

LEGAL REVIEW

Your quarterly bulletin on legal news & views from Allan Janes Solicitors



Winter 09

Allan Janes LLP
21-23 Easton Street
High Wycombe
Buckinghamshire.
HP11 1NT

Tel: (01494) 521301
Fax: (01494) 442315

email:enquiries@
allanjan.es.com

allanjan.es.com



STUBS

ALLAN JANES IS PROUD TO SUPPORT THE STUBS CHARITY.

STUBS is a charitable initiative which aims to demonstrate care and respect for our UK armed services in an innovative way. Its principal objectives are:-

- To provide hospitality facilities at sports and cultural events for injured servicemen and women undergoing rehabilitation at DMRC Hedley Court or UHB Selly Oak.
- To acquire and distribute event tickets to armed services veterans who would not otherwise be able to attend the event.

STUBS was founded by Allan Janes' clients, Craig and Jan Vassie. Those of you who have attended Allan Janes' Wasps Box will know that Craig and Jan gave over their box (which was adjacent to ours) for most of last year to injured servicemen. Indeed we, ourselves, hosted two of them at Twickenham when Wasps played Leinster in the Heineken Cup.

In addition, Allan Janes has agreed to be Honorary Solicitors to the Charity whose



Allan Janes' Partner, Clive Hitchen, (left) with Ian McGeechan, the former Wasps' and Lions' coach, at a recent dinner held in aid of STUBS.

website can be found at:
www.stubs.org.uk. Tel: 01494 811500.

Their next event is to be held on 12th December 2009 in conjunction with Wasps. Full details can be found on their website. This charity deserves your support, and we commend it to you.

ALLAN JANES AND THE BRITISH HEART FOUNDATION

Nick Morrison and Clive Hitchen would like to thank all of Allan Janes' clients who supported them on their recent sojourn from London to Brighton on mountain bikes.

However, this was not the annual London to Brighton bike ride as you probably know it, this was the mountain-biking version, travelling off road on a 75 mile route that took in Richmond Park; the Thames; North and South Downs; and a lot of wooded tracks in between.

Nick and Clive were in a party of 18, who all managed to complete the ride well before the cut-off time of 7 o'clock at night.

Between them they have raised nearly £1,000 for the British Heart Foundation. Next year Clive intends to complete the Coast to Coast cycle ride from East to West, Nick intends to take up extreme mountain biking, throwing himself off converted slag heaps in Wales.

Peter and Iwan, in the meantime, are checking out the Partnership Life insurance policies!

INSOLVENCY AND TUPE

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) operate to protect the employment law rights of employees when there is a relevant transfer of a business or part of a business. However, Regulation 8(7) provides that the transfer provisions of TUPE do not apply to any relevant transfer where insolvency proceedings are analogous to bankruptcy proceedings and have been instituted with a view to liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner. In such circumstances, employees do not automatically transfer to the new owner and any dismissals are not automatically unfair.

A recent case, *Oakland v Wellwood (Yorkshire) Ltd.*, concerned a 'pre-pack' administration. In a pre-pack, the profitable parts of the company are transferred to a new company set up for the purpose of continuing all or part of the trade of the insolvent company. The new, viable company often takes on employees and assets of the old company, which is liquidated after the transfer.

Mr Oakland was a director of Wellwood (Yorkshire) Ltd., which traded as a wholesaler in fruit and vegetables. By mid-2006, the company was in financial difficulties. It approached a major creditor, Gilbert Thompson (Leeds) Ltd. (GTL), as a potential buyer and sought the advice of an insolvency practitioner. It was agreed that administration was the appropriate course of action. GTL was not willing to purchase the old company as a going concern but decided to incorporate a new company as a wholly owned subsidiary of GTL. The new company would acquire the assets of the old company and five of its seven employees, including Mr Oakland.

On 6 December 2006, the sale of the assets to the new company was completed and administrators were appointed to the old company.

The new company subsequently dismissed Mr Oakland, who brought a claim of unfair dismissal. The Employment Appeal Tribunal (EAT) held that the administration had been instituted with a view to the eventual liquidation of the old company's assets and Regulation 8(7) of TUPE therefore applied. Mr Oakland could not therefore bring a claim of unfair dismissal because the transfer provisions of TUPE did not apply in his case and he did not have sufficient service with his new employer to bring a claim.

On appeal, the Court of Appeal focused on Section 218(2) of the Employment Rights Act 1996 (ERA) and held that administration does not terminate a contract of employment. The administrator transferred the business and, under Section 218(2) of the ERA, Mr Oakland's continuity of service was preserved. He was therefore entitled to bring a claim for unfair dismissal even though there was no finding that he had transferred to the new company under TUPE.

Whilst the Court of Appeal's decision confirms that continuity of service is preserved when the transferee in a pre-pack sale takes on an employee of the transferor, it was not required to express a definitive view regarding whether or not the insolvency exemption from TUPE applies automatically to a company in administration or to a pre-pack sale. However, the Court expressed the view that a strong argument could be made that it does not.

LIABILITY REMAINS WHERE NOT EXCLUDED



Having deserted units in a retail complex can have negative effects on the other tenants and the landlord. It is therefore common for such leases to contain a 'keep open' clause, which provides for the payment of damages to the landlord if a retailer closes a store in breach of its lease.

The Scottish courts recently had to consider such a circumstance. The damages due because a tenant had vacated its premises had been calculated and paid to the landlord. The unit had been closed for several years when the landlord served a schedule

of dilapidations on the former tenant, requiring compensation of more than £600,000, in accordance with the dilapidations clause in the lease.

The tenant refused to pay, arguing that payment of damages under the keep open clause meant that its responsibility was reduced to keeping the premises wind and watertight.

The court ruled that, in the absence of a clause which acted to cancel the tenant's liability for dilapidations in the event that the keep open clause was triggered, the tenant was liable for the dilapidations.

The law will enforce a contract which is not on the face of it unfair. It is important to make sure that the implications of any lease agreement or other contractual arrangement you want to undertake are fully understood before you sign on the dotted line.

Not all potential pitfalls are clear at the outset. We can help you avoid costly mistakes.

FRIENDS FALL OUT WHEN AGREEMENTS ARE NOT FORMAL

Doing business with friends can be fraught with danger, as a recent case illustrates.

It involved two men, one of whom was building a house for himself and his fiancée. He wanted to have some complex electrical devices built into the house and entered into discussions with his friend (who is a builder), who advised him that the work required would cost in the region of £15,000.

The details had been agreed by the end of 2001 and there was a costed schedule of works at that point. As is not at all unusual, as time passed the house owner changed the specification and added extra items to it. It is clear that as this was occurring, neither of the two men put the changes that had been authorised and their cost implications into proper written form, with the predictable result that at the end of the project, the bill presented was for more than £15,000 and a dispute arose.

The homeowner refused to pay the extra amount and the matter ended up in court. The hearing took three days, the cost of which must have been similar to the value of the original contract. In court, it was accepted that some of the changes warranted extra payment as 'variations' or 'extras'.



Additionally, there was no complaint about the quality of the workmanship: the dispute was over the cost and the cost alone.

In essence, the claimant's case was that it was a design and build contract with reasonable remuneration for labour and materials supplied.

The defendant's case was that it was a fixed price contract for £15,000 and that almost all of the extras should have been accommodated within that price.

The court ruled that the contract was not a fixed price contract and awarded the claimant a modest extra sum.

The essential point is that the case only arose because, being friends, the two men did not agree things formally as they went along, each assuming that their view of the circumstances was also held by the other. When this turned out to be incorrect, a falling-out was predictable.

The moral of the story is that if you value your friendships, it is doubly important to make sure that you have all the necessary paperwork in place if you do decide to do business with friends. It is a mistake to rely on friendship to prevent a disagreement.

COURT FINDS HOLE IN POLO ARGUMENT

Ownership of land is often fettered with obligations and, in some circumstances, the obligation can be to permit someone else to extract something from the land. In legal terminology, this is called a profit-à-prendre and one of the most common of these is the right to graze animals.

Where such a right exists, the owner of the land cannot prevent it being exercised. Recently, the High Court had to consider such a case. A farm which reared polo ponies sought to re-establish the right to graze them over a piece of adjacent land owned by someone else. The right was to graze the ponies from evening until morning for eight months of the year. The farm sought to register the right at the Land Registry. The application was opposed by the landowners.

The landowners had fenced off a part of the land which was being used to keep chickens and a pig. A deputy adjudicator at the Land Registry ruled that the farm had no right to graze its ponies on the

land. The owners of the farm appealed against the decision, which led to the matter being heard in the High Court.

After complex arguments, the judge decided that the initial decision had been made on the wrong grounds and that, in principle, a right to profit-à-prendre had been established. The case was remitted back to the adjudicator for reconsideration.

The issue arose initially because the owners of the land, which they had bought in 1994, appeared not to be aware of the existence of the legal right to graze the ponies. The result was a court case over a right that, in financial terms, is almost valueless.

It is important when buying any property to ensure that rights others may have over the land are fully explored and their implications considered. Our property professionals can help you ensure you do not have any nasty surprises after you have purchased a property.

DEALING WITH YOUR AFFAIRS IF YOU ARE NO LONGER ABLE

A property and affairs Lasting Power of Attorney (LPA) is a power of attorney which allows you to authorise one or more named persons to make decisions on your behalf in order to manage your property and financial affairs if you are no longer able or willing to do so yourself.

What differentiates an LPA from the old-style Enduring Power of Attorney (EPA) is that once an LPA is registered with the Office of the Public Guardian, your attorney can act before and after you lack capacity. EPAs that were in place before these were abolished (1 October 2007) continue to be valid. Under an EPA, however, if the donor (the person who made the EPA) loses the mental capacity to make decisions on their own behalf, it is then necessary to go to court in order to obtain confirmation of the right to act.

The advantage of having an LPA in place is that it enables other family members or trusted friends to take over dealing with your affairs smoothly and progressively in the event that you lose the capacity or the will to do so. When decisions have to be made for you, your attorney must always act in your best interests.

If you are worried about how your affairs will be dealt with in the future, we can help you decide the best course of action.

FAMILY OVERTURNS WILL THAT BENEFITS CARER

Elderly people can become suggestible and it is, regrettably, not uncommon for avaricious people to attempt to influence them for personal gain.

In a recent case in point, an elderly and wheelchair-bound lady altered her will a few months before she died so as to bequeath her £400,000 estate to the son of her carer. Her previous will had left her entire estate to her family.

The family contested the new will, claiming that the woman had fallen under the influence of her carer and was too mentally infirm to resist her.

In addition, more than £400,000 had been withdrawn from the woman's bank account in the three years prior to her death. The evidence of undue influence was sufficient for the judge to rule that the woman's earlier will, made in 2002, should stand. In addition, it is understood that following a police investigation into the depletion of the woman's assets

in the final few years of her life, papers have been passed to the Crown Prosecution Service.

This sort of circumstance is a nightmare for the family involved.

If you are concerned about the possibility of people abusing the trust of your elderly relations, please contact us for assistance. It is always better to avoid problems than to deal with the aftermath.



TENANT CANNOT FORCE COUNCIL TO DO REPAIRS

The Court of Appeal has recently ruled that a tenant who wishes to purchase his or her property under the 'right to buy' legislation cannot require the landlord to carry out remedial works to the property as a precondition of complying with a notice to complete.

Emma Ryan had sought to force Islington Borough Council to make repairs to her flat, arguing that her request for the repairs to be made was a 'relevant outstanding matter', which had to be dealt with before she could complete the purchase of the flat.

The Court ruled that it was not a natural use of language to include repairs in relevant outstanding matters, which are those which have yet to be determined or agreed.

IHT AND THE RECESSION

The recession hasn't brought much favourable comment, but falling asset values do present



opportunities for savings on Inheritance Tax (IHT).

Here are some ways that you can save IHT when asset prices are depressed.

lifetime gifts

In general, the value for IHT purposes of an asset transferred is its value at the date of transfer. Giving away assets as lifetime gifts when prices are low means that a subsequent increase in value will belong to the new owner.

Consideration should be given to transferring assets when values are low and the 'best' assets to transfer are

those which are most likely to show gains.

falling property prices

The IHT on the value of a property can be paid in instalments over 10 years.

If, however, a property is sold within four years of death at a price below the valuation fixed for probate, then the executor can elect for the IHT liability to be recalculated based on the reduced value. Only the executor can make this election, so if the property is passed to a beneficiary and then sold, the election is not available.

When a property is sold, the IHT due becomes payable immediately. Arranging the sale of a property just to save IHT requires careful thought as the costs associated with such a transaction are not inconsiderable. Where a house is transferred to a

beneficiary, the base cost of the asset will be the IHT value. Therefore, when the value of such an asset falls, a subsequent sale by the beneficiary may lead to a loss for Capital Gains Tax purposes.

other issues

The other main issue to consider as one gets older is the possible need to fund the cost of long-term care. This is a much greater threat to the wealth of most families than IHT, since the system is, in practical terms, confiscatory.

Planning to protect family wealth and to fund future care needs must be approached with careful thought and knowledge of the relevant law.

Please contact us for advice on this sensitive matter.

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