Cumberland Ellis

Welcome to the June 2007 Cumberland Ellis LLP News Bulletin which provides a brief overview and update on topics which may be of interest to you in your business or personal life.

I would like to take this opportunity to introduce Cordelia Brand, formerly with Manches LLP in Oxford, who joins us as a partner in our Private Client Department, where she will add to the strength of our team of specialist advisors on personal tax, trusts, probate and wills.

I trust you will find the legal news and press set out below both useful and informative. If you would like any further information on any of the issues raised below or concerning a specific situation, then please do not hesitate to contact the writer of the article or your usual contact at Cumberland Ellis.

Neil Turner, Senior Partner
Cumberland Ellis LLP

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Cumberland Ellis

Valuing your business in the event of divorce

Family

When a couple divorce, one of the tasks facing them is to deal fairly with any assets they may have. The first job is to find out what they have, and then to work out what those assets are worth.

It is often said that any asset is only worth what someone will pay for it. If the asset is a property, perhaps the family home, it may be fairly straightforward to find out the value, by asking three estate agents or surveyors to quote a value, and then take an average. If the assets are quoted shares, or other investments with a known value, the figure is even easier to find.

But what if the asset is a privately owned business? The first question a divorce solicitor or mediator will ask is whether there are any provisions, such as may be found in a partnership agreement, in a shareholders' agreement, or in the memorandum and articles of association, which regulate how the business can be dealt with. To protect your business in the event that divorce affects one of the owners or investors, you should review such documents regularly and ensure they fit your current circumstances.

It is usually necessary to agree a valuation. Two recent family court decisions (A v A in 2006 and D v D&B Limited in 2007) have focused on finding out the reality for the businesses involved, rather than trying to find out a figure which can never form the basis of any settlement.

In the first case, it was unlikely that the wife could realise her minority shareholding in a family company unless it was bought by another shareholder or the company. A forced sale would be at a very low price. So the judge told the parties to concentrate on the real value as the benefits the shares provided to the wife. A commercial perspective was necessary as well as one based in family law.

In the second more recent decision, the husband was sole shareholder in the company with a complex structure. Both husband and wife wanted a clean break, with no further financial ties to each other, after a long marriage had broken down. But the structure meant that it was difficult to extract funds to secure that clean break, so the judge refused to order it, when he could not really work out the value of the business to the husband. He therefore told the parties to go and seek alternatives to the clean break, as it was not feasible to base it on an unreliable valuation.

Hazel Wright, Partner
Family Law Department

Dividing the assets on divorce - latest developments

Family

The Charman case, decided on 24th May 2007 by the Court of Appeal, guides us where there are really large assets, created by the divorcing couple or one of them. In this case John Charman, the chairman of the Axis reinsurance group, and his wife Beverley had been married for 28 years, and created £131 million of assets, putting £68 million into a "dynastic trust" in Bermuda, over which he retained control, for their descendants. Because of his special contribution, the judges awarded Mr Charman 63.5% of the assets, but warned that it is only in really high value cases that special contribution will make a difference, usually of between 5% and 16.7%. But they rejected his argument that the trust fund should not form part of his assets, even though it was a fully discretionary family trust, formed as part of the couple's wealth planning. The best course remains to have a pre–nuptial agreement if possible. This case does not apply to unmarried couples, where the law is different, but it may be of influence in some cases. In international cases, claimants remain more likely to bring cases in London, where the awards for dependant wives are among the highest in the world.

Emma Ries and Hazel Wright, Partners
Family Law Department

Paternity Rights

Family

English law is increasingly recognising the complexities of modern family relationships, such as paternity disputes, and many parents are turning to the law for assistance in resolving these issues. Based on the right of children to know the truth about their paternity, judges have the power to order scientific tests (most often a DNA test), and can also ask the Registrar General of Births Deaths and Marriages to re–register the birth and issue a new birth certificate if paternity tests show that amendment is advisable. If a person refuses to submit themselves or their child to such testing, then the Courts can use that to infer paternity.

One way to ask the Court to establish paternity is to make an application for a Declaration of Parentage, as part of which such a scientific test can be ordered. This application can be made by a parent, child or anyone with sufficient personal interest.

Declarations of Parentage can also be of value where there isn't a dispute but where, for whatever reason, the father wasn't originally or correctly registered on the child's birth certificate. In the past, the stigma of illegitimacy meant that this was relatively common if the parents were not married to each other. Cumberland Ellis Family Team were recently successful in obtaining such a Declaration

in the High Court, reported as M v W (Declaration of Parentage) [2006] EWHC 2341 (Fam).

Our client had been adopted as a baby, and while his unmarried natural mother's name was on the birth certificate, his natural father's, although known to the mother, was not. The client learned of the details of this on receiving his adoption file as an adult, and he instructed us to obtain a Declaration of Parentage. While the Court was initially reluctant to grant this for fear it would affect our client's adoption (as it affected legal status), the Judge was persuaded to make the Declaration, and stressed the particular value of the State acknowledging the identity of a child's parents and for the child to know the truth. Important cases such as these help spread awareness of the ever–complex family relationships found today and of the options available to provide some resolution to those.

Richard Adams, Solicitor
Family Law Department

Company Identity

Company Commercial

Companies (including LLP's) are now required to disclose certain additional details on their websites, e–communications and order forms due to a change in the law which took effect on 1 January 2007. Previously companies have been required to disclose their name clearly on documents such as business letters, notices, official publications and financial documents. The company's place of registration, registered number and registered office should also have been present on business letters and order forms.

Following the change in law companies are now also required to state clearly their name (as registered at Companies House as well as any trading name) on their order forms and websites. In addition, the place of registration, registered number and registered office should be detailed on their websites. It is important to note that any correspondence sent electronically (including from Blackberrys) must now also include the required information for a business letter.

The penalty for non–compliance is a fine which can be levied on any officer of the company or on any person who authorised the issue of the non–complying document or website. For information about further forthcoming changes to the Companies Act 1985 please contact Charlotte Baker or your usual contact at Cumberland Ellis.

Charlotte Baker, Solicitor
Company Commercial Department

Director's Rights

Company Commercial

Another of the changes in company law which came into effect on 6 April 2007 affects the position of directors in public and private companies. In summary (1) the age limits for directors were abolished (i.e. someone aged 70 or over no longer needs shareholder approval to be a director of a public company and there is no obligation on the director to notify the company when he reaches age 70) (2) under the new law it will no longer be unlawful for a company to pay a director tax–free (although any tax which is paid for the director will obviously be taxed as part of the director's emoluments) and (3) it will no longer be an offence for a director, or his family, to deal in options listed shares and debentures of the company or any group company. Likewise, there will no longer be a requirement for every director to notify his company of his dealings and those of his family in any shares or debentures of the company or any group company. Companies will also no longer be required to keep a register of directors’ interests (but public companies whose shares are listed on a regulated market, e.g. AIM, and their shareholders remain subject to FSA disclosure rules).

Suzanne Eva, Partner
Company Commercial Department

Consumer Credit Act

Commercial Dispute Resolution

The Consumer Credit Act 2006, has been described as being the biggest change in consumer credit law for 30 years. Part of it came into force in April this year and part comes into effect in April 2008.

Some of the key changes include :–

- who is protected or covered by Consumer Credit legislation. Sole traders (people who carry on business on their own account e.g. not through a company) or partnerships of two or three members and unincorporated associations can be protected by the Act.
- Currently only those credit or hire payments of up to £25,000 are covered by the legislation. From April 2008 this threshold will be removed and all consumer credit/ hire agreements will be regulated unless specifically exempted (including mortgage transactions, which are regulated by the Financial Services and Markets Act 2000, lending "for business purposes" and agreements with certified high net worth individuals who have agreed to waive the legislation's protection.
- The Court being granted a greater discretion to enforce agreements where the technical requirements of the legislation (e.g. notices and copies) have not been complied with.
- The introduction of the Financial Ombudsman Service scheme for resolving disputes where

the credit/hire provider has not provided an acceptable response to a complaint.

The Act makes significant changes to consumer credit law. Clients will need to review their internal policies and systems to ensure they comply.

Louise Kennett, Solicitor
Commercial Dispute Resolution Department

Blogging

Employment

You have discovered that a member of your staff has posted a blog on the web that is disparaging about you, his employer, and possibly defamatory about one of his colleagues. What can you do? Well, prevention is always better than cure and curing this particular problem could, in the age when everyone seems to be blogging their hearts out, be difficult.

The most important first step is to ensure that you have the appropriate internet use policies in place: your internet policy should prohibit the creation and accessing of weblogs on your company's equipment, through its internet link and in company hours. You should also prohibit the making (on a blog, in an email, or in any written form) of any defamatory or discriminatory comments – it should be made clear that a breach of this can lead to disciplinary action and possibly legal action. The policy should provide guidelines about what can and cannot be said about the company, other members of staff and even clients/customers and should make its absolutely clear that the company should not be brought into disrepute or its reputation damaged by the actions of its staff. In addition, it is worth stating that all grievances must be dealt with through the company's Grievance Procedure before being aired in public. Clear and unambiguous policies will be much easier to enforce than vague ones and, whilst you may not be able to prevent the odd rogue blogger, at least if you have made it clear that they are doing wrong in advance of their actions you have a much better chance of disciplining that person successfully.

Finally, if you can cultivate an atmosphere of respect within your company – respect for the staff, management and the reputation of the company in general – then incidences of harmful blogging will, with luck, be reduced to a minimum.

Suzanne Eva, Partner
Employment Department

Smoking in the work place

Employment

From 1st July 2007 all enclosed public spaces and workplaces will be required to be smoke–free in England, (subject to some limited exceptions). This follows the introduction of a smoking ban in Scotland, Wales and Northern Ireland earlier this year. Employers will have various legal obligations to ensure that staff, customers and visitors are aware that the workplace premises are smoke free. There is also a legal requirement for no–smoking signs to be put in place and employers will also need to ensure that there are no indoor rooms available for smoking. A smokefree policy published to staff should help employees to be aware of the new legal requirements.

Mark Shulman, Partner
Employment Law Department

Tenancy Deposit Schemes

Commercial Property

Since 6th April, residential landlords who receive a deposit from a tenant on the creation of a new assured shorthold tenancy are obliged to join a TDS. The landlord must select either a Custodial or an Insurance Scheme. Under the Custodial Scheme, the deposit must be paid to the scheme administrator and held by the administrator until termination of the tenancy. The scheme is funded through the interest earned on deposits held and is provided by The Deposit Protection Service Ltd (http://www.depositprotection.com).

With an Insurance Scheme, the landlord keeps the deposit but pays insurance premiums and administration fees to the scheme administrator so that funds are available to repay the deposit to the tenant if it is misappropriated. These schemes are provided by The Dispute Service Ltd (http://www.tds.gb.com) and Tenancy Deposit Solutions Ltd (http://www.mydeposits.co.uk).

The landlord is also obliged to provide certain information to tenants and ‘relevant persons’ (including parents paying rent for their children). This includes the name and contact details of the Scheme. Failure to participate in a scheme or to comply with the requirements can lead to the landlord being prevented from recovering possession of the property when the term ends and/or incurring a fine. All providers offer free dispute resolution and further recourse is through the County Court.

Angela Lucy, Partner
Commercial Property Department

HIPs launch delayed

Commercial Property

As a result of pressure from groups representing every facet of the housing industry, and in particular a legal challenge by the Royal Institution of Chartered Surveyors, the government has decided to delay the launch of Home Information Packs until 1st August 2007, and to restrict their application.

From that date, a pack will be required for properties with four or more bedrooms only, to be extended to other types of property in due course.

Our In Brief item of February 2007 will therefore be relevant if you are thinking of selling a property with more than three bedrooms. We recommend that you contact Angela Lucy or Gwendoline Hewett well before 1st August to discuss preparation of the pack, or any other query you may have on property matters.

Robert Maclean, Consultant
Commercial Property Department

Enduring Powers of Attorney

Private Client

We have always advised our clients to sign Enduring Powers of Attorney (EPA's) giving someone authority to manage their financial affairs should they become mentally incapable and unable to manage them themselves. The passing of the Mental Capacity Act 2005, whose main provisions come into force in October 2007, makes changes of which our clients should be aware.

Under the present rules, if you have a valid EPA, and become incapable of managing your affairs, an application to the Public Guardianship Office, registers the EPA, and allows your attorney to continue managing your affairs on your behalf. If you do not give anyone an EPA and, through illness or incapacity you are unable to look after your affairs, then your next of kin, your solicitor, or the most appropriate person, will have to apply to the Court of Protection to become your Receiver, a longer more expensive procedure.

Under the current system, the donor completes a form giving name, address, date of birth and appointing the attorneys. The form is signed in the presence of a witness, and the attorneys then sign to indicate their acceptance. Under the new Act, there will be a new Power of Attorney known as the Lasting Power of Attorney, (LPA) and this will be in two parts, covering personal welfare and property and financial affairs.

Personal Welfare LPA's amongst other things will cover: where the donor should live; consenting or

refusing medical examination or treatment; personal correspondence and matters generally in connection with their general health and wellbeing.

Property and Financial LPA's amongst other things will cover:– Buying or selling property; opening, closing or operating bank or building society accounts; ensuring that the donor receives all benefits, allowances and rebates, dealing with their tax affairs, investing the donor's savings.

One of the formalities to create a LPA, is production of a certificate which has to be signed by a person who is not a relative of the donor but has known the donor for at least two years, and there is a list of people who can sign the certificates. The certificate provider has to show that he is one of the prescribed people listed, and that he or she is independent of the donor and has the appropriate experience and understanding of mental incapacity issues involved in making a LPA. They also have to know enough about the donor's affairs to assert that they were not under any pressure and no fraud is involved. These requirements impose a substantial burden on the person providing the certificate.

From the above you will see that anyone providing such a certificate will have to obtain details of the donor's personal and financial background. Our opinion is that anybody who wishes to make an Enduring Power of Attorney should make one as soon as possible and before October; we can provide you with full information and the necessary forms for completion.

Susan Pape, Associate
Private Client Department

Limitation in Claims of Historic Abuse

Private Client

To provide some certainty and to avoid prejudice to defendants by claims being brought many years after a wrong is committed, the law provides in many cases, that court proceedings must be brought within a set period. Such a period is known as the limitation period. There are a variety of periods, depending on the nature of the claim. A number of limitation periods are set out in the Limitation Act 1980, although there have been various Limitation Acts and statutes on limitation both before and since (which amend the Act).

Where a person has suffered injury resulting from someone's negligence or breach of duty, the limitation period is 3 years from when the cause of action accrues (i.e. when the injury is suffered) or the date of the claimant's knowledge of damage, (see below) whichever is the later. The possibility of extending the limitation period by reference to date of knowledge of the Claimant might be useful to a claimant where the nature of the damage is psychological, e.g. in a case of child abuse. Such a claimant may only become aware of the connection between the abuse and the damage when he/she is well into adulthood. Such cases are sometimes referred to as historic

abuse claims. By contrast, deliberate assaults (i.e. not negligence) causing personal injury are subject to a 6 year limitation period (see A v Hoare [2006] however this is the subject of an appeal to the House of Lords to be heard later this year).

Section 14 of the 1980 Act sets out a definition of the date of knowledge from which the time for bringing a claim might run, mentioned above. The section is complicated, but in essence, the question is at what point the claimant first knew that the injury was significant, was attributable to the act or omission complained of and knew of the identity of the defendant or others involved. In the type of cases mentioned above, the Court is highly likely to require convincing evidence from a psychologist or psychiatrist. The test applied by the Court of Appeal in the Catholic Care v Young 2006 was an objective one – i.e. would the "reasonable man" in the position of the particular claimant have had the requisite knowledge. It was not relevant that Mr. Young himself may not have been well enough to appreciate that he had a significant psychiatric injury, to justify commencing proceedings for damages. It was sufficient that he had become aware that he had suffered abuse. The claim failed. The Court has since then, in a more recent case slightly refined the objective test.

The Court, in addition, has a separate discretion to extend the time for bringing a claim in respect of personal injuries (or death) under section 33 of the 1980 Act. The court can allow this type of claim to proceed outside the normal time period where it would be "equitable" so to do. The Court takes into account all the circumstances of the case and a number of specific factors including the length of delay and the steps taken by the parties after the claim arose. However, there is a Court decision which limits the time within which a claimant has to bring a claim. In McDonnell v Congregation of Christian Brothers 2003, a case where we represented one of the successful defendants, the alleged physical and emotional abuse in a school was said to have taken place between 1941 and 1951, but it was stated that the claimant only acquired the requisite knowledge in 1997, as a result of reading a newspaper article. The House of Lords decided that the court had no jurisdiction under the 1980 Act to extend the time for bringing a claim where the cause of action accrued before June 1954 (when a precursor of the 1980 Act came into force).

Limitation of claims is a complex subject and is often an area of contention in disputes of all kinds as it can dispose of claims that might otherwise be meritorious. Thus attention needs to be paid to the time within which Court proceedings must be issued.

Richard Collier–Wright, Associate
Private Client Department

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