MOSS SOLICITORS

LEGAL REVIEW

Your legal bulletin on news & views from Moss Solicitors LLP

Autumn 2012

IN BRIEF

The 2009 agreement between the Government and the Association of British Insurers, which ensures that all properties are insurable against the risk of damage caused by flooding, ends in June 2013.

The inability to insure against the risk of flood will pose significant problems for property owners and occupiers, and may make securing mortgage funding for such properties difficult or impossible.

Owners and occupiers of properties in flood risk areas should consider the potential implications of the expiry of the agreement. Please contact us for advice.

Moss Solicitors LLP
80 -81 Woodgate
Loughborough
Leicestershire
LE11 2XE
Tel: 01509 217770
Fax: 01509 233698

Unit 11A, Whitwick
Business Centre
Stenson Road, Coalville
Leicestershire
LE67 4JP
Tel: 01530 815747
Fax: 01509 233698

Email: enquiries@moss-solicitors.co.uk
www.moss-solicitors.co.uk

Unsuccessful job applicants – access to recruitment information

Does an unsuccessful job applicant who can show that he or she meets the requirements for a post advertised by an employer have the right under the applicable EC Equal Treatment Directives to information on whether another applicant was appointed and the criteria used in deciding to recruit them? This was the question referred to the European Court of Justice (ECJ) by the German Labour Court in *Meister v Speech Design Carrier Systems GmbH*. Secondly, if the answer to this question is 'yes', if the employer fails to disclose the requested information, does this give rise to a presumption that the discrimination alleged by the unsuccessful applicant exists?

Ms Meister, a Russian national with a degree in systems engineering from a Russian university, replied to a newspaper advertisement for a job as an 'experienced software developer' with Speech Design Carrier Systems GmbH but her application was rejected without her being invited for interview. Shortly afterwards, a similar advertisement appeared on the Internet and Ms Meister reapplied. Once again, Speech Design rejected her application, without inviting her to an interview and without telling her on what ground her application was unsuccessful. Speech Design made no claim that her level of expertise was insufficient for the post.

Ms Meister claimed that she had suffered less favourable treatment than another person in a comparable situation on the grounds of her sex, age and ethnic origin. She sought the production of the file for the person who was recruited to the post, which would enable her to prove that she was the better-qualified candidate.

The ECJ ruled that the Directives must be

interpreted as not entitling an unsuccessful applicant who claims plausibly that he or she meets the requirements listed in a job advertisement to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process. However, the burden of proof in such cases is a matter for application by the national courts. Where a claimant establishes facts from which it may be presumed that there has been direct or indirect discrimination, the burden of proof then shifts to the employer (or prospective employer) to prove that there has been no breach of the principle of equal treatment. In this context, it is for the national court to ensure that the employer's refusal to disclose information does not compromise the achievement of the objectives of the relevant Directives. It cannot be ruled out that the employer's refusal to grant access to any of the recruitment information may be one of the factors to take into account in the context of establishing a prima facie case for less favourable treatment.

A recruitment process that discriminates – directly or indirectly – against people on the ground of a 'protected characteristic' can be a recipe for trouble. The best course of action is to make sure your recruitment policies are fully compliant with equal treatment legislation and can be demonstrated to be so if challenged. Contact us for advice on any discrimination matter.

MOSS SOLICITORS UPDATE

Advance directive made by eye movements upheld

It is open to anyone to make what is popularly called a 'living will', a document also commonly known as an 'advance directive' or 'advance decision'. Advance directives can include a direction that life-sustaining medical treatment should be withdrawn in certain circumstances. They are often used to communicate a wish that life-prolonging medical treatment should cease if a person has no hope of recovery from an illness.

In a recent case, an advance directive to refuse life-sustaining treatment was upheld by the Court of Protection in a decision in which the judge emphasised the need for clarity of language in such documents.

The advance directive was made in November last year by a 67-year-old man who was suffering from motor neurone disease. He communicated his wishes by way of eye movements. At that time, he was believed to have the necessary mental capacity to create a directive, but by the time of the Court of Protection hearing in early May 2012 that capacity had been lost.

One of the man's carers raised doubts about the recording of the decision, which had been carried out using a form downloaded from the Internet. This appeared to have an expiry date of 2 May 2012. An urgent application was made to the Court of Protection, which upheld the validity of the document, thus making it possible for doctors to remove the man's artificial feeding tube.

The judge hearing the case emphasised the importance of clarity in such documents and recommended that charities and others providing pro-forma advance directive forms should review them in the light of her comments.

If you wish to appoint another person to make decisions about your medical treatment in the event that you lose the capacity to do so yourself, this may be done by executing a Personal Welfare Lasting Power of Attorney rather than an advance directive. Such a document can give a person of your choosing power to make a range of decisions relating to your personal welfare if you become incapacitated, including where you will live and decisions regarding medical treatment.

If you would like to discuss the options available regarding the arrangements you can make to allow your affairs to be managed for you should you no longer be able to do so, contact us.

Maintenance payments should be based on need

Helpful guidance on the calculation of periodical payments (popularly known as maintenance payments) in a divorce settlement has been provided by a High Court judge in a recent case.

In deciding a contested claim for maintenance, Mr Justice Mostyn expressed the view that the law relating to property acquired during the marriage is 'reasonably clear'. However, the law relating to periodical payments is, by comparison, not so clear. He therefore gave his views on how these should be calculated, in the hope that this will result in more cases being settled out of court.

In the judge's opinion, a claim for periodical payments should be settled by reference to the principle of need alone, although there should be some room for discretion in assessing those needs, which 'are elastic in concept'. His view is that the principle of sharing, which could give rise to additional maintenance over and above need, should not be applicable other than in the most exceptional circumstances.

For the judge, one vital distinction between the division of matrimonial property, where the sharing principle is commonly used so that there is equal division of assets between the couple, and the amount of maintenance to be paid is that by definition the matrimonial property has been acquired during the marriage whilst periodical payments would be met from post-divorce earnings.

It remains to be seen whether the judge's guidance will be followed in future disputes, but any attempt to facilitate resolution of contested cases is to be welcomed.

Our experts can advise you on all aspects of family law. Contact us for advice.

New cookie law – a reminder

The Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 require consent to be obtained for the use of cookies and similar technologies for storing information, and accessing information stored, on a user's equipment, such as their computer or mobile phone.

The Regulations came into force on 25 May 2011. However, the Information Commissioner's Office (ICO) announced that organisations would be allowed a year-long period to work towards compliance with the changes. That grace period has now expired.

Previously, privacy rules only required websites to tell users about cookies they used and provide information on how to 'opt out'. Most organisations did this by putting information in their privacy policy. The new rules require that in most cases websites wanting to use cookies must gain consent, which must involve some form of communication whereby the individual knowingly indicates their acceptance.

The ICO made last-minute changes to its guidance on how to comply with the new cookie law in order to clarify the following points with regard to implied consent:

- Implied consent is a valid form of consent and can be used in the context of compliance with the revised rules on cookies;
- If you are relying on implied consent you need to be satisfied that your users understand that their actions will result in cookies being set. Without this understanding you do not have their informed consent;
- You should not rely on the fact that users might have read a privacy policy that is perhaps hard to find or difficult to understand; and
- In some circumstances, for example where you are collecting sensitive personal data such as information about an identifiable individual's health, data protection law might require you to obtain explicit consent.

The updated guidance can be found at www.ico.gov.uk/. The ICO has also produced a short video answering FAQs.

Contact us for individual advice on this issue.

Forfeited leases – practical issues

When a landlord wishes to re-let a property that it has repossessed by 'forfeiture' because the tenant is in arrears with its rent payments, there is a potential problem in the form of the right a tenant has to apply for 'relief from forfeiture' for a period of six months after the landlord has caused the lease to be forfeited.

The court will grant relief from forfeiture where the tenant applies for it and it is reasonable to do so.

Where the tenant's application is granted, the landlord can incur significant costs. If the property has been re-let, the new tenant may be forced to move out if previously advised of the tenant's intention to apply for relief.

Clearly, a landlord will not want to leave a property empty for six months just to make sure 'the coast is clear'.

The best course of action in such circum-stances is usually to seek written assurances from the outgoing tenant that it will not seek relief from forfeiture and to keep the new tenant informed of the position.

Contact us for advice on dealing and negotiating with tenants in such circumstances.

Failure to create clear terms means copyright shared

How many times has the adage 'get it in writing' been ignored to the cost of one or more of the parties to a contract?

Recently, a failure to make clear contractual terms regarding who owned the copyright in a film, which featured a skydive over Mount Everest, led to the producer/financier and the cameraman falling out over their respective rights.

Although the court was satisfied that the producer had intended to have full ownership of the copyright, there was no express agreement to that effect and the court considered that, on the balance of probabilities, he had not made this clear to the cameraman.

As a result, the court ruled that they owned the copyright equally.

This is yet another case involving an argument that would not have arisen had the two parties put the terms of their agreement in writing: this is crucial when it comes to any form of profit sharing or ownership of intellectual property assets.

Contact us for advice on any aspect of contract law.

Redundancy and the pool for selection

In Halpin v Sandpiper Books Ltd., the Employment Appeal Tribunal (EAT) held that the Employment Tribunal (ET) had been correct to find that the pool for selection for redundancy could consist of only one person where he was the only person doing that job.

Mr Halpin began working for Sandpiper Books Ltd. in 2007 as an administrator/analyst at its London office. In 2008, the company decided to look into the prospect of selling books in the Chinese market and Mr Halpin, who had spent a year in China teaching English, was given the job of developing sales in that country. However, Sandpiper Books subsequently decided that it would be preferable to outsource this work to a local agency and Mr Halpin's role was at risk of redundancy.

For redundancy selection purposes, Mr Halpin was treated as being in a pool of one. Sandpiper Books consulted with him extensively and offered him alternative employment, but this was refused and he was made redundant. He brought a claim for unfair dismissal but the ET was satisfied that there was a genuine redundancy situation and that he had been fairly selected for redundancy 'in so far as he was in a pool of one given his unique position dealing solely with sales and based in China'.

Mr Halpin appealed on the basis that no reasonable employer would automatically limit the selection pool for redundancy to those whose work had itself diminished, but would include other workers with interchangeable skills.

The EAT dismissed the appeal. An ET is in error if it makes itself 'the decision-maker as to pools'. The finding of the ET in this case as regards the employer's decision to have a pool of one was not only open to the ET but was also a decision that it could not easily overturn. The decision was logical. Mr Halpin was on his own working in China and this work had come to an end. The ET had found no fault with the procedure adopted by the management of the company, so it would not have been correct for it to interfere with any of the decisions that caused Mr Halpin's redundancy.

When contemplating making job cuts, employers should always give careful consideration to the composition of the pool of those at risk of redundancy but, as this case shows, there are circumstances where the redundant post is in fact unique and the pool will consist of the job holder alone.

Contact us for advice on any employment law matter.

Chancel repair liability – registration requirement

A recent case in which the owners of a farm faced ruin because their property was saddled with an ancient responsibility to maintain the local church received a great deal of publicity, and has prompted a change in the applicable law.

So-called 'chancel repair liabilities' (CRLs) can attach to properties and have no impact on successive owners of those properties for centuries, only coming to light when a major refurbishment of the church becomes necessary. The consequences can then be disastrous for the owner of the affected property. It is normally possible to insure against the risk of a property carrying a CRL, but not against the cost of a CRL claim where a property is known to be at risk.

A change has now been made to the law and this will come into force on 13 October 2013. From that date, a CRL will have to be registered by way of a notice against the property title at the Land Registry in order to be effective against a buyer of a property which is registered land. This will mean that the prospective buyer of a property that is subject to a CRL will be warned of its existence when the usual property searches are done.

Existing CRLs are unaffected.

MOSS
SOLICITORS
80 -81 Woodgate, Loughborough, LE11 2XE
Tel: 01509 217770 **Fax:** 01509 233698
Email: enquiries@moss-solicitors.co.uk
web: www.moss-solicitors.co.uk

WOODGATE
FINANCIAL PLANNING LTD
an associated business of Moss Solicitors LLP
80 -81 Woodgate, Loughborough, LE11 2XE
Tel: 01509 635467 **Fax:** 01509 233698
Email: enquiries@woodgatefs.co.uk
web: www.woodgatefs.co.uk