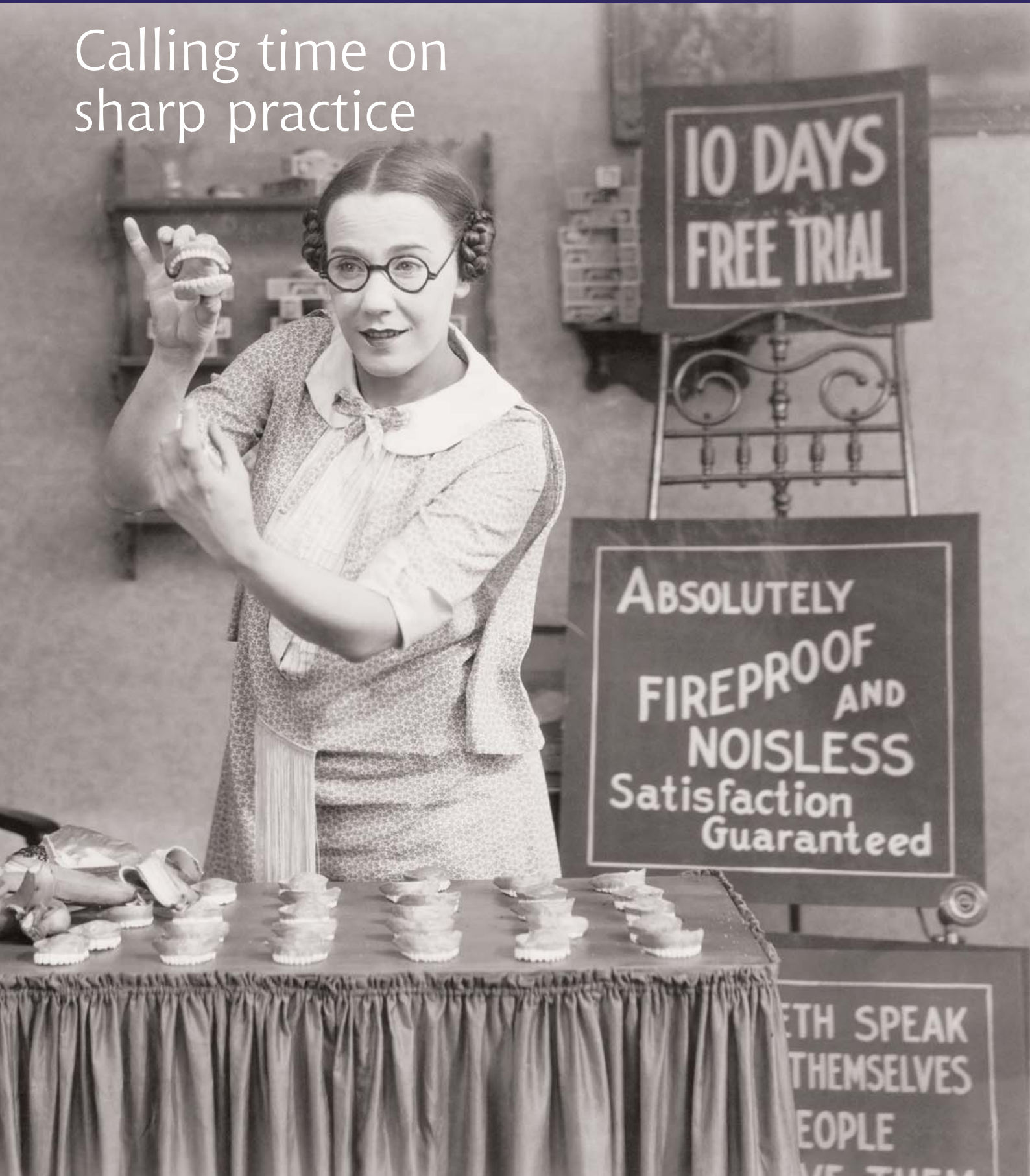


WJM contact

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THE MAGAZINE OF WRIGHT, JOHNSTON & MACKENZIE LLP · SOLICITORS

Calling time on sharp practice



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Welcome to Contact. In this issue we announce the arrival of new Partner, Susan Hoyle, to lead our Tax Team. We also cover the very successful model we have developed to help employers manage their employment issues and look at whether the property crunch has reached Scotland.

From David Bone, Chief Executive

I am delighted to announce that Susan Hoyle has recently joined WJM as a Partner to lead our Tax Team.

Susan was attracted to WJM by our pioneering approach to looking after family businesses and business families and our strong connections with a number of major corporate clients. She came to us from one of the UK's leading law firms and it is a testament to our client-centric vision that Susan has joined us.

WJM's client-centric vision is challenging us to create innovative structures that help you, our clients, achieve their aspirations. This may sound straightforward and obvious to clients, but it is unconventional among lawyers because it involves us getting out of our comfortable specialist silos and collaborating in service of the needs of our clients. We've taken this bold step because we believe it is right and it is great that we can attract talent like Susan to help us achieve this goal.



Susan will become a familiar face to you as she works with clients advising them on the tax implications of their proposed actions.

I'm sure you will join me in welcoming her to the firm.

More information from David Bone:
djbone@wjm.co.uk

Property Market Meltdown?

Unless you have been marooned on a desert island for the past few months, you can't fail to have seen or heard the media frenzy surrounding the credit crunch and an alleged meltdown in the property market.

Whilst, without a doubt, there has been a cooling off in the property market with a down turn in the level of mortgages granted and in sales taking place, it seems as if Scotland is weathering the storm and has not been as badly affected as other parts of the UK.

If you look closely behind the sensational headlines detailing a collapse in the buy-to-let market, you will see that the specific examples often relate to individuals who were unfamiliar with the market, exceeded their limits and bought speculatively off plan in the hope of turning around a quick profit. Investors who know their market, have some capital behind them and are prepared to

invest for the longer term, will still be able to invest in property. Indeed, people who decide not to get on the property ladder or who are unable to secure a mortgage under the present climate are more likely to rent, so the rental market should remain strong.

Properties are still being bought and sold – people downsize, look for more space with an expanding family, move for work related reasons or buy holiday houses or flats for children at university. At this uncertain time, specialist advice at an early stage is essential and, in WJM, we have a team who can help you. So long as sellers have reasonable expectations of the price which is achievable for their property and the length of time it may take to sell it, and so long as buyers are realistic about their borrowing options, then the property market will be resilient. For those who have large deposits available or are first time or cash buyers, there may even be some bargains to be had!

More information from Hilary Denholm: hdd@wjm.co.uk,
Aileen McInnes: ajm@wjm.co.uk or **Shona Brown** smb@wjm.co.uk

Protecting your Business – the key to Key Man Insurance



The performance of a business can be significantly influenced by the contributions, skills and business acumen of ‘key’ individuals – for example, those employees responsible for looking after areas of the business such as design, marketing, or those with specific ‘special relationships’ amongst their business contacts may be considered “key”.

If these key individuals die unexpectedly or are unable to work due to long-term illness, the effect on the business could be potentially crippling. Small businesses are particularly vulnerable especially where these key individuals may be the largest asset of the business.

Employers are able to cover this risk cheaply and effectively by taking out key man insurance. Often overlooked, key man insurance can be provided at a pre-set level with the cost of the insurance depending upon the financial impact of the insured event upon the business.

While the insurance payout cannot completely put the business back into the same position that it would have been in had it not been for the loss of the key individual, it can help the business to continue to run

profitably by ‘softening the blow’ of the loss.

For example, the payout could be used for:

- The recruitment costs of finding a suitable replacement to the key individual;
- The costs of hiring an interim whilst permanent recruitment takes place;
- The costs of any reorganisation;
- The costs of additional staff training;
- A simple cash injection.

When considering key man insurance, it is prudent to conduct a review of the overall business strategy and identify major risks that could impinge on future profitability. Appropriate cover can then be implemented – but this should only occur after taking professional advice as to the correct sums insured, the most suitable policies, and the tax implications of the premium and the possible claim.

Our Financial Planning group can discuss the life insurance needs of your business and provide an indication of the costs to you. You might be surprised at the low cost of peace of mind.

More information from Robert Wilson: rw@wjm.co.uk

IN Brief

Court follows strict line on data protection

The right of access to personal data, allowing an individual to check and correct information relating to them, is one of the most fundamental rights guaranteed by the Data Protection Act 1998.

However, organisations face increasing numbers of complex and wide-ranging subject access requests from individuals for “all information about me” – typically to further a complaint or grievance or simply to cause nuisance. Such requests can impose heavy administrative and financial burdens and how far organisations have to go to respond has been hotly debated.

A recent case provided some welcome guidance. The pursuer, to obtain information he considered relevant, made several wide-ranging and overlapping subject access requests to the Welsh Assembly.

The Court decided for the Welsh Assembly, holding that organisations only have to carry out “reasonable and proportionate” searches to locate personal data.

Providing they conduct a reasonable and proportionate search, data controllers can now comply with their legal obligations. What is reasonable and proportionate, however, will depend on the circumstances of each case.

To justify a search as reasonable and proportionate, data controllers should

- Identify the limits of the proposed search.
- Justify why any locations/databases/archives are excluded.
- Quantify, in detail, the potential cost, time and effort involved in searching any excluded locations, including IT related expenses, employee costs, legal and other service provider fees.
- Record all of the above in writing and keep records for an appropriate period after responding to the request.

This remains a high threshold and cases where a “reasonable and proportionate” search is still costly, onerous and time-consuming will still occur.

More information from
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Landowners' Action on Affordable Housing

Scotland's landowners have long provided for their local communities, in terms of jobs, housing and contributions to community projects amongst other things. However, these days Scottish estates are no longer a source of great incomes for the landowner, and diversification is playing a much greater role in running any estate. But the desire to give to the local community is still strong, and, given viable opportunities, there is much more to be made of this.

The Scottish Government have now recognised the role of the rural landowner in the provision of affordable rural housing lets, by setting up a Pilot Scheme offering grant funding for new build housing in areas where there is greatest need.

The Pilot Scheme, which will run initially for 3 years, is currently open for expressions of interest to be submitted by July 2008. It makes provision for a grant of up to 55% of total development costs, up to a specified maximum based on the occupancy of the

house (e.g. the limit for a 3 person house is £60,000). An initial sum of £5m is available for this Pilot Scheme, with the intention that 100 new build properties will be produced for let. Applications for places on the scheme will be considered according to where there is greatest need which is not currently being met.

Of course there are quite stringent conditions, and rural landowners taking part in the scheme and receiving a grant, will require to take on a role similar to that of a registered social landlord, and to let the property on terms approved by the scheme for at least 30 years. Each let must be by Short Assured Tenancy and for a period of 20 years (the maximum allowed under a Short Assured Tenancy) or, if less, for the remaining part of the 30 year period.

The Scottish Rural Property and Business Association (SRPBA), of which WJM are members, has been closely involved in developing the pilot.

Sarah-Jane Laing, the SRPBA's Housing Strategy Officer, said, "The SRPBA is delighted that the Scottish Government is delivering on its proposals to involve rural landowners in developing affordable rural housing, after years of campaigning and work by the Association and its members.

"The houses built under this Pilot Scheme will make a significant contribution to meeting housing need in rural Scotland. The SRPBA has a large number of members eager to take up this opportunity to provide additional, good-quality rented accommodation and build on the crucial role that rural landlords already play."

The WJM Agricultural, Rural & Sporting Property team will be working with landowners who wish to take part in the scheme. We are also working with landowners who have taken the matter into their own hands and are developing affordable housing on their existing land.

English Law & Commercial Leases – Abolition of Landlord



The WJM Commercial Property team work for clients in both England & Wales and Scotland. Our rapidly increasing English law practice has prompted Joanne Reilly to look at new legislation enabling landlords in England & Wales to recover rent arrears.

Landlords will be familiar with the ancient common law remedy of Distress, which allows them to recover arrears of rent without having to go to court. New legislation will soon replace this remedy with a new power known as Commercial Rent Arrears Recovery (CRAR).

What is Rent Distress?

Distress allows a landlord to seize goods from leased premises and sell them to cover a tenant's rent arrears. The landlord does not need to go to court and get permission to do this (unless the tenant is, or is about to become, insolvent) nor does it need to give the tenant notice of its intention to exercise this remedy.



More information from: Laura Boswell leb@wjm.co.uk

Landlord's Right of Rent Distress

The term 'rent' is construed more widely than just the basic annual rent and can include service charge, rates, insurance, VAT and even interest if the lease also refers to these items as rents, which you will generally find to be the case in most leases.

Distress can be carried out by either the landlord in person or by a certified bailiff acting as their agent.

Commercial Rent Arrears Recovery

In contrast, CRAR has a much narrower scope and stricter provisions for enforcement than Distress, and the landlord must appoint an enforcement agent to carry out CRAR on its behalf.

The only rent that can be recovered is the basic rent the tenant pays for its occupation and use of the premises (together with VAT and any interest due on that amount). You cannot recover any other arrears as you could with Distress - and it makes no difference

whether these payments are referred to in the lease as 'rents' or not.

CRAR applies to all commercial leases provided they are in writing. It does not apply to a tenancy at sufferance (where a tenant remains in occupation following expiry of the lease and the landlord has not confirmed in writing that it is happy for the tenant to remain), nor does it apply to a licence to occupy.

The landlord still doesn't need to go to court but the following conditions must be satisfied before CRAR can be exercised:

- A notice must be served on the tenant before "taking control" of the goods.
- The tenant must be in arrears of rent before notice of enforcement is given.
- The amount of the arrears must be certain or capable of being satisfied with certainty.
- The "net unpaid rent" equals or exceeds a minimum amount to be prescribed in

regulations (which have still to be published). Indications at this stage are that the minimum will be a relatively low figure.

The real downfall of the new system is that the landlord must give prior notice to the tenant, which will give them ample opportunity to remove any items of value so that when the enforcement agent arrives to seize the goods there is nothing to take. CRAR will soon be coming into force but until that time landlords can continue to use the old system.

As the law and practice evolves, we will continue to keep our English & Welsh and multi-national clients informed on the changes in this area. Should you have a cross-border property portfolio, please remember that we offer a one-stop shop for legal services.

More information from Joanne Reilly:
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Calling time on sharp practice



New rules against “unfair commercial practices” now affect every UK business which deals directly with consumers, or whose goods are ultimately sold to consumers. Businesses involved in retail, advertising and marketing are particularly likely to be affected.

The Consumer Protection from Unfair Trading Regulations 2008 are now in effect, and ban unfair commercial practices in general, including:

- Practices which mislead consumers: for example by providing false or deceptive information.
- Activity which goes against the requirements of professional diligence such as honest marketing practices or good faith – and which is likely to alter the economic behaviour of the average consumer with regard to the product.
- Misleading consumers by failing to give them important information or by giving information in an unclear way.
- Using aggressive sales tactics that harass, coerce or unduly influence a consumer to make a decision they would not otherwise have made.

Bodies which operate, or are responsible for, codes of conduct are banned from promoting any unfair commercial practice as part of a code.

In addition to these general prohibitions, the Regulations also list 31 specific practices as being unlawful. For example, these include rules that businesses may not:

- Offer goods for sale at a price which they know they can't or won't honour (known as “bait advertising”).
- Offer goods for sale at a particular price in order to then sell different goods at a higher price (“bait & switch”).
- Make false claims about being subject to a code of conduct (or display a trust mark, quality mark or equivalent when they are not entitled to do so).
- Falsely claim endorsements or approvals from a public or private body.
- Ignore a consumer's request to leave his or her home or not to return.
- Falsely suggest that the consumer has already won a prize or other benefit, or that the consumer will win, or will win on taking some action, where they would have to pay money to do so.

- Include within an advert a direct appeal to children to buy a product or persuade adults to buy it for them (known as “pester power”).

Breach of the Regulations is an offence, punishable by an unlimited fine, or up to two years' imprisonment, or both. Directors or other officers of companies may be prosecuted as individuals if their companies breach the Regulations. The BERR (formerly the DTI) and Trading Standards' departments will be the main enforcers of the Regulations.

Unlike the old law in this area (which will, in the main, be swept away) the new rules place wide, general duties on traders not to act unfairly towards consumers. This means there is much less certainty as to what is banned and what is not: all traders should carefully review their practices to assess whether what they are doing is fair, or not, in the light of the new Regulations.

More information from Angus MacLeod:
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Commercial Agents – Free agents or employees?

If a business uses someone to help them sell or purchase goods then, legally, this person may be considered to be a commercial agent. A commercial agent is not an employee of the business but an intermediary who has the authority of the business to negotiate the sale or purchase of goods on behalf of, and in the name of, the business.

A commercial agent will be entitled to compensation on the termination of the agency relationship. They may also be entitled to bring a contractual claim for damages.

A recent case has implications for any business retaining commercial agents.

In *Nigel Fryer Joinery Services Ltd v Iain Firth Hardware Ltd (IFH)*, Mr Fryer had previously been an employee of IFH but became a self-employed sales agent earning commission only. He was not permitted to conclude sales and his role was limited to getting potential customers interested in IFH's products and services

through quoting indicative prices and dealing with any queries.

Despite his not being allowed to conclude sales, the Court determined that Mr Fryer was a commercial agent. They defined 'negotiate' as meaning "to deal with, manage or conduct". This is clearly a very wide definition which is meant to protect commercial agents. However, it could mean that businesses could be liable to pay compensation for ending a relationship in circumstances where the business had thought it had deliberately ensured that it (the business) would not face any claims due to the absence of an employer/employee relationship.

A business in such circumstances would need to define the duties of a commercial agent extremely carefully in order to avoid facing a future claim. A properly drafted contract can protect in such situations. The WJM team have experience in drawing up such contracts and can advise on how best to protect your business.



More information from John Grant: jzg@wjm.co.uk

IN Brief

The contract that never was



When Mrs McDougall paid her deposit of £500 for her dream apartment in North Berwick she assumed that she would shortly be the owner of a new seaside apartment. However, it was not to be.

After Mrs McDougall had paid her deposit, the sellers withdrew the apartment from sale and, in fact, subsequently sold the apartment to a third party. Naturally, Mrs McDougall was very upset, so she went to court to enforce the contract she believed she had entered into.

The Court refused to grant her request for the simple reason that Mrs McDougall, despite thinking that she had entered into a binding contract, had not done so.

The Judge came to the view that Mrs McDougall had not got beyond the stage of initial negotiations to purchase. At best, all she had was the right to continue to deal with the sellers on a possible sale of the flat and that no binding contract had been entered into.

All of this was an unfortunate consequence of the careful wording of the reservation form, which Mrs McDougall signed when she paid her deposit, and which made it clear that no contract was being entered into at that point. The lesson to be drawn is to check carefully on the wording of any document you are signing. What you think may be a binding contract may turn out to be the contract that never was...

More information from Andrew Wilson: ajpw@wjm.co.uk

New Penalty Regime from HMRC



HMRC's new penalty regime for errors and omissions on tax returns and other documents has been in force since 1 April 2008. We are currently working through a transitional period, but when the regime is fully operational it will represent a significant change in tax compliance.

The current penalties for incorrect tax returns, which result in an underpayment of income tax, corporation tax, PAYE, National Insurance and VAT, are being replaced. The new system will apply across a far wider range of taxes and duties, and will also extend to 'failure to notify' offences.

For the first time, taxpayers who take "reasonable care" when completing their returns will never be liable to a penalty for an incorrect return which results in tax being underpaid. A major change, this part of the new regime is designed to encourage voluntary compliance by taxpayers.

HMRC have published guidance on what they consider to be "reasonable care". They recognise that reasonable care will be different for every taxpayer depending on their circumstances.

"Reasonable care" will also differ for individual tax payers depending on whether they are involved in a simple transaction or

a more complex transaction. The Revenue expects those involved in unfamiliar complex transactions for the first time to take extra care to ensure that their tax matters are dealt with correctly.

The WJM Tax Team will help clients navigate the new regime, but the onus is still on clients to take reasonable care to make sure there are no mistakes in their return.

It is therefore important that you give us a full and accurate set of facts to work from, including disclosure of all sources of income, allowances and capital transactions. That way, we can both be confident that your tax return will be accurate and on time, and that no penalties will be payable.

WJM's Tax Team offers a full service to all taxpayers covering everything from a very simple tax return for an individual, through Inheritance Tax issues to advice on complex cross border commercial transactions.

More information from Brendan Kelly@ bjk@wjm.co.uk



Provides you with the piece of mind that you are complying with the fast changing world of employment law and protects your business against the threat of sudden and potentially expensive claims.

Visit our website to find out more.

www.wjm.co.uk/praesidium

IN Brief

The WJM Human Resource Manager Service – A successful model

One of the most successful models to come out of the work of WJM's innovative Employment Team is the Human Resource Manager Service (HURMS). Many employers do not have the need, nor the resources, to employ their own HR staff and that's where we come in. HURMS gives you a fully qualified and highly experienced human resource manager as and when you need one.

HR staff are not just there for the problems but they can help in motivating your employees.

Motivating your employees and managing issues that arise can often be a big stumbling block when you want to grow your business. Employees that are not motivated can cause your business to slow down and that often causes friction as you want to develop at a rate which they may not be comfortable with.

By keeping employees clear about what is expected of them, dealing quickly with issues, giving constructive feedback and praise, and by finding ways to make them feel special, they will come with you in your journey to build your business over the long term.

That's why, through our HURMS model, we work with a number of organisations on proactive planning, team building and motivational aspects of employing. Of course we still help with the practical everyday issues of employment such as recruitment, grievances and retention. The model is successful and, as employment law changes more rapidly, essential to keep a responsible employer on the right side of the law.

More information from Julia Macdonald: jmc@wjm.co.uk