

Spring update

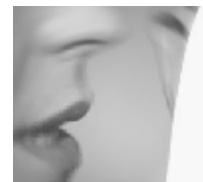
Spring 2004



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News from CKFT



PROPERTY

Daniel Fireman reports that there has been a great deal of activity in the acquisition of residential development sites both in the North and South of England. He believes that developers who had been delaying progressing deals while they assessed the market, have become more confident as a result of continued price stability.

LITIGATION

Lanny Silverstone, Iain Roden and **Adam Myeroff** have recently completed a series of seven seminars raising awareness of employment law pitfalls, involving role play and a mock tribunal scenario. The seminars took place in Bromley, Bracknell, Croydon, Central London, Maidstone, Docklands and Leeds and were delivered to about 350-400 HR managers and business managers

MATRIMONIAL

Tom Farley-Hills joined the firm in February from Bolt Burden as an assistant solicitor. He specialises in all aspects of family and matrimonial law including providing advice on financial aspects of divorce and separation and financial provision for children. He has a particular interest in property disputes between cohabitants and also advises in connection

with child related issues including contact and residence. When he is relaxing, Tom plays the drums in a rock and roll band, usually around the pubs and clubs of North London. He is also in the unenviable position of being a Swansea City FC supporter. Tom's other interests include eating out, the odd bit of jogging and, time permitting, hill walking in his native Wales.

COMPANY AND COMMERCIAL

Adam Blain reports that there has been a steady growth in the volume of M & A work recently, reflecting increasing confidence in the market.

Richard Barnett joined the firm in February as a partner from Barnett Sampson, which he co-founded and where he was senior partner. He has extensive corporate/commercial experience and also practices in employment law and undertakes wills and tax planning for high net worth individuals. In addition, Richard has extensive experience of commercial and financial services litigation at all levels through to the House of Lords. He lists his outside interests as cycling (the longer the distance the better he enjoys it), skiing (ditto), supporting Arsenal, travelling (including trekking in remote mountain regions), the visual arts and music and family life.

Property Update

New rules for business tenancies

New measures drastically changing the procedures for renewing or terminating business tenancies under the Landlord and Tenant Act 1954 will come into effect on 1 June 2004 by virtue of the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003. Perhaps most significant of the measures is that parties about to agree a lease will no longer require court permission to contract out of the Act, which has, up to now, been the requirement where the tenant is to surrender his security of tenure. Instead, the landlord will need to serve a

prescribed notice, known as a "health warning", at least 14 days before the tenancy is to be entered into, which explains the loss of rights and the importance of obtaining professional advice. The tenant must then sign a declaration that he has received the notice and accepts its consequences. If the parties wish to waive the 14 day period, the tenant must sign a statutory declaration.

In addition, the Order makes the following changes:

- It improves the arrangements for the parties to obtain information from

each other. A landlord's notice stating that the landlord is not opposed to the grant of a new tenancy must set out the landlord's proposals as to the property, the rent and other terms.

- The tenant is no longer required to give a counter-notice saying that he is not willing to give up possession;
- At present only the tenant may apply to the court for an order for a new tenancy but the Order will also allow the landlord to apply.
- If the landlord has given a section 25/26 notice stating his opposition to the grant of a new tenancy, then he

may apply to the court for the tenancy to be terminated.

- The time limits under the Act are altered and the parties may agree to waive them.
- There are changes to the interim rent provisions so that either party may apply for an interim rent and the interim rent will be payable from the earliest date that could have been specified in either the landlord's notice or the tenant's request. Where a new tenancy is granted the interim rent will usually be the same as the rent proposed under it.

Litigation Update

Money Laundering Enforcement

The Money Laundering Regulations 2003 under the Proceeds of Crime Act 2002 ("the Act") came into effect on 1 March 2004. Providers of a range of advisory and financial services, including accountants, estate agents and lawyers ("the provider") will find themselves within the new regulated sector. The Act creates a series of money laundering offences which may apply to such providers who, in the course of their business, become involved with the proceeds of crime. In addition, such providers will be required to:

- Appoint a reporting officer
- keep records and set up reporting procedures;
- check client identities; and
- train their staff in the law on money laundering and to recognise suspicious transactions.

Failure to comply with these requirements will be a criminal offence.

We will be sending a more detailed analysis of these new obligations and their ramifications to clients involved in the regulated sector.

Privilege

In our last newsletter, we explained that where litigation is not in prospect, communications between a client and its legal adviser may be protected from disclosure by legal advice privilege. This operates where the dominant purpose of the communication is to obtain legal

advice but it has become clear that the scope of legal advice privilege is narrower than was supposed following a decision by the Court of Appeal that documents prepared by the client's employees and sent to legal advisers were not protected because the documents were not prepared by the client itself but rather by its employees. It therefore appears that "the client" is confined to those members of management entrusted with the task of obtaining legal advice,

More recently still, the scope of legal advice privilege appears to have been cut even further when it was held that where lawyers give advice on presentational matters only "which might almost equally have been given by suitably experienced accountants or management consultants", such advice was also not privileged. It therefore appears that unless litigation is in prospect at the time that legal advice is requested, that advice may not be protected from disclosure. Accordingly, clients must avoid making any potentially damaging statements where they instruct their legal advisers, for example during regulatory inquiries and other non-adversarial investigations, unless it is clear that the advice will be covered by legal advice privilege.

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Employment Update

Awards in unfair dismissal cases may make provision for injury to feelings

The long-standing belief that awards for unfair dismissal could not reflect non-economic matters, such as distress, has been overturned by the Court of Appeal. The first wind of change occurred nearly three years ago, following comments made in a House of Lords case and a number of awards were made incorporating compensation for distress, psychiatric damage and injury to reputation until a recent ruling by the EAT appeared to restore the previous position. However, the Court of Appeal has now held that the statutory definition of the compensatory award in an unfair dismissal case is sufficiently wide to cover non-financial losses so long as they are confined to real injury to the employee's feelings and not every minor upset. Whether this is the last word is nevertheless unclear since the case may go to the House of Lords.

Draft statutory dispute resolution regulations published

The Employment Act 2002 set out a framework of disciplinary and grievance procedures to encourage the resolution of employment disputes. The draft regulations containing the detail of how the procedures will apply were published in February. The finalised version will, apparently, come into force, together with the Act itself and a re-issue of the ACAS Code of Practice, in October. A recap of the main changes are:

- A statutory disciplinary procedure setting out minimum standards to be followed *by all employers* where they are considering disciplining or dismissing an employee. There is a standard procedure and a shorter modified procedure for cases of gross misconduct. Where the employer dismisses the employee without complying with the procedure, there will be an automatically unfair dismissal, with a potential increase in the amount of compensatory award of between 10% and 50%. Where the employee fails to comply, the award may be reduced by between 10% and

50%. Note that there are certain exemptions.

- A statutory grievance procedure also setting out minimum standards. There is a standard procedure and a shorter modified procedure to be followed in certain circumstances where the employee has already left employment. A failure to comply by the employer may result in the constructive dismissal of the employee and an increase in the amount of any compensatory award of between 10% and 50%. A failure to comply by an employee may prevent him/her from bringing a claim in an Employment Tribunal and even if s/he has complied with the requirement, s/he will be prevented from bringing a claim if less than 28 days have passed since the requirement was complied with. There are certain exemptions where a grievance procedure does not need to be followed.

Right not to be unfairly dismissed applies to "employment in Great Britain"

There has been considerable controversy over whether the right not to be unfairly dismissed applies outside Great Britain. One recent case suggested that if the employer carried on business in Great Britain then employees could claim the protection of UK unfair dismissal rights even if they were employed outside the country. This was modified in a subsequent case so that the employment had to have a "substantial connection" with this country. However, the Court of Appeal has now rejected this interpretation and ruled that the right not to be unfairly dismissed applies only to employment in Great Britain. The Court did, however, accept the need for a degree of flexibility in deciding the location of the employment, which will depend on the particular facts of the case.

Overtime which is not contractually provided for not included as part of employee's paid annual holiday.

In a recent test case, an employee claimed that his holiday pay should include overtime pay on top of his basic salary. It

was held that the entitlement to four paid weeks annual leave under the Working Time Regulations 1998 at the rate of "a week's pay." was to be calculated by reference to the "normal working hours" and that such a definition would only catch overtime which the employer was contractually obliged to provide.

Data Protection

New guidance on data protection

The Court of Appeal has given clear guidance recently as to how data controllers should approach Data Subject Access Requests under the Data Protection Act 1998 (DPA), which are requests by individuals to access personal data. The case has significantly restricted this right in two ways:

Firstly, the DPA only applies to personal data and therefore a clear interpretation of this is essential. The Court of Appeal has now ruled that personal data should be interpreted narrowly and is only information which affects a person's privacy, whether in his personal life or business capacity. This means that it must be biographical in a significant sense and have the individual as its focus. It must therefore go beyond the mere recording of the data subject's involvement in a matter and similarly, the fact that a document is retrievable by reference to an individual's name does not mean it is personal data entitling the data subject to a copy of it. Guidance by the Information Commissioner on this point states that it is more likely that the data will be personal where the individual's name appears together with other information such as address, telephone number, hobbies, medical history, salary details, spending preferences etc.

Secondly, under the DPA, personal data includes both information held on computer and manual information

provided that the manual data is organised into a "relevant filing system". In this respect, the Court of Appeal held that the DPA only covered manual files if they are as readily accessible as a computerised filing system. This means that the filing system must be so indexed that it allows the searcher to know in advance the file in which the data is located. Any manual filing system which requires the searcher to leaf through files to locate personal data will not qualify as a relevant filing system and will not be within the system of data protection. Therefore a filing system containing files about individuals where the content of each file is structured purely in chronological order will not be a relevant filing system as the files are not appropriately indexed to allow the retrieval of the data without leafing through the file. The Information Commissioner has commented that "it is likely that very few manual files will be covered by the provisions of the DPA".

This case is obviously good news for businesses at a time when Data Subject Access Requests are increasing. The narrow interpretation of personal data and the fact that most information held in manual filing systems will not fall within the data protection regime mean that the obligation to disclose information under the DPA is unlikely to become the burden that was feared. Data controllers will need to set up new procedures to take advantage of this decision.

Matrimonial Update

New costs regime spells end for Calderbank offers?

The clock is ticking on the current method governing the calculation of costs in financial disputes. So far, the starting point on costs awards has been that the

successful party should get his/her costs although this was always subject to the court's discretion. This was further developed by the Calderbank procedure under which a party would seek to protect him/herself against a costs order by making a without prejudice offer to settle the case (known as a Calderbank offer).

Where the other party beat the offer at trial, the offeror would then have to pay the other's costs from 28 days after the offer was made, unless this was considered unjust by the court.

Recently, however, there has been growing dissatisfaction with this state of affairs, in particular, because it tends to promote a series of offers and counter offers from both parties, each attempting to second guess the eventual outcome with the result that there are complicated costs disputes post judgement. In addition, the concept of "winner takes all" does not fit well with the new approach to the division of marital assets following *White v White*, since it is now less easy to ascertain the winner than it was under the old regime where the wife's reasonable needs were in dispute. Accordingly, in one recent case it was held that in big money cases, where the assets exceed the parties' requirements, the starting point should be that there be no order as to costs unless one party refuses to negotiate. The rationale behind this decision was approved in a subsequent case, but this time, the court felt it was obliged to continue to apply the rules until they are amended and it therefore upheld the previous position in respect of Calderbank offers. The court did, however, suggest that there was a greater degree of latitude in making costs orders than has previously been recognised.

Meanwhile, in the summer a family division committee recommended fundamental changes to that system, in particular:

- the replacement of the starting point of winner takes all by one that each party should bear its own costs ; and
- the abolition of Calderbank offers, to be replaced by open offers which the court may examine at the hearing.

.It is therefore simply a matter of time before the rules governing costs are radically changed and the complicated gamble that often characterises the Calderbank procedure is a thing of the past.

The matrimonial lawyers at CKFT, Pamela Collis, Miles Geffin, Shikha Datta and Tom Farley-Hills are all members of [the Solicitors Family Law Association \(http://sfla.co.uk\)](http://sfla.co.uk).



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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