

LEGAL UPDATE

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**Spring Employment Law
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for further details.



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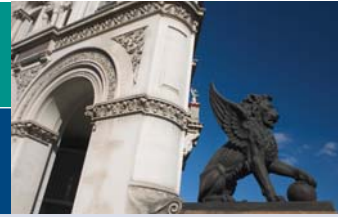
“ This issue of GRM’s new style Legal Update focuses on a number of items which we believe are particularly timely in our current economic climate. Several developments in property law (my area of specialism) in 2010 have resulted in changes which will impact on commercial and private property owners and landlords, while a new court decision relating to inheritance tax has implications for those seeking to claim Business Property Relief.

Effectively handling commercial disputes and the implications of the Courts’ attitude towards agreements to negotiate in good faith are two of our other articles which are pertinent for a wide range of businesses of all sizes and types and stress the wisdom of taking preventative measures to avoid future trouble.

I hope you find these and the other articles of interest. ”



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PROPERTY: THE IMPLICATIONS OF LAST YEAR'S OUTCOMES

NEIL SPURRIER

Several cases last year will have considerable impact for property owners and developers in the future. Amongst them were:

Good Harvest Partnership LLP -v- Centaur Services Ltd (2010) This was manna from heaven for commercial tenants and their guarantors as it ruled that guarantors of commercial leases cannot be held to account for the default of subsequent assignees. Landlords should be aware of this and get new guarantors if they are not satisfied with the ability of an assignee tenant to pay the rent.

HXRUK Ltd -v- Heaney (2010) was a graphic illustration of how not to develop property. A developer refurbished his building by adding two storeys infringing the rights of light of his neighbour. The Court ordered the developer to take down the sixth and seventh floors at a cost of some £2 million. Make sure that you know your rights before redevelopment!

Roadside Group Ltd -v- Zara Commercial Ltd (2010) showed the penalty for defective drafting in a lease. An active covenant stating that "the tenant shall not use the premises other than..." rather than a passive covenant that "the premises shall not be used..." or an extended obligation that "the tenant shall not permit the premises to be used other than..." did not cover a breach by an under-tenant and left the landlord without a remedy for a breach of user covenant. The recommendation, naturally, is to seek professional advice when drafting or changing leases.

Changes to regulations mean more tenancies are to be brought within the shorthold tenancy regime. Previously tenancies with rents of up to £25,000 per year were shorthold. The limit was increased to £100,000 per year from 1st October 2010.

Of far more importance though is the extension of the rules relating to deposit taking. Landlords of shorthold tenancies must belong to one of the Government schemes when taking deposits. These schemes provide for protection of deposit monies and for adjudication of disputes at the end of the tenancy; failure to observe the requirements brings draconian penalties. First, the landlord is not entitled to bring any action to get his property back. Second, the landlord will have to pay a penalty of three times the deposit to the tenant – an expensive mistake.



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BUSINESS PROPERTY RELIEF: YES, NO, MAYBE?

OLIVIA COOPER

Business Property Relief (BPR) has always proved a useful tool in lowering an estate's liability to Inheritance Tax although, as with any relief, there are exceptions where it cannot be applied – an example being investment assets.

In order to qualify for BPR an asset needs to have been owned for a minimum period of time – usually two years – and qualify as 'Relevant Business Property' as defined in the Inheritance Tax Act 1984. Recently the "Balfour Case"* has brought into question how these two requirements should be interpreted.

Briefly the facts were as follows: in 1968 the Fourth Earl of Balfour inherited a life interest on a Scottish landed estate (i.e. a right to enjoy the use and benefit, as well as the income, of the land for the lifetime of the beneficiary). The estate consisted of various assets including properties rented to both agricultural workers and others not connected with the estate. In 2002 the Earl finally was granted a declaration stating he no longer held the estate as a life tenant but as a proprietor. At this point he entered into partnership with his nephew and heir and together they ran the estate.

The Earl died in 2003 whereupon Her Majesty's Revenue and Customs refused BPR on the Estate for two reasons, the Earl had not owned the assets for long enough and the estate did not qualify as 'relevant business property' as it consisted mainly of investment assets and had not been run for gain.

The case went to the Upper Tribunal on appeal wherein the decision by the First-Tier tribunal to allow BPR was upheld. Firstly it was held that despite the Earl only having a life interest he had run the Estate as his own making all the key decisions therefore this period of ownership was added to the period of ownership as proprietor hence the assets had been owned for the relevant period. Secondly, although the estate did contain investment assets, when looked at from a global perspective taking into account a number of factors over a considerable period of time, the Tribunals found that the estate was run for gain and therefore qualified as 'Relevant Business Property'.

The ramifications of this decision give hope not only to those fortunate enough to own a landed estate but also to those with diversified business interests whether held by an individual or through a corporate structure. It may also prove useful where there are questions as to the period of ownership.

**(Brander (representative of James (deceased), Fourth Earl of Balfour) v Revenue and Customs Commissioners (2010) UKUT 300 TCC)*



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HOW TO HANDLE A COMMERCIAL DISPUTE

CATERINA IODICE

Since the economic downturn commercial disputes seem to have increased in number.

Such disputes - especially those concerning debt recovery - can badly affect a business's cash flow and may even put the company at risk of insolvency. This being the case it is sensible to consider some actions that you might take to reduce the associated costs and duration of the dispute when it arises and to minimise the overall consequences:

- 1** Your first step should be to take legal advice not least because a strongly worded solicitor's letter may be enough to resolve the dispute immediately. In the meantime do not talk to the other party, admit anything or agree to settle; you may regret having said something if this is used against you at a later date.
- 2** Consider your options. Your solicitor will be able to assist you with assessing the value of the claim and the costs involved in order to establish whether making a claim is cost effective. They should also be able to guide you through the commercial implications of success or failure in terms of whether legal proceedings may affect your business reputation and/or ongoing commercial relationships or create difficulties in engaging new business relationships.
- 3** Make sure that the other party has the means to settle. In a claim for debt your debt would be probably be irrecoverable if the customer is bankrupt or in liquidation. You may also be able to identify any other party who is liable or should be involved in the case and any of their assets which you might rely on if you succeed in court.
- 4** Assuming that they do appear solvent, establish the key issues of the case at the outset. Gather your evidence; locate and safeguard any relevant material (emails, correspondence, orders, etc.) containing information relevant to the case. Ensure that any routine destruction process is suspended in order to avoid destroying or deleting any significant material.

- 5 Identify anyone who may be relevant to the case and ascertain whether they are willing to give evidence in court if legal proceedings do take place. Within the company limit discussion about the dispute to those employees with a real "need to know".
- 6 Charge interest on the debt. Under English law you have a statutory right to charge interest on a late payment. This may be at 8 per cent over the current Bank of England base rate or you may set out a contractual interest rate that is higher or lower than the statutory rate. Before charging interest it would be advisable to issue a letter stating that the payment is late and if it is not paid within a stipulated time such interest will be charged on the outstanding gross amount.
- 7 Be prepared to resolve the dispute by way of settlement. If necessary this may be facilitated through a neutral third party such as a mediator. Remember it is almost always better to find a solution to a dispute and any court action should be seen as the last resort; such an attitude should not be considered a sign of weakness. However, take legal advice to ensure that any discussion of settlement is conducted on a "without prejudice" basis which means that anything said or written during the negotiations cannot be used in court.
- 8 If an offer is made to settle, you should consider whether this represents a cheaper alternative than facing litigation costs and wasting management's time and commitment. In a claim for debt, if only a relatively minor amount is involved or if it is likely that good relations can still be maintained and the customer will place a large order in the future, it is often better to let things lie.

It would however be advisable to take preventative measures and review your procedures to reduce the likelihood of such disputes recurring in the future.



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AGREEING TO NEGOTIATE IN GOOD FAITH: HOW ENFORCEABLE IS IT? CHRIS BANNISTER

To what extent can you legally oblige another party to negotiate matters in good faith and should you accept such an obligation in contracts with others? Can such a requirement ever be enforced under English law?

The enforceability of agreements to negotiate has been subject to considerable legal debate over the years and in general under English law such agreements have been held not to be enforceable, mainly because:

- Such obligations have been held to be fundamentally incompatible with the principle that in negotiations each party should be free to pursue its own interests.
- The concept is too uncertain for the courts to enforce.
- It would be too difficult for the courts to assess damages for failure to fulfil such an obligation because the outcome of fulfilling it cannot be foreseen.

That said, there have been cases where, on their particular facts, such agreements to negotiate have been enforced. Recent English case law has suggested that such an obligation to negotiate in good faith may be enforceable in those cases where it is express (rather than implied), where it is part of a contractually binding agreement and where the matter to be negotiated is relatively easy to ascertain and capable of objective assessment by a third party.

However, the position under English law is still far from clear and this means in practice that, while you should not rely on being able to enforce an obligation to negotiate in good faith (or for it to be able to be enforced against you), neither should you assume that any such obligation is unenforceable if it is included in a contract to which you are a party.

As is the case with many other contractual provisions, the enforceability of such an obligation will depend on the circumstances of the particular contract and the parties to it. Seeking legal advice at an early stage when negotiating any contract is undoubtedly the safest way forward.



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DIVORCE DISCLOSURE: NEW GUIDANCE ON ALLOWABLE EVIDENCE

JACQUELINE FITZGERALD

Unfortunately divorce usually brings with it mistrust and suspicion between the divorcing couple. This manifests itself in a belief that one party, very often the husband, will be less than honest when he is forced to disclose his income and assets.

In the past, often encouraged by sympathetic friends and family, a wife would embark on her own investigative exercise, trawling through her husband's desk, briefcase, filing cabinet, pockets, anywhere, in which she hoped to find evidence of undisclosed assets. The wife would send the documents to her solicitor, who would photocopy these, return the originals to the husband's solicitors and safely rely upon the contents to pursue the husband for non-disclosure.

The Court of Appeal has now said that such conduct may be unlawful. An end to the practice has not only stopped what wives saw as a cross-check against their husband's honesty, it has introduced the prospect that wives who conduct themselves in this way may expose themselves to criminal and civil liability - penalties which may extend also to their solicitor or barrister. If a wife were to take confidential documents she may be found to be committing theft, burglary, or offences under computer legislation as well as breaching her husband's confidentiality.

Before handling or reviewing any such documents an advisor must consider whether they are confidential. A document left lying around may not be seen as confidential whereas it might be if, for example, it were kept in a desk or briefcase. Any advisor who reads and passes on such documents, which are found to be confidential knowing that they were taken from the husband unlawfully may be a defendant alongside the wife. The advisor may also be prevented from continuing to act for the wife.

Where does this leave the wife who believes that her husband's disclosure is not full and complete? The Court of Appeal has said that while the court can admit unlawfully obtained evidence, there is also the power to exclude it. It has also said that a wife can still challenge the husband's disclosure on what she knew previously and that freezing injunctions and search and seizure orders are available. However, in practice such remedies are very expensive and may be unaffordable and indeed disproportionate to the available assets.



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A LASTING POWER OF ATTORNEY: AND WHY YOU SHOULD HAVE ONE

MUNA JALLOW

Everyone knows that they should have a will in order to provide for their family and friends after they die. But what happens if someone who is still alive is left mentally unable to make decisions because of an illness or physically unable to deal with their affairs due to infirmity or an accident?

If you should find yourself in such a situation and you have not made a Lasting Power of Attorney (LPA) the only way to deal with your affairs would be through the Court of Protection. This process can be both costly and lengthy, leaving your family with the strain of being unable to deal with your assets or pay your bills.

An LPA gives another person or persons chosen by you (called your "Attorney/s") the right to make decisions on your behalf if you are unable to do so yourself. There are two types of LPA:

1. Property and Affairs LPA

This allows you to nominate someone to make decisions on your behalf about your money - including paying bills and managing your property and investments. It is effective as soon as it is registered (see below) allowing your Attorney/s to deal with your financial affairs whether or not you have lost capacity to make decisions. This ensures that you are protected if you are mentally able to make decisions but physically unable to carry them out.

2. Personal Welfare LPA

This allows you to choose someone to make decisions about your healthcare and general welfare if you are not able to do so, including making decisions relating to where you should live, or medical treatment. Your Attorney/s may consent or refuse to life-sustaining treatment on your behalf if you choose to authorise them to do so. This type of LPA only becomes effective if you no longer have the mental capacity to make relevant decisions yourself.

Both forms of LPA must be registered with the Office of the Public Guardian (OPG) before they can be used. The application to register can be made by the person granting the LPA (the "Donor") or by the Attorney/s; a fee of £120 is payable for the registration of each LPA.