



# Inbrief

August 2009

## Speechly Bircham gears up for the future

Directors going ex-directory  
Companies Act 2006

The Carbon Reduction Commitment  
The impact on outsourcing transactions

Regime change for employers  
The new ACAS code of practice

Contingency fees  
The future

Protecting advance payments  
in an insolvency world  
Practical tips for tenants

I need some breathing space  
Standstill agreements for developers and funders

Love in a cold climate  
Important developments in family law

## Speechly Bircham gears up for the future

One of the biggest challenges faced by law firms (and indeed most businesses) today is the need to ensure that we stand out in clients' minds in a clear and distinct way. We recognise that clients' requirements are becoming more and more sophisticated and it is important that law firms have the right platform to attract and retain the right quality of people to help service client needs.

In a move to demonstrate such a commitment to all our clients, and to capture the positive opportunities thrown up by a shaky marketplace, the partners and employees of Campbell Hooper joined forces with us in June 2009 in what has been hailed as "one of the largest UK mergers in recent years" (The Lawyer, May 2009).

### Speechly Bircham with a twist

Operating under the name of Speechly Bircham LLP, the combined teams from Speechlys and Campbell Hooper offer clients a greater breadth of expertise and more enhanced service coverage. It ensures we continue to evolve a robust business to withstand future challenging markets whilst demonstrating our strengths in meeting the associated client needs.

With more than 240 lawyers, all based at New Street Square, the expanded firm is approaching the UK's top 50 law firms. It is organised around providing seamless transactional, advisory and dispute resolution services to our three main client markets: businesses; private clients and clients in the real estate, construction and engineering sector.



### Business Services

UK and multinational organisations benefit from the breadth of experience of the specialist teams in Speechly Bircham's Business Services division. With more than 120 lawyers, we provide businesses with a comprehensive legal service to meet their developing, and often complex, needs in areas that include corporate finance; banking; financial services; insolvency; tax; IP; technology; competition; data protection; employment; pensions; business immigration as well as all types of commercial disputes.

### Private Client Services

Ranked among the top 10 private client practices in the world (Chambers Global 2009), our highly regarded private client practice is widely known for providing a complete service to UK and international individuals and families, wealth management organisations, trustees, family offices and charities. The team specialises in delivering comprehensive practical advice on wealth protection, tax and succession planning, philanthropy, family and real estate issues in difficult and sometimes contentious circumstances.

### Real Estate, Construction & Engineering Services

Over 70 lawyers work in multidisciplinary teams to provide advice to lenders, investors, developers, occupiers, contractors and engineers. Meeting the requirements of our clients we operate across all major real estate sectors including commercial and industrial property; strategic land and regeneration; urban estates; healthcare; retail and leisure. With services including real estate, finance, tax, planning and environment, sustainability, construction and dispute resolution, our key strength is our ability to manage complex, high profile projects.

### Not such a bleak outlook

So how exactly will the new set up benefit you?

- The integration of Campbell Hooper people with Speechly Bircham means that our joint emphasis on delivering a truly personal service will be delivered by a more impressive team of trusted advisers.
- The long-term client relationships that have been forged over the years, for which both entities are well-known, continue as a focus – the only difference now being that you have a greater resource and advisory network at your fingertips.
- Together, the teams will focus on the energetic delivery of commercial and practical solutions that are designed to be cost-effective and rewarding to all our clients.
- Our complementary international links with other advisers and firms around the world will strengthen our ability to advise the complex needs of people and companies operating internationally.

### Great expectations

Commenting on the integration of the two firms Managing Partner, Michael Lingens, says: "Our commitment to providing an exemplary service to our clients will always be paramount. The integration of the two firms represents a great leap forward in our strategic vision and is excellent news for all the clients of the enlarged firm."

Martin Wright, former Chairman of Campbell Hooper adds: "Having taken the decision to look for a tie up with a larger firm, we were delighted by both the exceptional practice fit and, most importantly, the remarkable cultural attunement enjoyed by both practices. We are very much enjoying working as an enlarged firm."

To find out more about how the new look at Speechly Bircham will affect you, please email or call your usual contact. In the meantime, please visit our newly launched website [www.speechlys.com](http://www.speechlys.com) for more information.



## Directors going ex-directory

**On 1 October 2009, the remaining provisions of the Companies Act 2006 will finally come into force. Included in these provisions are protections for directors' residential addresses. This follows on from the protections previously introduced for shareholders' addresses.**

Like the protection of shareholders' addresses, this change can be traced to the abuse of the public record by individuals and organisations that specifically target the homes of directors working for companies in sensitive sectors, such as animal research. Whilst it was possible for directors to protect their addresses by way of a confidentiality order, it was necessary to show that there was a serious risk that the individual, or a person living with them, would be subjected to violence or intimidation as a result of the activities of the relevant company.

This opt-out system was of course only viable for directors who anticipated a threat and with an ever growing number of causes to be aware of, and the divergence of companies into ever expanding fields of business, directors might find themselves targeted without warning.

### Dual system

From 1 October 2009, directors will be able to provide both a service address for the public record and their usual residential address to be held on a separate protected register.

Unlike a company's register of members, where any person with a 'proper purpose' can request access, this protected register will only be accessible to specified public authorities and to credit reference agencies, which will be subject to stringent conditions over their terms of access. The credit reference agencies will only be able to access the information for certain prescribed purposes and will require appropriate security procedures for handling the information.

### No change to the status quo

The changes will however only affect all new company appointments and amendments taking place after 1 October 2009.

For those directors with their details already on the public register there will be no change. Whilst it will still be possible to apply for the removal of addresses listed between January 2003 and October 2009, any address listed prior to 2003 will be difficult to remove due to the reliance on hardcopy records.

Short of moving house this autumn, for directors who are already on the register it therefore looks like their details are there to stay.

We will shortly be publishing a briefing note with details of other provisions which come into force on 1 October 2009, and looking at the consequential changes that should be considered to companies' constitutional documents.

David Hicks, Corporate Solicitor  
[david.hicks@speechlys.com](mailto:david.hicks@speechlys.com)

The protected register will only be accessible to specified public authorities and to credit reference agencies

## The Carbon Reduction Commitment – impact on outsourcing transactions

**The Carbon Reduction Commitment (CRC) is a climate change and energy saving scheme that will apply directly to large energy intensive businesses. The scheme has been designed to encourage behaviour and infrastructure change to help the UK meet the targets for emissions reductions imposed by the Climate Change Act 2008. Whilst it is targeted to be in operation by April 2010, those potentially affected need to start preparing.**

In essence:

- it will be a mandatory auction-based emissions trading scheme for large non-transport energy intensive UK organisations. The scheme adopts a 'carrot and stick' approach
- money collected by the Government on the sale of allowances will be recycled to participants at the end of each CRC year. The amount returned will depend on the emission reductions achieved, with bonuses for good performers and penalties for poor performers – a financial implication
- participants will be ranked in a published annual league table – a reputation implication.

### CRC and outsourcing contracts

CRC does not take into account the effect of any form of outsourcing or managed service provision by third parties. The outsourcer potentially pays the cost, and not the business in reality consuming the energy. There has been extensive lobbying, for example, by the data centre industry who may be (certainly initially) at the bottom of the league table, even if they are relatively speaking, energy efficient.

The outsourcing industry has predicted that in extreme circumstances it may become the 'carbon sink' for its customers, who could migrate power hungry services to outsourcers to boost their position in the league table, remaining 'green' to the public, and dumping the reputation risk on the outsourcer.

On the financial side, the scheme could add between 6% and 10% to the cost of energy for an affected outsourcing organisation, according to rough estimates made by the trade association Intellect.

### Effect on outsourcing contracts

Careful contract drafting will be necessary to predict and deal with the full effects of CRC such as:

- offshore issues – multinational businesses may move non-critical capacity offshore to jurisdictions with cheaper energy and environmental costs, and will need the right to do so contractually
- change control – increasing attention on change control clauses will be required; customers may see the CRC as partly the outsourcer's problem, but with co-operation from outsourcer and customer, more sophisticated energy benchmarking and contractually binding initiatives to monitor and save energy (and reduce energy costs overall) could be developed
- data centre infrastructure – the CRC has implications which have yet to be fully worked out, for example its interaction with the EU Data Centre Code of Conduct (November 2008). This code is not legally binding, but it is expected that adopting the good practice recommendations, particularly in new build data centres, may be made contractually binding by customers. Compliance with the code will assist in reducing the financial and reputational risks of CRC. The code could become compulsory for outsourcers seeking government and public sector contracts.

For many outsourcers the reputation of their customers is the outsourcer's reputation. Well advised outsourcers will predict that CRC is one of the first legislative initiatives in the low carbon UK economy world, to provide a cross selling opportunity for green services and therefore a 'powerful value-add'.

Mark Bailey, IP, Technology & Commercial Partner  
[mark.bailey@speechlys.com](mailto:mark.bailey@speechlys.com)

## Regime change: the new ACAS code of practice

Employers are having to get to grips with another regime for managing discipline, dismissals and grievance, which was introduced in April. The Government has dumped the rigid and derided statutory minimum disciplinary, dismissals and grievance procedures and replaced them with a more flexible system.

The aim remains the same: encourage employers and employees to use tribunals as a last resort. The method is less impenetrable and the sanctions for breach less draconian. However, there is no room for complacency amongst employers keen to avoid claims for unfair dismissal and enhanced compensation.

The core of the new rules requires employers and employees to follow a principles based ACAS Code of Practice which tribunals will use as a yardstick to measure the conduct of the parties. The code sets out 'basic practical guidance' designed to cover most disciplinary and grievance situations.

The key points include:

- Breach of the code will no longer render a dismissal automatically unfair – although it is still likely to do so.
- Unreasonable failure to comply with the code allows the tribunal a discretion to increase or reduce compensation by up to 25% - for unfair dismissal and most statutory claims including discrimination, where compensation is uncapped.

- Employees are no longer obliged to raise an internal grievance before being allowed to lodge a claim in the tribunal – but failure to do so may mean compensation is reduced.
- Time limits for employees to start claims have been restored to three (or six) months, depending on the nature of the claim.
- Employees must now be offered a right to appeal against any form of disciplinary action – even warnings, to which the old rules did not apply.
- The code does not apply to redundancy dismissals or dismissals on the expiration of a fixed term.
- The old regime will continue to apply in certain circumstances by virtue of complex transitional arrangements.

At the heart of the code remain the well-established principles of natural justice: An employee should know the nature of the case against him, he should have a fair opportunity to respond to that case and a right of appeal. However, there are plenty of unresolved issues likely to lead to litigation. Such issues include obligations on employers to involve the workforce in formulating procedures, whether the code applies the grievances of ex-employees, whether employees have a right to cross-examine witnesses and whether one party is excused from the obligation to follow the procedure due to the failure by the other party to take a key step.

Employers should welcome the code but be wary of tripping over its requirements which tribunals will scrutinise. Employers should also review their existing disciplinary and grievance procedures, which may require some subtle but potentially significant changes – not only to ensure compliance but also to take advantage of some aspects of the code.

Trevor Bettany, Employment Partner  
[trevor.bettany@speechlys.com](mailto:trevor.bettany@speechlys.com)



## Contingency fees – the future

In the last year there have been a number of financial disasters at home and abroad which have affected the economy. This, coupled with the high risks and costs sanctions of litigation, has led to a rise in the number of requests for lawyers to undertake work for clients on a US-style contingency fee basis.

Contingency fees are a type of 'no-win, no-fee' arrangement which allow lawyers to take their fees as a percentage of the damages awarded to their client. These arrangements are currently prohibited in civil court proceedings in England and Wales, but are permitted in employment, VAT and duties tribunals.

### Could this be about to change?

Lord Justice Jackson is currently conducting a review of the civil litigation costs system, and in May 2009 he published his preliminary report. His final recommendations on 'how to promote access to justice at proportionate cost' are due to be published by 31 December 2009.

The preliminary report identifies and addresses key issues impacting the current costs of civil litigation. One of those issues is whether the practice of costs shifting (ie the losing party pays the other side's costs of the litigation) should be replaced by a US-style damages based contingency fees model.

### Costs shifting and contingency fees

Jackson LJ's tentative view is that cost shifting must be retained in some form in litigation. However, he observes that some areas of litigation (eg tribunals) currently function smoothly without cost shifting. He concludes that a 'no costs' regime may benefit claimants and defendants in collective actions provided appropriate safeguards exist to discourage frivolous and unmeritorious claims.

The report suggests that were costs shifting abolished in collective actions then claimants' lawyers would have to take their fee out of the damages recovered on a contingency fee basis.

Jackson LJ summarises the pros and cons of damage based contingency fees in his report and invites views on whether a contingency fee system should be permitted in certain cases and if so, whether the losing party should pay costs on a conventional basis or should also be liable for the contingent element of the fee.

The report refers to an 'overwhelming consensus' in submissions received to date that we should not adopt the total US system (ie damage based contingency fees combined with no cost shifting) because, amongst other things, it encourages lawyers to take too personal an interest in their case. However, if costs shifting is retained views are more evenly divided.

There is a general acceptance that damage based contingency fees are inevitable in the future and, if they were permitted, the focus should be on regulating them so that the UK system does not replicate the problems of the US system.

Jackson LJ is now proceeding with vigour to the consultation phase of the review and has sought further feedback on the matters raised in his preliminary report. Anyone involved in civil litigation and affected by its cost, will be interested in what may be the biggest review of civil procedure in England and Wales since Lord Woolf's *Access to Justice* report in 1996.

Julie Thrower,  
Commercial Dispute Resolution Solicitor  
[julie.thrower@speechlys.com](mailto:julie.thrower@speechlys.com)

## Protecting advance payments in an insolvency world

Unused payments of on-account service charge and insurance rent, which are not held on trust, will form part of the landlord's assets in an administration, liquidation or bankruptcy. Generally, a tenant will rank as an unsecured creditor so limiting its ability to recover unused pre-payments. There are, however, some practical steps which a tenant can take to minimise its losses.

### Understand how on-account money is being dealt with

A tenant of a landlord that is facing financial difficulties should: (i) establish whether the landlord is holding large amounts of unused service charge and whether that money is held on trust for the tenant either because the lease requires it to be held on trust or because it is held on trust in a specific purpose trust account; and (ii) ask the landlord to provide evidence that insurance rent has been used to obtain insurance and that an appropriate level of cover is in place.

### Ask the landlord to hold fund on trust

If there is a service charge balance, a tenant should seek to persuade the landlord to hold this money in a separate account on trust for the tenant in accordance with RICS recommended best practice. The tenant should also make future payments of service charge conditional upon such sums being held on trust.

If there is a service charge balance, a tenant should try to persuade the landlord to hold this money in a separate account on trust

### Scrutinise service charge demands

All future service charge demands should be examined closely. Are there any particularly large items of expenditure? When is it anticipated that the payments will be used to provide the services? Do all items covered by the demand fall within the definition of service charge items in the lease? Are all items of expenditure necessary? Until it has been established that each item of service charge expenditure is properly chargeable under the terms of the lease, a tenant may wish to consider delaying payment of all or part of the landlord's service charge demand (although this should be balanced against the risks of breaching the lease). In multi-tenanted buildings it would be more effective to try and co-ordinate a response with the other tenants.

### Rights of set-off

Once a landlord has entered into administration, liquidation or bankruptcy, legislation introduces rights of set-off pursuant to which sums due from one party must be set-off against the other (so any pre-payments of service charge can be set-off against any unpaid rents as at the date of administration, liquidation or bankruptcy). The rules of set-off in insolvency crystallise the position as it was immediately before the administration, liquidation or bankruptcy, bringing all debts due in either direction into account to give rise to a single figure due to or from the landlord. They are mandatory and cannot be excluded by contract. The contractual exclusion of rights of set-off contained in most leases will therefore be ineffective once a landlord becomes insolvent.

Jill Bister, Real Estate Solicitor  
[jill.bister@speechlys.com](mailto:jill.bister@speechlys.com)

## I need some breathing space – standstill agreements

The current economic climate has caused many property developments to become commercially unviable mid-way through construction. In these circumstances, developers and funders could consider standstill agreements which will allow them to stop work until the market recovers and the development returns to a profit making project.

Even if funders had the money to meet the monthly requests for drawdown for the payment of construction costs, the anticipated value of the finished property may have fallen to such an extent that the project has become loss making with loan to value covenants being breached. This would leave the developer facing potential insolvency and the funder facing the prospect of stepping into a loss making project.

An attractive alternative option for the developer and the funder would be to 'mothball' or 'stand the project still' for whatever time it takes for the market to recover and the project to return to a profit making position.

However, you must take account that the building contract between the developer and the contractor will almost certainly lack provision for unilateral termination or substantial suspension of the works by the developer on the grounds the project is no longer commercially viable. Should the developer attempt to do this, the contractor would have a claim against the developer for wrongful termination with the measure of the contractor's damages being his loss of profit on the remainder of the job. That is the contractor's legal position.

The commercial reality is that most developers these days are an SPV (Special Purpose Vehicle) created for the particular project. The SPV is likely to lack its own assets so any claim by a contractor for unlawful termination may actually be rather pointless if the contractor has no prospect of getting his hands on any money. In such circumstances the contractor may be willing to accept a deal along the following lines:

"A multi-party agreement, the 'standstill agreement', between the funder, the developer, the contractor and, if there is a pre-let in place, the tenant, standing the project still, until market conditions improve."

Such an agreement might include the following provisions:

- if the contractor is big enough and has other work and other cash flow that can keep him going during the standstill period, then he may be able to live with simply downing tools and resuming on another day
- if the contractor's financial position means he really can't wait for the work to resume on another day, then the developer and funder allow the contractor to sell the benefit of the building contract on to another contractor who is in a better position to wait out the standstill period
- the original contractor gets his hands on some ready cash in the form of whatever price he can obtain for selling the work on. The new contractor banks a certain job for the future, albeit the funder may have to produce some sort of guarantee to that effect
- the devil would be in the details and in the due diligence the new contractor would have to undertake before taking on the work of another contractor
- what about the tenant in all of this? In the current market he may well be only too happy to walk away from an impending lease and a level of rent that was negotiated before the market fell.

For those who find themselves in this predicament, a standstill agreement could offer some breathing space. However, if you are considering this route, you should seek professional legal advice.

Ian Reid, Construction & Engineering Partner  
[ian.reid@speechlys.com](mailto:ian.reid@speechlys.com)

## Love in a cold climate: important developments in family law

In recent months we have witnessed a number of significant developments in the field of family law, affecting in various ways those planning to marry, the married, the divorcing and indeed the divorced.

### Post-nuptial agreements

The post-nuptial agreement has come to the fore following The Privy Council's decision in a *Manx* case, *Macleod*. *Macleod* has confirmed that post-nuptial agreements may be binding, so long as they make proper provision for a child and so long as the circumstances prevailing at the time of the agreement have not changed in such a way as to undermine it. Clearly the second of those exceptions is potentially a wide one and caution is required in any consideration of post-nuptial agreements (they can prove controversial). Nonetheless, a binding agreement regulating the financial consequences of marital breakdown is an attractive prospect for those wishing to protect wealth or simply to avoid the damage that can be caused by divorce litigation.

### Myerson and the credit crunch

The Court of Appeal's decision in *Myerson* is a stark warning to anyone who agrees a financial settlement during good economic times and then regrets it when the economy turns sour. Mr Myerson essentially kept his business assets whilst giving his wife a property and cash lump sums. At the time of the agreement, this appeared equitable and Mr Myerson no doubt envisaged that he would then be free to continue growing his business interests.

Unfortunately the value of those interests then collapsed. However, even this relatively extreme change in his financial position did not persuade The Court of Appeal to release Mr Myerson from his obligations under the agreement. He had, they concluded, chosen the bargain that he wished to make and was held to it.

In difficult economic climates, divorcing spouses should be aware of these risks. They should consider the merits of dividing assets "in specie" and agreeing ongoing maintenance payments, which can be and often are varied when circumstances change, rather than lump sums.

### Media access in the family courts

Recent changes to the court rules have granted 'accredited media' limited access to Family Court hearings. The position remains unclear as restrictions on what the media is actually allowed to report largely remain in place. Nonetheless the changes have caused some concerns. These changes have also served to highlight the useful role that alternative dispute resolution techniques, mediation and collaborative law, can play in settling issues arising from relationship breakdown constructively and discreetly.

For more information on any of the above topics please contact the family team or go to [www.speechlys.com/family\\_and\\_divorce](http://www.speechlys.com/family_and_divorce).

James Freeman, Family Partner  
[james.freeman@speechlys.com](mailto:james.freeman@speechlys.com)

A binding agreement regulating the financial consequences of marital breakdown is an attractive prospect for those wishing to protect wealth

## News and future events

### New partners

We are delighted to announce the promotion of Emma Bartlett (Employment), Tracy Evlogidis (Immigration), Richard Hogwood (Family) and Sanjeev Shah (International Tax and Trusts) to the partnership on 1 May 2009. This brings the total number of partners to 87.

### Invitations to...

#### Events

**Consumer insight in the electronic marketplace**  
22 September 2009 - 8am

**Technology – looking beyond recession**  
1 October 2009 - 5pm

**Contract law update**  
6 October 2009 - 8pm

**Opportunities and threats in the online world**  
22 October 2009 - 5pm

**Comparative advertising: The law and the science**  
3 November 2009 - 5pm

**European design rights – underused and underrated**  
17 November 2009 - 8am

All events will take place at Speechly Bircham's New Street Square offices in London. For more information on our events and webinars, or to register, please email [seminars@speechlys.com](mailto:seminars@speechlys.com).

#### Webinars

**Information law update**  
10 September 2009 - 4.30pm

**An introduction to data protection**  
24 September 2009 - 4.30pm

**An introduction to e-privacy**  
8 October 2009, 4.30pm

**Transferring data**  
22 October 2009 - 4.30pm

**Compliance methodology**  
5 November - 4.30pm



## About us

At Speechly Bircham we believe that close partner involvement and an emphasis on personal service are key to building long-term relationships with our clients. Our teams work energetically to deliver commercial and practical solutions and to advise clients in an efficient and cost-effective way.

With over 240 lawyers at its modern City location, the firm is organised around providing integrated transactional, advisory and dispute resolution services to our three main client markets: business clients; private clients and clients in the real estate, construction and engineering sector.

Much of Speechly Bircham's work has an international dimension and over many years close working relationships have been built with leading independent firms in all the major financial, commercial and wealth management centres across the world.

### Key contacts

#### Business Services

James Carter +44 (0)20 7427 6513

#### Real Estate, Construction & Engineering

Tim Raper +44 (0)20 7427 6472

#### Private Client

Richard Kirby +44 (0)20 7427 6498

## Speechly Bircham

Speechly Bircham LLP  
6 New Street Square  
London EC4A 3LX  
Tel +44 (0)20 7427 6400  
Fax +44 (0)20 7427 6600  
DX 54 Chancery Lane  
information@speechlys.com  
www.speechlys.com

Speechly Bircham LLP is a limited liability partnership registered in England and Wales (registered number OC321620) and is regulated by the Solicitors Regulation Authority.

This newsletter is correct to the best of our knowledge and belief at the time of going to press. It is, however, written as a general guide, so we recommend that specific professional advice is sought before any action is taken. The firm is not authorised under the Financial Services and Markets Act 2000 but we are able in certain circumstances to offer a limited range of investment services to clients because we are members of the Law Society. We can provide these investment services if they are an incidental part of the professional services we have been engaged to provide.

© Speechly Bircham LLP 2009

