements) as it provides a meaningful relief from the obligation to work. The Tribunal did not agree. It had particular regard to the wording of the contracts of employment in the sample cases and in its view, field break under these contracts was earned contractual rest. They further ruled that annual leave under WTR is something other than rest and therefore could not be taken from periods designated as field break.

In terms of the calculation of a week, the Tribunal agreed with the employers' argument that this must be viewed having regard to the entire work pattern and be pro rated to the actual working time. Therefore, on an "equal time" basis, a week amounted to 3.5 days. The net effect of the Tribunal decision therefore was that based upon an entitlement of 4 weeks' annual leave, the offshore working time in the sample cases was to be reduced by 14 days ie from 26 weeks to 24.

A number of significant issues arise from the Tribunal's Judgement which remain unanswered. Firstly, applying the Tribunal's logic would mean that the total days entitlement to come from offshore working time would increase based upon the amendments to WTR, in terms of which the entitlement increased to 4.8 weeks in October 2007 and will further increase to 5.6 weeks in April 2009. In broad terms, that means that the working time reduction would amount to 17 and 20 days respectively. A further issue is the impact on other working rotations eg 2 on/3 off which is becoming more common in the sector. The basis of the Tribunal's reasoning means that an increase to the length of field break will not per se discharge WTR annual leave entitlements. Field break in its Judgement is something different from annual leave. To be compliant,



Sean Saluja

according to the Tribunal's decision, annual leave must have three characteristics (a) be designated in advance, (b) be a real break from obligations to work and (c) be paid for.

A further matter to be determined is the extent to which there may be arguments about the retrospective effect of the Tribunal decision and potential values in terms of compensation for those workers who have not, according to the Tribunal's Judgement, been given their full WTR annual leave entitlement.

The industry is currently considering its options in light of the Tribunal's Judgement. The two main avenues available are either to appeal the decision to the next level being the Employment Appeal Tribunal or secondly to try to enter into negotiation with the Trade Unions as to the effect of the Judgement across the industry. The latter option is very challenging, given the number of unresolved issues that arise from the Tribunal Judgement and indeed, whether some sectors can actually provide the further personnel needed to reduce the offshore working time. Furthermore, the Tribunal Judgement is at the first level of the process and as such is not authoritative or binding on any other Employment Tribunal. Therefore, to achieve certainty as to the meaning of WTR and annual leave entitlement for offshore workers, an appeal would be necessary in the absence of clear statutory amendment to the Regulations themselves which seems unlikely. It is likely that both employers and unions will at least lodge an appeal to protect their positions in the meantime.

All employers would be well advised in light of the Tribunal Judgement to review the wording of their particular contracts of employment.

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Firm set to move to prime office location

In late summer of 2008, staff at the Aberdeen offices of Paull & Williamson will be moving to a newly-built flagship office development in the city. Currently the firm's offices are spread across three buildings.

The move to these state-of-the-art premises will ensure that all employees work in the same location and will greatly enhance team working and ease of communication, as well as providing onsite car parking for clients.

The firm will occupy the entire top floor (6th level) and half of the fifth floor, both of which

boast spectacular views over the city to the coast and the countryside. Gordon Buchan, managing partner of Paull & Williamson, said: "This is a very positive decision which the firm has taken and we are looking forward to moving to Union Plaza. Having everyone operating under the same roof will allow our teams of lawyers and support staff to work together more easily and efficiently, and will

generally improve communication. We have been in our current premises for many years and felt that the time was now right to make the move to more modern and efficient offices, providing the type of accommodation that modern practice requires. It's a really exciting time for Paull & Williamson as we focus our full attention on providing a first-class service to the commercial sector."



View from top of Union Plaza



Artist's illustrations of Union Plaza

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