MOON BEEVER
SOLICITORS

NEWSLETTER WINTER 2017

Former Chief Bankruptcy Registrar Stephen Baister to join Moon Beever solicitors

Following his retirement at the end of this term, former Chief Bankruptcy Registrar, Stephen Baister, has joined Moon Beever solicitors with effect from November, meanwhile taking a well-earned break. His specific experience and expertise, as well as his language skills will add particular value to clients. Whilst he will take on other roles, Moon Beever is delighted that he has chosen their firm as solicitors he can relish working with.

Stephen is a popular and highly-respected figure in the insolvency industry. A former solicitor and insolvency practitioner, he practised as a litigator specialising in insolvency and financial litigation, much of it for German clients. He was appointed as a Bankruptcy Registrar of the High Court in 1996 and Chief Bankruptcy Registrar in 2004 where he served with integrity. He is also President of the Chartered Institute of Credit Management.

Moon Beever is ranked among leading legal firms for an expanding range of services, and has a high profile and strong track record for its insolvency and litigation department, headed by Managing Partner Frances Coulson. "We are delighted Stephen has chosen to bring his expertise and experience to our team," she said. "His presence reinforces what is a core practice area for Moon Beever and comes after a year of significant developments including the hallmark Jyske Bank case in Gibraltar and an increase in work with international clients."

Stephen Baister said, "I have considerable respect for Frances who chairs the R3 Fraud Panel and it will be a pleasure for me to work closely with her and the team at Moon Beever. I look forward to contributing to the reputation and success of this growing and highly-regarded firm".

Clothing Company Wins Right to Trade Mark Internet Blogger's Pseudonym

Online bloggers can build up phenomenal followings that can be monetised through advertising and endorsements. In a guideline decision, the Intellectual Property Office (IPO) has considered the extent to which their names, or very often the pseudonyms under which they operate, can be protected by trademarks.

The case concerned a young blogger who, going under a pseudonym, had become a major Internet personality with a fan base numbered in millions. He objected after a company applied to register the pseudonym as a trade mark in respect of clothing, headgear and footwear. He alleged that he had pre-dating rights in the pseudonym and that the company's application had been made in bad faith.

It was argued that the blogger, by use of the pseudonym over a period of about seven years, had generated significant income streams and goodwill. His loyal followers had been eagerly awaiting the launch of his own branded merchandise, an enterprise that had been jeopardised by the company's application.

In rejecting his opposition to the proposed trade mark, however, the IPO noted that there was no evidence that he had engaged in any trade in clothing goods, or indeed any goods, as at the date on which the company made its application. There was also no evidence that the company was seeking to take illegitimate advantage of his goodwill and his claim of bad faith could not hope to succeed.

Sugg v ABT Merchandising Limited

Buying a Houseboat? See a Solicitor First or Face That Sinking Feeling

Buying a houseboat can be just as tricky as purchasing a house and, in both cases, legal advice is absolutely essential so that you can be sure you get what you pay for. In one case exactly on point, two couples paid almost £2 million for luxury houseboats before realising that they had no residential mooring rights.

One couple had sold their home on land in order to buy their vast, 5,000 square foot, houseboat for £1.25 million. On discovering the absence of mooring rights, they had to remove the boat - which was too large to fit under river bridges - to storage and it had since proved impossible to find an alternative berth for her. The other couple agreed to pay £850,000 for their vessel and parted with £550,000 before realising their mistake. It was subsequently repossessed and sold.

The couples launched proceedings against the entrepreneur who built both boats and who owned the marina where it was intended that they would be moored. In upholding their claims, the High Court found that they had relied upon his promises that they would enjoy 125-year residential mooring licences.

The Court noted that the haven that was sold to them had become a legal nightmare and that the effusive and charming entrepreneur had flouted their expectations. He had neither believed, nor had reasonable cause to believe, that residential mooring of the boats would be lawful. In the circumstances, he was ordered to pay damages for misrepresentation. The couples' awards included full reimbursement of the sums they had paid for the vessels.

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Thieving Women's Institute Treasurer Deserved Deterrent Sentence

Most charities rely heavily on voluntary workers but it should never be assumed that benevolence equates to honesty. In one case, the treasurer of a Women's Institute branch fleeced the organisation of more than £17,000 over an eight-year period.

The middle-aged woman abused her position of trust to siphon the branch's funds into her own bank account. She had at the time been suffering from a series of personal tragedies, including the loss of a child. Some of the money was recovered after she was caught, but the branch suffered a loss of £12,234. She was ultimately jailed for 10 months after admitting a number of theft charges.

The facts of the case emerged as the Court of Appeal dismissed her challenge to the sentence. The Court noted that there are thousands of people nationwide in positions of financial trust whose honesty is central to the proper administration of charities, large and small. Public confidence in the charity system demanded a deterrent sentence and a substantial custodial term was inevitable.

R v Kelman

Online Financial Trading - $460,000 'Profit' Made from Abusive Trades

Online platforms make it possible for almost anyone to have a flutter on the financial markets. However, web-based trading can be open to abuse and that was certainly so in one case concerning a retired teacher who made a profit of more than $460,000 in less than a minute.

In very quick succession, the woman had placed 43 orders, totalling $130 million, to sell gold and buy US dollars on a foreign exchange and commodity broker's website. Within the same minute, she closed all the positions, making a handsome profit. After the broker refused to pay her, on the basis that the trades were abusive, she launched proceedings alleging breach of contract.

In dismissing her claim, the High Court found that she had taken advantage of a high-speed news feed that gave details of a US payroll data announcement that would inevitably affect market prices. She carried out the trades in the seconds before the announcement was reflected in the prices quoted by the broker. The trades had been placed with foreknowledge of the announcement, without risk, and the Court ruled that it was a classic case of abusive trading. The broker had thus been entitled to revoke the trades.

Shurbanova v Forex Capital Markets Limited

Agency That Failed to Pay the National Minimum Wage Hit Hard In Pocket

Paying the National Minimum Wage (NMW) is a strict legal requirement and employers that fail to do so can be hit with punitive penalties. In one case, an employment agency that laid on thousands of underpaid workers at a warehouse received a six-figure fine.

Following an investigation by HM Revenue and Customs (HMRC), it emerged that workers who clocked on one minute late to work were docked a full quarter of an hour. After clocking off at the end of their shifts, they were also required to queue for an average of 11 minutes for security checks.

The agency accepted that, as a result of those unpaid periods, workers had not received the NMW. To make up the difference, it paid almost £470,000 to affected workers. It was also required to pay a total of £263,628 in respect of 13 penalty notices raised by HMRC. It was, however, permitted to pay half the penalties - £131,814 - because it remitted the sum promptly, within 14 days.

After the agency appealed against the penalties to an Employment Tribunal (ET), HMRC acknowledged that the notices were defective in that they did not include certain information, particularly the names of individual workers concerned and the amounts by which they had been underpaid.

In dismissing the agency's appeal, however, the ET found that the notices were nevertheless valid. The agency knew precisely the figures on which the notices were based, did not dispute that workers had been underpaid and had agreed how much was owed to them. The penalties were designed to have a deterrent effect on others and HMRC had been entitled to issue multiple notices.

The Best Connection Group Limited v HM Revenue and Customs

High Court Underlines Importance of Consistent Ministerial Decision-Making

Government ministers cannot be expected to know everything that civil servants are doing in their name. However, as one High Court ruling emphasised, it is vitally important that decisions that bear their signatures are reasonably consistent.

The case concerned a planning permission that had been granted for 50 new homes in a rural village. The Secretary of State for Communities and Local Government had based his decision on a planning inspector's advice that a local policy - targeted at preserving the countryside and strategic gaps between existing settlements - was out of date. In accordance with principles contained within the National Planning Policy Framework, the Secretary of State had thus applied a tilted balance in favour of the housing development.

Local objectors to the proposals pointed to another decision that had been taken by the Secretary of State just a few weeks earlier. In that matter, he had refused consent for development of 70 new homes in another village just a short distance away. In that decision, he had followed another inspector's advice that the same local policy was not out of date.

In upholding the objectors' judicial review challenge, the Court noted that the two apparently conflicting decisions had on the face of it been made by the Secretary of State himself. They had been issued from the same unit of his department on the same floor of the same building within 10 weeks of each other. There had been no attempt to explain the apparent inconsistencies between the two decisions. The planning permission was quashed.

Baroness Cumberlege of Newick & Anr v Secretary of State for Communities and Local Government

New 'Vento' Bands

Following a consultation, the Presidents of the Employment Tribunal have issued revised guidance on the amount of compensation payable for injury to feelings in discrimination cases (the 'Vento' bands).

In future, the guidance will be subject to revision on an annual basis, without the need for further consultation, with the first review taking place in March 2018.

The Presidents consider that, for the time being, the Retail Prices Index (RPI) is the appropriate measure of the rate of inflation to be applied.

Applying the formula adopted by the Presidents, the new bands for awards for injury to feelings are as follows:

- **Lower band** - between £800 and £8,400. Awards in this range are appropriate where the act of discrimination is an isolated or one-off occurrence;
- **Middle band** - between £8,400 and £25,200. Awards in this range are made in serious cases but where an award in the top band is not merited; and
- **Top band** - between £25,200 and £42,000. Awards in this range are made in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in exceptional circumstances will a compensation award for injury to feelings exceed the upper limit.

The Guidance will apply to claims presented to the ET on or after 11 September 2017.

The response to the consultation can be found on the Courts and Tribunals Judiciary's website or if you would like more information and advice, contact us on **0207 400 7770 or info@moonbeever.com.**

Why You Should Appoint a Solicitor as Executor of Your Will

If ever there was a case that proved the wisdom of appointing a solicitor as executor of your will, it must be that of a war hero whose thoroughly dishonest son made no attempt to ensure that his wishes were honoured following his death.

The decorated Second World War veteran had left the majority of his estate to his four surviving children and to his grandchildren by a daughter who had predeceased him. By a codicil to his will that he signed a few months before his death, he made the mistake of appointing his youngest son as his executor. That decision lay at the root of a dispute notable for deep and bitter enmity between siblings.

After his death, the son made no attempt to take out a grant of probate or otherwise fulfil the role with which his father had entrusted him. A judge ultimately removed him as executor and appointed his older brother as personal representative of the estate. The latter subsequently launched proceedings against his younger sibling to recover money that he was alleged to have misappropriated from the estate.

The High Court condemned the younger son as an aggressive and gratuitously rude witness who appeared to have felt that his position as executor gave him the right to do whatever he wished with his father's estate. He had, amongst other things, withdrawn £76,000 from his father's bank account and kept it for himself, rather than sharing it amongst the beneficiaries of the will.

His father's military medals had been lost or stolen whilst he was executor and he had also breached his legal duties by refusing to part with the title deeds to the family home so that it could be sold and the proceeds divided. The Court would hear further argument as to the precise sums he would be required to reimburse the estate. It also took the rare step of referring papers in the case to the police.

Ridley v Ridley

Consumer Claims Agglomeration Legitimate – Landmark High Court Ruling

In a ground-breaking decision, the High Court has upheld the legitimacy of the growing number of companies that specialise in taking over legal claims by disgruntled consumers and pursuing them, en bloc, against alleged wrongdoers.

The case concerned one such company that had taken assignment from a number of members of the public of their claims against an online data storage provider that was alleged to have charged them unfair cancellation fees. Those who assigned their causes of action to the company had the option of receiving a fixed sum or 60 per cent of sums recovered in the event that the claim against the provider succeeded.

In attempting to strike out the company's claim, the provider - which denied that its charges were unfair - argued that the company's mode of business amounted to illegitimate support of litigation in which it had no concern whatsoever. The company's methods were alleged to constitute "maintenance" and "champerty" activities which have been banned since medieval times when intermeddling with litigation was rife.

In rejecting those arguments, however, the Court found that there was a strong public interest in upholding the validity of the assignments and in permitting the company to pursue its claim. Individual claims by the provider's customers would be too small to be cost- or time-effective and the company had a legitimate and genuine commercial interest in being able to pursue the claims assigned to it.

The company's methods were an innovative and responsible means of enhancing access to justice in small money cases and there was no risk of the litigation process being abused, inflated damages being awarded or frivolous litigation being pursued. Arguments that the assignments were an attempt to circumvent the regulatory provisions concerning the provision of legal services contained within Section 13 of the Legal Services Act 2007 were also rejected.

Casehub Limited v Wolf Cola Limited

GDPR – ICO Consults on Written Contracts

The General Data Protection Regulation (GDPR), which replaces the EU Data Protection Directive, is a comprehensive data protection regime aimed at achieving a high level of security of network and information systems across the EU and giving individuals greater control over their own personal data. The GDPR will apply to all EU member states from 25 May 2018 and will impose significant compliance issues for any organisation which holds 'protected data'. The Government has indicated that the GDPR will remain on the UK statute books after Brexit. To this end, a new Data Protection Bill has been introduced to Parliament that will transfer the GDPR into UK law, replacing the Data Protection Act 1998 and introducing new data protection rights that take into account developments in digital technology and the way organisations often collect a wide range of information about people.

Under the GDPR, data processors have new responsibilities and liabilities in their own right and both controllers and processors may be liable to pay damages or be subject to fines and penalties. Also, the written contracts between controllers and processors must contain specific detailed terms.

The Information Commissioner's Office (ICO) is running a short consultation on draft guidance on the responsibilities and liabilities of processors under the GDPR and what must be included in written contracts. Responses must be submitted by 10 October 2017.

Withdrawal of Life-Sustaining Treatment – Who Decides?

Should decisions to withdraw life-sustaining treatment be made by a patient's loved ones, in consultation with doctors, or by judges? The High Court tackled that burning issue in the case of a Huntington's disease sufferer who had for years been in a minimally conscious state.

The inherited condition, which leads to the inexorable death of brain cells, had left the mother of two incapable of recognising members of her family. She had been hospitalised for more than 20 years and her mother, who visited her four times a week, had described her as rarely awake. Doctors could only speculate as to her level of awareness and the extent of her suffering.

In those circumstances, the hospital that cared for her applied to the High Court for a declaration that it would be lawful to withdraw the clinically assisted hydration and nutrition on which she depended. The Court granted the relief sought and the woman died peacefully, aged 50, about two weeks after treatment was withdrawn.

In finding that the hospital's application, whilst understandable, was unnecessary, the Court noted that treating clinicians and the woman's family were unanimous in their views that further treatment would not be in her best interests. Given that agreement and the particular facts of the case, the decision to withdraw treatment could lawfully have been taken without judicial intervention.

The Court noted that costly and time-consuming proceedings in such cases are not mandatory and could have a deterrent effect. Clinicians and families could be deflected from making true best interests decisions and there was a risk that inappropriate treatment might be continued by default. In the present case, treatment that neither doctors nor the woman's family considered to be appropriate was persisted with for almost a year before a judicial decision was sought.

M v A Hospital

Prescriptive Rights of Way – The Absence of Permission Is Vital

Rights of way across the land of others can become established if they have been used openly and without force for at least 20 years. However, such use must also be without permission and, as one case showed, that can often prove a sticking point.

The owners of land on which a workshop stood claimed a vehicular right of way over an adjoining yard. The First-tier Tribunal (FTT) found that the yard had been used as a means of vehicular access to the workshop for the required 20-year period.

However, in refusing to recognise a right of way, the FTT noted that the workshop owners had only succeeded in proving that the relevant use of the yard had been without the permission of its owners for 10 years. It had thus not been established that the use had been as of right for two decades or more.

In upholding the workshop owners' appeal against that decision, however, the Upper Tribunal (UT) found that the FTT had misapplied the burden of proof. Having established that the yard had been used as an access route openly and without interruption for the required period, the workshop owners had the benefit of an evidential presumption that that use had been without permission and as of right.

The yard owners had not called any evidence to rebut that presumption and the workshop owners had thus discharged the burden of showing relevant use, as of right, for a sufficient period. In the circumstances, the UT directed that the right of way be registered as an established burden on the yard owners' land.

Welford & Ors v Graham & Anr

Making a Will? Don't Forget Your Moral Responsibilities to Your Family

When making your will, the law expects that you will not forget your responsibilities to those who have a legitimate call on your bounty. The point was made by one case in which a father left his entire £265,000 estate to a friend, cutting out his three children.

The man had severed links with his family following the end of his second marriage and had for many years had little or no contact with his children. His daughter's efforts in adulthood to rekindle her relationship with him had borne fruit for about three years before they fell out and all communication between them lapsed.

After his death, she launched proceedings under the Inheritance (Provision for Family and Dependants) Act 1975 on the basis that he had been obliged to make reasonable provision for her in his will. Working for a retailer under a zero hours contract, she was in straitened financial circumstances and her lack of funds was standing in the way of her ambition to qualify as a veterinary nurse.

Her application was, however, resisted by the sole beneficiary of the will, a close friend of her father who had visited him regularly during his final months when he was dying from cancer. He claimed that the man had had no relationship with his daughter and pointed to a side letter attached to the will in which the man claimed not to have seen or heard from his children in 18 years. The friend claimed to have spent his entire inheritance on settling his debts and other expenses and that he faced his own financial difficulties.

In upholding the daughter's claim, however, a judge found that it was a not a case of a prodigal child who only reappeared when there was the possibility of some money to be had. It was clear that she very much regretted the absence of a relationship with her father and that she had a moral claim on his bounty. She was awarded £30,000 from his estate. The friend had earlier agreed to pay £22,000 from his inheritance to one of the man's sons who was unable to work due to health problems. His other son had made no claim on the estate.

Nahajec v Fowle

Penalised by Officialdom? A Good Solicitor Can Help

Official decisions can have a dramatic impact on your life - but one of the benefits of living in a country where the rule of law prevails is that they can be challenged. The point was proved by one case in which a single mother took on HM Revenue and Customs (HMRC) in a dispute over tax credits and won hands down.

The woman's tax credits had been stopped on the basis that she was not a lone parent, but rather was living with the father of her children. She explained that they were separated and, in lieu of child maintenance, he had permitted her to live in his house when he was away on business, which he frequently was.

She moved out to live with her parents whenever he returned home and it had been agreed between them that, when their children left full-time education, she would either move out or start to pay rent. Her arguments, however, did not impress HMRC and her challenge to the decision was rejected by the First-tier Tribunal (FTT).

In upholding her appeal against the latter decision, the Upper Tribunal (UT) found that the FTT had failed to analyse the reasons for HMRC's decision with sufficient rigour. The woman's description of her living arrangements was credible and the FTT had erred in reversing the burden of proof against her. The UT substituted its own decision that the woman's tax credits should be restored to her.

NI v HM Revenue and Customs

Ireland Budget 2018 Highlights

Following Minister Paschal Donohoe's Budget speech on 10 October 2017, we have rounded up the salient points here:

Highlights

- A threefold increase in Stamp Duty from 2% to 6% on commercial property transactions effective from midnight
- A reduction in USC for earnings up to €70,044
- An increase to the tax credit for the self-employed to €1,150 and to the Home Carer Credit to €1,200
- Increase in Standard Rate Band of €750
- 12.5% Corporation Tax Rate "to remain a core part of our offering"
- Introduction of Sugar Tax from April 2018

Nature of Confidentiality Defined in Court of Appeal Test Case

The nature of confidentiality has been pondered by the Court of Appeal in a guideline decision concerning a parent who posted information about eleven-plus examination papers online before all the candidates had sat them.

The exam was taken by over 1,800 pupils vying for entry to six grammar schools in one local authority area. The majority of them sat it on the same day, but over 300 candidates took it later. In the interim, the parent published details of the questions on a website, giving rise to concerns that those pupils who took the exam later may have gained an unfair advantage.

After the parent declined the council's request to take down the posts, an injunction was issued against him by a judge. He was banned him from publishing or disclosing the contents of eleven-plus exam papers used in three consecutive years. The judge found that dissemination of the information was plainly unauthorised and that he had breached the council's confidentiality rights.

In challenging the injunction, the parent pointed out that candidates had never been told not to disclose the contents of the exam papers to others. Many would have done so to their parents without committing any breach of confidence. The information that he had published was in any event so limited and imprecise that it did not compromise the examination process.

In dismissing his appeal, however, the Court noted that it would have been obvious to him, and to any other reasonable person, that the council did not want information about the contents of the exam to be disseminated. It did not follow that, because a child could tell his or her parents about the questions, the parents were free to publish that information, knowing that other candidates were yet to take the exam.

Such communications were made in very particular circumstances, as part of the child-parent relationship, and did not dilute the information's confidential character. It was entirely consistent with principle to impose a duty of confidentiality on parents in those circumstances. The information posted by the parent was far from trivial and was not so generally accessible that it had ceased to be confidential.

Matalia v Warwickshire County Council

Buying a Holiday Home Abroad? You Need Independent Legal Advice

When buying holiday homes abroad, it is absolutely vital to employ solicitors who are entirely independent of the vendors. One case that resoundingly proved the point concerned a development of luxury homes in Italy that was alleged to have been a money laundering front for the IRA and the mafia.

Almost 200 UK and Irish purchasers had paid deposits of up to £105,000 in respect of seaside homes that had been marketed in glossy brochures but had yet to be built. After allegations that the project was connected to organised crime emerged, the development was taken over by the Italian police. Only a small number of units were ever completed and the purchasers lost their deposits.

In order to recover their money, the purchasers launched proceedings against a firm of Italian solicitors that was registered to practise in England. The firm, which had purported to give the purchasers comprehensive legal advice in respect of their investments, had become involved at the behest of agents who were engaged in selling the properties, one of whom was said to be a convicted IRA terrorist.

A judge found that the firm had breached the duties that it owed the purchasers in numerous respects. Amongst other things, it had failed to ensure that the proper guarantees and planning permissions were in place before parting with its clients' money. It had failed to reveal to the purchasers the substantial commissions that were being paid to the selling agents or to alert them to the risks of organised criminal activity in the region of Italy concerned.

Having acted in breach of trust, the firm was ordered to pay equitable compensation to most of the purchasers in the full amount of their deposits. Some of them were, however, confined to compensation in respect of that part of their deposits that had been paid to the agents. In dismissing the firm's challenge to the judge's ruling, the Court of Appeal could detect no error of law in his conclusions. At Moon Beever our property team can help you with property purchases abroad and we have extensive associations with law firms in many countries worldwide who can assist.

Main & Ors v Giambrone & Law & Ors

It's Good To Be Trusting – But Important Agreements Should Be In Writing

It is good to be trusting, particularly of loved ones, but, where a great deal is at stake, it really does make sense to get agreements in writing. In one case, a woman's claim that her ex-partner promised to give her half his property business failed due to a lack of documentary evidence that any such conversation took place.

The couple's stormy relationship had lasted more than 15 years and they had a child together before their acrimonious separation. She claimed that she had put her life savings - about £200,000 - into buying a family home and that, in return, he had promised to transfer to her 50 per cent of the shares in his company.

In rejecting her claim, however, a judge noted that the absence of a single document to back up the woman's claim was surprising. It was hard to believe that, in such an important matter, she would have relied on his word alone. There was, in truth, no imbalance between them so far as the property purchase was concerned as he had agreed to pay instalments on the £250,000 mortgage.

In finding on the balance of probabilities that the alleged promise had not been made, the Court noted that the driven and ambitious man treated his business as his top priority and it was inherently improbable that he would have agreed to part with half of it. The woman was ordered to pay the substantial legal costs of the case.

Turner v Durant

Informational Law analysis: What will the Data Protection Bill (the Bill) mean in practice?

Christopher Burt, a senior associate at Moon Beever Solicitors, was interviewed by Kate Beaumont for Lexis PSL regarding provisions relating to law enforcement processing, contained in Part 3 of the Data Protection Bill

Original news

Government publishes Data Protection Bill, LNB News 14/09/2017 105

The government has published the Bill which it believes will make data protection laws fit for the digital age. The Bill will replace the Data Protection Act 1998 (DPA 1998) and sets new standards for protecting general data, giving people control over their own data and providing new rights to move and delete personal data. It will preserve existing exemptions which the government says have worked well in DPA 1998, to ensure businesses and organisations can continue to support research, financial and legal services, and journalism. It also includes specific measures to allow action against terrorist financing, money laundering and child abuse.

What is the background to Part 3 of the Bill?

The General Data Protection Regulation (EU) 2016/679 (GDPR) was not the only act adopted by the European Parliament and Council in April 2016. To ensure comprehensive reform of European data protection law, the Data Protection Law Enforcement Directive 2016/680/EU (DPLED) was issued at the same time.

Recital 19 of the GDPR made clear that 'the protection of natural persons with regard to the processing of personal data by competent authorities' for various law enforcement activities, was to be the domain of the DPLED, not the GDPR.

Unlike the directly applicable GDPR, the DPLED is a Directive and requires implementation by Member States into domestic law (by 6 May 2018). Within the Queen's Speech and the subsequent Statement of Intent published by the Department for Digital, Culture, Media and Sport (DDCMS), it became clear that the government's preferred strategy was to implement the DPLED as part of a wider act, which would also transpose the GDPR itself.

This decision to create a new data protection act based on the GDPR and the DPLED has clear practical advantages, not least given the need to Brexit-proof new legislation.

The Bill was published on 13 September 2017 and will have its second reading in the House of Lords on 10 October 2017. It is a cautious (and lengthy) document and may well face opposition in Parliament. But despite its flaws, two decades after DPA 1998, the UK will soon have a comprehensive replacement, compliant with European legislation and suitable for the 21 century digital world.

How does the Bill seek to implement the DPLED?

The current revision of the Bill contains seven parts.

Part 3 (ss 27 to 79) addresses 'the processing of personal data by competent authorities for law enforcement purposes' and makes only a small number of direct references to the DPLED. Part 3 follows the structure of the DPLED, with some adapted language, and sets out the key definitions, principles of data protection, rights of data subjects, obligations of controllers and processors and transfers of data to third countries.

Some aspects, such as in relation to supervisory authorities (the Information Commissioner in the UK) are blended into other parts of the Bill.

In what ways does the Bill diverge from DPLED for law enforcement processing?

One of the main differences is that the DPLED has narrower application than the Bill. The DPLED excludes data processing outside the scope of EU law. The Bill does not contain this exclusion and applies to all relevant data processing in the law enforcement arena whether cross-border or domestic and whether governed by EU law or not. According to DDCMS this 'demonstrates our commitment to staying at the forefront of data protection standards'.

Another difference is the definition of competent authority. The DPLED refers broadly to 'any public authority competent for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security' (Article 3(7)) and extends the definition to 'any other body or entity entrusted by Member State law to exercise public authority and public powers' for those purposes.

By contrast, the Bill provides a specific list of entities at Schedule 7 (such as the police, HMRC, the courts) and 'any other person if and to the extent that the person has statutory functions for any of the law enforcement purposes'.

Some commentators have said that this will unfairly exclude individuals bringing private prosecutions.

What permitted exemptions and derogations from the GDPR would apply under the Bill? When can personal data be lawfully processed by law enforcement agencies?

A number of derogations were negotiated during the years of consultation leading to the adoption of the GDPR and DPLED. Some of these derogations have garnered more press interest than others, including the modification in the UK to the age at which a child may give consent to data processing, without parental consent (s 18 of the Bill).

Another useful preservation is the right of private organisations to process criminal conviction and offence data, something not otherwise permitted under the GDPR. While, this is still subject to organisations having a suitable policy in place for the purpose (Schedule 1, Part 1) it ensures that, for example, criminal records checks can still be undertaken by employers, and insurers can continue to underwrite policies based on complete information etc.

A competent authority can lawfully process data, for law enforcement purposes (s 29), in accordance with the principles listed in Chapter 2 of the Bill. These include that:

- processing be lawful and fair (s 33),
- the purposes of processing be specified, explicit and legitimate (s 34),
- personal data should be adequate, relevant and not excessive (s 35),
- personal data be accurate and kept up to date (s 36),
- personal data be kept for no longer than is necessary (s 37),
- personal data be processed in a secure manner (s 38).

In addition, there are provisions on archiving and sensitive processing along with a series of duties imposed on controllers/processers and rights available to data subjects.

Some of the more prosaic provisions include ss 59 and 60 on reporting and logging and the requirement for impact assessments under s 62. Processing must be technically and organisationally secure (s 64) and a data protection officer will usually need to be appointed (s 67).

One of the wider themes in the GDPR and now in the Bill are for data protection 'by design and default'. This features in Part 3 at s 55 and requires controllers to 'implement appropriate technical and organisational measures' to integrate the principles and safeguards into routine processing.

For competent authorities this means a change in emphasis to demonstrable and effective compliance.

In practical terms, what do the proposed changes mean for requests for personal data from investigatory and enforcement bodies?

Subject access requests are provided for under s 43 of the Bill. However, the right of data subjects to request information is tempered by a wide-ranging right to restrict disclosure under subs 43(4). The headline change will be the removal of the (small) fee charged to data subjects, at least on any first reasonable request for disclosure.

To what extent does the Bill prepare for Brexit, and how would this Part apply once the UK exits the EU?

Without more, the GDPR will have direct application in the UK in May 2018 (and the government will have needed to address the DPLED in some fashion). As the UK is due to leave the European Union in March 2019, the data protection landscape in the UK will have changed by May 2018 regardless of whether Parliament secures a new data protection act in advance.

However, it seems likely that this Bill will pass in broadly its current form, in time. The Bill is a

worthy attempt to modernise the UK's data protection regime, comply with EU law, account for domestic concerns/interests on data protection and retain as many of the familiar concepts of the DPA 1998 as possible.

Christopher Burt specialises in commercial litigation, civil fraud and insolvency (domestic and international). He speaks on topical issues including the GDPR.
This article was first published on Lexis®PSL Information Law on 9 October 2017.

Frances Coulson to represent the UK on the council of Insol Europe

Frances Coulson, Senior Partner at Moon Beever solicitors, has been elected to the Council of Insol Europe, representing the United Kingdom.

Insol Europe is the European organisation of professionals who specialise in insolvency, bankruptcy and business reconstruction and recovery. It facilitates the exchange of information and ideas among members and represents the industry in discussions with European and international legislative bodies, encouraging greater international co-operation, and it leads the way in lobbying in this area.

Frances Coulson is also Head of Insolvency and Litigation at Moon Beever running a substantial team of insolvency and litigation specialists. She maintains a high-profile within the industry, undertaking regular speaking engagements in the UK and abroad on issues including insolvency and fraud. She is a trustee of the Fraud Advisory Panel and former president of the UK insolvency trade association R3.

At the recent Insol Europe conference on Preventive Restructuring held in Warsaw, Frances was an active Chair of two sessions on differences and similarities between the Proposed EU Commission Directive and the UK Insolvency Service 2016 Review proposals. She later presented to over 400 delegates, with French and German counterparts, a session on prepacks and whether they represent a "magic tool" to rescue a business.

"We are entering an important period for cross-border issues and insolvencies as the fine detail of arrangements following Brexit are negotiated and agreed," she said. "During this time, communication and partnership with our European colleagues in the industry will be more important than ever. I am delighted to be able to support strong relationships, trust and understanding in my new position on Insol Europe's Council."

To seek advice from Frances Coulson and her team, contact us on 020 400 7770 or info@moonbeever.com.

The Criminal Finances Act 2017

The Criminal Finances Act, which received Royal Assent on April 27 2017 introduces new corporate criminal offences of failing to prevent facilitation of UK and foreign tax evasion. These new offences came into effect on September 30 2017 and it is worth knowing how the new legislation might affect you and your business.

Government guidance, required under the Act, was published on September 1, 2017 and comes into operation on September 30. This is supplemented by government-endorsed sector-specific guidance from industry bodies. The Law Society and CIOT guidance has been published and guidance for the financial services sector is anticipated shortly. It is clear that each organisation must look at its own specific risks; it would be unwise to rely on generic guidance or to rely on existing procedures to combat related offences.

Potential fines are unlimited. Disclosure may also be required to professional regulators and conviction may prevent organisations being eligible for public contracts as well as lead to wider reputational damage. While financial services, legal and accounting sectors are expected to be most affected, all companies and partnerships are potentially within scope. Both UK and international businesses are potentially subject to it.

The UK domestic offence is split into three components, referred to as "stages":

Stage 1

Criminal evasion of tax by the taxpayer - This refers to the offence of cheating the public revenue and all other statutory offences involving dishonestly taking steps with a view to, or being "knowingly concerned in", the fraudulent evasion of tax.

Stage 2

Criminal facilitation of the tax evasion by an "associated person" of the relevant body who is acting in that capacity – this refers only to deliberate and dishonest action and will not pick up assistance which is unwitting, even if it is negligent. "Associated person" is a person who performs services for or on behalf of the relevant body – this is deliberately vague and broad and guidance is clear that this may include agents and sub-contractors as well as employees.

Stage 3

Failure by the relevant body to prevent that facilitation – This is a strict liability offence. There is a statutory defence where at the time of the offence the relevant body had reasonable prevention procedures in place to prevent its associated persons from committing tax evasion facilitation offences or where it is unreasonable to expect such procedures.

The foreign offence starts from the premise that tax evasion is wrong and that a UK-based relevant body should not escape liability for failure to prevent the facilitation of tax evasion simply because the foreign country suffering the tax loss is unable to bring a prosecution against it.

In addition to the three stages outlined above, the foreign offence requires a "UK Nexus" and "dual criminality".

UK Nexus

This will exist where the relevant body

- Is incorporated or formed under UK law;
- Carries on business in the UK; or

Where any of the conduct constituting the facilitation of the foreign tax evasion takes place in the UK. Examples include any UK bank with overseas branches; any overseas bank with a London branch; and any bank which does not conduct its business in the UK but where the associated person facilitated the criminal act from the UK.

"Dual Criminality"

This requirement is met when both the actions of the taxpayer and of the facilitator would be an offence in the UK and the overseas jurisdiction has equivalent criminal offences at both taxpayer and facilitator level. **There will be no UK offence if the facilitation was inadvertent or negligent, regardless of the standards of the foreign law.**

It is already clear that, because of the financial and reputational risk stemming from any suggestion of an offence having been committed, businesses are looking to see how they can put procedures in place, so that the defence is potentially available. To seek advice on this subject, contact us on **020 400 7770 or info@moonbeever.com.**

Would you like to know if someone is making a Land Registry application against your property?

For most of us it is our most valuable asset. Yet the Land Registry does not have an up-to-date contact address for a large number of property owners, should they need to reach them.

Why does it matter?

Fraudsters can mortgage or even try to sell properties by pretending to be the property owner.

What can I do?

The first step is to check all of your Land Registry titles to ensure that your address for service is correct. You can have up to three addresses for service including overseas addresses and email addresses. If your address as shown on the registers is incorrect we can help you correct them or include further addresses for you.

Since 2014, the Land Registry have been offering a free monitoring service called the Property Alert Service enabling users to receive email alerts each time there is any activity on their property. Once you have signed up to the service, Land Registry will email you when certain activity occurs on your monitored properties so that you may take action if necessary. You can monitor up to ten properties. The activity need not always be fraudulent and can be something as simple as an application requesting an official copy of the title of a property. *Whatever the reason, wouldn't you like to know?*

Some properties are more at risk than others, such as rented out properties, mortgage-free properties and empty properties. Nevertheless, it is a service which all properties owners should register with to protect their assets.

You do not even need to own the property to monitor it. This can be important for a claimant embroiled in legal proceedings, a defendant's property is often the only asset available with which to enforce against, as was covered in an article earlier this year titled 'The Early IP Bird Catches the Asset Worm: A Quick Guide to the Land Registry's Property Alert Service' by Salina Brindle from the firm's Insolvency Team,

If you have any queries on this article, contact Ahmed Anwar at aanwar@moonbeever.com

Firm News

We were pleased to welcome back Alexandra Bartrope in private client following the birth of her daughter Tilly last year. Returning in November also is Sarah May to the Insolvency Team. Sarah was made a partner in January 2017 whilst on maternity leave. Sara Crystal returns in February 2018 to the Insolvency Team. Meanwhile Sam Fenwick joined us some months ago as a Senior Associate in Insolvency and Simon Duncan recently returned from his sabbatical in Oxford where he was taking a PhD in insolvency set off. New trainee Kate Herbert joined us in summer from Stephenson Harwood. We were particularly sorry to see Natasha Thompson leave the Admin Team after 15 years. Natasha was Frances' right hand woman but wanted to spend more time with her small daughters and so a tearful farewell was said. Other leavers included Maeve O'Higgins in Family and Tony Sampson in insolvency, both off to pastures new. The firm has had a busy year including quite a lot of international focus with Daniel Moore and Frances Coulson visiting Hong Kong to see numerous clients, as well as Frances speaking in Warsaw at Insol on the proposed EU Directive on Restructuring, and in Dalian, China in October on the use of civil recovery and insolvency in tackling fraud. Slightly closer to home Frances spoke at the small practitioners group conference for R3 giving a corporate legal update in Coventry in early November, and Salina Brindle Chaired a full day Fraud Conference in London for R3. Graham McPhie is a regular speaker for R3 and others, most recently speaking at the ICAEW Insolvency conference. Sam Fenwick gave a webinar for LexisNexis with members of the Bar on the new Insolvency Rules. If you would like information about our quarterly insolvency seminars please email **newsandevents@moonbeever.com**

Ever Popular Insolvency Quiz raises £9,754.80 for Debbie Fund and Macmillan Cancer

Each year, our Insolvency Quiz proves to be a great evening and an excellent fundraiser for our chosen charities and this year was no exception. In October, friends and clients of Moon Beever gathered for the annual quiz and auction to raise money for Debbie Fund and Macmillan Cancer. Debbie Fund is a charity set up in memory of Debbie Phillips and which funds research into treatment for cervical cancer. Macmillan Cancer is a charity which provides support for those suffering with cancer, including providing nurses and end of life care.

As usual, cheating in the quiz was both strictly monitored and highly encouraged, with cheaters paying fines for their use of internet assistance. Fortunately, quiz attendees were not shy of cheating and over the course of the evening, £9,754.80 was raised for the two charities.

Our Private Client Quiz will be held at Balls Brothers on 20th February 2018. For more information on this event, contact us on 0207 400 7770 or info@moonbeever.com.

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