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WELCOME TO THE SUMMER 2020 EDITION OF

Inside Out

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Welcome to the summer 2020 edition of Inside Out, our newsletter for those with an interest in corporate and commercial services.

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As we begin to emerge from lockdown, Birketts remains mobilised to support businesses as they adjust to the new challenges. Although there is a balance to be struck between mitigating against risk and looking to the future, for many change has created new opportunities. Circumstances have necessitated rapid innovation, streamlined service delivery and improved communication. As the landscape begins to settle, it is on this optimistic note we extend our wishes for the continued prosperity of all our readers.

In this issue of *Inside Out,* we are excited to announce the appointment of Andrew Priest, whose significant technological expertise and experience in the ICT, cleantech and life sciences sectors is set to expand the team's offering in line with the growth of the knowledge based industry. Technology certainly seems to be the theme of the edition as we reflect on a number of our recent deals, including Birketts' involvement in the sale of a leading tech PR agency, a management buy-out for a tech recruitment heavyweight and an investment deal for high-end technology manufacturers Vanilla Electronics. In addition to details of Birketts' involvement in the acquisition of plant bio stimulant business for The Milbank Group, Pamela Blore and I examine the reality of furlough for private company directors. Meanwhile, with an eye to the future, Greg Allan looks at how navigating the path to recovery might look for businesses in these unprecedented times.

As always, we hope you have enjoyed this edition of *Inside Out* and do let us know if you have any questions or suggestions for articles in the future.

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Birketts Corporate and Commercial Team welcomes new technology specialist

Birketts is pleased to announce the appointment of Andrew Priest as a Partner in its highly regarded Corporate and Commercial Team.

Andrew has significant expertise and experience in the ICT, cleantech and life sciences sectors, specialising in technology and business process outsourcing, technology transfer and licensing, and telecoms projects...

Andrew is a commercial lawyer with over thirty years' legal experience advising a range of private and public sector clients across commercial law firms in Cambridge, London, Edinburgh, Glasgow and Brussels. With an MBA from Manchester Business School, Andrew is well-placed to offer advice on commercial and technology related arrangements, projects and deals of all descriptions.

Andrew has significant expertise and experience in the ICT, cleantech and life sciences sectors, specialising in technology and business process outsourcing, technology transfer and licensing, and telecoms projects, both nationally and internationally. As an intellectual property specialist he drafts and negotiates agreements for the commercial exploitation of patents and trade marks, and also advises on a wide range of data protection issues, from GDPR compliance and policies to data security and international data transfers.

Adrian Seagers, Partner and Head of Corporate Services commented: "*As knowledge based industries continue to grow, a wide variety of legal issues concerning intellectual property, and technology development, protection and exploitation, become increasingly important. Birketts is excited to further expand our offering in this exciting area, and I have no doubt that Andrew's appointment will prove to be a significant step towards this goal.*"

Commenting on his appointment, Andrew said: "*I am delighted to be joining such a well-respected law firm with its focus set firmly on the future. I am particularly looking forward to fresh challenges within a dynamic and innovative commercial environment as well as supporting the growth of Birketts' technology sector offering.*"

Birketts advises on sale of leading tech PR agency

Birketts has advised the co-founders of leading tech PR agency Dynamo Communications Limited (Dynamo) on its sale to pioneering global communications firm Clarity London Ltd (Clarity), for an undisclosed sum.

Top-tier tech PR agency, Dynamo, was co-founded in 2011 by Peter Bowles and Paul Cockerton and specialises in representing disruptive challenge branders. Located in London with offices in San Francisco, the sale of the company is expected to create an industry leading full service independent consumer and B2B tech PR agency.

> *Top-tier tech PR agency, Dynamo, was co-founded in 2011 by Peter Bowles and Paul Cockerton and specialises in representing disruptive challenge branders.*

Based in New York, progressive communications agency Clarity also has offices in London, LA and San Francisco. Founded in 2013 and specialising in digital and content marketing, social media and media relations, Clarity supports clients from a range of sectors to develop their communications strategies and improve their media and analyst relations.

Birketts' Chelmsford office led the transaction. The team advising on the deal included Heidi Jones (Corporate) with assistance from Sabina Rooney (Corporate) and John Kahn (Tax).

Peter Bowles, co-founder of Dynamo Communications Limited commented: "*We are very excited to join forces with Clarity, a company who are likewise driven by innovation and quality of service. We want to thank the Dynamo team for embracing this fresh challenge and also Birketts, who provided us with a great service and were pro-active and attentive throughout the transaction. A pleasure to deal with.*"

Heidi Jones, Associate, concluded: "*We are delighted to have had the opportunity to work with an innovative business like Dynamo. Like Birketts, they are contemporary in outlook and approach, and it was a delight to play our part in helping this great team move to the next level. We are confident that this deal will see the company go from strength to strength.*"

Navigating the path to recovery

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For leaders of businesses in these extraordinary times, focus shifts to exposure to risk and for many the eligibility to receive government's support, but for others whether there are opportunities to capitalise on. Whilst experience of past economic disruptions provides some insight into what could happen, the current situation is unprecedented and priorities should be considered including the viability of a business.

The UK Government and policy makers have been quick to react in providing multi-billion pound packages to support to businesses and individuals. As the landscape changes and the lockdown eases, entrepreneurs and owner managers should shift their focus to trading out of the current economic coma and strategically analysing the future of their businesses.

Whilst many have embraced the change to remote working and others have been forced into entire lockdown, recovery planning and consideration of funding and the legal implications for an exit out of the economic pandemic is paramount. Businesses need to be both agile and secure as matters change but equally having some form of business plan. While demand over the coming weeks and months is difficult to predict, an ability to recognise a new market place, in terms of the here and now and the new normal, will provide opportunities for those that have ridden the storm or have been able to capitalise on new revenue streams or operations. For those that haven't, consideration needs to be born in relation to the duties of the directors and the risk this poses to those individuals.

For businesses that are facing financial difficulty or a funding gap, a key consideration needs to be the shift in the director's duties with the addition of a primary obligation to act in the best interest of a company's creditors.

"For businesses that are facing financial difficulty or a funding gap, a key consideration needs to be the shift in the director's duties with the addition of a primary obligation to act in the best interest of a company's creditors.

A directors normal statutory duties continue to apply, but where a business is in financial distress, the additional primary duty in favour of its creditors leads to a number of potential pitfalls, as well as reviewable transactions. Breaching that duty can lead to personal liability on the part of the directors. Consequently, whilst there might be a wealth of opportunities to grab and potential transactions to protect a business' assets, these need to be considered in the light of a potential insolvency risk. These risks can appear innocently in a transaction whether it be granting new security, transferring assets or taking on new contracts or obligations as well as making payments out to a company's directors or stakeholders.

The Bill marks a shift towards protecting viable businesses over the interest of creditors but also includes temporary measures protecting directors given the current economic situation.

Assessing ones supply chain, understanding their position and having regular dialog to build resilience into supply will enable those businesses to gain from the opportunities...

The Corporate Insolvency Bill offers some respite with a mix of temporary and permanent measures amending current insolvency law. The Bill marks a shift towards protecting viable businesses over the interest of creditors but also includes temporary measures protecting directors given the current economic situation. In particular, many directors may find themselves in the realms of wrongful trading, i.e. trading in a scenario where they knew or reasonably to have known that there was a risk that the company would enter insolvency. Such a breach can lead to personal liability and whilst under COVID-19 pandemic, this is a significant potential risk. The Government's proposal includes a temporary only relaxation of the director's responsibility however, this doesn't change any of the director's responsibilities under the Company's Act or any other insolvency claims and, therefore, one might challenge the benefit of such early relaxation.

For companies considering some transactions right now, consideration needs to be placed on why they are to be undertaken, in particular, whether or not any supplier, customer or other third party is demanding payment or threatening claims or if sufficient value or consideration is being paid in relation to the proposed transaction or why the payment or variation is happening now. Whilst usually simply scenarios, each bares risk if one doesn't understand the background for why a transaction might be happening and whether or not this is to protect assets or potentially defraud creditors. Such scenarios could be treated as fraudulent trading and subsequently unwound. Equally, transactions where fair value is not being placed on the asset transferring could be treated as a transaction at an under value or where accelerating a payment is made without a justifiable reason, a preference to that party. With these and many other insolvency claims, the timing for reviewable transactions will often catch out the directors. The transactions are not reviewable merely at the point in time that the company is imminently insolvent but in a period of 12 to 24 months prior to insolvency, opening up the risk that a prior transaction could be challenged by an insolvency practitioner.

Whilst the full impact of COVID-19 for society and business at large remains to be seen, there remains opportunity while some predict consolidation within various markets as value expectations are realigned.

So, are we all in it together? Largely, yes but some businesses are in trouble so their thoughts are likely to be more self-regarding. Assessing ones supply chain, understanding their position and having regular dialog to build resilience into supply will enable those businesses to gain from the opportunities in front of them but avoiding the potential insolvency risks.

Two Norfolk care homes sold to major national operator

A successful Norfolk company which runs two care homes for adults with complex learning disabilities has been sold to a major national operator.

Progress Pathways, which runs the two homes in Marham, has been sold to Achieve Together, a specialist firm which operates over 350 similar facilities in England and Wales, including eight in Norfolk and six in Suffolk, for an undisclosed sum.

Progress Pathways was founded in 2008 by current managing director Jane Drinnan-Payne and her late husband Robert Payne. As well as the two homes, the company also operates a domiciliary support/supported living service, aimed at supporting young people and adults with learning disabilities who are living in their own homes.

Mrs Drinnan-Payne commented, "*I am very happy that the business, and the people for whom we care, are going to be in safe and experienced hands as part of the Achieve Together group.*

"*I am very grateful to Lovewell Blake for their expertise in helping us find the right buyer and for working tirelessly to support me along the way. Birketts have provided excellent legal support to ensure that the transaction proceeded smoothly to completion, with the team providing down-to-earth advice all the way along.*

"*The sale of a business like this is not a simple matter, as it's about the welfare of our residents as well as the business aspects, and I am able to step away from the business confident that the excellent levels of care delivered by its staff will continue.*"

Hannah Douglas of Lovewell Blake's Corporate Finance team, which used its extensive experience in the sector to find the purchaser and negotiate the sale, said, "*It was very important to find a buyer which had the right expertise and experience to continue to deliver the quality care for which Progress Pathways is known.*

"*Achieve Together has a national reputation, and we are very pleased to have played our part in securing the future of the two homes in Norfolk, their residents and the staff.*"

Ed Savory, corporate partner at Birketts, added, "*I could not be happier for Jane, who deserves this so much. She has been such a delight to advise, and her patience is incredible. It is always fun working on transactions alongside Lovewell Blake, who have impressed with their commercial nous, and showed real care for Jane.*

> *As well as the two homes, the company also operates a domiciliary support/ supported living service, aimed at supporting young people...*

"*I think it is testament to both firms that we have been able to finalise and complete a transaction of this nature during the COVID-19 lockdown.*"

Other members of the Birketts team who worked on the sale were Shereen Semnani, Macauley Ashcroft, Sam Greenhalgh, Rosie Shipp, Andrew Ridout, Joe Yexley, Emily Mills and Ben Clarke.

Birketts advises tech recruitment heavyweight on management buy-out

Birketts has advised high-tech recruitment expert firm ECM Selection on the successful management buy-out by the new directors, Mr Dan Archer and Dr Keith Tan.

ECM is amongst the longest serving and best reputed recruitment companies in the Cambridge area, and in high technology in the UK overall. For over 30 years, ECM has offered a personal service to highly qualified candidates and clients from startups to multinationals. This MBO is a natural culmination as the new directors have been increasingly involved in all aspects of the business for some years.

> *This MBO is a natural culmination as the new directors have been increasingly involved in all aspects of the business for some years.*

The transaction was led by Associate Heidi Jones, who was assisted by Solicitor Sabina Rooney (Corporate), Senior Associate John Kahn (Corporate Tax) and Associate Nicholas West (Employment).

Heidi Jones commented: "*Notwithstanding the uncertainty of the current climate and the complex challenges it has generated, Birketts is proud to have concluded another high-level deal. It was a pleasure to assist such a well-established, specialist business and we expect the bespoke service offered by ECM to see an increase in demand as the job market enters a new phase.*"

Mr Archer notes, "*Special thanks go to Birketts whose expert counsel, hard work and commercial acumen was vital in getting the deal over the finish line.*"

Visit the ECM website for further information.

Birketts advises The Milbank Group on the acquisition of pioneering plant bio stimulant business

Birketts has advised The Milbank Group on the acquisition of pioneering plant bio stimulant business Orion Future Technology Ltd.

Family owned Milbank Group continues to grow its diversified portfolio of businesses with the acquisition of Orion Future Technology, following a successful retirement sale. Orion FT complements the Milbank Group's already diverse range of agricultural businesses including ARK Agriculture Ltd and Thomas & Fontaine Ltd (trading as Secure Covers).

Martyn Charik and Gidon Bahiri, founders and directors of Orion FT said, "*We set Orion up 15 years ago and have really enjoyed developing it into the successful international business it is today. We have also enjoyed working with our wonderful customers and friends at Reading and Hertfordshire Universities. We thank them for the friendship and loyalty developed over the years. We explored a number of options for some time and both agreed that the family owned Milbank Group, with its young management team, would take the business forward whilst maintaining the high level of service, research and development that our customers are used to.*"

Orion FT was established in 2005 and has built its business as the pioneer in silicon based biostimulant technology and a lead provider of plant nutrient solutions. Orion FT have developed novel product formulations that stimulate natural plant defence mechanisms to protect crops against pest and disease attack. This technology has application across all sectors including agriculture, horticulture, ornamentals, amenity and forestry.

Over the past 15 years the business has grown significantly. From its operational base in the United Kingdom it has established sales in 20 countries around the world including those in Europe, Africa and Central America.

Orion FT products are widely used on edible crops due to their complementary application within integrated pest management programs. There are also fantastic opportunities for application in broadacre crops to support, enhance and protect traditional chemistry.

> *Orion FT complements the Milbank Group's already diverse range of agricultural businesses...*

> *Orion FT products are widely used on edible crops due to their complementary application within integrated pest management programs.*

> *Milbank Group is committed to continuing the vital research that Orion FT currently conduct ... to enable them to remain at the forefront of safe and sustainable global food production.*

> *The continued efforts to strengthen and diversify the Milbank Group will work towards goals of reducing risk and increasing safety and security for employees, customers and suppliers.*

Milbank Group is committed to continuing the vital research that Orion FT currently conduct, in conjunction with leading Universities around the world, to enable them to remain at the forefront of safe and sustainable global food production. Combining this research with a strategic drive to develop exciting new products will ensure the business continues to grow. Customer service and product quality will remain a core principle and continue at the same very high standard that the industry has come to expect.

James Kennedy, formally of Gemini Agriculture and Certis UK, will take over as Orion FT Commercial Director with immediate effect, and will be supported by the team at ARK Agriculture (a Milbank Group company).

Joining the well-established agricultural division of the Milbank Group, Orion FT will be well positioned to flourish in an environment full of exciting opportunities, rooted with values that encourage business development, growth and success. Gidon and Martyn, founders of Orion FT, will be available in the background to support the team, throughout the transition and in the short term, to ensure business continuity.

The continued efforts to strengthen and diversify the Milbank Group will work towards goals of reducing risk and increasing safety and security for employees, customers and suppliers. Sean Milbank of the Milbank Group said, "*The Group's agricultural businesses have performed well during the 2nd quarter of 2020 despite the impact of Coronavirus globally.*"

As a part of the Milbank Group, Orion Future Technology join ARK Agriculture, Thomas & Fontaine (t/a Secure Covers), Milbank Concrete Products, Cadman Cranes and Sui Generis International. A detailed overview of each Group company can be found within the Groups website.

The acquisition of Orion Future Technology Ltd was completed on Friday 15 May 2020 which was led by Prism Corporate Broking (buy side advisors), Birketts Solicitors and Ensors (Tax Due Diligence).

Birketts advised on all legal matters and James Allen, Partner in Birketts' Corporate Team, led the transaction supported by various other specialists across the firm including Stephanie Newman.

Birketts advises Vanilla Electronics on PE investment from Literacy

Birketts has advised the shareholders of Vanilla Electronics on a significant investment from Literacy Capital plc. The terms of the transaction were not disclosed.

... Vanilla expanded quickly to the provision of full supply chain management solutions for its customers, typically being specialist, high-end technology manufacturers in a range of sectors from oil and gas to healthcare.

We look forward to developing our relationship with Birketts going forward as we believe their approach and expertise is ideally suited to support us on our ambitious trajectory."

Founded in 2002 by Dan Croft and his father, Vince Croft, as a component distributor, Vanilla expanded quickly to the provision of full supply chain management solutions for its customers, typically being specialist, high-end technology manufacturers in a range of sectors from oil and gas to healthcare. Based in Thetford, Vanilla now offers a fully outsourced service, from conceptual design, material procurement, kitting, manufacturing, through to end customer order fulfilment, product returns, warranty, repair and re-supply. Vanilla has recently on-boarded new CFO, Matt Negus, to support Dan in taking the business forward.

The deal was led by Ed Savory with Adam Jones advising on the equity investment and support provided by William Kemp, Macauley Alsford, Jane Saunders and Julia Burfoot (corporate), Andrew Ridout (commercial property), Karl Pocock and John Kahn (tax) and Sam Greenhalgh (employment).

Dan Croft, CEO at Vanilla commented: "*We are excited about having Literacy invested in Vanilla which should provide the catalyst to fuel our accelerated growth plans for the business. The Birketts team was recommended to us and they have been brilliant from the outset. Ed and Adam and the rest of their team have been highly responsive and commercial, guiding us through this fast paced transaction in a controlled manner. We look forward to developing our relationship with Birketts going forward as we believe their approach and expertise is ideally suited to support us on our ambitious trajectory.*"

Ed Savory, Corporate Partner at Birketts concluded: "*It has been an extraordinary experience – started and finished in lockdown, only meeting the clients in person for signing at the end. In order to meet the client's expectations we split the roles so that I led on the share sale whilst Adam focused on the private equity elements. This approach meant we were able to maximise our expertise on PE deals whilst keeping to the timetable. Dan and Matt have been immense fun to work with - it has been a pleasure advising this pair of young and dynamic entrepreneurs. There is no doubt that Vanilla has an exciting future, especially with Literacy behind it. The chemistry feels right which is crucial for PE-backed deals.*"

Can private company directors be furloughed?

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On 20 March 2020 the Government announced its Coronavirus Job Retention Scheme (the Scheme) which enables employers to claim reimbursement of up to 80% of furloughed employees' 'regular' PAYE monthly wage costs, up to £2,500 a month, plus the associated employer National Insurance contributions and statutory minimum employer pension contributions on the furlough pay.

The Scheme opened for applications on 20 April 2020. This article looks at the Scheme in the context of company directors and the specific considerations that will apply. For a more general overview of the Scheme please refer to our legal update COVID-19 Job Retention Scheme.

Can a company director be furloughed?

The short answer is yes to the extent that they are paid via PAYE and that other conditions of the Scheme are met. Directors would have had to be on the company payroll on or before 19 March 2020. However furloughing a director must be seen in the broader context of directors' duties which will make the decision more complex. See further detail below.

> *"... furloughing a director must be seen in the broader context of directors' duties which will make the decision more complex.*

How much can an employer claim in relation to directors' pay?

The Scheme relates to 'regular' wages (paid via PAYE) up to a maximum claim of £2,500 a month. It does not cover discretionary payments such as bonuses and commission payments or other benefits in kind not paid via PAYE such as share options, company dividends and similar.

> *The decision to furlough a director is one to be made by the company acting by its board of directors ... this will mean a virtual board meeting or a written resolution of the board...*

> *There is ... a potential tension between the conditions of the Scheme and the duties of directors more generally.*

> *... the Guidance provides that a director must not carry out work of a kind which in normal circumstances they would carry out to generate commercial revenue...*

What process must be followed?

The decision to furlough a director is one to be made by the company acting by its board of directors. So, in the current times, this will mean a virtual board meeting or a written resolution of the board; in all cases taking into account any requirements of the company's articles of association on board decisions and meetings. Note, in particular, that a director who is to be furloughed will be 'interested' in that arrangement so the articles of association will need to be checked for rules around quorum and voting.

Any decision to furlough a director must be noted in the company records and also, of course, communicated in writing to the director(s) concerned.

How does the decision to furlough a director sit with the duties of the board as a whole?

In coming to the decision to furlough a director the board of directors must be aware of their statutory duties; in particular the duty to promote the success of the company for the benefit of its members as a whole. The board must therefore consider whether the decision to furlough a particular director is in the best interests of the company. Certain directors will, for example, have a very specialist skills set and the board must consider whether the absence of such a director, by virtue of being on furlough, will negatively impact on the board's ability to manage and direct the company through the current difficult economic times.

What activities can a furloughed director undertake and how does this sit with their duties as a director?

One of the key principles of the Scheme is that employees who are furloughed will not be able to perform any work for their employer. Company directors, however, owe a number of statutory duties to their company which are not suspended during the period of the furlough. This includes their on-going duty to promote the success of the company, to exercise reasonable care, skill and diligence and to avoid conflicts of interest. There is therefore a potential tension between the conditions of the Scheme and the duties of directors more generally.

Government Guidance in relation to the Scheme recognises this tension and provides that in fulfilling their statutory duties a furloughed director must not do any more than would "reasonably be judged necessary for that purpose". In particular, the Guidance provides that a director must not carry out work of a kind which in normal circumstances they would carry out to generate commercial revenue (i.e. client facing activities and similar) or provide services to or on behalf of their company. It has been specified by Treasury Direction that certain purely administrative functions (such as the filing of company accounts) fall outside the definition of work for the purpose of the Scheme rules.

In general terms, a furloughed director should avoid taking part in key commercial or strategic decision making activities of the company...

In practice therefore great care will need to be taken as to the activities of any director during the period of their furlough. In general terms, a furloughed director should avoid taking part in key commercial or strategic decision making activities of the company and will very much need to take a 'back seat' during the period of furlough. That said, they should be kept fully informed of key developments within the business in order that they may consider their broader statutory duties as a director.

It is hoped that further guidance will follow in due course to give more practical guidance to boards and individual directors as to how to navigate their way through the requirements of the Scheme. In the meantime, it is possible that a number of boards will decide not to furlough directors owing to the gap in managerial and organisation skills that will often result.

For further information please contact Pamela Blore or another member of Birketts' Corporate Team.