MOON BEEVER
SOLICITORS

NEWSLETTER SUMMER 2018

MOON BEEVER JOINS STONEWALL'S DIVERSITY CHAMPIONS PROGRAMME

Law firms are ultimately a product of their staff. At Moon Beever our highly skilled lawyers and our dedicated support teams have made the firm what it is today.

Diversity and inclusion have always informed the way that we recruit, develop and retain talented people. We think that benefits not only our staff themselves but also our clients and the wider community. We have long worked with a number of organisations and networks to this end and our published diversity statistics show that we have made good progress.

To further develop our position on diversity inside and outside the workplace, Moon Beever has recently joined **Stonewall's Diversity Champions programme.** The programme has some 750 members, many from the legal and professional services sectors, but all with shared values in relation to inclusion and acceptance. Stonewall works with members to ensure that LGBT staff are "accepted without exception" in the workplace. The programme aims to help us work proactively to improve wider attitudes to inclusivity and diversity too.

We are very pleased to be a member of the programme and look forward to working with Stonewall going forward.

FIRM NEWS AND NEW WEBSITE


Christina Fitzgerald


Ian Rees


Robert Paterson

In our last newsletter we announced the joining of **Robert Paterson** a new Insolvency & Restructuring Partner. We are delighted to announce two more additions to the same department, with **Ian Rees** having joined us as an Associate in July, after a number of years at HM Revenue & Customs Solicitor's Office, and **Christina Fitzgerald** joining on 13th August as a Partner. Christina expands our non-contentious (as well as contentious) offering and has particular recent experience in charity and professional practices restructuring.

We also have Barnaby Heap joining as a commercial property associate on 10th September and Richard Boulding joining as our new Head of Private Client on 3rd September. Barnaby is an experienced commercial property lawyer with good clients and contacts and will be a great addition to the department. Richard is very experienced and brings his clients including his cases as a Court of Protection Deputy. We are still interviewing other private client, debt and residential property lawyers to complete our recruitment drive and broaden our offering to our client base.


David Toms

We are delighted that after working with us for almost 20 years **David Toms** has qualified as a solicitor on 1st August 2018. It takes dedication to undertake the exams whilst working and we are delighted to congratulate David on his achievement. David is a solicitor in our private client department servicing a wide range of work in wills probate and trusts as well as intestacy, lasting powers of attorney and succession planning.


Richard Boulding

We are delighted to welcome **Richard Boulding** who joins us on 3rd September as our new Head of Private Client. Richard deals with trusts, capital tax planning, probate, wills, intestacy, lasting powers of attorney and also has a Court of Protection practice. Richard has dealt with a considerable number of high value complex probate estates. He has also been a Court of Protection Deputy since 2002. In addition, Richard specialises in contentious probate. Richard is an alumnus of Dundee University but has practised in England and Wales since the 80's. He is a full member of STEP (The Society of Trust and Estates Practitioners). We hope that many of you will have the opportunity to meet Richard in the coming year and he will welcome the opportunity to meet many of you and discuss your succession planning needs. If you would like a chat do contact Richard at **rboulding@moonbeever.com** or telephone him on 0207 539 4123

Finally, for now, we have 2 marketing managers beginning on 10th September, **Alex Watt** and **Sophie Hudson.** They both have good experience in law firms, and good all round and digital media marketing skills and experience. With Chris Burt's dogged and excellent work on the new website we will focus on digital media more in the coming months. All in all a very positive and exciting set of recruits. Finally, do check out the new website at **www.moonbeever.com** – we hope you will like it. It is a work in progress but we think it is a big improvement on the old site- we hope you will agree!

Frances Coulson, Senior Partner.

Bedford House, 21a John Street, London WC1N 2BF Tel: 020 7400 7770 Fax: 020 7400 7799
e-mail: info@moonbeever.com website: www.moonbeever.com

Independent Contractors and Vicarious Liability – Court of Appeal Test Case

Employers generally bear legal responsibility for the misdeeds of their employees under the principle of vicarious liability - but what about independent contractors? The Court of Appeal tackled that thorny issue in a ruling that modernised the law.

The case concerned 126 women who applied for jobs with a high street bank and were required to undergo pre-employment health examinations by a GP. The women claimed that the doctor took the opportunity to sexually assault them. After solicitors launched proceedings on their behalf, a judge found that it would be fair, just and reasonable for the bank to hold vicarious liability for the doctor's actions.

In challenging that ruling, the bank - which neither admitted nor denied that the sexual assaults occurred - argued that the GP was neither its employee nor was their relationship akin to employment. He was self-employed and had been engaged as an independent contractor. It was submitted that it was preferable to have a bright line test and that the imposition of vicarious liability should not be extended beyond relationships that are, or are close to, employment.

In ruling on the matter, the Court noted that use of independent contractors is increasingly prevalent in the modern economy. They often perform operations intrinsic to business enterprises over long periods and are subject to precise obligations and high levels of control. Depending on the particular facts of a case, vicarious liability could thus be extended to such a relationship.

In the particular case, the GP was deceased and his estate had been distributed. The bank was thus clearly in a better position to satisfy the women's claims if they succeeded. He had examined the women on the bank's behalf and, although they might have had the benefit of being alerted to health problems, the principal benefit was clearly to the bank as their prospective employer.

In dismissing the appeal, the Court noted that the examinations were part of the business activity of the bank and that the risk of wrongdoing had arisen from the bank's engagement of the GP to perform them. He was paid a fixed fee for each examination and the level of the bank's control over him was sufficiently high to make the bank vicariously liable for his actions. The Court's ruling opened the way for the women to pursue their damages claims to trial.

Barclays Bank PLC. v Various Claimants. Case

Civil Partnerships – Supreme Court Puts Pressure On to End Discrimination

In a landmark decision which will put intense pressure on the Government to reform the law, the Supreme Court has declared that the unavailability of civil partnerships to heterosexual couples is incompatible with human rights.

Whilst the institution of marriage is now available to both same-sex and opposite-sex couples, the Civil Partnership Act 2004 continues to provide that only the former may enter into a civil partnership. It was that inequality of treatment which prompted a heterosexual couple who had deep-rooted moral objections to marriage to launch a judicial review challenge.

They argued that their inability to enter into a civil partnership amounted to a breach of Article 14 of the European Convention on Human Rights (ECHR) - which outlaws discrimination - together with their right to respect for privacy and family, which is enshrined in Article 8 of the ECHR. Their arguments were, however, rejected by the High Court and the Court of Appeal.

The Government conceded that there is an inequality of treatment between same-sex and opposite-sex couples in the context of civil partnerships and that the couple's human rights were engaged. It argued, however, that, in the light of evolving social attitudes, it was entitled to take time to consider whether that inequality should be resolved by abolishing civil partnerships or making them available to both same-sex and opposite-sex couples.

In upholding the couple's appeal, however, the Supreme Court noted that, although it was reasonable to allow time for the Government to reflect, the situation of inequality had persisted for several years and there remained no end point in sight. Tolerance of discrimination for an indefinite period, whilst the Government pondered how to end it, could not be characterised as a legitimate aim or a justification for human rights violations.

The interests of the community in denying civil partnerships to heterosexual couples were unspecified, whereas the consequences for such couples were far-reaching. Amongst other things, a couple could suffer serious fiscal disadvantages if one of them died before their relationship was formalised. The Court declared that Sections 1 and 3 of the Act, to the extent that they preclude opposite-sex couples from entering into civil partnerships, are incompatible with Article 14, taken in conjunction with Article 8, of the ECHR.

R on the Application of Steinfeld & Anr v Secretary of State for International Development.

Town or Village Green Application Generates High Court Controversy

Registration of land as a town or village green guarantees public access for recreational purposes and protects it against development. However, as a High Court case showed, it frequently generates controversy because it also greatly restricts the use to which land can be put, with a consequent impact on value.

The case concerned a local authority-owned 22-acre site that had for many years been used as playing fields by schools and sports clubs. A local campaign group applied for its registration as a town or village green under the Commons Act 2006, but faced stiff opposition from a school that held a 125-year lease over the site.

The council commissioned a non-statutory public inquiry into the application before an independent inspector, who recommended that the site should not be granted green status. He accepted that local inhabitants had used the site for recreational purposes for 20 years or more, but found that they had not done so as of right.

He reached that conclusion on the basis that clearly visible signs had been in place since the mid-1980s, warning members of the public against trespassing on the site. Those signs were sufficient to render local inhabitants' use of the site contentious and the criteria for registration contained within the Act had thus not been met.

Registration of the site as a green had garnered a great deal of public support and hundreds of people had sent emails to the council supporting that course. The council's Public Rights of Way and Greens Committee ultimately decided to reject the inspector's recommendation and to register the site.

In upholding the school's challenge to that decision, the Court noted that it was not a case in which a council had departed from an inspector's conclusions on the basis of a justified difference in view about the relevant facts. The committee had given no adequate reasons for differing from the inspector and had failed, erroneously and unlawfully, to analyse the evidence or consider the legal significance of the signs.

The Court left the door open to further argument as to what relief should be granted in the light of its ruling. However, it noted that the council and the campaign group would face a very difficult task in persuading the Court that the committee's decision should not be quashed.

R on the Application of Cotham School v Bristol City Council. Case Number: CO/1208/2017

Japanese Knotweed Property Blight – Landmark Court of Appeal Ruling

Japanese knotweed is a pernicious nuisance that blights property values. However, a landmark Court of Appeal ruling has established that, if it encroaches onto your land from a neighbouring property, you are entitled to compensation.

The case concerned two neighbours whose bungalows backed onto a railway embankment which, for more than 50 years, had been home to a burgeoning stand of Japanese knotweed. After they launched proceedings, a judge ruled that Network Rail Infrastructure Limited had for years been aware of the plant's presence on its land and should have known that it posed a reasonably foreseeable risk of causing damage or loss of amenity to neighbouring properties.

The company's efforts to eradicate the plant had been inadequate and the judge found that its failure to match up to its duty as a landowner had caused a continuing nuisance to the neighbours and a diminution in the value of their homes. Each of them was awarded about £15,000 in compensation, including sums that reflected the reduction in the market value of their properties.

In ruling on the company's challenge to that decision, the Court noted that Japanese knotweed is classified as controlled waste and can only be disposed of by licensed contractors. Specialist herbicides are needed to tackle it and its roots, once removed, have to be buried five metres underground, behind a protective membrane, in order to prevent re-growth. It can block drains and undermine structures if left uncontrolled, and mortgage companies are cautious about lending money on the security of homes located within seven metres of Japanese knotweed.

The Court ruled that the judge had been wrong to hold that the presence of Japanese knotweed within seven metres of the bungalows was an actionable nuisance simply because it had diminished the value of the properties. The purpose of the tort of nuisance was not to protect the value of property as an investment or as a financial asset, and to extend the law in order to provide compensation for pure economic loss would be radical and unprincipled.

In dismissing the company's appeal, however, the Court ruled that the encroachment of Japanese Knotweed rhizomes onto the neighbours' land amounted to a nuisance in that it harmed the amenity value of their properties. The presence of the plant placed an immediate burden on landowners in general, given the difficulty and expense of removing it. The plant could fairly be described as a natural hazard which interferes with landowners'; ability to make full use of and enjoy their properties.

Network Rail Infrastructure Limited v Williams & Anr.

Buying a Home Abroad? It's Best to Consult an English Solicitor

Buying a home abroad can be a risky business, and that is why it is wise to instruct a UK-based solicitor with expertise in the legal system of the country concerned to oversee the transaction. In one case exactly on point, 16 British would-be purchasers of luxury Costa Brava apartments risked losing their money due to a Spanish lawyer's negligence.

The flats had been marketed to UK buyers by agents based in this country, who had recommended the Spanish lawyer as part of what they described as a one-stop service. On paying final instalments, the buyers were handed the keys to their apartments and took up occupation. Only then did it emerge that the apartments had been heavily mortgaged by their Spanish developer, which subsequently went bust. The agents had also gone into liquidation. Two of the buyers managed to pay off the outstanding loans, thus obtaining good title to their properties, but the other flats were all repossessed by the lender.

After English solicitors launched proceedings on the buyers' behalf, a judge found that the Spanish lawyer had been negligent in failing to advise them about the risk of paying for the flats without ensuring that they would thereby obtain mortgage-free title to them. The transactions also did not have the benefit of bank guarantees, as required by Spanish law. The Spanish lawyer was ordered to compensate the buyers for their losses and to pay damages for their distress and inconvenience.

In dismissing the Spanish lawyer's challenge to that ruling, the Court of Appeal rejected as fanciful arguments that the buyers were not his clients and that he therefore owed them no duty of care. "Dear Client" letters had been sent to each of them and he had clearly been retained to provide conveyancing services. The buyers were not sophisticated property investors and he was obliged to exercise the degree of skill and care ordinarily to be expected of a competent Spanish lawyer advising English-speaking, non-resident clients.

Adams & Ors v Atlas International Property Services Limited & Ors. Case Number:

Trade Descriptions – Farmer Punished for Selling Bogus Free Range Eggs

Selling goods under a false description is a serious crime. In one case, a farmer who mislabelled ordinary barn eggs as free range received a 30-month prison sentence and a six-figure confiscation order under the Proceeds of Crime Act 2002.

The farmer had generated substantial profits by buying barn eggs at a price between 58p and 85p per dozen before labelling them as free range and selling them on for £1 per dozen. He was sentenced to imprisonment after being convicted of two counts of fraud. The confiscation order came to £505,381 and he was warned that he would serve a further five years in jail in default of payment.

Before the Court of Appeal, his lawyers argued that the amount of the confiscation was disproportionate. It should have been calculated on the basis of his profits - the difference between the price he had paid for the barn eggs and the price achieved for them after they were fraudulently mislabelled. It was submitted that his criminal benefit should have been assessed at £133,111.

In rejecting his appeal, however, the Court found that every penny that he received for the mislabelled eggs was properly made the subject of the confiscation order. To take account of the expense of purchasing the barn eggs would lend a measure of legitimacy to his fraudulent enterprise. Customers had paid a premium price for what they believed was a specific quality of eggs, laid by chickens living in identified conditions, and the goods they received were not what they had paid for.

R v Clarkson. Case

If You Suspect Employee Dishonesty, Act Swiftly

Companies cannot operate without employees having access to their bank accounts and the risk of fraud is therefore sadly ever present. However, as a High Court case showed, with the right legal advice miscreants can be tracked around the world and brought to book.

The case concerned the former chief financial officer of a company that formed part of a large insurance broking group who was alleged to have made, or procured, suspicious payments totalling $1.847 million to two suppliers and repairers of Swiss watches. The funds had been remitted from the company's account, although it had no commercial relationship with either payee, whose invoices were said to have been falsified.

The company had obtained a worldwide freezing order in respect of the former employee's assets from a court in Bermuda, where he was at the time believed to be present. It had also been granted an emergency freezing order by a judge in London after it emerged that the former employee had substantial assets in England, including a bank account and a pension policy.

In extending that order following a further hearing, the High Court emphasised that no wrongdoing on the former employee's part had yet been proved. However, the company's suspicions were based on credible evidence and there was a good arguable case that he had breached his fiduciary duty by fabricating the relevant invoices. He had also failed to comply with a court order requiring him to disclose his assets within the jurisdiction.

The Court noted that Swiss watches are highly mobile assets and that, since the discovery of the suspicious transactions, the former employee had moved widely around the world. The freezing order had been granted in support of the Bermudian proceedings, and there were good grounds for its continuation.

Hiscox Services Limited & Ors. v Abraham.

Enduring Powers of Attorney – Why Using a Solicitor Makes Sense

Enduring powers of attorney (EPAs) are a vital means by which the financial affairs of those who lack capacity to make their own decisions can be efficiently managed. However, those who exercise such powers do not have carte blanche and a High Court ruling showed why it is usually wiser to employ a professional, rather than a loved one, to perform the task.

The case concerned a 95-year-old Alzheimer's disease sufferer who required a very high level of care. There was no dispute that he lacked capacity to manage his own affairs and his youngest son had been entrusted with that role under an EPA.

The son, however, knew nothing of the duties and responsibilities he owed as an attorney. Although he was supposed to exercise his powers solely for his father's benefit, he had, over a period of about six years, used his control over the latter's bank account to make payments totalling £88,366 for his own benefit. Amongst other things, he used his father's money to cover his own household expenses and to pay for a fishing trip, dental treatment and a speeding fine. Sums of money had also been withdrawn from ATMs without explanation.

After his brother, with whom he did not get on, raised concerns, he applied to the Court of Protection for retrospective authorisation of the payments. He pointed out that he had provided a great deal of gratuitous care for his father when he was being looked after at home and that the sums paid to him represented only a fraction of the costs that his father would have incurred in institutional care.

In ruling on the matter, the Court was critical of the son's lackadaisical attitude to his duties as attorney. However, it accepted that he had been entitled to remuneration for the care that he gave his father and that the latter would probably have authorised most of the payments had he been able to do so. The Court granted retrospective approval of payments totalling £72,820. The balance would be treated as a debt to the father's estate and would be deducted from the son's inheritance.

TH v JH & Ors. Case Number: 12421862

Council Slammed for Mishandling £104 Million Contract Tendering Exercise

Judges are on the alert to ensure that tendering for public contracts is conducted transparently and fairly. In one case concerning a contract for the provision of nursing services to young people - worth up to £104 million - the High Court intervened after a local authority fell signally below those standards.

Following a tendering exercise, the council awarded the contract to a private sector healthcare provider at the expense of two NHS trusts that had previously provided the relevant services. The trusts raised a number of complaints and challenged that outcome under the Public Contracts Regulations 2015.

In setting aside the award of the contract, the Court found that there had been no consistency in the way in which bids had been discussed by the council's marking panel. The council's tendering guidelines - which stated that all evaluation documents and marks awarded would be fully documented and agreed by all members of the panel - had been entirely ignored.

The reality was that members of the panel had not been collectively shown notes of the marking process until after the trusts launched proceedings. When pressed for information by the trusts, the council had misled them by redacting certain dates and back-dating three of the individual panel members' evaluation notes.

The Court observed that to describe what happened, as the council did, as merely a regrettable episode of poor administration was an unacceptable understatement. The council's reasoning process was so unclear that it was impossible for the Court to effectively exercise its supervisory powers or to discern whether the marking process had been infected by manifest error. The Court would hear further argument as to the relief that should be granted to the trusts consequent upon its ruling.

Lancashire Care NHS Foundation Trust & Anr v Lancashire County Council. Case Number:

Facing Disciplinary Proceedings at Work? Consult a Solicitor

If you are facing disciplinary proceedings at work, it makes sense to contact a lawyer straight away. The point was made by one case in which a judge came to the aid of a consultant psychiatrist who faced accusations of gross misconduct after a young prison inmate hanged himself.

The psychiatrist worked part time at the prison where the 19-year-old took his own life. She was on leave at the time, but she had assessed him and seen him several times. Following a lengthy investigation, her employer, an NHS trust, informed her that she would be summoned to a formal disciplinary hearing and accused of gross misconduct. She was warned that the proceedings could result in her summary dismissal.

She swiftly contacted solicitors, who argued before the High Court that the evidence that would be available to the disciplinary panel simply could not support a finding of gross misconduct and that the proceedings would amount to a breach of her employment contract.

In issuing an interim injunction, the Court found that the psychiatrist had raised serious issues to be tried and that she had a realistic prospect of establishing that the proposed disciplinary hearing would be unlawful. If the hearing went ahead and she lost her job, damages would not be an adequate remedy. The injunction means that the disciplinary process will be stalled, at least until after the full hearing of the psychiatrist's case.

Ardron v Sussex Partnership NHS Foundation Trust. Case

Claims Handling Company Fined £553,000 for Regulatory Breaches

Repetitive and unsolicited telephone calls offering help in obtaining compensation for mis-sold payment protection insurance (PPI) are viewed by many as something of a modern plague. However, as one case showed, regulators are getting to grips with the problem.

The case concerned a PPI claims handling company that had been the subject of a formal investigation by the Claims Management Regulator (CMR) after the latter received numerous complaints from members of the public. Repeated breaches of the rules were uncovered and a £553,000 financial penalty was imposed.

The CMR found on the basis of recordings of telephone calls that the company's personnel had made misleading statements to potential clients and utilised high-pressure sales techniques. Staff had impersonated customers in making calls to financial institutions; customers had not been advised to read and retain documents and, when people asked not to be called back, their telephone numbers had not been suppressed as they should have been.

In dismissing the company's appeal against the penalty, the First-tier Tribunal noted that it appeared to suffer from an insular culture, resulting in a reactive, rather than a proactive, approach being taken to its regulatory obligations. The company's three shareholders had limited knowledge of the rules but had not bought in the required expertise.

Limited monitoring of calls meant that rogue personnel were able to evade detection and the impersonation of customers on multiple occasions indicated that the company was infected by a lack of honesty and integrity. Given the seriousness of the regulatory breaches, the financial penalty - which represented four per cent of the company's turnover during the relevant period - was warranted.

Help Your Claim Limited v The Claims Management Regulator.

The General Data Protection Regulation

For anyone who has heard about the GDPR, but not yet taken steps to comply - this is what it is and what you must do (and preferably fast).

The General Data Protection Regulation (GDPR), which replaced the EU Data Protection Directive, came into force on 25 May 2018 and now, together with the Data Protection Act 2018 (DPA 2018) forms a large part of the data protection regime in the UK.

The GDPR is intended to achieve a high level of security of network and information systems across the EU and give individuals greater control over their personal data. It applies to all EU member states and will impose significant compliance issues for any organisation which holds "protected data". Although it is European legislation, the Government has indicated that the GDPR will remain on the UK statute books after Brexit and, to this end, the DPA 2018 was enacted, replacing the Data Protection Act 1998 and building on existing data protection rights in order to take into account developments in digital technology and the way organisations often collect a wide range of information about people.

The GDPR regulates the processing of protected data by organisations operating within the EU and those outside the EU that offer goods or services to individuals in the EU. It builds on existing data protection principles, but also makes significant changes, imposing stricter rules concerning the holding and management of data and also the use of personal data for commercial purposes. The most significant addition is the accountability principle, whereby data controllers must keep records to demonstrate how they comply with the data protection principles - for example by documenting the decisions taken about a processing activity.

The penalties for non-compliance with the GDPR can be very substantial - for serious breaches, up to 4 per cent of global turnover or €20 million, whichever is the higher.

For anyone who has missed the deadline for compliance, the Information Commissioner's Office has comprehensive guidance on the GDPR to help organisations comply with its requirements. It is designed for those who have day-to-day responsibility for data protection.

The guidance covers the key points that organisations need to know, referring to the DPA 2018 where it is relevant, and includes links to relevant sections of the GDPR itself, other ICO guidance and guidance produced by the EU's Article 29 Working Party - now the European Data Protection Board.

The ICO intends to continue to develop new guidance and review its resources on an ongoing basis in order to take into account feedback from organisations as to their needs.

In the longer term, the ICO will publish further guidance, under the umbrella of a new Guide to Data Protection, which will cover the GDPR and the DPA 2018, as well as law enforcement, the applied GDPR and other relevant provisions.

To get your data protection compliance right, contact us today on **info@moonbeever.com.**

Landlord Who Failed to Consult Tenants Has Service Charges Capped

Tenants are legally entitled to be consulted before their landlords sign agreements with their managing agents or others that extend beyond a 12-month period and result in the levying of service charges. As a Court of Appeal case showed, failure to comply with such requirements can have extremely serious consequences.

The case concerned an urban block of flats occupied by over 150 leaseholders. The property's freeholder launched proceedings against one tenant in order to recover more than £24,000 in alleged arrears of service charges. Part of that related to the tenant's contribution to fees payable by the freeholder to its managing agent.

That portion of the service charges was, however, disallowed by the First-tier Tribunal on the basis that the agreement between the freeholder and its agent was a qualifying long-term agreement - within the meaning of Section 20ZA(2) of the Landlord and Tenant Act 1985 - to which mandatory consultation requirements applied. There was no dispute that those requirements had not been met. The freeholder's challenge to that ruling was later rejected by the Upper Tribunal.

In dismissing the freeholder's appeal against the latter decision, the Court of Appeal noted that the relevant agreement stated that it would last for one year. However, it did not stop there, also providing that the agreement would continue thereafter. On its true interpretation, the agreement introduced a mandatory requirement that it would continue beyond the initial 12 months for an unspecified further period.

In those circumstances, the Court found that the agreement was indeed a qualifying long-term agreement to which the consultation requirements applied. The failure to comply with those requirements meant that, by operation of the Service Charges (Consultation Requirements) (England) Regulations 2003, the tenant's contribution to the managing agent's fees was capped at £100 per annum.

Corvan (Properties) Limited v Abdel-Mahmoud.

Withdrawal of Life-Preserving Treatment – Supreme Court Clarifies the Law

Where medical professionals and loved ones are unanimous that it would not be in a gravely ill patient's best interests to keep them alive by clinically assisted nutrition and hydration (CANH), they may be withdrawn without seeking permission from a judge. The Supreme Court so ruled in a ground-breaking decision.

The case concerned a formerly active man in his 50s who suffered a catastrophic cardiac arrest, resulting in brain damage. He never regained consciousness and required CANH to keep him alive. His treating physician concluded that, even if he came round, he would be gravely disabled and dependent on others for all aspects of his care. A second professional opinion concurred with that view and the man's family believed that he would not have wished to be kept alive.

The NHS trust that bore responsibility for his care sought, and was granted, a High Court declaration that, given the unanimity of family and professional views, seeking judicial approval for the withdrawal of CANH was not mandatory. The man had subsequently died. However, given the important point of principle at stake, the Official Solicitor, who had acted in the proceedings on the man's behalf, was granted permission to appeal directly to the Supreme Court.

In dismissing the appeal, the Court noted that the fundamental question facing a doctor, or a judge, in considering the appropriate treatment of a patient who is not able to make his or her own decisions is not whether it is lawful to withdraw or withhold treatment, but whether it is lawful to give it. Treatment can only lawfully be given if it is in a patient's best interests and, if a doctor carries out treatment in the reasonable belief that that is the case, he or she will be entitled to protection from liability by Section 5 of the Mental Capacity Act 2005 ("the Act").

The Act specifically requires treating doctors to take account of patients' express wishes, together with the views of his or her loved ones and the opinions of other medical professionals. The opportunity to seek judicial authority can be taken whether or not a dispute is apparent and, in the circumstances, the UK's regulatory framework for dealing with such cases was compliant with Article 2 of the European Convention on Human Rights, which enshrines the right to life.

The Court acknowledged that decisions on whether or not a particular treatment, or the withdrawal of such treatment, is in a patient's best interests can be finely balanced. It emphasised that, where there is a difference of medical opinion, or where there is a lack of agreement from family or others with an interest in a patient's welfare, an application for judicial authority can and should be made.

An NHS Trust v Y. (2018) UKSC 46

Taxpayer Pays Price for Failing to Comply With HMRC Information Requests

Those who fail to promptly and accurately answer requests from HM Revenue and Customs (HMRC) for information about their tax affairs are at risk of penal sanctions. The Court of Appeal has, however, ruled in a guideline case that financial penalties totalling more than £1 million imposed on a professional man were excessive.

The man had, over a period of several years, failed to comply with many of his most basic obligations as a taxpayer, not only in relation to his own Income Tax affairs, but also in respect of Inheritance Tax liabilities arising from the death of his father. After he failed to comply with a number of requests for information, HMRC lost patience and took him before the Upper Tribunal (UT). Penalties totalling £1,075,210 were imposed under Section 113(1) of the Finance Act 2008.

In ruling on the man's challenge to the amount of the penalties, the Court noted that this was the first case in which HMRC had invoked its power to seek such penal sanctions from the UT. The use of that power was only appropriate in serious cases where the imposition of more modest penalties had failed to secure compliance. HMRC was also required to hold a reasonable belief that, due to the failure to provide requested information, significantly less tax had been paid than would otherwise have been the case.

In upholding the man's appeal, the Court found that the UT had erred in principle in setting the penalty at 100 per cent of the tax that HMRC estimated should have been paid. The figure should have been discounted to take account of the manifold and acknowledged uncertainties to which that estimate was subject. The amount of unpaid tax had now been agreed at a much lower figure than the estimate. In reducing the overall penalty to £220,000, the Court also had firmly in mind that the man had not been accused or found guilty of dishonesty.

Tager & Anr v The Commissioners for Her Majesty's Revenue and Customs.

Diverse Communities Have Diverse Business Methods – But English Law Is Supreme

In a diverse society, close-knit minority communities often have their own distinctive ways of doing business. However, as a man engaged in the unauthorised and potentially dangerous refilling of liquid petroleum gas (LPG) canisters discovered to his cost, in England, the full force of English law applies.

In common with other legitimate LPG suppliers, the owner of the branded canisters provided them pre-filled to customers through authorised dealers. Ownership of the canisters did not pass with the contents and, when emptied, clients were required to return them to the supplier to be refilled. Unauthorised refilling posed a direct threat to the supplier's business and created significant risks of fire or explosion.

Following a tip-off, the supplier discovered that the man's company had been refilling its canisters without authority and on a substantial scale. Faced with legal action, the man gave formal undertakings on his company's behalf that that unlawful activity would cease forthwith and agreed to pay the supplier's legal costs.

However, subsequent test purchases revealed that the unauthorised refilling had continued and the supplier launched proceedings against the man and his company, alleging contempt of court. The man's lawyers pointed out that he speaks very little English and that his company serves a largely closed community in which business is conducted on trust, by word of mouth. Within that community, formal legal relationships were unusual to the point of being alien.

In upholding the supplier's claim, however, the High Court found that, whatever the cultural differences, the man was capable of living normally in the Western world in which he had settled, and was sophisticated enough to use bank accounts and understand transactions. He was aware that he faced formal litigation, with significant financial consequences, and that unauthorised refilling was forbidden.

The unlawful activity had been intentional, in that it continued to take place with his knowledge and approval, and he knew full well that his employees were routinely acting in breach of the undertakings. The Court would hear further argument as to the appropriate penalties to impose on the man and his company for their proven acts of contempt.

Flogas Britain Limited v Attock Metal & LPG Limited & Anr.

The IP and the Court

Many IPs never go anywhere near a court; but many do. For some it is second nature; for others it is an alien and unwelcome diversion from their mainstream work. This article sets out some dos and don'ts and is written, in particular, with IPs in mind who are less accustomed to a forensic environment, but it is hoped that it will be of some use even to those who feel at home there.

An IP's contact with the court will generally be as a witness in a case he or she has brought, so it on that role that I intend to concentrate. I shall first say something about being a witness before you get anywhere near the court itself and then rather more about what you should or should not do if a case goes all the way and you find yourself giving evidence at trial.

In the beginning…

Most cases (the most straightforward) will begin with the IP giving written evidence in the form of a witness statement; but even in a case which starts with pleadings (statements of case: points of claim, points of defence and points in reply) there will be witness statements at some stage. Your solicitors, and possible counsel too, will usually do the actual drafting, but your input is vital, and in the end it is your evidence, so it is important that you are happy with it, both its form and its content. If your case goes to trial it is highly likely that you will be cross-examined on it, possibly quite closely and quite fiercely, so it is vital that it is something you can stand by when you come under pressure.

The first thing to remember is that it should be in your own words. There is a tension here, because your lawyers will, of course, want to mould your words so as to direct them to the legal points that need to be made. A good lawyer will know how to do that, and a good witness statement will be the product of constructive collaboration that means that the words are yours but ordered in a way that will make it easy for the court to understand your case and to see how the facts on which you rely support the case you are putting forward. The best results come from collaboration of this kind. So be an active participant in the preparation of your evidence: don't just leave it to your solicitors.

Don't sign any witness statement if you are unhappy with any of the content. Raise questions with your solicitors and iron out any problems before you sign. There are things you can put right later, but there are others that may be trickier to correct later. In many cases your witness statement will be the first thing the judge reads, so it must read convincingly.

Make sure you have the whole witness statement in front of you when you sign it. Never sign a last page and let your solicitors construct the final version around it. You may be asked to confirm that you had everything there when you signed, and you don't want to get caught out at trial. You will be signing a statement of truth that the contents of your witness statement are true, and that means the references to the documents in the accompanying exhibit too. Check that they are all there and are the documents you refer to. In short, make sure that what you say in the statement of truth you have to sign is, in fact, true!

It is also worth giving some thought to who is going to give the witness statement. You may need more than one. If your case involves little more than putting documents before the court and inviting it to draw inferences from those documents, it is probably enough for the office-holder to give all the evidence in one witness statement. But if the case is factually more complex, consider whether some or even all the evidence is better given by your manager who has had day-to-day conduct of the insolvency and has a better grasp of the facts than you might, many of which you may not be able to give evidence about at all. And if there is an important but isolated issue of fact, such as who said what in the course of a telephone conversation, make sure your evidence about what was said comes from the person who had the conversation. Clearly you will need to see that your manager or other member of staff is confident about giving evidence, but in some cases (such as a one-to-one conversation) you may not have much choice. The more direct the evidence is, the more persuasive it is. Direct evidence from Ms Smith about what a former director said to her is more cogent than you giving evidence about what Ms Smith told you the director said.

Your solicitors should know this, but the error I mention next is so common that you should be alive to it too. If you do give evidence of something you have been told by someone else ("evidence of information and belief" as it is still sometimes called) make sure you say who told you whatever it is and that you say that you believe what you were told. The who should be a human being. "The bank" or "HMRC" is not a source; the person who communicated with you is.

Avoid what I call "weasel phrases": "it was clearly understood that…" (which usually means that it wasn't) and "I would have done this or that" (which implies that in fact you didn't: you either did do it or you didn't). Formulations like these annoy the judge and weaken your evidence. For the same reason use the active and not the passive voice as much as you can. "I did this" carries more conviction than the vaguer "This was done".

Finally, keep your evidence as short and to the point as you can. You may want to get all sorts of things about the defendant off your chest, but if they are not relevant they will simply waste time when you get to trial and distract everyone involved (including the judge) from what the case is really about.

Before the trial

It's an obvious point, but re-read your witness statements (you may have put in evidence in reply to the defendant's): it may be a year or more since you made them, and you need to be on top of your material. Read the defendant's evidence too. A witness who has to confess that she has not looked at her evidence recently is likely to be met with a sigh from the judge and being told, "Well you'd better go out of court and read it now: I'll give you half an hour but no more". It does not make a good impression. You need to know your evidence because you are going to be cross-examined by a barrister who will probably have spent some time reading what you have written and whose whole purpose may be to undermine what you say and your own credibility, sometimes so subtly that you won't even notice that it's happening.

Don't go to the other extreme, though, by learning your evidence off by heart or repeating pre-learned phrases like a parrot. Evidence given like that does not convince. You must prepare but without rehearsing. Your solicitors may help you, but never let them coach you in the way you see it being done in American TV trials: that is not allowed here.

In the days before trial it is also worth thinking about settlement. The door of the court casts a powerful shadow, and many defendants get last minute cold feet and come up with an offer. It is as well, then, to have your figures at your fingertips. "I haven't thought about it" or "I haven't got my costs to hand" may mean you miss a golden opportunity to settle and save time and money for yourself and the creditors.

At the trial

Turn up looking like a professional and not as though you are on the way to the pub. You are an office-holder and an officer of the court, and you should present yourself as such. My recommendation is that you wear a suit and tie.

Before you are cross-examined make sure you correct any errors you may have found in your witness statement. Your advocate will generally have checked this with you in advance and should get you to deal with this before you are cross-examined. Don't worry if the mistakes are minor: the court will understand. (Of course, it may be quite different if you have made a major mistake that goes to the heart of your case.)

If you have had to come to court it is probably because you (and your other witnesses) are going to be cross-examined by someone who knows what he is doing and has been through the papers with a fine-toothed comb. Don't let him get under your skin. Give your answers calmly and neutrally. If he asks you a question that is rambling or too long, ask him to break it down. (The judge will usually support you in this.) Always answer the question you are asked, not one you wished had been asked. Be brief, and stick to the point: remember, the more you say, the more you can get wrong. Equally, however, back up your answer when you need to with the facts and matters you know support what it is you want to say in your answer.

Never answer a question with another question.

("Well, what would you have done in my position?") Your cross-examiner will simply say that he is there to ask the questions, not to answer them. You will feel put down, because that is exactly what he has done to you.

Don't be afraid to concede the occasional proposition that is put to you if it seems right. You will gain points for objectivity and for being truthful. Your advocate will have a chance to put things right if they go wrong when he comes to your re-examination.

If, like most of us, you suffer from esprit d'escalier and think of something later that you wish you had said when answering an earlier question. Raise it when there is a gap: "Sorry, could I just go back to something I said earlier…?" The court will understand that it is often hard to think on your feet.

If you are dealing with accountancy points, do so clearly and simply, and avoid using jargon if possible. The chances are that you are now the expert and everyone else is a layman. Use your expertise to clarify rather than bamboozle. Again, you will gain points in the eyes of the court.

Above all, tell the truth. Advocates and judges are adept at sorting the truth from lies. They may not always get it right, but generally they do. It is what they are there for.

When the defendant and his witnesses are being cross-examined sit as quietly and impassively as you can. The judge will hear you tutting and see if you are rolling your eyes. That kind of behaviour never goes down well, and you may get a telling off.

No one expects…

Finally, always expect the unexpected. Many, perhaps most, trials proceed smoothly and tediously to their inevitable conclusion. Others take unexpected turns because of something a witness says or some vital document that has just come to light. Be prepared for such odd turns, don't panic – and trust your legal team. They are there to deal with situations like this, and often what seems to be a sudden turn for the worse is, in the end, not as bad as it seems.

First published in Recovery Magazine

Is Your Home Affected by Coal Mining Subsidence? What to Do

Coal mining subsidence is a scourge in many parts of the country and, if you are affected, you should seek legal advice straight away. In one case, a man whose newly built luxury home was left tilted and cracked by the presence of disused underground workings won the right to six-figure compensation.

The man had demolished a farmhouse that he had bought from his grandparents and replaced it with what he described as a modern, well-insulated palace. A cinema, games room and two large garages were installed in various out-houses and the property was agreed to be worth up to £1.55 million.

However, not long after the project was completed, the property began to display signs of coal mining subsidence. Its walls, which had tilted out of the vertical, began to crack and its floors were no longer horizontal. Doors would swing open and shut of their own accord and the man was distressed to find that the floors and window frames were noticeably sloped.

After lawyers issued proceedings on his behalf under the Coal Mining Subsidence Act 1991, the Upper Tribunal (UT) held the Coal Authority liable to cover the cost of remedial works that would, to the man's reasonable satisfaction, restore the property to the condition that it was in prior to the subsidence occurring. The Coal Authority argued that the cost of those works should be assessed at £68,086, whereas the man contended for a figure of £954,642.

In ruling on the dispute, the UT found that the subsidence damage, in particular the noticeable tilt, could only feasibly be made good by demolishing and reconstructing the main building. The Coal Authority's case that such a course would be extravagant was rejected. The man was awarded a £670,000 interim payment, pending precise calculation of the total damages due to him.

White v The Coal Authority.

Dog Trainer Fends off Dissatisfied Client's Breach of Contract Claim

The courts will only imply contractual obligations that are realistically achievable. In one unusual case on this point, a judge rejected a breach of contract claim against a professional dog trainer who was said to have failed in her duty to reform the behaviour of a miscreant puppy.

The Fox Terrier's owner had sent her on a two-week intensive course with the trainer who, she claimed, had promised to stop her nipping, jumping up, chewing furniture and barking. On returning home, however, the puppy was said to have swiftly returned to her old ways and become uncontrollable. The owner sued the trainer for the return of the £2,800 she had spent on the puppy's schooling, but her claim was rejected by a district judge.

In dismissing her appeal against that ruling, a more senior judge noted that the trainer had been dealing with a puppy, not a machine. The trainer had given no guarantee that the course would permanently resolve the terrier's behavioural issues and any statement to that effect would have been unrealistic.

The trainer had achieved some, if not all, of her objectives in schooling the boisterous puppy. The owner lived in a one-bedroom inner city flat and there was evidence that a failure to adequately exercise and discipline the puppy after her return home caused or contributed to the regression in her behaviour.

King v Egan.

MOON BEEVER DEPARTMENTS – Key Contacts

Company/Commercial
Daniel Moore 020 7539 4108
Edward Saunders 020 7539 4113
Sam Fenwick 020 7539 4167
Daniel Addrison 020 7539 4130

Debt Recovery
Frances Coulson 020 7539 4114
Charles Robinson 020 7539 4103
Graham McPhie 020 7539 4116
Pritti Amin 020 7539 4144

Insolvency/Litigation
Frances Coulson 020 7539 4114
Graham McPhie 020 7539 4116
James Latham 020 7539 4120
Richard Saunders 020 7539 4137
Edward Saunders 020 7539 4113
Robert Paterson 020 7539 4165
Christina Fitzgerald 020 7539 4111

Employment
Sarah Rushton 020 7539 4147
Edward Saunders 020 7539 4113

Property
Daniel Moore 020 7539 4108
Esat Degirman 020 7539 4150
Monika Haidar 020 7539 4126

Agency
Chris Anderson 020 7539 4104

Private Client
Richard Boulding 020 7539 4123
David Toms 020 7539 4110
Charlotte Cooper 020 7539 4168

Intellectual Property
Edward Saunders 020 7539 4113

Email: initialsurname@moonbeever.com

Editor: Newsandevents@moonbeever.com