

Autumn update

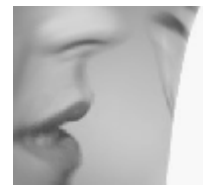
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News from CKFT



PROPERTY

Graham Kaye, a partner in our conveyancing department, believes that the year ahead will see great changes for conveyancing practitioners, in the light of the Land Registration Act 2002, stamp duty land tax, and the Homebuyers Packs coming into effect. These developments will mean that there will be greater transparency in the practice of conveyancing, for example, through the registration of overriding interests. However, the changes in the regime will also, at least initially, increase the workload for solicitors.

LITIGATION

It has been a busy year for the litigation department, which has seen the addition of a new partner, **Iain Roden**. Iain specialises in commercial litigation, especially contractual and company disputes, as well as construction and property litigation. He has a particular interest in entertainment and media with clients including film production companies, artists and arts venues and also handles employment matters with particular reference to restraint of trade issues.

Adam Taylor, a partner in our litigation department notes that the debt recovery part of his practice has been much busier recently, which is probably a function of the current economic climate. He observes, however, that while creditors continue actively to pursue debtors, they are anxious not to jeopardise any ongoing business relationships. In this context, Adam has successfully recovered difficult debts without damaging such relationships.

Joel Leigh, another partner in our litigation department, has seen considerable activity in his personal injury/professional negligence practice, which includes MIB and CICA work. He has several substantial personal injury cases coming to trial and has recently settled a £650,000 claim for serious head injuries arising from assault, where the client was advised by his previous

solicitors to accept £6,000! The conditional fee side of his business continues to grow, both in commercial and personal injury disputes. Joel has recovered success fees with ease, but he notes that the market from an insurance perspective is hardening. He also sees a trend in the future towards two tier success fees, since the courts have suggested recently that when it becomes apparent that a case is less complicated than originally envisaged, a lower success fee should be applied.

Lanny Silverstone has been elected as a member of the Property Litigation Association from September 2003. This reflects his experience and expertise in dealing with all forms of property related disputes. Lanny's employment law practice has also developed significantly in recent years, including a successful application to the High Court for delivery up of confidential information removed from a client's office by former employees and advising a former director of a major national PLC concerning his claims following termination of his employment.

MATRIMONIAL

The matrimonial department has consolidated its position this year as a recommended and recognised matrimonial law department. **Miles Geffin**, a partner in the matrimonial department, recently acted for the father in P v T sub nom P (a child) (financial provision), the first case involving financial provision for illegitimate children to reach the Court of Appeal and which received national and legal press coverage.

There have recently been tremendous changes in the field of matrimonial law, in particular in the areas of prenuptial agreements and the division of assets on divorce. This has led to increasing instructions on drafting prenuptial agreements and the obtaining of higher awards on divorce for wives in big money cases. In addition, the growth in cohabitation at the expense of marriage, even where there are children, has led to a greater demand for cohabitation agreements. The department also

envisages an increase in instructions from the gay community following the planned legislation for registration of same sex relationships.

COMPANY AND COMMERCIAL

Adam Blain, a partner in our company and commercial department, notes an

upturn in commercial activity. He acts for a wide range of companies and businesses, from IT to manufacturing. He is currently engaged in the refinancing of a company, a company restructuring, and the legal audit of a company's documentation.

Property Update

Land Registration Act 2002

Some of the widest ranging changes affecting property law in recent years will be implemented by the Land Registration Act 2002 ("the Act"). The Act received Royal Assent in 2002 and most of its provisions, with the exception of some changes to the adverse possession rules, came into force on 13th October 2003.

The aim of the Act, as stated in the consultation paper, is that "the register should be a complete and accurate reflection of the state of the title to the land at any given time, and it should be possible to investigate title to land online, with the absolute minimum of additional inquiries and inspections." As a result, the Act introduces various measures so that the information on the register should be more comprehensive.

Part 8 of the Act provides for the introduction of an e-conveyancing regime by means of the electronic execution of conveyancing documents and a secure electronic communications network. The Land Registry hopes to pilot this new regime during 2006, following which it will be implemented on a voluntary basis with a view to it ultimately becoming compulsory.

In addition, the Act introduces a new procedure for the acquisition of registered title by adverse possession which provides registered owners with a far greater degree of protection than they presently enjoy. Previously, after twelve years' adverse possession, the registered owner's title was automatically held on trust for the squatter so that he effectively lost his title without the squatter taking any further action other than formally applying to the registrar to be registered as proprietor. Under the Act however, subject to certain transitional

arrangements to protect rights already acquired, this will change so that after ten years, the squatter will be entitled to apply to the registrar to become the registered proprietor. Once the registrar has received the application, he will notify the registered owner and the proprietor of any registered charge on the estate. If such persons, within seven weeks of notification, serve the appropriate notice, the squatter will only succeed in his application if he satisfies one of three conditions with any dispute being determined by the adjudicator.

Landlord and Tenant – Residential Possession

New emphasis has been placed by the Courts on the importance of all leases being properly stamped. Correct stamping can avoid delay during possession proceedings. Both a lease and a counterpart lease attract stamp duty, the Counterpart Lease at a fixed sum of £5, and the stamp duty payable on the lease is dependant on the rent payable and the term. This includes Assured Shorthold Tenancies.

If a lease is to be relied upon during proceedings, it must be correctly stamped. In the event that the Lease is not stamped within 28 days of the date of the Lease, this will result in interest and a penalty.

Litigation Update

Changes to pre-action conduct

The dashing off of a letter before action threatening the commencement of proceedings within 14 days has been a distant memory for some time in various specialised fields of litigation, including personal injury, construction, and professional negligence fields. Instead, the courts have required parties to comply with rules on pre-action conduct set out in various Pre-Action Protocols before they embark on formal litigation. In other disputes, however, this practice still survived, despite the fact that the Civil Procedure Rules ("CPR") exhorted all parties to act reasonably in exchanging information and documents prior to commencing proceedings and generally in trying to avoid the necessity for the start of proceedings.

However, from 1 April 2003, the CPR have been changed so that there is effectively a Pre-Action Protocol which must be followed by parties to *any dispute*. Thus both parties are required to follow a reasonable procedure intended to avoid litigation, which should normally include:

- The claimant writing to the defendant with details of the claim
- The defendant acknowledging the claim letter promptly
- The defendant giving, within a reasonable time, a detailed written response and
- The parties conducting genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings.

There are detailed requirements as to what information should be contained in the claimant's letter and defendant's response. In particular, you should note that both parties are required to enclose copies of essential documents upon which they will rely. In addition, the claimant is required to allow the defendant to reply within a "reasonable" period and this is suggested as being one month. Any claimant seeking to rush matters will need to have very good reasons for departing from this time scale.

The courts are empowered to impose sanctions on any party that does not comply with these requirements, including *costs sanctions* or the *payment of sums into court*. Judging from the courts' approach generally, parties who fail to follow correct pre-action conduct can expect harsh penalties, even there they ultimately succeed in the proceedings.

Failure to mediate risks sanctions

Since the introduction of the CPR in 1999, the courts have been keen to encourage the use of alternative dispute resolution ("ADR") instead of litigation wherever possible. Recent cases have shown that parties are at real risk of costs sanctions if they fail properly to consider the use of ADR or unreasonably refuse an offer of mediation from the other party. Although a failure to mediate will not automatically lead to penalties depending on the circumstances, it is a risky strategy. In one recent case, the defendant won on appeal but because it had refused to consider ADR, it did not recover its costs from the claimant. In another case, it was held that the strength of a party's claim was not a good reason to reject mediation and the critical factor was whether the mediation had a real prospect of success. The courts' willingness to deploy sanctions to encourage the use of ADR has been extended most recently to cases where parties unreasonably withdraw from mediation. In this case, the parties agreed to mediate but then one party withdrew the day before mediation was due to commence without a reasonable excuse. The party withdrawing from the mediation was successful but the court ordered that the losing party should only pay costs up to the date of the agreement to mediate and thereafter, each party was to bear its own costs. This underlines once again the fact that parties who do not seriously consider and/or go on genuinely to participate in ADR are at real risk of penalties.

Legal advice privilege narrowly defined

Communications between a client and its legal adviser are protected from disclosure

by virtue of legal advice privilege, so long as the purpose of the communication was to obtain legal advice. Communications may also be protected by litigation privilege, but only where litigation is in prospect. A recent case in the Court of Appeal has, however, revealed that the scope of legal advice privilege is not as far-reaching as was thought. It had been assumed that any document prepared with the dominant purpose of obtaining legal advice was privileged.

However, in this case, the Court held that documents and internal memoranda prepared by employees were not protected, despite the fact that they were intended to be sent to legal advisers. This was because the Court drew a distinction between information supplied by the *client itself* to its legal advisers to the purpose of obtaining legal advice, which is protected, and information supplied by *employees* for the purpose of being sent to the client's solicitor, which is not protected.

So when will communications be from the client itself? It appears that they will be confined to communications from those members of management entrusted with the task of obtaining legal advice, which would probably include directors, in-house lawyers etc. Documents prepared by other employees at the behest of "the client" would appear not to be privileged. Thus, unless this decision is overturned, great care should be taken when requesting employees to prepare documents for the obtaining of legal advice and where litigation is not envisaged, lest they be disclosable.

Need to draw a line under present satellite litigation over arising from technical challenges to conditional fee agreements ("CFAs")

The Government's new CFA regime came into force in April 2000, with the aim of widening access to justice. There is a raft of primary and subordinate legislation containing the various requirements that must be followed to ensure such agreements are enforceable, the purpose being to protect gullible clients from unscrupulous lawyers.

However, this technical minefield has recently been exploited with defendant

liability insurers mounting frequent challenges as to the enforceability of CFAs on the ground that they do not comply with the regulations.

This trend has, however, been condemned by the Court of Appeal in a recent case where it was held that a CFA would only be unenforceable if, in the circumstances of the particular case, the breach was a material one and had had a materially adverse effect either upon the protections afforded to the client or upon the proper administration of justice. Courts were also generally warned to be watchful when considering such allegations since the parliamentary purpose of the CFA regime was to enhance access to justice, not to impede it.

In the meantime, with effect from 2 June, the Government has also tried to discourage challenges to CFAs by allowing a solicitor to agree with a client that he will only charge the client what he obtains from the other side in costs. In essence, this change legitimises what are commonly known as 'speccing' or Thai Trading arrangements. A simplified form of agreement is also permitted in these cases.

CKFT
SOLICITORS



Matrimonial Update

Pre-Nuptial Agreements

In the past, English Law has taken the view that entering into a marriage with one eye on what would happen should that marriage fail was incompatible with the sanctity of marriage and, often the existence of a pre-nuptial agreement has been ignored by the Courts.

Clients have, however, increasingly been advised by their lawyers to consider entering into pre-nuptial agreements with their future spouses in anticipation that times change and those agreements will eventually be given legal status by Parliament.

Whilst no one would want to have to invoke such an agreement, not having one may make the resolution of claims arising from a divorce much more expensive, both financially and emotionally.

The enforceability of a pre-nuptial agreement was recently considered in the case of *K v K*.

It appears from the decision in that case that there is now a will, amongst the judiciary at least, to give some weight to the terms of agreements entered into before marriage.

In *K v K* the marriage lasted 14 months and had produced a child. Both the husband and wife were independently wealthy, the husband particularly so. The agreement recited that the parties intended the terms agreed to be in full and final settlement of all claims in the event of a separation within the first 5 years of the marriage.

Following their separation, the husband sought to rely on the agreement.

At trial the Judge resolved the issue having decided that the parties had understood and were properly advised upon the terms of the agreement. The award made to the wife was ultimately closer in quantum to the provisions of the agreement than to comparable awards in other short marriage cases.

The matrimonial lawyers at CKFT, Pamela Collis, Sarah Futerman, Miles Geffin, Shikha Datta and Barbara Reeves, are all members of [the Solicitors Family Law Association](#).



This newsletter is designed to give a general guide to legal developments and while we have used reasonable endeavours to ensure its accuracy, it should not be relied upon as constituting legal advice.

If you would like to follow up any of the issues raised, or have a specific legal query, please contact the partner with whom you usually deal.

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