



## DIRECTORS' LIABILITY

**A friend of mine told me he would never sign a personal guarantee, as this could mean losing the family home and he owed it to his wife not to expose her to this risk. My friend is a company director, and as such he is accepting personal liabilities which could have the same end result. Indeed, I would argue that the personal guarantee is preferable as they are often limited to a particular amount and restricted to a particular non-performance.**

Directors are exposed to unlimited liability in circumstances which could not reasonably have been foreseen. The good news is that, unlike personal guarantees, the liabilities of directors can be insured. The bad news is that the insurance cover available in today's market is seriously flawed.

### Claims

The problem has been highlighted by some high profile cases involving company directors. The Equitable Life were recently given approval by the courts to sue their former directors. Who could have foreseen that sitting on the board of such a venerable institution would expose an individual to such risk? Major decisions would have been made on the advice of experienced professionals within the organisation and also external lawyers, auditors and actuaries. The liability insurance of £10,000,000 lasted two weeks according to press reports and exposed a fundamental flaw in the insurance available. Meanwhile in the USA Enron's cover of US\$380M seems to have been comfortably exceeded by claims brought.

### Aggregate Limit

Policies are written on the basis of an aggregate limit of liability applying during the course of the 12 month duration of the policy. This means there is one amount of money to cover all claims against all directors during the 12 month period of the policy. The events at Equitable Life triggered simultaneous claims

against all directors and each director needs their own legal representation. The defence of each director may be different, depending on their period of service with the company and complex issues arise involving many hours of work by top law firms. £10,000,000 may seem like a lot of money, but not when it is divided by a substantial number of directors. This illustrates the fundamental flaw in the insurance protection provided. You may be content with the cover carried by your particular organisation, however if all of your fellow directors submit claims your protection may disappear overnight. The policy effectively pays on a first come first served basis.

### Insurers Reaction

The insurance industry are aware of the flaws in the current policies available, however underwriters are reluctant to provide extensions of cover in the current climate. Many insurers have had their fingers burnt recently and are seeking to restrict their exposure rather than provide additional cover.

### Claims Made

Directors Liability Policies are written on a "claims made" basis. This means the policy applies to claims which arise during the course of that policy year irrespective of when the negligent act was committed. The nature of the policy cover creates more potential pitfalls for the unwary and it is important the cover is correctly explained and understood.

The purpose of this article is to raise awareness of some of the issues we face now and potential problems for the future. The environment in which we live and work changes more and more rapidly creating imbalances and injustices. We seem more and more eager to resort to litigation to resolve any inequalities and I do not see this trend abating. In this environment, giving a personal guarantee to a bank seems quite innocuous compared to the risks of taking any responsible position without the comfort of insurance protection.

*Contributed by Sean Trent from Lucas Fettes  
Specialist insurance advisors who can be contacted on  
020 7413 0999*



## ELECTRONIC FUNDS TRANSFER

There has been a massive growth in internet banking over the last few years and many organisations are now making payments to suppliers by electronic funds transfer. Even the Inland Revenue allow tax payments to be made by internet banking services. To ease this process for our clients, we are shortly to print on our invoices our bank details in order that any payments to this firm can be made by electronic funds transfer if you so wish. There is no compulsion to use electronic transfer, but many of our clients have asked us for our bank details from time-to-time and this seems an opportune moment to formalise the procedure. There are many advantages in the system, such as security, avoidance of our wonderful postal service and a saving in bank charges to name but a few.

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# BUSINESS RECOVERY : RESIDENTIAL PROPERTY INVESTMENT IN THE UK

**B**usiness recovery is a term that fills some with fear, yet others may welcome it as a lifesaver.

Often the view put forward is based on whether you see it as a "corporate undertaker" or as a specialism that can help resolve some very challenging business issues.

The Business Recovery team at Gerald Edelman is involved with everything from personal bankruptcy to large corporate restructuring (which may or may not involve formal insolvency procedures) and everything in-between. For example, recently we have:

- Discreetly assisted a client of the firm negotiate and implement repayment terms with its creditors, thereby avoiding a formal insolvency whilst preserving the value of the business to its owners
- Negotiated a phased repayment plan of a company's creditors, thereby avoiding insolvency of the client and payment of the creditors in full
- Attended meetings of creditors, following the failure of clients' debtors
- Investigated fraud and undertaken the recovery of assets following fraud
- Taken appointment as receiver on behalf of a contact who held security in a third party company following loans made to that company
- Assisted a client with negotiations to purchase another business from the liquidator of a target company

Our work is varied and contributes real benefit to our clients. We always aim to maximise and preserve stakeholder value, but where that is not possible we seek a return for creditors; equally where fraud or misappropriation is involved we are tenacious in tracking down and recovering assets and prosecuting wrongdoers.

Our approach is partner-led and ensures a high, but appropriate, level of partner input for all cases; we have the resources to advise on substantial cases as well as smaller ones.

Our team, which is based in London and Ashford, Kent has a wealth of experience and deals with all aspects of cases in a professional and sensitive manner. We have two licensed partners, supported by a substantial team.

They are experienced in most industry sectors, ranging from construction to software companies, professional practices and retail outlets.

This team can help by:

- Attending meetings of creditors
- Assisting with negotiations with liquidators and receivers
- Advising clients in financial difficulties of strategies to avoid formal insolvency and assisting with negotiations with creditors to reschedule payments
- Investigating frauds perpetrated against clients and assisting in recovering monies

Remember, if you have customers who cannot pay, we can help you deal with them.

If you, or someone you know, would like to discuss one of the issues above or a related matter – in confidence – with one of our licensed partners, please contact one of the following:

**London**

Bernard Hoffman  
020 7299 1400  
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**Ashford**

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**W**ith the continual rise in the UK property market and vulnerable stock market trading, property investing in the UK is still considered one of the safest long term options for investment. Although a market slow down is anticipated and conservative growth figures are predicted for 2004, market trends assure us that property is "as safe as houses"! But how do busy people find the right property?

Libre Properties is a Property Search and Acquisition agency providing a personal and confidential service to our clients. We work on behalf of our client to identify, locate, manage and negotiate the total purchase transaction from instruction to completion, "a one stop shop".

Our knowledge and experience of the property market will ensure that we purchase at the right price and direct you to the best locations to gain maximum rental and capital growth for your investment.

We will advise you on:

- Rental procedure and guidance on typical rents
- Expected yields and capital gain.
- Location
- Property management
- Inventory preparation
- Interior design and build
- Project management

You will deal with an experienced property consultant who will assess your individual requirements, search for and identify the properties best suited to you.

We will provide a property report to include all vital information to ascertain the best deals, set up viewing appointments, negotiate the purchase, ensure the best possible price and liaise with solicitors, surveyors and agents throughout the process.

Unlike traditional agencies, which represent the vendor, we have a vested interest in finding you the right property. Our contacts and knowledge of the property market and our negotiating experience have yielded excellent financial results on behalf of our clients which can often cover the cost of the service provided.

We have access to established and competent property professionals including mortgage providers, conveyancers, insurers, right through to design and build to ensure quickness and efficiency throughout the process.

For further information please contact our invited contributor:

**Estelle Botsman tel : 07939 941872, Estelle@Libreproperties.com**  
or log onto our Website [www.Libreproperties.com](http://www.Libreproperties.com)



## DILUTION OF INDIVIDUAL SAVINGS ACCOUNTS

The Government plans to reduce the annual maximum that can be contributed into individual savings accounts from £7,000 per tax year down to £5,000 with effect from 6 April 2006. Although the current rules prevent fund managers reclaiming the tax credits on dividends they receive from 6 April 2004 (thus removing one of the big advantages of ISAs over Pension Schemes) nonetheless they still shelter non-dividend income and capital gains.

If you do want to take advantage of your annual ISA allowances to the full, do not hesitate to contact us for our suggestions.



# FOREIGN CURRENCY OUTLOOK 2004: DOLLAR DECLINE HAS FURTHER TO RUN

- **Dollar decline far from over**
- **Resistance to weaker dollar will remain in China, Japan – may intensify elsewhere**
- **Global deflation theme will shift gradually to growth laggards**

**Three key currency themes stand out for 2004: the ongoing adjustment of the US current account deficit; non-US attitudes towards a weaker dollar; and global deflation. None of these are new, but each has yet to run its course.**

## **Continued dollar decline key again in 2004**

The ongoing correction in the dollar will again be the most important issue for the foreign exchange market in 2004.

We think the dollar will continue its broad decline for three reasons. First is the US's inability to attract sufficient capital to fund its widening savings shortfall. During the mid to late 1990s, US disaving funded a rapid expansion of productivity, enhancing private sector investment, the majority of it in IT. We now know the US over invested, but at the time this powerful force sucked in capital, causing the equity market to surge and the dollar to strengthen. In the current situation an increasing share of the savings shortfall is accounted for by the higher US budget deficit. This has less magnetism for global savings than attractive US companies did in the 1990's.

Moreover, in the midst of a synchronous global upswing the US has to compete harder than ever for a share of the global savings pot. Both US and global growth now pose threats for the dollar. Strong domestic growth means that the rest of the world has other options open to its savings, thus threatening US deficit funding.

The second reason we think the dollar will continue to decline is that official US policy towards the greenback has clearly changed to one of benign neglect from one of actively supporting a stronger dollar. This can be seen most clearly from the G7 Dubai communiqué in September.

Thirdly, the dollar is still overvalued. Clearly a part of this overvaluation has been removed over the past two years. According to the Federal Reserve Bank's broad trade weighted index the dollar has declined 10% from its peak in February 2002 but the greenback still looks stretched against Asia. Moreover, when major currency adjustments occur, the correcting currency often tends to overshoot what is seen as fair value. This was the case with dollar overvaluation in the late 1990's.

## **Intervention inclinations**

Our second, related theme for 2004 will be the reaction of others to US dollar weakness. Our view in London is that China will revalue in 2004. This is more likely to be the modest repricing that markets are currently anticipating rather than a sharp one-off jump. The Chinese are intent on maintaining the cushion of undervaluation that is protecting the economy from the 'troubles' within its banking system. As China revalues, so will the rest of Asia. The Japanese authorities grudging acceptance of a stronger yen will continue, with stealth intervention again the name of the Bank of Japan game. With Asian Central Banks currently comprising a sizeable part of the small group of eager buyers of US Treasuries, the US is in no position to argue.

Outside Asia, the Canadian authorities are becoming increasingly uncomfortable with Canadian dollar strength, given the very strong trade links with the US. Intervention is unlikely, but a monetary policy reaction is not out of the question should the C\$ continue to move higher against the dollar.

The significant absentee from our list of currency malcontents is Europe, where there have been precious few objections to euro strength. This is partly because the structure of the region makes clear policy pronouncements of this type more difficult. It is also because the strong global upswing has more than offset the impact of the stronger euro on exporters. In Germany, for

example, foreign factory orders are growing faster than domestic orders in spite of two years of euro strength. Other Europeans have remained quiet on the subject, as the US is less important in terms of trade than elsewhere. We think this is an important factor when considering the structure of "short" dollar trades next year.

## **Global deflation theme continues**

Our final theme for 2004 is the ongoing effects of global deflation. We are positive about the outlook for global growth this year. We are forecasting a pick-up in inflation in the faster growing economies with limited spare capacity. In terms of major currencies the outperformance of the Aussie dollar and the yen over the past year already reflects the fact that their economies tend to enjoy favourable leverage from global growth and commodity cycles.

Looking forward, we wonder whether the obvious "growth" currencies have had most of their Outperformance. Is it time for lower yielders? Perhaps. Much stronger growth in Europe still has the power to surprise the markets in a way that strong Australian growth, for example, has not. The cycle certainly looks to be at an earlier stage in Europe and looks less owned than many peripheral currencies. As yields rise, the high yielders will gradually lose some of their appeal.

In the Emerging world we still like commodity currencies, but as with the majors we prefer those that have had less taken out of them in 2003, especially those where Central banks have tried to hold appreciation in check.

Pulling the themes together, our clear currency favourite for 2004 is the euro. A level of 1.25 versus the US dollar is our conservative target, but a much higher print reflects where we see the risks. A stronger euro still represents the path of least resistance for a weaker dollar. The euro is far less exhausted by its own good news than the likes of the Australian dollar, and it is still less owned than some of the other higher yielders that have performed well this year. We also like sterling and, on valuation grounds, both the Swedish and Norwegian krone.

In the emerging world, we favour the Russian Rouble and Argentine Peso over the South African Rand or the Brazilian Real. Unlike Asia, yield in Argentina (and sporadically in Russia) gives a reason to own these markets. The picture is less clear in the more mature markets because the attempts to compete with China and India on low-end manufacturing and simple services require more competitive currencies. Worse yet, the stable, long-term, locally-funded debts in these markets give no incentive to increase interest rates and protect currencies for the benefit of speculators. The Mexican Peso and Polish Zloty may ultimately become more attractive, but we see no reason to hurry. The one fairly major move we do see is a substantially weaker Hungarian Forint by mid-year, as the Hungarians learn a lesson already taught to those trying to protect fixed rates globally.

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## DISCLAIMING A LEASE

**T**he Enterprise Act which came into force on 15 September 2003 has seen the abolition of Crown Preference and offers the prospect of swelling the coffers for unsecured creditors, including landlords. It seems timely therefore, to consider the factors that need considering when assessing the value of a landlord's claim when a lease is disclaimed during a liquidation.

Historically, tenants have often entered into relatively long leases and it is not uncommon for a landlord to submit a claim, following disclaimer, for loss of rent for the entire residue of the unexpired lease. This can result in the landlord's claim being overstated and far exceeding that of other creditors to their detriment.

The principal case law governing what a landlord is entitled to is Christopher Moran Holdings Limited – v – Bairstow (Re Park Air Services). In summary, the House of Lords held that a landlord's loss should be calculated as the difference between the rents and other sums that would have been due had the lease not been disclaimed, less the amount, at the date of disclaimer, the landlord could obtain from a new tenant entering into a lease (on the same terms) for the residue of the unexpired term.

This is then to be discounted to take account of advance payment rather than instalments over the term.

Whilst this judgement would seem to be logical enough it still leaves a whole number of issues to be considered in order to calculate the claim. Firstly, how long will it take the landlord to relet and what incentives will need to be offered to an incoming tenant, such as a rent free period, capital contribution etc? Secondly, will the rent on reletting be higher, lower or the same as that paid by the insolvent tenant company? Thirdly, has the tenant complied with its repairing obligations – if not, what is appropriate for dilapidations?

In addition there may be specific factors in the disclaimed lease that will have an effect on the claim such as a break clause. There may also be landlord's costs.

Market conditions are also clearly critical to the level of claim. The 'rising' property market of the late 1990's often had the effect of limiting claims with landlords not only finding new tenants relatively easily, and at higher rents, substantially if not totally mitigating their loss.

Conversely today's market conditions are quite different with certain sectors, in particular the London office market, having seen significant falls in rental levels over the past two years. It is not unheard of in the current London office market for Landlords of prime office space to be agreeing to 3 year rent free periods together with a capital contribution. Clearly this would produce a significant claim. Indeed it was the depressed property market of the early 1990's that gave rise to the Park Air Services case.

The Enterprise Act in abolishing Crown Preference seeks to provide a greater distribution to unsecured creditors. The change of regime away from Administrative Receivership to Administration will also take away previous 'self-help' remedies available to Landlords, such as levying distress and peaceable re-entry, so they may well take a closer look at what proportion of any dividend they can secure. Accordingly, for a fair distribution to be made to unsecured creditors the landlord's claim will need to be properly assessed.

If you need advice on disclaiming a lease or indeed any aspect of insolvency please contact Bernard Hoffman or Ian Yerril whose details are given elsewhere in this edition.

## THE EXPORT OF WHITE COLLAR JOBS IS NOW BEGINNING TO GATHER MORE AND MORE PACE - THE ROLES ARE ALSO BECOMING MORE SKILLED

WRITES RICHARD KLEINER

**R**ecently another exodus of call centre and processing jobs to India was announced by Aviva, the insurance giant. Shortly after came the IT jobs and backroom personnel and many of Britain's leading banks and other insurance companies.

Presently the migration of British jobs to the East is swiftly extending to other aspects of corporate and business life, including analysts, equity researchers, underwriters and even some accountants!

Examples of this are J.P. Morgan recently hiring 40 junior equity researchers in Bombay; EDS, the IT giant, is set to hire 3,000 Indian graduates between now and next December; and IBM has 4,700 graduates employed in India.

Such statistics are causing jitters in White Collar Britain and moreover, may have an impact on the future of all high cost locations, including New York, Frankfurt, Paris and London.

The greatest attraction to head East is the lower labour costs. Whilst an Indian graduate is usually paid around 30% of his British equivalent, UK firms stress that outsourcing is not only driven by labour costs but the fact that experience shows that Indian graduates are more hard working than their British counterparts, and excel at handling processes.

The sheer diversity of jobs that have been and will be relocated demonstrates the scale of the threat to the British economy. However, it is not only the multi-nationals who are utilising the resources in India, and this is having the effect of increasing the cost of particularly call centre and backroom staff.

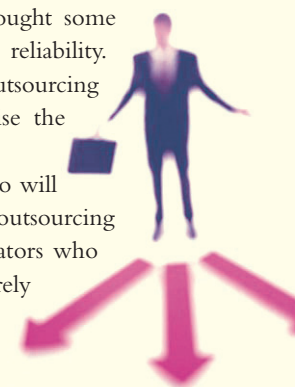
In India the businesses that have set up the service departments and divisions, such as Wiprow and NIIT, are increasing the intensity of their sales pitch in an effort to move up the value chain and target new service lines.

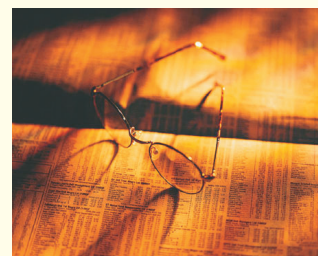
India, of course, is not the only beneficiary of the current trend. According to some leading commentators, South Africa's Universities have excellent courses for aspiring actuaries, along with others linked to the insurance industry. Furthermore, Singapore and Sri Lanka are producing legions of IT graduates. There is even a further twist to the Indian migration, in that Indian firms themselves are beginning to create call centres in China, where labour is even cheaper still.

As outsourcing climbs the value chain, there clearly will be redundancies and job losses in Britain, as retraining opportunities become scarcer and more expensive. There are of course some problems in that whilst it is very easy to measure productivity and manufacturing, it is more difficult to do so in the service industry. As certain people say, "cost cutting does not always increase productivity".

There are rumours that outsourcing has brought some errors in processing, and question marks over reliability. However, the Indian businesses providing the outsourcing services have already and continue to minimise the frequency of these.

There will be many companies and firms who will adopt a "wait-and-see" approach before their outsourcing moves up the value chain. There are commentators who believe that such firms and companies are merely delaying the inevitable.





## MYTHS & TRUTHS

– Implications of new legislation on email & mobile marketing

**The new Electronic Communications Regulations 2003 came into force on 11 December 2003. The new regulations come from Europe and apply to all member states. They are aimed at stopping email and SMS marketing where recipients clearly do not want to receive and have never asked for such communication.**

There are some serious implications for companies wishing to use email or mobile marketing and for those wanting to run telemarketing campaigns in 2004.

Making sure your website privacy policies and data collection notices are compliant is also more important as the Office of the Information Commissioner (OIC) will now take greater notice of website abuse by companies.

Note: Sole traders and non-limited liability partnerships are classified as individuals for the purposes of the regulations.

### The Background

It has been reported that more than 40-60% of all emails are SPAM and mobile SPAM is on the increase. If we were to take up every offer we receive, we'd all clearly be a whole lot richer and cleverer (thanks to quickie online degrees) and certain parts of our anatomy would be of super-human magnitude! Apparently, anti-wrinkle creams perform such wonders that even 90 year-old grandmothers can look not a day over 18.

Much has been written about the new rules resulting in a lot of confusion amongst companies wanting to take advantage of the flexible and cost-effective medium of email.

### Are YOU guilty of spamming?

SPAM is generally understood to mean *unsolicited* communications to those who do not want to receive them.

### Marketing to Individuals in a business context

The big new change here has yet to take effect and relates to telephone marketing.

### Telephone

From May 2004, it is going to be possible for companies to register their business telephone number with the Telephone Preference Service (TPS). This is an opt-out register that individuals can already use to stop companies from telephoning them (2.7m individuals have already registered to stop companies from calling them at home). This is not yet in the new regulations but is going to come into effect from next year. In practical terms, companies wanting to target other business via cold telemarketing will either need to have had some dealings with them before (and where they didn't opt-out) or filter their lists against the TPS.

### Emails and SMS

The new regulations do NOT apply to business-to-business emails or SMS since the rules apply only to individuals in a private context. However, care is needed to ensure you are marketing to a valid business email and that you don't send a message to a personal email address in error without consent potentially breaching the regulations.

In practice, it may be worth companies asking people who give them information to tick a box indicating whether the email or mobile is business or private.

### Details collected before 11 December 2003

It is likely that for business emails and mobiles you won't have to worry. However, for individuals, you must check that you either collected the information with consent, in the course of a sale or based on a valid opt-out under the previous rules. The OIC will look favourably on those companies that collected the data previously just using an opt-out as long as the company satisfied the other data protection requirements.

### Getting it right

The rules say that businesses wishing to market by electronic mail cannot send unsolicited communications unless they have either consent from the recipient; or the email address or mobile number collected *in the course of or in negotiations for a sale* and where;

- The email address or mobile number was collected by **your** company **directly** from the intended recipient
- You gave the individual an opportunity to object at the time of collection
- You did not conceal your identity
- The subsequent email or text is for your similar products and services **only**
- You offer a valid unsubscribe with every communication
- It is clear without opening the email that it is a marketing communication

### You will need to

- Ensure the individual knows who you are
- Ensure the individual understands the purposes for which you are going to use their details (including sharing or selling their information to other companies)
- Ensure you use appropriate data protection notices
- Ensure there is a valid privacy policy for online data collection that includes what you do with people's information
- Ensure you inform site users about cookies, their purpose and how to turn them off. Information on cookies must be included in your online privacy policy.

### In Summary

Give attention to how you collect email addresses and mobile numbers. This is particularly important if you are planning to sell the data.

Review forms for capturing personal data on and offline as well as call centre scripts, privacy policies and data collection notices.

Assess the level of consent for email and SMS marketing for your current customer database ensuring that adequate consent has been obtained or that the information was collected in the course of a sale.

Train staff in their obligations to avoid getting into hot water.

For greater details, if you need help on data protection queries or on the rules for electronic communications, call Jonathan Silverman on 01923 661 999 or email [jonathan@getsoundadvice.co.uk](mailto:jonathan@getsoundadvice.co.uk). Jonathan Silverman is a business development and marketing consultant and trainer and runs seminars on data protection for the Institute of Direct Marketing as well as providing consultancy to help companies maximise the value of their customer data in a compliant manner.

**Note: Whenever taking any action related to the law, it is advisable to obtain specific legal advice.**

## CASH DEALS

**W**ith effect from 1 March 2004 any business that accepts cash in payment for goods of €15,000 (approximately £10,000) or more for any single transaction must be registered with HM Customs & Excise as a high value dealer by 1 April 2004.

If a business has a clear policy of not accepting cash payments over the €15,000 limit for any single transaction they are not affected by the new rules.

The new rules do not apply to large sums received by other means such as cheque or credit card.

In the event that you do accept cash payments in excess of the limit there is a requirement to ask your customer for evidence of their identity and keep a record of the evidence they supplied. This will mean seeing a photo ID proving their name such as a passport plus evidence of address such as a utility bill which is no more than 3 months old.

These rules have been brought in as a broadening of the existing rules that apply to the financial services industry to assist with anti-money laundering of funds obtained by criminal means.

Therefore in summary if you are proposing to accept cash payments in excess of the above limit you will have to carry out the following for which Customs have suggested a useful mnemonic "CATCH": -

- **Control your business by having money laundering procedures in place.**
- **Appoint a Nominated Officer**
- **Train your staff**
- **Confirm the identity of your customers**
- **Hold all records for at least 5 years**

Disclosures of any suspicious activity can be reported at [www.ncis.gov.uk/downloads/NCISDF1.DOT](http://www.ncis.gov.uk/downloads/NCISDF1.DOT) and further information is available from [www.ncis.gov.uk](http://www.ncis.gov.uk). The above article is extracted from HM Customs & Excise leaflet MLR7 – Anti Money Laundering Guide for High Value Dealers.

Colin R Burns

## GENIE

### COMMENTS & SUGGESTIONS



Phone your contact partner (or Michelle Greenland on our editorial team) at Harley Street on 020 7299 1400. We welcome your thoughts and ideas on how to improve future issues of GENIE.



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