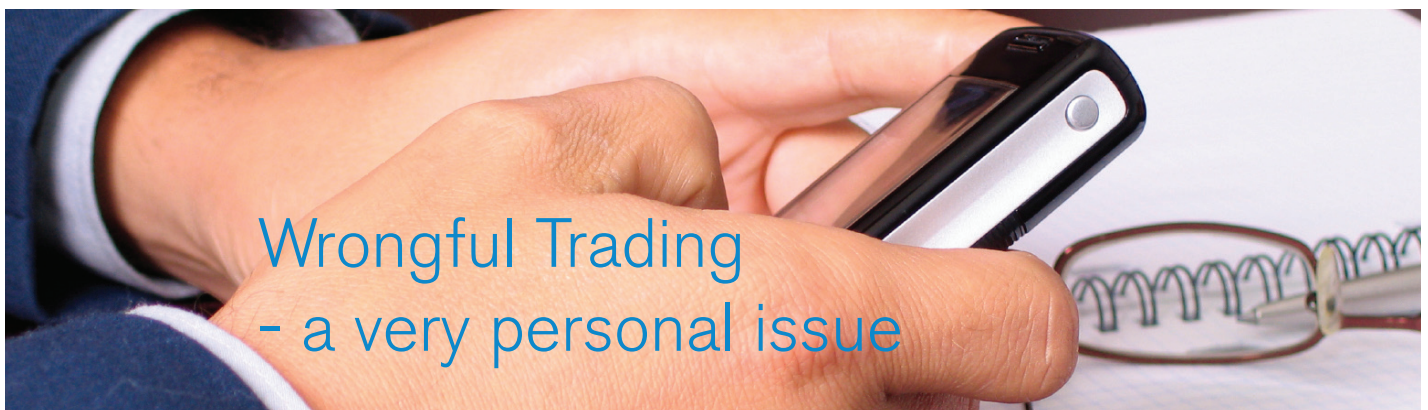


# Update

## Welcome to Anthony Golds

In this issue we look at wrongful trading, challenges to Wills and getting the best out of your divorce lawyer.



### Wrongful Trading - a very personal issue

#### Alexandra Knipe Commercial Team

It is a harsh reality of the current economic climate that many companies are struggling to survive and are facing insolvency. Directors of those companies often find themselves in an impossible situation. In the day to day struggle to ensure the survival of their businesses, they are often unaware that their actions might increase their exposure to personal liability during a potential winding up.

Although the Companies Act 2006 codifies numerous directors' duties, liability for the breach of those core duties often arises through fraud, deception or some other intentional act by the director. The Insolvency Act 1986 however imposes personal liability in circumstances that require no dishonesty.

Section 214 of the Insolvency Act allows a liquidator to apply for a personal contribution to the assets of a company from directors. This applies in circumstances where a company continued to trade when the directors knew, or ought to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation.

This is known as "wrongful trading". Liability will arise where the liquidator can show the company is worse off as a result of the continued trading. The potential impact on a director can be devastating where the main personal asset to which a liquidator can enforce his claim is the family home. Apart from a financial claim, if a director is found to have engaged in wrongful trading, that director can be disqualified from holding any directorships, for up to 15 years.

Although wrongful trading is an area which can expose directors to personal liability, there are other considerations that should be taken into

account during a winding up process. In practice, directors will often have given personal guarantees to banks to secure an overdraft. Whilst these can be challenged, they are often binding and banks will seek to enforce them against personal assets. Furthermore, banks and other institutions may seek the early repayment of a term loan where a company is deemed unable to repay its debts.

A liquidator will look critically at the actions of directors leading up to insolvency. However, claims for wrongful trading are rare, despite there always being a period of time when a director fears that the company may go under.

A liquidator will not normally seek an order for wrongful trading where, the directors have taken all possible steps to minimise the potential loss to the company's creditors. Directors of a company can reduce their exposure to claims by ensuring that they scrutinise their finances regularly. It is recommended that regular board meetings are held with clearly documented minutes of the meeting, where the status of the company is discussed and realistic choices made to resolve issues. Directors should also be careful not to take out further loans or liabilities that will have an adverse impact on the internal financial viability of the company.

Directors should seek advice as soon as they discover that their company is in financial difficulties. Early advice will help eliminate the risk of committing an offence or personal liability

Please contact Alexandra or a member of Anthony Golds' Commercial team if you have any commercial or business queries.

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# Challenge to McLaren's will

Susan Jackson  
Trainee Solicitor  
Anthony Gold

The recent reported challenge to the Will of Malcolm McLaren, the creator of the Sex Pistols, highlights the need to avoid challenges by family members and others by ensuring the Will is made correctly.

McLaren died of mesothelioma, a rare form of cancer, in Switzerland in April this year. He was just 64. He reportedly had a Will drawn up just before his death, leaving everything to his girlfriend of 12 years, Young Kim and specifically excluding his son. McLaren is estimated to have had assets worth around £1 million, plus homes in Paris and New York.

Joe Corre, McLaren's son he had with Vivienne Westwood, is challenging the validity of this Will on the basis that his father was too ill and lacked the mental capacity at the time to make a valid Will. This was the first Will that McLaren made, so if his son can show that the Will is invalid then McLaren will be said to have died intestate. Under the intestacy rules, his estate will go to his son rather than his girlfriend, Young Kim. Joe Corre, himself, is a multi-millionaire, having founded the Agent Provocateur lingerie business, selling it 3 years ago for around £60 million.

Under English law, when a person makes a Will, he or she must have the mental capacity to do so. This means that the person must understand what they are doing and what he or she is giving away in the Will. The Mental Capacity Act 2005 ('MCA') sets out the test for capacity and whilst it is not directly concerned with the execution of Wills, it provides a useful guideline for how the courts might go about determining whether someone had the mental capacity at the time to make a valid Will.

The MCA also gives guidelines as to whether a person is able to make a decision. The person must be able to:

- Understand the information relevant to the decision
- Be able to retain that information, even if only for a short period
- To use or weight that information as part of the process of making the decision
- To communicate his decision (whether by talking, using sign language or any other means).

Deciding the capacity of someone who is alive is complex. Once they are dead it becomes more so. This often leads to uncertainty and court battles. If there is any doubt, the best practice is to have a doctor assess capacity before making the Will.

McLaren's son is also said to be challenging the Will on the basis that it was not signed in the correct manner. Swiss law (where McLaren made the will and died) differs from English law. Under English law, a Will must comply with section 9 of the Wills Act 1837. This says that the person making the Will must sign it at the end in the presence of two or more witnesses. The witnesses must be present at the same time and sign the Will in the presence of the person making the Will.

The Will may also be challenged under the Inheritance (Provision for Family and Dependents) Act 1975. Those entitled to make a claim under this Act are wide ranging and includes not just family members, but persons who received financial assistance from the deceased. The crucial question is whether or not the Will failed to make reasonable financial provision for the person making the claim, according to the standard applicable to that applicant. This will depend on who the claimant is and their relationship to the deceased. Ordinarily an independent child with no financial needs would not be successful, unless there was some strong moral claim. Unlike in many foreign countries, there is a basic rule in English law that you can leave your money to whoever you chose. Hence, it is unlikely that McLaren's Will is unreasonable.

Malcolm McLaren's Will and the challenge by his son highlights the fact that, where there is a strong sense of grievance, those close to the deceased will often look for a way to challenge a Will. Money is often a secondary issue and people are primarily looking for an acknowledgement of their position. Hence many claims are settled in mediation and do not go all the way to court. This is the likely outcome of the McLaren case.

Please contact any member of the Contentious Probate or Private client team if you have a query about a Will or require assistance with any private client matters.  
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0207 940 4000





# Getting the best out of your divorce lawyer

Kim Beatson  
Head of Family law team

In the current economic climate the price of legal advice is obviously crucial but the cheaper lawyer may not have the necessary expertise. Efficient, experienced lawyers could be better value and possibly less expensive in the long run providing the focus is on the settlement process. Clients too must take some responsibility for costs and this article seeks to assist divorcing and separating clients in examining their own role in the legal process with a view to ensuring that costs do not run out of control.

## Process

Select the right process for you. Specialist family lawyers will not simply offer legal advice and representation in Court and some will have other skills, for example as mediators and collaborative lawyers.

Many separating couples prefer to attempt to negotiate issues relating to children or financial affairs with the assistance of a mediator so that their respective lawyers play a cost effective, supportive role - very much in the background. The mediator may also be an experienced family lawyer (in the writer's view this is essential in more complex financial cases). The advantage of mediation is that there will usually be just one mediator so the costs can be shared between the couple.

Some lawyers will have trained as collaborative lawyers which is very different from the traditional process. Here both parties instruct a collaborative lawyer so that each has the benefit of legal advice. However, the lawyers have a wholly different role which is supportive of the couple and child focused. Decisions are negotiated at round table meetings and the couple and the lawyers agree not to go through the Court system unless negotiations breakdown totally. The couple dictate the timetable and the agenda. Where appropriate, other professionals such as child development specialists, accountants and actuaries are involved in the process, receiving joint instructions from the lawyers and this in itself reduces costs.

## Choice of Solicitor

Make sure the solicitor suits your chosen process. This could mean that your solicitor is supportive of mediation and able to refer you to an experienced mediator. If collaborative law is the process for you then you must ensure that your solicitor is collaboratively trained. For information about special qualifications you should visit the Resolution website ([www.resolution.org.uk](http://www.resolution.org.uk)). Many journals (Chambers Guide and Legal 500) recommend solicitors and these guides are based on peer reviews and client recommendations. Many solicitors are accredited specialists and have a particular expertise in a given area (for example, high value financial cases, children or cohabitation). The accrediting organisations are The Law Society and Resolution. The best way to choose a solicitor is to rely on personal recommendation from friends and family then to recheck the guides and websites for comments and information about specialist qualifications.

Always seek a detailed costs estimate and timetable. Ask your solicitor how junior fee earners will be deployed and how they will be charged out. It is not always necessary for a partner level solicitor to attend Court with counsel or to prepare straightforward documentation.

## Your relationship with your former partner

Try to retain a working relationship in order to keep costs down and remember the long term benefits of doing so if you have children. Maintaining a working relationship may enable you to sort out valuations together. The two of you may be able to decide who will be responsible for the bills and mortgage, whether the joint accounts should be closed and whether credit cards should be suspended. (Remember: divorcing couples sometimes spend freely on themselves and on new relationships so this might be an important consideration!)

You need to check this with your solicitor but the Principal Registry of the Family Division in London is said to be generous to women and slow. The County Courts in Oxford and Ipswich are thought to be very efficient. It is not necessary to file your Petition in the local County Court and you may have good reasons to avoid yours.

## Unbundling/Delegation

Whatever process you use, consider very carefully how you wish to employ your solicitor and never use your lawyer as a therapist unless you are prepared to pay the price.

Clients are increasingly seeking a relationship with a solicitor that involves co-working. Typically the client pays the solicitor at hourly rates or fixed or capped fees for different aspects of their advice and this is known as "an unbundled retainer".

It is necessary for the solicitor and client to jointly decide who will be responsible for what tasks. For example, a client may decide to act in person (dealing directly with the other solicitor) in connection with the divorce and matters relating to children. He/she could instruct his/her own solicitor in connection with the financial negotiations. Even that aspect could be unbundled so that the client is responsible for gathering together financial data and preparing financial disclosure documents and the solicitor might then be responsible for negotiating and advising on terms of settlement. The client could also act in person and then appoint a solicitor at certain stages in the process such as attending round table meetings or providing representation at Court.

From the point of view of all concerned it is necessary to carefully agree the ambit of such retainer so that everyone is crystal clear about responsibility for various tasks.

Finally, empower yourself. There is a wealth of information in handouts, literature, DVDs and on the website. Inform your decision-making by researching and educating yourself.

"You get what you pay for" can take on a whole new meaning.

Please contact [kim.beatson@anthonygold.co.uk](mailto:kim.beatson@anthonygold.co.uk)  
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## Chambers UK, a client's guide to the UK legal profession 2011

Chambers UK, a client's guide to the UK legal profession 2011

Anthony Gold was ranked in four practice areas:

### Clinical Negligence: Mainly Claimant

#### THE FIRM

The "impressive team" of five partners at Anthony Gold is well regarded for its clinical negligence work. It focuses on orthopaedic injury, birth injury, brain-damaged children and psychiatric injury claims.

#### KEY INDIVIDUALS

[Jon Nicholson](#) specialises in handling difficult child brain injury claims. Clients describe him as "very quiet and modest, but incredibly clever and bright". [Stephanie Prior](#) is a former nurse who was recently made partner. She is a well-respected practitioner who brings her medical experience to bear on a range of cardiology and cancer-related claims.

Ranking: Band 3

Leading individuals: [Jon Nicholson](#) - Band 2, [Stephanie Prior](#) - Band 3.

### Family/Matrimonial

#### THE FIRM

This firm's growing family team is recommended for complex matrimonial finance matters such as cross-jurisdictional freezing injunctions. According to sources, "all its members have impeccable judgement".

#### KEY INDIVIDUALS

[Kim Beatson](#) specialises in matrimonial finance with an emphasis on prenuptial and cohabitation agreements. Sources admire her talent for mediation and say: "She has an incisive and businesslike approach which enables her to deliver hard news to clients without upsetting them". [Elle Chapman](#) is an extremely experienced ancillary relief practitioner who is praised for her skills in litigation.

Ranking: Band 4

Leading individuals: [Kim Beatson](#) - Band 3, [Elle Chapman](#) - Band 4

### Personal Injury: Mainly Claimant

#### THE FIRM

This strong personal injury practice regularly handles high-value cases in the field of EL/PL and RTAs. Client Service "They were excellent - they kept me up to date and informed of everything."

#### KEY INDIVIDUALS

[Jenny Kennedy](#) is regarded by sources as a lawyer who "cares deeply about her clients" and demonstrates a "painstaking" approach to litigation. She recently settled a tetraplegia claim for £7 million. [David Marshall](#) draws upon his employment law expertise when handling personal injury matters and is regarded as "highly intelligent, calm, experienced and cool in a crisis".

[Jon Nicholson](#) maintains a strong reputation in the personal injury world.

Ranking: Band 2

Leading individuals: [Jenny Kennedy](#) - Band 1, [David Marshall](#) - Band 1, [Jon Nicholson](#) - Band 2.

This year the team is also one of five to be **Recommended for Client Service**.

### Social Housing: Tenants

#### THE FIRM

This firm offers advice on a range of public sector work. The housing team is commended for its work on homelessness cases, tolerated trespassers, disrepair and housing allocation schemes.

#### KEY INDIVIDUALS

[Andrew Brookes](#) is widely respected by clients, who says he is "extremely knowledgeable and runs a good ship". [Giles Peaker](#) has a growing reputation in the sector. His enthusiasm for his work is evident to clients, who describe him as "a housing law nut".

Ranking: Band 2

Leading individuals: [Andrew Brookes](#) - Band 2. [Giles Peaker](#) is mentioned as an Associate to watch.

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if you do not want to receive any future issues of Update.



anthony gold

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