

FIRM NEWS

WJC advises on world class sci-fi wargames deal

The corporate and commercial team of Wall James Chappell is providing specialist advice to CMA Moldform in relation to its exciting new deal as the casting manufacturers for Hawk Wargames, a brand new company, dedicated to the design, development and production of class leading miniatures and wargames.

Hawk's first venture is the 10mm scale sci-fi massed battle game, Dropzone Commander and their greatest ambition is to provide a whole range of innovative and high quality wargames in multiple scales, and multiple game universes.

Mr Chapman explained "CMA are an ambitious Birmingham based manufacturer. I have been working closely with the company for the last two years to help put in place the right deal for this exciting venture."

Peter Turnock, Managing Director of CMA Moldform, explained "CMA has been contracted by Hawk Wargames to produce high quality castings, all created from master models that were sculpted by David J Lewis, Founder of Hawk Wargames. CMA has invested heavily in new casting equipment, additional working space and skilled staff in order to keep up with the increasing production demands of this international best seller."

Hawk Wargames recently exhibited at GenCon Indianapolis 2013, the gargantuan American gaming show was held in August where Hawk launched their two player Starter Kit and displayed the new Resistance Race kit. Another big success in their world-wide marketing campaign.

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WJC advises Midlands Air Ambulance Charity on new Trust Corporation Status

Wall James Chappell were lead advisors for the Midlands Air Ambulance on the charity's conversion to trust corporation status. This will enable the charity to administer estates and is of particular benefit due to the significant legacy income of the Midlands Air Ambulance.

Philip Chapman, head of corporate and charities at Wall James Chappell, explained: "In cases where the executors of a Will cannot, or do not wish to administer the estate, the charity can now do so with its trust corporation status. Additionally, if a supporter contacts the charity and asks them to act as executor of his or her estate which he or she is intending to leave to the charity, the charity will be able to reassure him or her that they will be able to act. As a large charity, the Midlands Air Ambulance is able to employ qualified staff and can therefore impartially administer a trust or estate in-house."

Mr Chapman added: "Many charity legacy donors do not have immediate family who would normally be an executor jointly with the solicitor who drafted the Will. Often they fear that immediate family do not have the necessary skills or that they may abuse their position. The donor may have friends who they do not wish to burden with the responsibility or feel that they do not have the appropriate skills. More usually they do not wish those friends to know the extent or lack of assets. Legatees are also fearful the solicitor executor will exploit their position. Trust corporation status allows the charity to best control the professional executor."

Hanna Sebright, chief executive for Midlands Air Ambulance Charity explained: "Four in every ten missions we undertake are funded by a Gift in a Will, so to have Trust Corporation Status to support our donors and carry out their wishes, has come as very welcome news. For charities that receive significant income from legacies, trust corporation status is worth considering."



WJC advises Birmingham City FC on main sponsorship deal

Wall James Chappell, were lead advisors on the contractual sponsorship arrangements between Nicolites and Birmingham City FC. The new agreement meant electronic cigarettes firm, Nicolites, signed up as the new principal partner of Blues for the 2013/14 season.

As part of the major sponsorship agreement, the Birmingham-based firm's logo will adorn Blues' first-team and adult replica shirts for the forthcoming Championship campaign. The link with last season's official charity partner, Help Harry Help Others, will continue this season.

To further this partnership, Nicolites has agreed to allow the Help Harry Help Others logo to be carried on the front of all junior, infant and baby shirts for the 2013/14 campaign. It will also feature on the Blues Academy's playing kit.

Nicolites is the UK's largest brand of electronic cigarettes, stocked by a large number of national retailers, including Tesco, ASDA, Superdrug and Co-op. E-cigarettes are designed to look and feel like real cigarettes but are battery-powered products containing liquid nicotine, which is inhaled as a vapour.

Philip Chapman, Head of commercial services at Wall James Chappell, said: "We were delighted to advise on this deal.

Birmingham City FC continues to attract strong sponsorship and we are sure that this partnership with Nicolites will be successful for both parties for the 2013/14 season."

Nicolites managing director Nikhil Nathwani said: "As a Birmingham-based company we are proud to be able to support Birmingham City FC as the club and fans look forward to a successful season both on and off the pitch. We have grown our business in the city, invested in the region and created jobs. This new partnership demonstrates our commitment to the West Midlands region and to one of its largest football clubs."

Ian Dutton, Blues' head of commercial, said: "We are delighted to have secured an outstanding principal partnership with one of the most successful Birmingham-based businesses in recent years. Although they are a national brand stocking in major retail outlets, it is quite clear that Birmingham and the surrounding Midlands area is very much still at the forefront of their minds."



ARTICLES

Share purchase agreements: penalty and forfeiture clauses

In *El Makdessi v Cavendish Square Holdings BV* and another, the Court of Appeal considered whether clauses in a share purchase agreement were unenforceable penalties. The clauses in question provided that, on the seller's breach of a restrictive covenant the buyer would be:

1. Released from its obligation to pay certain deferred consideration.
2. Entitled to force the seller to transfer the remainder of his shares in the target company to the buyer at a price based on net asset value (which was less advantageous than the price that would apply on a sale of the shares where there had been no breach).

The court found that, taken in the context of the agreement as a whole, the relevant clauses were not a genuine pre-estimate of the buyer's loss. On the contrary, they were extravagant and unreasonable. While this was not, of itself, conclusive in determining whether the clauses were penal, the court also found that, in the circumstances, the provisions lacked commercial justification. Their predominant function was to act as a deterrent to breach. The sum the seller stood to lose under these clauses was out of all proportion to the loss attributable to the breach. This took these clauses way beyond compensation and into the territory of deterrence.

Accordingly, the court held that the relevant clauses were penal and the buyer could not enforce them.

Penalties and forfeiture clauses

In limited cases, the courts will relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result, and where the forfeiture provision is added by way of security for the production of that result, taking

into account the conduct of the applicant for relief, the gravity of the breaches, and the disparity between the value of the property of which forfeiture is claimed compared with the damage caused by the breach (*Shiloh Spinners Ltd v Harding* [1973] AC 691, 723).

Accordingly, there may be some overlap between the application of the rule against penalties and relief against forfeiture. In *Jobson v Johnson*, the court applied the penalty rule to a clause entitling the innocent party to the re-transfer property which had previously been transferred to the contract breaker, a clause which was also a forfeiture clause.

However, the courts have developed different approaches to the enforcement of penalty clauses and the enforcement of forfeiture clauses. As stated by Nicholls LJ in *Jobson v Johnson*:

"In the case of a penalty clause in a contract, equity relieves by cutting down the extent to which the contractual obligation is enforceable.... In the case of forfeiture clauses equitable relief takes the form of relieving wholly against the contractual forfeiture provision, subject to compliance with conditions imposed by the court. Be that as it may, I see no reason why the court's ability to grant discretionary relief against forfeiture should deprive a defendant of the relief automatically granted in respect of a penalty clause if, exceptionally, a contractual provision has characteristics which enable a defendant to pray in aid both heads of relief."

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Philip Chapman

A mountain of paper

Solicitors firms are not unusual in having to store vast amounts of paperwork for a number of years, although we tend to be more fastidious about it. When is it appropriate to dispose of historic documents?

The answer to this lies in the purpose for which the paperwork might be required. Is it, for example, required as evidence to satisfy any enquiry from HM Revenue and Customs or to deal with a claim of alleged breach of contract or negligence?

HMRC have given guidance as to periods for which they would expect records to be kept (and indeed in certain circumstances have power to impose penalties for failure to keep such paperwork of up to £3,000.00). For income tax purposes, documentation should be kept until the February after the sixth anniversary of the end of the tax year. This means that documentation for the tax year 2006/7 can be disposed of after 31/1/14, but nothing subsequent to that. The only exception is if there is an enquiry pending, in which case nothing further should be disposed of until the enquiry has been concluded.

There are similar 6-year time limits for VAT records, corporation tax and (unless the Revenue has decided to reduce the period to four years because of 'storage problems, undue expense or other difficulties') insurance premium tax, stamp duty land tax, aggregate levy, climate change levy and landfill tax. PAYE records are to be kept until 3 years after the end of the tax year to which they relate.



For capital gains tax purposes, records will need to be kept until 6 years after the relevant disposal. This means that expense information which might be of use to reduce the taxable gain will have to be maintained for the lifetime of the asset.

It is possible to computerise certain items, as long as the document is capable of being reproduced in legible form. This includes backing up a document remotely or on the internet to a cloud system. If utilising the computer system of storage, it is well to remember that systems might be incapable of recovering the documentation if the software is upgraded, the particular program no longer works on a new platform which has been installed subsequently, or the hardware has changed (does anyone remember floppy discs?). It is also important to note that there are some records which cannot be stored on computer but must be held in original form, namely dividend statements where a tax credit has been claimed, any documentation where income tax has been deducted at source, payments under construction

contracts and anything required to back up a claim for repayment of tax or claim tax relief on income outside the UK. Additionally, original manual records for VAT should be kept for varying periods of up to 6 years (including till rolls, which should be kept for 6 years unless the Revenue has reduced the period to 4 years by agreement), depending on their nature. ECR and EPOS records should be kept for 4 years as well as purchase and sale invoices and credit and debit notes. Bank statements and paying in books should be kept for 5 years and also management and annual accounts. Employees' expenses invoices should be kept in original form for a minimum of 1 year.

The Companies Act also imposes an obligation to keep adequate accounting records including statements of assets, liabilities and stock, for a minimum of 6 years for a public company, 3 years for a private company, with minutes to be held for at least 10 years and some records for the lifetime of the company. If not, offences are committed, some punishable by up to two years in prison.

Finally, on the question of non-statutory reasons for retaining records, there may be the question of evidence to protect a claim for breach of contract or negligence. In either case there is a time limit of 6 years for such claims to be made, although that can be extended if the claimant is under a disability, though subject to an outside time limit of 15 years for a negligence claim and 10 years for claims for defective products. Other longstop limits are 12 years for unpaid legacies from deceased estates, 15 years in the case of a claim which is 'latent' (i.e. not known until a later date) and 30 years to recover land or money charged on land. It is prudent to add a further period of 6 months after the expiry of any time limit in case a court claim has been issued within the relevant time but has not yet been served. Clearly, in circumstances such as these, original documentary evidence is likely to be more corroborative than a copy, particularly in the case of handwritten specimens. Whilst a court might rely on a computerised copy, there must also be some evidence kept of how the original document is being transferred to the computer in order to counter any suggestions of tampering with the document or with the electronic copy.

In short, the paperless office is a pipe-dream.

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John Cockling

Buyers - and sellers - beware

During your lifetime, almost invariably, the biggest financial transactions you undertake are buying and/or selling your dwelling house.

A recent Judgment of the Court for Appeal has highlighted the need and importance to reduce the terms and conditions of any contract for sale to writing and thus avoiding the risk of expensive civil litigation to enforce or dispute any **ALLEGED ORAL** representation which may have induced the entering into a binding contract.

In this particular case Lloyd and another v Browning and another 2013 EWCA Civ 1637, the parties' solicitors had agreed special conditions which provided that "the buyer hereby admits that he has inspected the property and he enters into this contract solely as a result of such inspection and upon the basis of the terms of this contract, and that in making this contract no statement made by the seller or his agent has induced him to enter **EXCEPT WRITTEN STATEMENTS**, if any, made by the seller's conveyancers in replies to enquiries raised by the buyer's conveyancers or in correspondence between the parties' conveyancers".

The facts were that the sellers were disposing of a barn within the green belt with planning permission for residential use. The planning consent was limited to the current footprint of the barn, but at three separate meetings the buyers were shown plans by the sellers which included an extension to the barn. These plans were an earlier version, and the planning permission actually granted did not include the extension. The buyers' solicitors were instructed that the planning permission had been dealt with by the principals direct.

The buyers' planning consultant did not know what the buyers' solicitors were doing, or instructed to do. Nor did the lawyers know what the planning consultant was doing. The Judgment handed down by the Court of Appeal states: "it is not clear what knowledge of the local planning policies, the planning consultant had".



At first instance, it was held that the seller knew that the planning permission did not authorise the extension and that the buyers wanted to build the extension. This misrepresentation induced the buyers to enter into the contract. A fortnight after completion, the buyers discovered that the extension was contrary to local planning policies and could not be built. Did the non-reliance clause defeat the buyers' claim for misrepresentation? And if it did, could the sellers rely on it?

Section 3 of the Misrepresentation Act 1967 means that the non-reliance clause is ineffective, unless it satisfies the test of reasonableness. There are good general reasons for a non-reliance clause, such as certainty, and avoiding trials on contested issues of fact. However, the general reasons alone will not be enough to uphold a non-reliance clause. One must always consider the specifics of each case.

Upon appeal, the Court of Appeal considered a number of issues when reaching their Judgment. It was relevant that both parties were legally advised, and that the buyer had engaged an architect and planning consultants. The contract was for the sale of land, which brings attendant formalities. The parties had equal and corresponding negotiating positions. The wording of the clause allowed the buyer to rely on correspondence as well as replies to enquiries. This meant that any issue of particular importance to the buyer could easily be elevated to the status of a representation covered by the clause. The Court of Appeal also stated that it was relevant that it was the buyer who was putting pressure on the sellers to exchange, not vice versa. **THE BUYERS TOOK A DELIBERATE DECISION TO EXCHANGE KNOWING THAT THE INFORMATION THEY HAD ON THE PLANNING PERMISSION WAS INCOMPLETE. THE BUYERS HAD NO REMEDY AGAINST THE SELLERS FOR MISREPRESENTATION.**

The finding of the Court of Appeal that the pressure for exchange by the buyer is interesting as the property market becomes highly pressured in some parts of the country.

The case also highlights the need for some sufficiently knowledgeable person to have oversight of all the advisers involved in the due diligence exercise. Often solicitors have this role. However, lawyers tend to be the most expensive professionals on any team, so either lawyers or clients sometimes reduce the scope of legal work to reduce the legal bill. This is not in itself wrong, as long as nothing falls between the various scopes of work.

Buyers and sellers must ensure that all terms upon which they wish to rely in a contract for sale and purchase **ARE REDUCED TO WRITING** before entering into a legally binding contract.

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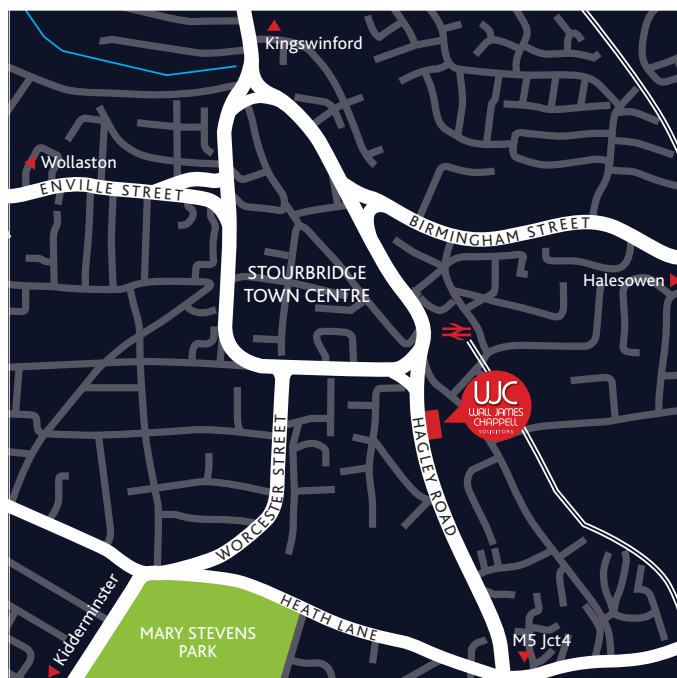
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