Carter Lemon Camerons *Healthcare*

Healthcare **View**

Giving a clearer view of the legal landscape

WELCOME to Carter Lemon Camerons' February edition of Healthcare View

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Who controls the federation?

So you are proposing to set up a federation. Who will control it?

There are two main elements to a company – the members who own it and the Board which runs it.

When setting up a company it is important to understand the roles and responsibilities of the members and the Board.

In a company limited by guarantee the members own the company and usually have a simple structure of one member, one vote. In a company limited by shares the members are shareholders, and usually there is one vote per share, so the number of shares a shareholder holds determines the number of votes the shareholder has. However it is possible to have some shares which do not have voting rights.

The members appoint, or approve the appointment, by election of the directors of the company, and the directors form the Board. The members may also remove the directors, so members do have power over the Board.

The members have other powers as well which the Companies Act 2006 or the articles of association (Articles) the company state can only be exercised by them, and not by the Board. In this way the powers of the Board can be limited. These include approval of any dividend declared, a change in the Articles (effectively its the constitution) or changes to the share structure and rights.

The liability of members is usually limited to a nominal sum, such as £1.00 per share. However, if the members have invested in the company by paying more for their shares and the company becomes insolvent, then the members may lose some or all of their investment.

The Board, made up of the directors, run the company. So between them, the directors are going to make the decisions such as employing people, which contracts to bid for, where the offices will be, and all the financial and operational decisions which a business has to take each day. So, appointing the right directors is vital. In the Articles you may state who people have to be to be directors, for example only partners of practices. You may also state that they have to retire every few years, so that there is a change of directors and fresh ideas are introduced.

Directors do have fiduciary duties, and these are now set out in Chapter 2, part 10 of the Companies Act 2006 as the general duties of directors and include:

1. To act within powers.
2. To promote the success of a company.
3. To exercise independent judgement.
4. To exercise reasonable care, skill and diligence.
5. To avoid conflicts of interest.
6. Not accept benefits from third parties.

If the Directors fail to comply with these duties, then they may become personally liable for the losses of the company.

Structuring the company through careful agreement of the Articles means an appropriate balance of power between the members and the Board is achieved.

Justin Cumberlege heads the healthcare team at Carter Lemon Camerons
justincumberlege@cartercamerons.com

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TOP FIVE TIPS FOR GP PRACTICE PREMISES

We are delighted that Sabrina Umrani will be joining Carter Lemon Camerons this February primarily to provide property advice in the healthcare team.

Having trained and qualified in a firm which specialises in commercial property, Sabrina brings with her a wide range of experience in dealing with property transactions including landlord and tenant work, sales and purchases and development projects. We asked her what her top five tips were for GP practice premises. Her replies were:

1. Get advice early! It is important to get legal advice early in a transaction to put yourself in the best possible position both for getting matters completed within your desired timeframe and ensuring you understand the implications of what you are agreeing in heads of terms (this is especially relevant when agreeing the terms of a lease).

2. Make certain that you have all the necessary consents, such as from NHS England and/or NHS Property Services Limited, for the transaction, as well as your CCG to ensure that you are entitled to rent reimbursement.

3. Remember other expenses. It is important to include all the costs which will be incurred when dealing with your property transaction, and budget accordingly. These include Stamp Duty Land Tax, the cost of property searches and fees for registering the transaction at the Land Registry. These expenses are relevant both to freehold and leasehold transactions.

4. Think about any works you want to do and any change of use (e.g. having a pharmacy) before and after purchasing the practice (including a sale and leaseback). Obtain professional advice about what consents from the Landlord will be required to carry out the intended works or for a change of use and whether planning permission and building regulations consents are required. You may find that there are restrictions which prohibit certain works and uses. Failure to comply with such restrictions can prove costly.

5. Keep papers together and remember to change the registered owners when a partner leaves (and, if appropriate, joins). Do keep all documents (e.g. deeds, guarantees and planning permissions) relating to the property safely so they can be easily found. Carter Lemon Camerons offer a facility to store deeds for its clients.

Sabrina Umrani joins the healthcare team at Carter Lemon Camerons, and can be emailed at *sabrinaumrani@cartercamerons.com*

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WHEN COMMISSIONING GOES WRONG

2013 saw the publication of the NHS (Procurement, Patient Choice and Competition) (No. 2) Regulations. This essentially set out requirements on NHS England and CCGs to guarantee good practice when procuring health care services. Some argue this could be a step towards the privatisation of the NHS, but the objective is to settle the media speculation that the original procurement regulations would introduce compulsory competitive tendering.

The new regulations seek to strike a better balance between the issues of competition and integration by highlighting the wider discretion for using the single provider exception and the duty to promote integration. In effect however they seem to have added an extra step in commissioning decisions and unfortunately made it more complex.

Commissioners are increasingly the subject of scrutiny and as such are looking for the most profitable and innovative solutions whilst providers are keen to optimise customer satisfaction. The process of blending both goals together, as well as the more complex procedure, could result in further disagreements between commissioners and providers.

There are now various avenues for providers to raise their concerns and bring a challenge as below:

Through the Cabinet Office

- A free service
- Which can be anonymous
- It may take time to go through this route
- The result may simply be a recommendation regarding future conduct

Making a complaint through Monitor (the independent health regulator) under The NHS (Procurement, Patient Choice and Competition) Regulations (No 2) 2013

- A free service
- Monitor has discretion as to whether to take the complaint on
- Monitor can investigate and make directions
- The powers given to Monitor are in Regulation 15 and include the power to direct a commissioning body to vary or withdraw an invitation to tender or to vary an arrangement for the provision of health care services

Formal Court Challenge

- Risk of paying costs for legal fees, court fees and a payment to the commissioner if the claim does not succeed
- This is a harsher route which could result in the immediate remedy of halting the procurement process if the claim is made during the stand still period. There is also a potential remedy of damages. Could be quicker than the other routes
- The strict time limits of the court must be kept to.

David Bennett, the chief executive at Monitor, commented that Monitor intends to engage at an earlier stage with those contemplating a merger to ensure the outcome works well for patients, from both good governance and competition perspectives. This will ensure you have set long term goals which will help develop new approaches to the delivery of services to patients.

Naimi Shah is a trainee solicitor in the healthcare team
naimishah@cartercamerons.com

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TOP EMPLOYMENT LAW CHANGES FOR 2014

2013 was the start of the stemming of the tide in relation to numbers of Employment Tribunal claims, due to the introduction of tribunal fees to issue. 2014 brings with it a number of other employment law changes which Practice Managers and Partners should start preparing for now.

Bharti Gorasia guides you through the key changes to make sure you are ready for the year ahead.

TUPE for mergers and federations

If your practice is in the process of joining another practice or forming a federation then you need to be aware of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) which are the regulations which protect staff when any business is merged with another. From 31 January 2014, key changes are being made to the Regulations; one of which includes the removal of transfer-connected reasons from the protection against dismissal and another the restriction on varying employment contracts. The changes are good news for practices who will also be given the ability to start collective redundancy consultation prior to the transfer. Prior to the changes, practices had to wait until the transfer had taken place before commencing their redundancy consultation: now provided the transferring practice agrees, the conversations can start well in advance of the proposed transfer date.

Conciliation for Employee claims

From 6 April 2014 any employee making a claim will need to notify ACAS before lodging a claim at the Employment Tribunal. ACAS will provide a conciliation service within a set period. If conciliation fails, the employee may then lodge the claim. ACAS supports the Government's "light-touch" approach, to avoid satellite litigation and make best use of ACAS's expertise; however it remains to be seen whether ACAS will be given the resources to cope with the significant rise in the work that it will now be required to perform.

Financial penalties imposed by Tribunals

From April 2014, Employment Tribunal Judges will have the discretion to impose financial penalties on Practices which lose claims at Tribunal. The penalty will be up to 50% of any financial award made, in addition to that award, with a minimum of £100 and a maximum of £5,000. There will be a reduction in the penalty of 50% if it is paid within 21 days.

Tribunals given power to order equal pay audits

The employment tribunals will be granted powers to order employers to undertake an equal pay audit if they are found to have breached equal pay laws. The Government has indicated an implementation date of October 2014.

Removal of Discrimination Questionnaires

Practice Managers and Partners will be very familiar with the daunting task (because they are long and technical) of completing Discrimination Questionnaires when an employee brings a discrimination claim to the Employment Tribunal. The good news is

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that the Government is proposing to abolish the discrimination questionnaire procedure, as of 6 April it is proposed to replace it with informal guidance from ACAS. Even so, Practice Managers and Partners may need some guidance on how to respond to informal questionnaires served after the abolition.

The status of the proposed ACAS guidance is unclear, but it is unlikely an employer will have to pay any significant penalty if it is not followed unless the guidance is elevated to a Code of Practice. If it is a Code, rather than guidance, an employer failing to follow it will risk adverse inferences from the employment tribunal.

Managing sickness absence

Spring 2014 will see the introduction of the Government's health and work assessment and advisory service. This could mean more work for GPs. It is intended to provide state funded occupational health assessments for employees absent due to sickness for 4 weeks or more with referrals being made by GPs (unless there are reasons not to), or, where requested by the employer, after the 4 week period. The service will also provide assistance, available to both employers and employees, on managing and facilitating an employee's return to work.

Flexible working extended to all

The right to request flexible working is to be extended to all employees from April 2014. The right currently applies only to parents (in respect of children under 17 years, or 18 in the case of a disabled child) and carers. Practices must follow a statutory procedure in considering, agreeing or refusing a request for flexible working.

The statutory process for considering requests will be replaced with a duty to deal with the request in a reasonable manner within a reasonable period. The change will allow all employees to request flexible working after 26 weeks' continuous employment. A new ACAS Code of Practice is expected to be published which will provide further guidance.

Statutory rates increase

The rate of statutory maternity pay, ordinary and additional statutory paternity pay and statutory adoption pay, and the standard rate of statutory sick pay, are due to increase on 6 April 2014.

For further information please contact:

- *Bharti Gorasia* is a solicitor in the healthcare team specialising in commercial and employment matters *bhartigorasia@cartercamerons.com*
- *Andrew Firman* is a partner in the Healthcare Team specialising in commercial and employment matters *andrewfirman@cartercamerons.com*

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