A QUESTION OF CAPACITY:

A GUIDE FOR BUSINESSES

CRISIS MANAGEMENT AND SAFEGUARDING A BUSINESS AGAINST INCAPACITY

Crisis management planning is vitally important in any business to ensure continuity if the worst happens. Inadequate planning will not only have an immediate detrimental effect on the business's activities, but it may affect the value of the business on a potential sale or exit. In this context, the possibility of key officers and personnel becoming incapacitated is often overlooked.

WHAT RISKS DO BUSINESSES FACE AS A RESULT OF INCAPACITY?

- No day-to-day management of the business
- Inability to operate bank accounts or authorise payroll
- Business not able to enter into new contracts (but note that contracts purported to be entered into by a person lacking capacity may still be enforceable against the business)
- Problems amending company articles / partnership agreements
- Inability to accept new directors/partners or dismiss others
- Regulatory and statutory breaches

WHAT SHOULD BUSINESSES LOOK FOR?

- Identify the key points of dependency – where knowledge or control is pooled in one person:
  - Who manages client / supplier relationships?
  - Who has access to the banking?
  - Who is responsible for health and safety or regulatory compliance?
  - Is the profile or reputation of one individual a large part of the business?

HOW CAN BUSINESSES MITIGATE THE RISKS OF INCAPACITY – BUSINESS LASTING POWER OF ATTORNEY ("BLPA")

- A BLPA is a document by which a person can appoint an individual (their attorney) to make decisions concerning their business interests when they are unavailable or lack mental capacity. The BLPA is specifically limited to business interests, so as not to encroach on any personal LPAs that the donor may have.
- Many businesses already use 'ordinary powers' of attorney to facilitate a range of commercial transactions. However, these fall away if the donor loses capacity. BLPAs survive the incapacity of the donor and should therefore form an integral part of a business's crisis management planning.
- The donor should choose an individual who is familiar with the business (or at least familiar with running a business in general terms). Depending on the business, the attorney may need to hold similar qualifications or regulatory status to the donor. Ultimately, the attorney should be someone the donor knows and trusts to make business decisions on their behalf.
- It is possible to include non-binding instructions for the attorney (whether in the BLPA itself, or by a separate letter of wishes), setting out how the donor would like the attorney to exercise their authority. This could include their views on the future development of the business, succession, circumstances in which the donor would consider exiting the business, and so on.
- The legal costs of preparing a BLPA are a business expense and are tax deductible.
- Businesses should also consider 'key man' insurance policies, which will provide for continuity and cash flow in the event of loss of capacity.

FIVE PRACTICAL TIPS

1 **Check the business's governing document (i.e. Articles of Association, LLP or Partnership Agreement)**

- Are they adequate? What happens on death or incapacity? For example, if it's a general partnership under the Partnership Act 1890, then the partnership simply dissolves on death. Is this satisfactory?
- For a sole trader, who can carry on the business, access the bank account, pay suppliers etc.?
- Do the articles of association include provision for the death of a shareholder or director?

2 **Identify points of dependencies**

- Who has the business knowledge? Is this shared? Who manages the client/supplier relations? Who has access to the banking? Are there any other areas where the company relies on one individual?

3 **Prepare business LPAs**

- Ensure that you appoint appropriate attorneys, ideally ones who are familiar with the business for a seamless transition.
- BLPAs can be used as a general power of attorney once registered, so they are a practical tool for use in everyday situations.

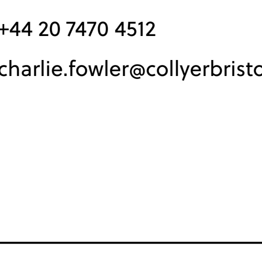
4 **Execute a Will**

- Choose your executors wisely – perhaps appointing a separate executor for your business interests to ensure the business is dealt with appropriately.
- Provisions relating to passing of shares in a company should be consistent with the company's articles.
- If your business interests qualify for Business Property Relief from inheritance tax, consider structuring your Will using a trust of your business property to pass assets down a generation tax-efficiently.

5 **Plan for the future and consider a business succession or exit plan**

- Who can you hand the reins over to? What are the practical and legal steps for this? Is any training required for the successor? When would be an ideal point to exit/sell?

FOR MORE INFORMATION PLEASE CONTACT



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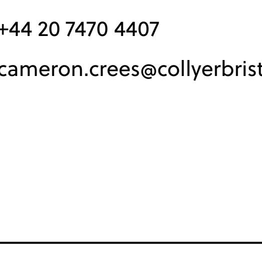

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