



# Outside the Box

SPRING  
2009

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### Landlords and the Commercial Tenant in Hard Times

Article by David Chapman



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**An increasing number of tenants are facing financial difficulty because of the recession and are looking for help to see them through it. If the bank cannot help, can the landlord? Can the landlord afford not to?**

Most leases contain a forfeiture clause entitling a landlord to end the tenancy for rent arrears. If the tenancy ends the landlord will become responsible for the premises (insurance, asbestos management, fire regulations, contamination, utilities and in due course, non domestic rates). A landlord may consider it better to have a tenant paying something than no tenant at all.

A tenant asking for help should provide evidence its business cannot afford the full rent but that a rent concession will help the tenant's business to survive.

A landlord may assist the tenant's cashflow by agreeing to accept monthly rent instead of quarterly rent.

Leases usually provide for the payment of rent in advance but accepting rent in arrears gives the tenant an immediate short respite.

A rent holiday can take effect as a rent free period, a temporary reduction in rent or the postponement of the obligation to pay the whole or part of the rent. The tenant should expect to pay interest on any postponed rent and landlord may ask for additional security perhaps a mortgage over the tenant's home and/

or third party guarantees.

Any concession must be expressed to be personal to the tenant requesting it so the arrangement ends and all postponed rent paid before the landlord is obliged to consent to an assignment of the tenancy or an underletting. The arrangement must also end when the tenant's business picks up or the economy recovers according to agreed indicators.

If the tenant fails to keep to the arrangement the landlord should have the same remedies as if the tenant had failed to comply with the terms of the lease and all the postponed rent, with default interest, will then become due and payable and the lease liable to forfeiture.

To be an effective variation of a lease, the arrangements must be recorded in writing and if the lease is by deed, the variation must also be by a deed. If the lease is registered at the Land Registry, the variation must also be registered at the Land Registry and this may require the consent of the landlord's mortgagee. If the landlord has a leasehold interest, the consent of the superior landlord may also be required.

Wortley Byers can assist with advice on the above and on many other legal issues which may affect the day to day running of your business.



## NEWS

### The Hammers!

Sue Dowman (Partner) and Aaron Cane (Associate) enjoyed the corporate hospitality of West Ham United when



they were invited by Jon O'Neill, Commercial Executive of the Football Club to a match on 14 February 2009.

They supported West Ham for the day in their quest to reach the next round of the FA Cup against Middlesbrough FC and were joined by others including guests from AJC Wilson Auto Repair, Natwest Bank and HSBC Bank.

The match ended in a 1-1 draw for The Hammers. Our thanks to Jon O'Neill for his kind invitation.

### Brentwood Half Marathon

On 15 March 2009, Nick Traill and Lori Spencer took part in their second Brentwood Half Marathon. We are delighted that they both ran the entire 13 miles in under 2 1/2 hours. They were supported by their fellow employees with kind words and encouragement, in addition to hundreds of spectators along the route!



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## Making Alterations to Your Home?

Article by Anne Ellis

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**When undertaking building work or alterations to your home it is important to make sure that you are proceeding with the correct consents in place. The consents required will depend on the work you intend to carry out but could include applications to both the planning and building regulations departments at your local authority.**

Due to the recent changes in the legislation you may now need to obtain consents which were not previously required. For example from 1st October 2008 any new impermeable driveways or hard standing which are built, and which are larger than 5 square metres, require a planning permission to be obtained.

Some alterations will however no longer require an application to the planning department and this could include some single storey ground floor rear extensions and loft conversions of a certain size. The new

requirements are however complicated and difficult to interpret and therefore before you undertake any work to your property we would recommend that you take advice as to whether consent is or is not required.

In any event it is worth remembering that planning permissions and building regulation consents are entirely separate requirements and even if the works you undertake no longer require a planning permission they may well still require building regulation consent to be obtained.

If you would like advice on any of the above, or similar issues, please contact Anne Ellis or a member of the Property Department.

## Employment Law Changes

Article by Michael Callaghan

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**Where employees have been employed for a year they gain protection against dismissal. If an employer then wishes to dismiss an employee this must be for a reason allowed by statute and the employer must act fairly in dismissing the employee.**

Currently, employers have to follow a mandatory three-step dismissal procedure and, if they fail to do so, a dismissal will be an unfair dismissal regardless of the employer's reasons or the conduct of the employee.

From 6 April the current procedure is revoked in its entirety. A dismissal will no longer be automatically unfair because the proper procedure has not been followed. Employers will still need to ensure that they follow a fair procedure, though this will depend upon the reason for the dismissal, the conduct of the employee and the size and resources of the employer. It

is likely that a dismissal will be unfair if an employer's internal procedures are not followed.

ACAS have produced a Code of Conduct which will apply to dismissals based on the conduct or capacity of the employee. An Employment Tribunal can award an uplift on damages to an ex-employee for unfair dismissal of up to 25% if an employer does not comply with the Code. Notably, however, the Code will not apply to redundancy dismissals.

Employers may want to review their employment contracts and internal procedures to ensure they reflect the new law.

If you would like to know more please contact Michael Callaghan.

## Are Your Terms and Conditions Up to Date?

Article by Sue Dowman

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If your business sells goods and services to consumers you must take account of a multitude of rules and regulations in your standard terms and conditions. If you are a business owner, you should not assume that your Terms will be appropriate for all contracts for the indefinite future. The Terms should be reviewed and updated at regular intervals, particularly when new legislation comes into force.

Contract terms must be fair and reasonable under the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999, otherwise they will not be binding on a consumer. A contract cannot seek to exclude any terms which are implicit under the law, such as that the goods are of satisfactory quality or fit for their purpose. It is also important to note that some exclusions may be illegal under the Consumer Protection from Unfair Trading Regulations 2008 and may therefore lead to potential

criminal liability.

Additionally if your business trades online, over the telephone or uses other distance means to take orders for goods and services, the Terms must provide all the necessary information to comply with distance and doorstep selling legislation. For example, the Terms would need to include a notice that the consumer has the right to cancel the contract without cause during a seven day cooling off period. Furthermore, your business may also need to consider whether the contract complies with the information requirements under the Electronic Commerce (EC Directive) Regulations 2002.

For further information and advice, please contact our Corporate Commercial Department.



## NEWS

### Congratulations to Andrew Dashwood-Begg



Andrew Dashwood-Begg qualified as a solicitor in March 2009 having joined the firm as a trainee in 2007.

He assists in all areas of the Litigation Department including general commercial litigation, company disputes, insolvency and debt collection.

### Handelsbanken Charity Bowl

Two teams from Wortley Byers participated in the Handelsbanken Charity Bowl at Tenpin in Chelmsford on 10 March 2009.

64 teams of estate agents, solicitors, banks, accountants and businesses took part and £4,200 was raised for two charities, Essex Air Ambulance and 4Children. A great time was had by all with the bonus of knowing the proceeds went to worthwhile causes.

Each of our teams won one match and lost the other but put up respectable scores in all of them.

Those attending had the opportunity of bidding for a drive in a Lamborghini Gallardo but sadly none of our representatives were successful so we are now queuing up to take Sue Dowman's Mini Cooper S for a spin!

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## Private Limited Companies and Succession Planning

Article by Warren Hawkings



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### Owners of businesses face particular challenges when planning what happens to their business after their death.

On the positive side shares in private companies may qualify for Business Property Relief provided that specific conditions are met. These include a requirement that the Company is a trading company and the shares have been held for a minimum of two years. If this is the case shares may be gifted to family members or third parties completely free of Inheritance Tax.

Problems can, however, arise in obtaining tax relief where part of the Company has a trading function and part derives income from investment property. There has been a particular tendency in recent times for some clients to move into property that is often buy-to-let in a variety of forms. Rightly or wrongly they have seen bricks and mortar, and the income from it, as more secure than the vagaries of the Stock Market. (None of these investments are without problems in the current turbulent times!)

If shares qualify for full Inheritance Tax relief careful consideration should be given to passing them to beneficiaries who would otherwise be liable to pay tax e.g. children, as opposed to spouses or civil partners who are exempt from tax. As a compromise it is often useful to use discretionary trusts for such gifts with spouses and children as potential beneficiaries.

As an alternative, shareholders of private companies may decide amongst themselves that their families receive cash rather than shares. This is often the case where small companies do not have a particular dividend policy.

To achieve this result shareholders frequently enter into cross-option agreements. These provide that the surviving shareholders will purchase the deceased's shares for a pre-determined sum. Life policies are taken out on each shareholder's life written in trust for the other shareholders to ensure that purchase funds are available on the death of the shareholder. Shares then pass to the surviving shareholders and cash to the relatives. No Inheritance Tax is payable on the policy proceeds used to buy the shares provided they qualify for Business Property Relief.

It is essential that shareholders consider the needs of their families and the effect an early death would have not only on them, but also their business partners. Term assurance and critical illness cover are also an important part of the planning process. Finally, a well thought out Will is vital and arrangements should be reviewed regularly.

If you would like advice on any of the above, or similar issues, please contact Warren Hawkings or a member of the Wills, Probate, Tax & Trusts Team.

## Where There's a Will... or Not

Article by Sarah Stanyer



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### In England and Wales a person is free to leave their property to whomsoever they wish and in whatever proportions they wish. That said, in doing so they should give consideration to any individuals they have any obligation to or responsibilities for.

If inadequate financial provision is made then legal action can be commenced under the Inheritance (Provision for Family and Dependants) Act 1975 by any person (of any age) deemed under the Act to be a dependant of the deceased.

If the applicant is not the spouse or civil partner of the deceased their claim will be limited to maintenance. However, if the applicant is the spouse or civil partner of the deceased the court will make more

generous provision whether or not it is required for their maintenance.

Obviously, any award by the court will be governed by the size and nature of the estate.

An application for reasonable financial provision can be made to the Court regardless as to whether the deceased left a Will or not. Time is of the essence and the time limit for making an application is 6 months from the date a grant of probate or letters of administration is obtained.

For more information on how to make a claim please contact Sarah Stanyer.

## A STEP in the Right Direction

### Two of our wills, trust and probate lawyers are building up their expertise by studying for membership of the Society of Trust and Estate Practitioners (STEP).

Once the exams have been completed Associate Poh Shan Chong and solicitor Andrew Spearman will become full STEP members, which is widely recognised as a gold standard for those practising in the wills, trusts, tax and estates areas.



## NEWS

### Red Nose Day 2009



To mark Red Nose Day, on Friday 13 March, we held the "Wortley Byers Bake Off". Staff were encouraged to don their aprons and get baking. Whisks, sieves and scales were at the ready....

The competition was judged by our expert in-house judge Jacqueline Quickendon-Parker and with over 15 cakes in the running, the competition was fierce.

There could however only be one winner. Miz Choudhury was deservedly crowned Wortley Byers' "Bake King" for his creative and somewhat original Red Nose Cake (pictured above).

Second place went to Angela Thompson for her chocolate mouse cake (pictured below). (Angela assures us that no mice were included in the recipe!) Third place went to Kimberley Brooker, who baked her favourite bread pudding.



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## Avoiding the Pitfalls

Article by Angela Thompson



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### Buying the assets of an insolvent company

The buyer assumes much greater risk when buying the assets of an insolvent company from an insolvency practitioner. Normally a seller remains liable to the buyer for any claims that the assets were not suitable for the buyer's purposes or were not what was needed or expected. With insolvency, the insolvency practitioner will not want future liability. He will not know enough about the assets and he will need to distribute the proceeds of sale amongst the creditors immediately so will not want to hold money back for claims. Therefore you will be unlikely to get any warranties at all as the business and assets will be 'sold as seen'.

In addition, information about the assets will be scarce. The insolvency practitioner may produce a sales brochure but this will often include a disclaimer. The onus will be on the buyer to investigate and inspect the assets. Access to premises may be permitted albeit on a limited basis and access to commerial-

ly sensitive customer lists will often not be provided as potential buyers are often competitors.

A buyer would usually expect the seller to assign the business name, undertake not to prejudice the name and agree to change the company's name. A legal adviser can advise on alternatives where the insolvency practitioner is not willing to sell the name or where these undertakings are not available.

The business may have employees, legal responsibility for whom may pass to the buyer. You should consult a legal adviser who can advise whether the purchase will initiate a relevant transfer, what your future responsibilities and level of liability will be and guide you through the correct employment law procedures.

If you would like advice on any of the above, or similar issues, please contact Angela Thompson or a member of the Corporate Commercial Team.

## Avoiding the Pitfalls

Article by Sarah Stanyer



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### Redundancy

A redundancy is a dismissal where a business closes either wholly, at a particular workplace, or there is a reduced need for employees to carry out work of a particular type.

The dismissal is only fair when the statutory minimum procedures have been met. Failure to do this means that the dismissal is automatically unfair and the Employment Tribunal can increase compensation by up to 50%.

A fair procedure will include the following:-

- Selection
- Consultation
- An offer of suitable alternative employment or, at least, consideration as to whether any is available.
- Appeal

Before October 2006 it was common for Last in, First Out (LIFO) to be used as a selection criteria. However, since the introduction of the Employment Equality (Age) Regulations 2006 this could result in a claim of indirect age discrimination as younger employees have not had the opportunity of building up service. It is also potentially sex discriminatory due to women taking career breaks to have children and look after family.

The redundancy process can be a difficult time for both employer and employees. Instructing solicitors at an early stage can ensure that the process runs as smoothly as possible.

If you require any further advice or assistance please contact Sarah Stanyer.

## Planning Interview

**Brian Spencer offers a free 30 minute preliminary interview for potential new clients who have town and country planning issues which they would like to discuss.**

Whether you would like to explore the possibility of obtaining planning permission for a new use of land or a new building, or whether you are concerned about proposed new development which might affect your own property, call Brian on 01277 268303 to arrange a no-obligation appointment.



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