REPORT ON PRINCIPAL UK LEGAL AND TAX DEVELOPMENTS

APRIL 2007 – MAY 2008

GRUNDBERG MOCATTA RAKISON LLP
Imperial House
15-19 Kingsway
London WC2B 6UN
England

Tel: +44 (0)20 7632 1600
Fax: +44 (0)20 7632 1638
www.gmrlaw.com

Contact: Robert Rakison
Tel: +44 (0)20 7632 1620
robertr@gmrlaw.com

TABLE OF CONTENTS AND EXECUTIVE SUMMARY

1.0 CORPORATE

1 Changes in Company law of General Application (*by Rhidian Jones, Consultant*)

1.1 **Companies Act 2006 ("CA 2006**")

The implementation of this very important reforming act, the purpose and content of which has been reported on previously, has continued, although the introduction of some reforms to make the company registration process fully electronic has been delayed for a year to October 2009 for technical reasons. Accordingly, the timetable for implementation of the principal provisions of the **CA 2006** by subordinate legislation, regulations and commencement orders, may now be summarised as follows:

- 1 January 2007 - Electronic communication and related provisions to comply with the **First Company Law Amendment Directive (2003/58/EC)** and the **Transparency Obligations Directive (2004/109/EC)**;

- 6 April 2007 - Provisions implementing the **Takeovers Directive (2004/25/EC)**;

- 1 October 2007 – Right of underlying beneficial owners to exercise members' rights; statutory re-statement of directors' duties; reform of law relating to derivative claims and proceedings by members; resolutions and meetings; control of political donations; and various accounting provisions, including the requirement for a business review for financial years beginning on or after 1 October 2007 for all but small companies;

- 6 April 2008 – Removal of requirement for a company secretary for private companies; right of the public to inspect register of members now subject to a "proper purpose" test; removal of register entries relating to former members; accounting and audit provisions; and provisions for mergers and divisions of public companies;

- 1 October 2008 – Objection to company names; trading disclosures; corporate directors (all companies must have one natural person) and minimum age of 16 for directors; general duties of directors in respect of conflicts of interest; declaration by a director of an interest in an existing transaction or arrangement; the repeal of the restrictions under s.151 **Companies Act 1985** on financial assistance for acquisition of shares in private companies; and new procedure for a private company to make a capital reduction supported by a solvency statement instead of by a court order; and

- 1 October 2009 (11 years after the Company Law Review started) – Company formation and constitutions, capacity; registration and other filing matters such as annual returns and company charges; and dissolution and restoration to the register.

1.2 Combined Code on Corporate Governance

The Financial Reporting Council ("FRC") has reported on its 2007 review of the Code and reaffirmed its belief that it is working well. Investors are, however, concerned over "poor quality" explanations by companies for diverging from the Code, while companies accuse investors of "box ticking". Two suggested amendments, which are out for consultation and expected to be in force this June, are a relaxation on the restriction on individuals chairing the board of more than one FTSE 100 company, and allowing the chairman of a smaller listed company to sit on the audit committee where he or she was considered independent on appointment. The preamble is to be revised "to reinforce important messages about how the Code should be viewed and implemented." The FRC is also looking at the Smith Guidance on Audit Committees but, other than provisions designed to ensure greater auditor independence and objectivity, radical revision is not expected.

2 Changes to AIM – May 2007 to May 2008 (*by Tom Dugdale, Associate*)

2.1 Transition to International Financial Reporting Standards ("IFRS")

Companies trading on AIM (the secondary market of the London Stock Exchange Plc ("LSE")) have been brought into line with companies on the main market of the LSE by having to present IFRS compliant accounts for reporting periods beginning on or after 1 January 2007. These have replaced the accounting standards formerly used which were The Generally Accepted Accounting Principles in the UK ("UK GAAP").

AIM businesses have had to resolve their problems resulting from the increased demands of IFRS with much smaller finance teams than those in larger companies, putting a huge individual burden on staff. The introduction of this new set of financial reporting standards is not surprisingly seen as an unwelcome burden.

The International Accounting Standards Board ("IASB") is taking a tough stance despite the difficulties that smaller companies appear to be suffering. An IASB source has commented that it is simply part of being a listed company. Reports also say that twice as many companies were considering stepping up to the main market compared to 2007, so IFRS compliance will benefit these companies in the long term.

2.2 Reprimands under new AIM Rules for Nominated Advisers ("Nomads") and new AIM Rules for Companies

Since the LSE introduced its new rules for Nomads and AIM companies in February 2007, there has been growing speculation that it would start to act against under-performing Nomads.

In October 2007 it fined Nabarro Wells £250,000 - the biggest fine in AIM's history (and the first of a Nomad) – and publicly censured them on 5 counts including failing to act with due skill and care and failing to undertake the necessary level of due diligence in assessing the appropriateness of certain companies for admission on AIM.

In December 2007 the LSE fined an unidentified Nomad £30,000 for "failure to exercise due skill and care in respect of the admission of a company to AIM".

The LSE has fined nine AIM companies a total of £95,000 for a lack of transparency in the first 2 weeks of January 2008.

On 1 February 2008 Subsea Resources Plc was publicly censured by the LSE for breaches of 5 separate **AIM Rules**. Having considered the specific circumstances of the case the LSE decided not to impose a fine.

2.3 Far Eastern Markets

In June 2007 Chinese authorities published a guidance note requiring off-shore holding companies set up to acquire and float the assets of Chinese companies to demonstrate 3 years of profit as a pre-requisite to seeking approval for a foreign listing. This is obviously in direct conflict with the **AIM Rules'** own eligibility provisions which do not have any such requirement.

The Law Society has stepped in and the Lord Mayor of London has asked China Law Council chairman Neil Sampson to seek clarification on the issue.

2.0 COMMERCIAL LAW

1 House of Lords decision on termination of agencies and calculation of compensation (*by Claire Martin, Associate*)

1.1 Agency relationships are governed by the **Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053) (as amended)** which were introduced to implement **EU Commercial Agents Directive (86/653/EEC).**

1.2 The House of Lords' decision in July 2007 in the case *of Lonsdale v Howard & Hallam [2007] UKHL 32* has created more certainty over how to assess agents' rights to compensation under termination of agencies.

1.3 Following termination of his agency Mr Lonsdale sought to obtain a level of compensation equal to two year's commission, being the French Law method of compensation. Mr Lonsdale had tried to rely on a report published by the European Commission which noted that a body of case law had developed in France which fixed, "by judicial custom", the level of compensation for agents as two years' gross commission.

1.4 The Commission had said that this "conformed with commercial practice". The House of Lords rejected this argument and held that the courts were not bound by the French courts' approach but should calculate the compensation payable to an agent by reference to the value of the agency business at the date of termination. The value of the agency is the amount that a hypothetical purchaser would be willing to pay for it as at the termination date. Factors to take into account when valuing an agency include, for example, the right to future commissions that the agency would have earned had the agency continued.

2 Unfair Trading and Commercial Practices (*by Tom Dugdale, Associate*)

2.1 The **Consumer Protection from Unfair Trading Regulations 2008** (the "**CPUTR**") comes into force on 26 May 2008. This implements the **Unfair Commercial Practices Directive (2005/29/EC)** (the "**UCPD**") which was adopted on 11 May 2005.

2.2 The **UCPD** prohibits unfair business-to-consumer commercial practices in all business sectors before, during and after a transaction.

2.3 The UK currently relies on sector-specific legislation and is one of the few EU member states not to have a general fair trading duty incorporated into its national law. The **CPUTR** is set to change this and will repeal existing consumer laws (in particular, Part 3 of the **Consumer Protection Act 1987**, section 29 of the **Weights and Measures Act 1985** and much of the **Trade Descriptions Act 1968**).

2.4 Regulation 3 of the **CPUTR** will implement Article 5 of the **UCPD** and generally prohibits all unfair commercial practices. This general prohibition protects against unfair commercial practices which do not fall into the specific prohibitions of misleading and aggressive practices or the 31 specifically banned practices as set out in Schedule 1 of the **CPUTR**. It is therefore designed as a "safety net" and is drafted to catch all unfair commercial practices in any business sector even if novel in form.

3 New Offence of Corporate Manslaughter (*by Tom Dugdale, Associate*)

3.1 The **Corporate Manslaughter And Homicide Act 2007** ("**CMHA**") comes into force on 6 April 2008.

3.2 The **CMHA** creates a new criminal offence of corporate manslaughter. The new offence replaces the common law offence of manslaughter by gross negligence for companies and other organisations. The **CMHA** does not apply to individuals who will continue to be liable under the common law of manslaughter and existing health and safety legislation.

3.3 The new offence will lead to the prosecution of companies and other organisations where there has been a gross failing throughout the organisation in the management of health and safety which results in death ("Gross Breach").

3.4 A Gross Breach means conduct which falls far below what can reasonably be expected of the organisation in the circumstances. A substantial element of the Gross Breach must lie in the way the organisation's senior management organised or managed its activities.

3.5 There are certain factors which must be taken into account when deciding whether an organisation is guilty of the new offence, namely:

- Whether the organisation was in breach of health and safety legislation;
- How serious the management failure was; and
- How much of a risk there was of death occurring.

3.6 The penalty on conviction is an unlimited fine, a remedial order or a publicity order. As the new offence can only be committed by an organisation (rather than an individual) imprisonment would not be an appropriate penalty.

3.0 EMPLOYMENT AND PENSIONS

1 Employment Bill 2008 (*by Dan Peyton, Partner and Lucy Harrington, Associate*)

1.1 The most important and significant change to be introduced by the **Employment Bill 2008** is the proposed abolition of the statutory dispute resolution procedures. These procedures were introduced in 2002 with the aim of reducing the numbers of cases being heard by the Employment Tribunal and to aid the internal resolution of employment disputes. However, they arguably had the opposite effect, leading to significant amounts of satellite litigation regarding the procedures themselves.

1.2 The statutory procedures created procedures that must be followed when dealing with most work place disputes and dismissals. Failure to follow the statutory procedure, in every detail, would lead to a finding by the Employment Tribunal of automatic unfair dismissal (regardless of whether the employer had good reasons for the employee's dismissal) and there would be an uplift in compensation awarded to the employee of at least 10% and up to 50%.

1.3 The **Employment Bill 2008** proposes to remove the procedures in their entirety and replace them with the following:

- a recommended "code of practice", which will most likely take the form of an amended version of the existing **Advisory, Conciliation and Arbitration Service** ("**ACAS**") **Code of Practice** in workplace disputes (best practice guidelines which do not have force of law but are considered by Employment Tribunals);

- the Employment Tribunal will have the right to increase the compensation awarded to employees by up to 25% if the code of practice is not followed by the employer (or decrease by the same amount if the employee does not comply with the grievance procedure code of practice);

- the extension of the current conciliation periods in Employment Tribunal claims (periods when ACAS, the statutory body responsible for encouraging and facilitating settlement of employment claims, can assist in settling claims), to allow ACAS to assist settlement of the dispute up to the hearing date; and

- the return of what is known as the "Polkey reduction rule" which allows Employment Tribunals to reduce compensation awarded to employees if it is found that they would have been dismissed in any event, even if a fair procedure had been followed by the employer.

1.4 The success of these new rules will largely depend of the terms of the **Code of Practice**, the terms of which have not yet been released. It is thought the above changes will come into force in about April 2009.

2 Disability discrimination by association – the impact of *Coleman v Attridge [2007] IRLR 88*

2.1 On 31 January 2008 the Advocate General to the European Court of Justice ("ECJ") issued his independent opinion in this important disability discrimination claim. Although the Advocate General's opinion is not binding upon the ECJ Judges, it is usually followed.

2.2 This case concerns a woman who claims she was discriminated against at work on the ground that her child is disabled. She therefore claims that she was subjected to discrimination by virtue of her association with someone who is disabled, and not because she is disabled herself.

2.3 The Advocate General opined that direct discrimination and/or harassment by association is prohibited by the EC **Equal Treatment Framework Directive (2000/78)**, if that discrimination is on the grounds of disability, religion or belief, age or sexual orientation. By way of an example, if the Advocate General's opinion is followed by the ECJ, protection could be extended to someone who is discriminated against on the grounds that their husband or wife is a member of a particular religion or belief. It would also give additional rights to those who care for persons suffering from a disability.

2.4 If the ECJ follows the Advocate General's opinion, this case could have far-reaching implications on discrimination rights by extending those rights to people who are discriminated against by association.

3 Agency workers – the impact of the Court of Appeal's decision in *James v Greenwich Borough Council [2008] EWCA Civ 35*

3.1 A recent decision by the English Court of Appeal in the case of *James v Greenwich Borough Council* has clarified a much discussed question of law. This is the question of the protection of agency workers, and whether it is possible to imply a contract of employment between an agency worker and end user client, despite there being express separate contractual arrangements between the worker and the agency, and the agency and the end user client.

3.2 After a number of potentially conflicting and uncertain cases, the Court of Appeal has ruled that contracts of employment can only be implied between an agency worker and an end user client where there is evidence that the express arrangements in place are a sham and where it is necessary to do so because the express arrangements do not accurately explain the behaviour of the parties.

3.3 Now that this avenue of protection for agency workers has been severely restricted by the Court of Appeal, the issue of the rights of agency workers is likely to become an even more sensitive political issue. It is therefore likely that there will be fresh legislation in this area in the next few years.

4 TUPE transfers to non EU countries: the impact of *Hollis Metal Industries v GMB [2008] IRLR 302*

4.1 In this case the English Employment Appeal Tribunal ("EAT") looked at whether the **Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246)** ("**TUPE**") applies to the transfer of a business from the UK to a non EU state. This has been a much discussed issue over the last few years. It is widely accepted that **TUPE** does apply to transfers within EU states. However, this is the first case to look in detail at whether **TUPE** also applies to transfers from the UK to a jurisdiction outside of the EU.

4.2 The EAT concluded that **TUPE** has the potential to apply to a transfer from the UK to a non-EU entity, in the event that on the transfer the undertaking did not remain in the original jurisdiction. Any such transfers would therefore still need to satisfy the standard **TUPE** transfer tests. The case was then sent back to the Employment Tribunal to decide whether there was, in this case, a transfer under **TUPE**. We await the outcome of this decision.

4.3 Commentators are suggesting that in cases of cross border transfers of a business that falls within **TUPE**, the transferor in the UK will have the same duties of information and consultation that apply to standard UK **TUPE** transfers. However, once the business is transferred to the new jurisdiction, the rules of that jurisdiction will apply. If there are no similar **TUPE** obligations in the transferee's jurisdiction, the transferee will not be obliged to take on the affected employees or to maintain their terms and conditions of employment.

4.4 Commentators have also argued that businesses would not retain their identity as discrete economic entities after a transfer out of the EU due to changes in language, working practices and working regulations. If these arguments are successful, there will be no **TUPE** transfer in such circumstances.

4.5 It is also possible that a move to a new location out of the EU would constitute a "substantial change to working conditions" to employees' "material detriment". In such cases, employees will be found to have been automatically unfairly dismissed as a consequence of the transfer.

5 New Pensions Regulator Guidance (*by Tom Dugdale, Associate*)

5.1 On 10 September 2007 the Pensions Regulator ("Regulator") issued new draft clearance guidance on the circumstances in which it may use the wide-ranging powers bestowed on it by the **Pensions Act 2004** ("the Guidance"). The Guidance will replace the existing guidance which was first published in April 2005.

5.2 The Guidance sets out in much greater detail the voluntary process by which an employer can obtain "clearance" from the Regulator for certain events that could be detrimental to its pension scheme (for example, mergers and acquisitions). Having obtained clearance, an employer and other parties to an event would have comfort that the Regulator would not use either of the following powers:

- Contribution Notices (which require payments to be made to a pension scheme); and

- Financial Support Directions (which require financial support to be put in place for a pension scheme).

5.3 The Guidance is far-reaching and extensive. It is advisable for anyone contemplating a transaction which may prove detrimental to a funded pension scheme, whether bidder or target, to seek advice in relation to gaining clearance before proceeding.

4.0 INTELLECTUAL PROPERTY

1 Trade Marks (*by Marcus Andreen, Consultant and Tom Dugdale, Associate*)

1.1 From 1 October 2007 the UK Intellectual Property Office ("UKIPO") no longer examines a trade mark application on relative grounds and the onus now falls on proprietors of potentially conflicting marks to object to an application. Proprietors of community trade marks and certain Madrid Protocol registrations can 'opt in' to the UKIPO's notification system to receive details automatically of applications for potentially conflicting marks.

2 Regulation of Investigatory Powers Act 2000 ("RIPA")

2.1 On 1 October 2007 Part III of **RIPA** came into force. **RIPA** governs interception of communications, surveillance and sets out the circumstances in which public authorities can acquire and disclose information. Part III of **RIPA** gives authorities (who have obtained "protected information", i.e. encrypted information, in the exercise of their statutory powers) the right to request that information that is encrypted be converted to an intelligible form, or to request that a key is provided to enable decryption.

2.2 The '**Investigation of Protected Electronic Information Code of Practice'** was also published on 1 October 2007. This Code states that its aim is to "provide guidance to be followed when exercising powers under Part III of **RIPA**". The Code will be admissible as evidence in both civil and criminal proceedings, and therefore provides a valuable guide as to how Part III of **RIPA** will be implemented. Controversially, these powers have recently been used by a local authority to "spy" on parents thought to have been living outside the catchment area of a desirable state school, giving rise to fears that powers meant to be used for surveillance of terrorists may be abused by civil servants for merely administrative matters.

3 Court of Appeal upholds computer games copyright decision

3.1 The decision of the Court of Appeal in *Nova Productions Limited v Mazooma Games Limited and Bell Fruit Games Limited [2007] EWCA Civ 219* clarifies to some extent the circumstances in which the copyright in preparatory materials for a computer program can be infringed by the making of a computer program whose functionality, but not program code, is copied from that program.

3.2 The Court of Appeal considered Article 1(2) of the EU's **Software Directive (91/250/EEC)** ("the Directive") and commented as follows:

"The Directive does not say that mere ideas by way of preparatory design work are to be protected. … [The Directive] makes it clear that for computer programs as a whole (which includes their preparatory design work) ideas are not to be protected. What is protected by way of preparatory design work is that work as a literary work – the expression of the design which are to go into the ultimate program, not the ideas themselves."

The Court of Appeal's decision may influence the future attitude of the English courts to software copyright infringement cases.

4 Patents

4.1 Following the case of *Arrow Generics Limited v Merck & Co Inc [2007] EWHC Pat 1900*, the High Court has emphasized that it may grant novel forms of declaration where there is a genuine commercial need for doing so.

4.2 In this case Merck & Co Inc ("Merck") obtained a European patent for its osteoporosis drug, Fosamax. This was later revoked both in the UK and at the European Patent Office ("EPO") following opposition proceedings. Arrow Generics Limited ("Arrow") subsequently introduced a similar treatment for osteoporosis.

4.3 Merck then revived divisional applications which it had filed at the EPO on the basis of the original patent. Divisional applications carve separate inventions out of the original application and may proceed to grant as separate patents if they qualify for patentability in their own right. If granted these applications would have had significant consequences for Arrow, potentially exposing it to substantial claims in damages.

4.4 The High Court was unable to give Arrow a declaration to the effect that the applications would result in invalid patents as this was a matter for the EPO. Instead it proposed a more limited declaration which solved the commercial problem for Arrow. The declaration was that Arrow's own generic product was "obvious" at the priority date of Merck's applications. This declaration would mean that Merck could not argue that any patent it obtains covers Arrow's product because that patent would then be automatically invalid as "obvious".

5.0 LITIGATION

1 Costs Estimates: *Tribe v Southdown Gliding Club Limited [2007] EWHC 90080* (*by Dorothy McMahon, Senior Associate*)

1.1 Reliance on an inaccurate estimate of costs at allocation stage results in a limit on recoverable costs.

1.2 In this case, the Court limited the amount of costs which could be recoverable from the other side where the estimate given at allocation was approximately one fifth of the costs finally incurred. The Claimant had reasonably relied on the estimate and had obtained insurance cover in accordance with it. The reasons given by the Defendants for the difference between the estimate and the actual costs claimed were inadequate. The estimate did not act as a cap on recoverable costs, however it was held to be appropriate to limit the sum recoverable under sections 6.5A and 6.6 of **Practice Direction** 43.

1.3 Three requirements must be met before a cap can be ordered:

(i) There is a difference of 20% or more between the costs claimed and the costs shown in the receiving party's estimate;

(ii) The difference is not properly explained by the receiving party; and

(iii) The paying party has relied on the estimate.

2 Detailed Assessment Of Costs: *Harris v Moat Housing Group South Limited [2007] EWHC 3092* – All costs must be claimed in a single bill of costs

2.1 Where a party has instructed more than one firm of solicitors on a particular matter, the costs of both firms must be included in the Bill of Costs at detailed assessment. If the Costs Judge completes his assessment and proceeds to a final costs certificate without taking a solicitor's costs into account, there can be no further assessment of those additional costs.

2.2 **Civil Procedure Rule** 47.6 provides that detailed assessment proceedings are commenced by the receiving party serving both a notice of commencement and a copy of the bill of costs pursuant to an order entitling that party to costs. Paragraph 4.22 of the Practice Direction states that if different solicitors have represented the receiving party, their respective costs should be set out separately in the Bill of Costs.

2.3 The problem in the above case arose because the receiving party's solicitors settled the costs claim without reference to the previous firm's costs. The Judge held that the unclaimed costs could not be claimed from the paying party even though their solicitors had known the previous firm had done work on the case. Although the facts of this case are unusual, it usefully illustrates the importance of including all costs in the Bill of Costs prepared for detailed assessment.

6.0 PROPERTY

1 Home Information Pack ("HIP") Update (*by Bernard Mocatta, Partner*)

1.1 We reported last year that HIPs must be prepared for all residential properties marketed for sale from 1 June 2007. Since that date additional legislation has been introduced and further legislation is expected. The changes are being phased in more slowly than originally anticipated.

1.2 The **Home Information Pack (No.2) Regulations 2007 (SI 2007/1667)** ("**the Original Regulations**") have been amended by the **Home Information Pack (Amendment) Regulations 2007 (SI 2007/3301)** ("**the New Regulations**"), which came into force on 14 December 2007.

1.3 The **New Regulations**:

- Provide that until 1 June 2008 documents required under the **Original Regulations** for leasehold properties (other than the lease itself) will be treated as authorised documents;

- Extend the period during which a property may be marketed without an energy performance certificate ("EPC"); and

- Provide that between 6 April and 1 October 2008 the requirement for producing an EPC is being phased in for all residential and commercial properties whether on construction, sale or grant of a lease. The dates of commencement for this requirement vary both according to the size of the property and whether it has already been constructed.

2 Tenancy Deposit Schemes Update

2.1 We reported last year the introduction of Tenancy Deposit Schemes from 6 April 2007. The first indications suggest that these schemes are working effectively although it is still early days.

3 Update on Stamp Duty Land Tax ("SDLT") Anti-Avoidance Provisions

3.1 The government has published a consultation paper on the reform of the tax treatment of property transactions effected through special purpose vehicles ("SPVs").

3.2 Some high value property transactions are being taken outside the scope of SDLT by the use of SPVs. A company is a commonly used form of SPV which is created for a specific purpose, such as holding a property in place of the beneficial owner.

3.3 A property buyer can reduce the amount of tax due by purchasing an SPV that holds property, rather than by taking direct ownership of the land. If a buyer takes a transfer of land, there will be a potential charge to SDLT. However, if the buyer instead acquires the SPV that holds the property, the buyer gains beneficial control of the property, but will only pay tax (stamp duty in the case of an SPV) on the transfer of ownership of the SPV.

3.4 Buyers can make considerable tax savings by using an SPV. For example a transfer of shares in a company registered in the UK is generally liable to Stamp Duty at 0.5%. The current highest rate of SDLT is 4%.

3.5 Broadly, the Government's proposal is to introduce a tax charge, referred to as the "Indirect Charge", on the transfer of SPVs. The Indirect Charge will be equivalent to the SDLT that would be payable if the property had been transferred directly to the new owner, rather than indirectly through a transfer of the SPV.

3.6 The government acknowledges that it may be difficult to identify SPVs used for the purposes described above and the consultation process continues.

7.0 PRIVATE CLIENT

Divorce: Division of assets where assets have been acquired post separation (*by Zoë Bagg, Senior Associate*)

1 Increase over a relatively short time period and the effect of children

1.1 Case law has been gathering pace on this subject since the 2004 case of *M v M (Financial relief: substantial earning capacity) [2007] EWHC 1404 Fam*. The judgement was based on a couple who separated for two years in order to be divorced under section 1(2)(d) of the **Matrimonial Causes Act 1973**. During this period the assets of the parties rose by about £5.5 million which represented a 43% increase. The increase was created by the husband during the two year period. It was held that the wife should be entitled to a share in the accrual because the parties had remained financially linked through the period and had made an equal contribution through the marriage.

1.2 In contrast, in the subsequent case of *Miller [2006] UKHL 24* Lord Mance held in the House of Lords that the wife should have no claim to a significant uplift in the value of the husband's shares since the parties' separation.

1.3 The distinguishing factor between these two cases is that in *Miller* the parties had no children.

2 Increase over a significant time period

2.1 The leading case on the division of assets where there has been a significant delay between the parties separating and getting divorced is the case of *Rossi [2006] EWHC 1482 Fam*. This was subsequently approved by the case of *S v S (Ancillary relief after lengthy separation)[2007] EWHC 1975 Fam.*. In brief, the facts of *Rossi* were that the parties separated in the mid 1980s. The wife accrued significant assets and the husband did not begin his application for financial relief until 2004, some 20 years later.

2.2 The Court found in favour of the wife and laid down some helpful guidance:

- Assets are to be valued at the date of trial;
- Assets acquired by one party after separation by their own endeavours and which do not rely on the use of an existing matrimonial asset may be considered non-matrimonial property;
- Where an asset such as a bonus relates to a period of time where the parties were cohabiting it cannot be non-matrimonial. To be sure that it is non-matrimonial the bonus should relate to a period which commenced more than 12 months after separation; and
- The Court will consider whether the applicant has diligently proceeded with their claim, whether he/she has been treated fairly during the period of

separation and whether the money maker has the prospect of making further gains when considering whether post-separation accrual should be shared.

2.3 Most recently, the Courts have moved away from the more formulaic approach set out in *Rossi* and in the case of *P v P [2007] EWHC 2877Fam* Mr Justice Moylan declared that post-separation accrual is a matter for the discretion of the judge.

2.4 The Court of Appeal has indicated that it will review the issue if and when an appropriate case comes before it. We await further judgments for guidance.

8.0 TAXATION

1 Domicile and Residence (*by Helena Whitmore, Tax Director and Stacy Lake, Legal Assistant*)

1.1 Day Count Test for residence

The Budget confirmed the proposals for a new residency test in determining whether a person is UK resident for tax purposes based on presence of 183 days in any tax year or 91 days or more taken over an average of 4 years usually. A slight relaxation from the initial proposals (that days of arrival and departure should both count) has been made. A person will now be regarded as present in the UK on a day only if he is here at midnight on that day. In addition a person in the UK only in transit to another country will generally be treated as having not been here at all even if this results in still being in the country at midnight.

1.2 Remittance Basis Charge

The UK has been a favourable location for taxpayers who are resident but not domiciled ("non doms" – broadly those whose origin is not the UK) due to the remittance basis of taxation applicable to such persons. The intention to change these rules was announced in the pre-budget report in October 2007.

The 2008 Budget confirmed many of the proposed reforms to the tax rules for the non-dom. The headline change will be that the non-dom individual who has been resident in the UK for 7 out of the past 10 tax years will now be subject to an annual £30,000 charge in order to remain on the remittance basis, i.e. to be taxed on overseas income and gains that are brought into the UK rather than worldwide income and gains as they arise. Many tax allowances will also no longer be available for those who choose to be taxed in this way. Individuals with unremitted foreign income or gains of less than £2,000 will be exempt from the £30,000 charge and will be able to keep many of their allowances. The £30,000 charge will be treated as a tax charge for double tax treaty purposes.

Those who opt out of the remittance basis will be taxed on their worldwide income and gains.

1.3 Offshore Companies, Trusts & Mortgages

Due to the above changes in the way non-doms will be taxed in the future, there will be some changes to the taxation of offshore trusts, companies and mortgages for such individuals.

However, some concessions were made from the initial proposals. Most significantly the Budget saw a climb down on offshore trusts of non-domiciled settlors or beneficiaries. It is now intended that any income or gains from such trusts will only be taxed on the non-dom if remitted to the UK.

1.4 **'Ceased Source'**

The Ceased Source rules applied to convert certain overseas income to remittable capital on the basis that the source of the income had ceased in a previous year. This will now be abolished.

1.5 **'Alienation' of Income and Gains**

Under new legislation from 6 April 2008 an individual can no longer gift untaxed foreign income or property to a closely connected third party for remittance to the UK by the recipient in the form of tax free capital and escape taxation on it. This will affect gifts to spouses, civil partners, individuals living together as spouses or civil partners and their children or grandchildren under 18. It would also cover close companies and foreign companies that would be close if in the UK and if any of the above individuals are participators, beneficiaries or settlors.

1.6 **'Cash only' rule**

Under the current rules certain foreign income can only be taxed if remitted to the UK in the form of cash. The Budget revealed that this is set to change so that assets imported in specie and services in the UK derived from such income will also be taxed as a remittance. There will be exemptions for personal effects such as clothing, shoes, jewellery etc. and assets costing less than £1,000.

2 Capital Gains Tax

2.1 **New rate of Capital Gains Tax ("CGT") & Taper Relief abolished**

The rate of CGT is to be fixed at 18% as of 6 April 2008. From that date, taper relief and the indexation allowance will be abolished. The loss of business asset taper will affect many sellers of unquoted trading companies who could previously enjoy an effective CGT rate of 10%. On the other hand, in many cases the tax rate on gains will have reduced from 40% to 18%, so there will be winners as well as losers.

2.2 **New Entrepreneurs Relief**

From 6 April 2008 a new Entrepreneurs relief will be implemented alongside the CGT reforms to compensate for the loss of the business asset taper relief referred to above. This will be available in respect of gains made on disposals of all or part of a business, on disposal of assets following the cessation of business, or disposals by anyone who was involved in running the business. The first £1 million of gains will be taxed at the 'relief rate' of 10% and all monies thereafter at the new CGT flat rate of 18%. An individual will also be able to make claims for relief on more than one occasion.

2.3 **CGT losses for non-doms**

From 6 April 2008 a non-dom who opts to be taxed on the arising basis will be subject to UK CGT on their worldwide gains. The legislation will now also be amended to grant relief for foreign losses if the remittance basis is not claimed in the relevant year that losses occur.

9.0 GENERAL PRACTICE

1 New Regulatory Body for Solicitors (*by Tom Dugdale, Associate*)

1.1 The Solicitors Regulation Authority ("SRA") is the new independent regulatory body of the Law Society of England and Wales. Established in January 2007, the SRA changed its name from the Law Society Regulation Board to emphasize its independence and to make its objectives clearer. The SRA currently regulates more than 100,000 solicitors in England and Wales.

1.2 According to the SRA its purpose is to protect the public:

- by ensuring that solicitors meet high standards; and
- by acting when risks are identified.

It sets and maintains standards for solicitors with the aim of giving the public full confidence in the profession.

2 New Code of Conduct for Solicitors (*by Tom Dugdale, Associate*)

2.1 From 1 July 2007 the **Solicitors' Code of Conduct 2007** ("**the New Code**") which governs the general conduct of solicitors has replaced the old rules which are contained in the Guide to the **Professional Conduct of Solicitors 1999** ("**the Old Code**"). However not all of the old regulations have been repealed by the **New Code**. In particular, the **Solicitors' Accounts Rules, Solicitors' Indemnity Insurance Rules** and **Financial Services Rules** remain in force.

2.2 Some key changes in the **New Code** include the following:

- **Rule 1: the core duties**

  This replaces Practice Rule 1 of the Old Code as the core of the SRA's regulatory activities. The principal duties are:

  - Justice and the rule of law;
  - Integrity;
  - Independence;
  - Best interests of clients;
  - Standard of service; and
  - Public confidence.

  These define the characteristics of a solicitor and act as a benchmark against which he can measure his conduct when the more detailed rules are silent.

- **Rule 5: Business management in England and Wales**

This concerns the supervision and management of a practice and differs notably from Practice Rule 13 of the **Old Code**. It has three strands which set out the following:

1. Responsibilities of those running the firm or in-house practice for the overall supervision and management framework of that practice;

2. Minimum requirements to be met in order to be "qualified to supervise"; and

3. Minimum standards applying to the supervision of clients' matters.

- **Rule 6: equality and diversity**

  This now has provisions dealing with age discrimination, civil partnerships and paternity rights. It also clarifies the provisions relating to disability discrimination and reasonable adjustment, and changes the duties on implementing an equality and diversity policy.

3. New Money Laundering Regulations (*by Mehboob Dossa, Partner)*

3.1 The **Third Money Laundering Directive (2005/60/EC)** was implemented into UK Law via the **Money Laundering Regulations 2007 (SI 2007/2147)** (the "**MLR 2007**") which came into effect on 15 December 2007. The **MLR 2007** replace the **Money Laundering Regulations 2003 (SI 2003/3075)** and are designed to ensure that professionals report to the appropriate authorities any suspicions or knowledge that they may have of money laundering activities (which includes the use of monies, whatever their provenance, to finance any terrorist activity).

3.2 The **MLR 2007** apply mostly to financial firms and other credit institutions as well as legal professionals (when undertaking some activities), accountants, tax advisers, auditors, estate agents, casinos, high value dealers, trust or company service providers.

3.3 Businesses to which the regulations apply are now required to have appropriate systems in place:

- to prevent money laundering;

- to report suspicious transactions to the Serious Organised Crime Agency ("SOCA") which is a UK non-departmental public body set up to prevent and detect serious organised crime;

- to ensure that they know their clients' identity by conducting client identification on both individual and corporate clients including where applicable identifying the beneficial owner of the relevant client;

- to keep records of identity;

- to train their staff on the requirements of the **MLR 2007**; and

- to carry out ongoing monitoring of a business relationship.

3.4 The **MLR 2007** also require relevant businesses to adopt a "risk-based approach" when carrying out due diligence on their clients and on the transactions in which they are involved. This means varying the due diligence and monitoring process for each client and/or transaction (on a case by case basis) according to the perceived risk of money laundering and terrorist financing that the client or the transaction in question poses.

3.5 It will be difficult to assess the direct effects of the **MLR 2007** as there are (unsurprisingly) no hard figures for the amount of money laundered each year. The **MLR 2007** are, however, an important piece of legislation with severe civil and criminal penalties (including fines and imprisonment) for those relevant businesses which fail to comply with their provisions.

10.0 THE AUTHORS

MARCUS ANDREEN

Marcus is a solicitor who supports the firm's corporate team, including the Nordic Business Group. His principal areas of practice are IT, IP and telecoms. A Swedish national, Marcus qualified as an English solicitor in 1992 and worked as a corporate lawyer in the City of London for six years. Thereafter he worked in-house, including as General Counsel and Company Secretary for Eyretel plc, a UK-listed technology company. Marcus has extensive experience in advising software, telecoms and other IT/technology companies on a broad range of domestic and international commercial transactions, including acquisitions, joint ventures, share reorganisations and share option schemes.

marcusa@gmrlaw.com
Direct dial: +44 (0)20 7632 1600

ZOE BAGG

Zoë was admitted as a solicitor in 2004. She qualified in a London firm with a niche interest in tax planning for both UK residents and non-domiciled clients. She joined Grundberg Mocatta Rakison LLP's private client department in April 2005, having gained experience in all aspects of UK private client work including drafting wills, the administration of estates, inheritance tax planning and contentious probate disputes. Since joining Grundberg Mocatta Rakison, Zoë has expanded her divorce practice, acting for clients undergoing divorces, as well as assisting in the settlement of disputes over financial matters and access to children.

zoeb@gmrlaw.com
Direct dial: +44 (0)20 7632 1610

MEHBOOB DOSSA

Mehboob was admitted as a solicitor in December 1999. He joined the Corporate Commercial Department at Grundberg Mocatta Rakison in December 2004 after having worked as a senior assistant solicitor at a niche London corporate finance practice. Mehboob advises companies, from start-ups to listed companies, on a range of general corporate and corporate finance matters. He has extensive experience in advising on corporate transactions, including listing companies on the Official List and admitting companies to AIM, private placements, acquisitions, disposals, reorganisations and joint ventures. Mehboob also has expertise in advising clients on corporate governance, financial services

mehboobd@gmrlaw.com
Direct dial: +44 (0)20 7632 1609

and commercial property matters.

TOM DUGDALE (CO-EDITOR)

Tom joined GMR as an associate in the corporate department in December 2007 and works on M&A, private equity and general corporate matters. Tom completed his training at a corporate law firm in Mayfair having gained a broad range of experience in corporate and commercial matters. This included advising on a range of AIM related matters.

tomd@gmrlaw.com
Direct dial: +44 (0)20 7632 1701

LUCY HARRINGTON

Lucy is an Associate in the Employment Department. Lucy joined GMR in November 2007 after completing her training at a City law firm, before which she worked for two years as a para-legal in a large Channel Islands law firm. She qualified as a solicitor in October 2007. Lucy undertakes work in all areas of contentious and non-contentious employment law and assists on the employment aspects of corporate transactions.

lucyh@gmrlaw.com
Direct dial: +44 (0)20 7632 1695

RHIDIAN JONES (CO-EDITOR)

Rhidian is a senior lawyer who combines legal expertise with business experience. He has worked in industry and as an independent director for several companies, and practised company and commercial law for 25 years, handling many transactions all over the world, and becoming Head of Corporate at a major City of London law firm.

rhidianj@gmrlaw.com
Direct dial: +44 (0)20 7632 1600

STACY LAKE

Stacy joined the Private Client & Tax Department as a Legal Assistant in February 2008 where she is primarily assisting on tax matters. She was called to the Bar of England and Wales in October 2006 and plans to do the QLTT to qualify as a solicitor. Over the past year Stacy has been working for Henley & Partners AG as a residence planning associate advising high net-worth clients on citizenship & residence planning, international trust & tax planning and other cross border issues.

stacyl@gmrlaw.com
Direct dial: +44 (0)20 7632 1694

CLAIRE MARTIN (CO-EDITOR)

Claire is an Associate in the Corporate department. She joined GMR in January 2008 having qualified in 2006 with an established London firm. Claire handles a wide range of corporate work including sale and business acquisitions. Claire has also advised on group restructuring, shareholder agreements and general company matters. She has particular experience in working for European and US inbounds.

clairem@gmrlaw.com
Direct dial: +44 (0)20 7632 1681

DOROTHY McMAHON

Dorothy was admitted as a solicitor in 2002. She joined Grundberg Mocatta Rakison LLP in the litigation department in January 2005, having gained a broad range of commercial litigation experience as head of litigation at a niche London corporate practice. Dorothy has worked on several complex contract disputes and fraud cases in the High Court, and Court of Appeal, as well as share capital reduction, debt recovery and insolvency matters.

dorothym@gmrlaw.com
Direct dial: +44 (0)20 7632 1628

BERNARD MOCATTA

Bernard Mocatta practised as a barrister for ten years before he was admitted as a solicitor in 1978. He specialises in conveyancing, inheritance tax planning, probate, family law and litigation.

bernardm@gmrlaw.com
Direct dial: +44 (0)20 7632 1622

DAN PEYTON

Dan was called to the Bar in 1995 and was admitted as a solicitor in 2006, joining Grundberg Mocatta Rakison LLP in March 2007 as a partner. He acts for both employers and employees in all aspects of employment law including, boardroom and senior executive terminations, team moves, confidential information and restrictive covenant disputes as well as complex and sensitive whistle blowing and discrimination claims.

danp@gmrlaw.com
Direct dial: +44 (0)20 7632 1667

HELENA WHITMORE

Helena, a Swedish National, is a Chartered Tax Adviser and a Member of the Association of Taxation Technicians. She received her professional education in the UK and has worked with Grundberg Mocatta Rakison LLP since 1990. Helena advises both private and corporate clients with cross – border interests.

helenaw@gmrlaw.com
Direct dial: +44 (0)20 7632 1609