AUTUMN 2011

Moss Solicitors were pleased to sponsor The William Roache Golf Day at Rushcliffe Golf Club in June at which more than £10,000 was raised for the Rainbows Hospice in Loughborough.

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# MOSS SOLICITORS

# LEGAL REVIEW

*Your quarterly legal bulletin on news & views from Moss Solicitors LLP*

## REDUNDANCIES FOLLOWING A TUPE TRANSFER

When one business has acquired another similar business, the need for redundancies often arises. In *First Scottish Searching Services Ltd. v McDine and Middleton*, the judgment of the Employment Appeal Tribunal (EAT) illustrates what approach the Employment Tribunal (ET) should adopt when deciding what constitutes a fair redundancy selection process when the selection pool includes employees of the transferor and the transferee.

First Scottish Searching Services Ltd. (FSSS) had acquired another property title search business, SPH, in 2009. The contracts of employment of employees of SPH were automatically transferred to FSSS under the Transfer of Undertakings (Protection of Employment) Regulations (TUPE). FSSS had warned that redundancies would be likely and, in the event, used the same scoring matrix as it had adopted during an earlier round of redundancies in 2008. Former employees of SPH were assessed by managers who had transferred with them, whilst the scoring for existing FSSS employees was carried out by managers familiar with their work. The scores of the latter group were also compared with those achieved in the 2008 redundancy exercise. As it turned out, all of the employees identified as being at risk of redundancy had transferred from SPH.

Two of the dismissed employees contended that the redundancy exercise was biased and brought claims for unfair dismissal.

The ET criticised the redundancy selection system used by FSSS because it did not incorporate 'some system for moderating the two sets of scores'. In its view, because there was a 'clear and overt risk of unfairness', the entire redundancy process was unfair. FSSS appealed against this decision.

The EAT upheld the appeal. The ET had failed to give any explanation of what it meant by 'moderating' the scores nor, indeed, how moderation came to be a feature of the case at all. There were no findings of fact as to what might actually have been done to achieve whatever it was the ET had in mind nor as to what would have been the likely outcome if 'some system of moderation' had been employed.

Under Section 98 of the Employment Rights Act 1996 (ERA), whether a redundancy dismissal is fair or unfair depends on whether the employer acted reasonably or unreasonably in deciding to dismiss the employee. The ET had fallen into the trap of engaging in a 'microscopic' reassessment of the redundancy selection process and had substituted its own opinion for that of a reasonable employer. It had sought perfection when this is not what is required by the ERA.

There was no finding of fact as to any inconsistency of approach between the two sets of managers and no evidence of deliberate bias. Furthermore, the ET had failed to consider the impact on the redundancy decision of the claimants' scores for length of service – a wholly objective criterion that no amount of moderation could have affected – which was clearly substantial.

**We can advise you on any redundancy matter.**

# MOSS SOLICITORS UPDATE

## Bribery Act guidance published

The Government has now published final guidance for businesses on complying with the Bribery Act 2010. The implementation of the Act, originally scheduled for April this year, was delayed to allow time for the guidance to be finalised. The Act came into force on 1 July 2011.

Section 7 of the Act makes it an offence for a commercial organisation to fail to prevent bribery. A business can provide a defence by showing that it had in place adequate procedures to prevent bribery from occurring, however, and the guidance details the approach that should be taken when implementing such procedures.

The overriding point is that these should be proportionate in view of the likelihood of bribery taking place, which will depend on the size of the business and the countries and markets in which it operates. Although the principles remain similar to those in the draft guidance, published in September 2010, the advice in the final version is more detailed.

Section 14 of the Act provides that where an offence is committed with the consent or connivance of a senior officer of an organisation, that person (as well as the body corporate or partnership) is guilty of the offence and liable to be proceeded against and punished accordingly.

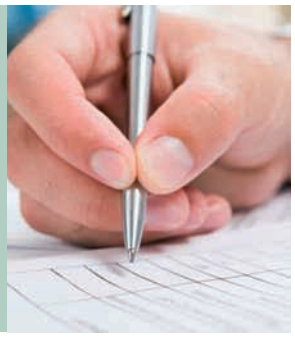
Under Section 11 of the Act, the maximum penalty for individuals is 10 years' imprisonment or an unlimited fine, or both. The maximum penalty for commercial organisations is an unlimited fine.

The guidance includes case studies to illustrate what approach businesses might take in certain situations. It, together with a 'quick start guide' to the Act, can be found at: www.justice.gov.uk/guidance/.

## Signatures of directors mean document executed

A purchaser that had second thoughts about buying a property from a company and sought to avoid the contract for sale, because the document was neither sealed with the company seal nor signed 'by or on behalf of' the company, was given short shrift by the Court of Appeal.

The Court considered that if the contract defined the 'seller' as the company, it would be absurd not to regard the signatures of the directors at the end of the document as meaning the document was executed by the company.



## Wills still a potential minefield for many


According to a recent poll, more than one in eight wills is 'self-written' and one in 10 of those people who have made a will fails to tell anyone where it is. Since nearly four out of every 10 adults have not made a will in the first place, the survey shows that approximately half of all families are likely to face the difficulties that more often than not accompany cases where there is no will or the will has a defect because it was made without the benefit of professional advice.

Making a will makes good sense for everyone. Having a will professionally drafted not only provides an assurance that it will not fail because of some simple defect, but it also means that your estate can be administered more quickly, and normally at less cost, than would otherwise be the case. Many people think that if they do not have sufficient assets to be caught by Inheritance Tax, it is not worth making a will. This assumption can cause those left behind unnecessary stress at a very difficult time and the intestacy laws could operate to distribute your estate in a way that conflicts with your wishes. Making these known in a simple will can avoid all such problems.

We can give you and your family the peace of mind that comes from knowing that your will is properly drafted, legally valid and held securely. Having your will professionally prepared is not expensive and will ensure that your affairs are settled without any unnecessary stress, delay or the considerably greater financial outlay that all too often results if professional advice is not taken.

**Contact us for expert advice on making a will or any other estate matter.**

## INHERITED WEALTH NOT SPLIT ON DIVORCE

A recent divorce case has confirmed the general position that when wealth is inherited, it is not normally subject to the 'equal shares' rule that applies to assets built up during a marriage.

The case involved a couple who married in the UK in 1991 after an earlier marriage ceremony in Israel in 1987. The wife had inherited shares worth £700,000 at the time of their UK marriage. By the time the marriage had broken up and the financial settlement was being negotiated, the shares were worth £57 million. Although neither of the couple had worked, on account of the income available to them from the wife's shares, they lived modestly.

The husband's assets were approximately £300,000, which consisted mainly of the family home, which was transferred to his sole name. He wished to sell that house and to purchase instead a property in Regent's Park, valued at an estimated £2 million. He also proposed to buy a second home in Israel for £450,000 and a new car costing £60,000, and claimed that he would require maintenance of more than £100,000 per year to fund his lifestyle – an amount which greatly exceeded the couple's annual outgoings when they were together.

The wife made an offer of £5 million to her husband, but he sought an additional sum to enable him to accomplish his aims. The Court of Appeal rejected his claim, however, holding that the initial offer was based on a generous assessment of his needs.

In general, on the dissolution of a marriage, any assets brought into the marriage will not be subject to the 'equal division' principle that normally applies to assets created during the marriage. The achievement of a different division must normally be founded on compelling reasoning.

## NEW RULES ON PRIVACY AND ELECTRONIC COMMUNICATIONS

The Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011, which came into force on 26 May 2011, make certain changes to the laws that cover direct marketing by electronic means.

Serious breaches of the rules surrounding the sending of unwanted text messages, emails and marketing telephone calls can now lead to fines of up to £500,000.

The Regulations also amend the rules that apply to websites using cookies and similar technologies to remember a user's preferences. Whereas previously websites were required to provide information about cookies they used and tell visitors to the site how they could 'opt out', the new rules require that websites wanting to use cookies gain the visitor's consent in most cases.

The Information Commissioner's Office (ICO) has enhanced investigative powers that allow it to require telecoms and Internet service providers to cooperate with its investigations of breaches of the Regulations.

The ICO has issued guidance on the changes, which is available at: www.ico.gov.uk. The guidance states that organisations have 12 months to make sure they comply with the new rules regarding cookies.

Although no fines will be issued until May 2012, the ICO anticipates receiving complaints about cookies in the interim period. In this event, it is expected to ask organisations to explain the steps they are taking to ensure that they will be in a position to comply with the Regulations by May 2012.

Website owners who cannot demonstrate that they are taking the action necessary may be issued with a warning notice that will be taken into account by the ICO after expiry of the 12-month lead-in period.

**The new Regulations give the ICO real teeth.**

## CHILD SUPPORT AND INSOLVENCY

When a person goes bankrupt, what is the position regarding a debt they owe to the Child Support Agency (CSA) with regard to arrears of maintenance payments? This question arose recently when a man applied for a creditors' voluntary arrangement (CVA). At the time the application was made, he owed the CSA more than £25,000 in respect of child support payments due to be paid for the benefit of his children.

The CSA ignored the notice inviting it to attend the hearing relating to the CVA as it did not consider it was a creditor that could be bound by the decision under insolvency law. The case reached the Court of Appeal, which agreed with the CSA.

Where a person is in financial difficulties and owes money to the CSA, the CSA retains the right to pursue the sums owed to it whether or not the person seeks a formal or informal arrangement with other creditors.

**If you are having difficulty with payment of child support, we can advise you on your best course of action.**

## NO-SHOWS – ECJ RULES NO VAT DUE

A recent decision of the European Court of Justice confirms that there is no relationship between a deposit taken for a hotel booking and the supply of a standard-rated service where the deposit is retained because the person making the booking is a 'no-show'.

Accordingly, in such cases there is no need to account for VAT on the deposit.

However, if the deposit is made for a specific room which is therefore kept vacant, the supply remains one on which VAT is due.

## THE CONVEYANCING QUALITY SCHEME – WHAT IT MEANS FOR YOU

Conveyancing is often thought to be a straightforward process, but the truth is very different. Problems with potential fraud, claims by lenders and title disputes are not infrequent. In order to protect consumers, the Law Society launched, in January 2011, the Conveyancing Quality Scheme (CQS) in order to provide a recognised quality standard for residential conveyancing practices.

The CQS is supported by the Council of Mortgage Lenders, the Building Societies Association and the Association of British Insurers.

Firms that want to become members of the CQS must:

- demonstrate at least three years' conveyancing experience;
- satisfy checks on their probity;
- show that their practice has high quality standards, consistently applied;
- subscribe to a 'clients' charter', designed to ensure high-quality service delivery; and
- show robust quality assurance backed up by a regulatory regime including 'spot checks' and audit by trained assessors.

**For most people, buying a property is probably the biggest transaction they will ever undertake. When doing so, using a firm with CQS accreditation gives you additional assurance that your house purchase will go smoothly and will not be blighted by legal disputes later on. We are among the first firms to apply for CQS membership.**

## MISPLACED FENCE LEADS TO £20,000 BILL

A fence put up by a Devon couple will cost them more than £20,000 in legal fees and re-erection costs after the court decided that it was built a few inches the wrong side of their boundary with their next-door neighbours.

The court case was necessary because the neighbours objected to the fence, which was erected whilst they were on holiday, and claimed that it had been built on their land. They considered the fence to be unsightly and complained that it blocked the view from their drive.

Photographic evidence of the position of an earlier wall was important in determining the line of the boundary, after an expert had given evidence that the boundary line could not be determined exactly.

The judge ordered the fence to be removed and issued an injunction prohibiting the couple from erecting further fencing on their neighbour's land.

It is often impossible to determine the exact line of a boundary and plans filed when properties change hands are more indicative than precise, so disputes are not infrequent. The outcome in such cases can be both expensive and unpredictable.

**If you have issues with a neighbour encroaching on your land, we can advise you of the appropriate steps to take.**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