

# THE *Brief*

**BELLS**  
solicitors

THE NEWSLETTER OF BELLS SOLICITORS

## New chapter in Financial Planning

Of the 9,000 or so firms of solicitors in the UK, you may be surprised to learn that only 56 are currently authorised by the Financial Services Authority to provide independent financial advice in house. Most solicitors avoid it, considering it to be too specialist or "non-core".

Here at Bells however, we have always believed that legal and financial advice go hand-in-hand, and that to offer one without the other is to offer a second-rate service that can border on the negligent.

Many of our clients receive large capital lump sums as a result of the work that we do for them – perhaps an inheritance, the proceeds from a house or company sale, a divorce settlement, a redundancy payment or a damages award.

Every day solicitors up and down the country send large cheques to their clients and blithely assume that their clients know what to do with the money. But take the case of a recently bereaved widow, whose husband previously dealt with all the family's financial affairs.

Should her solicitors assume that she does not require further advice? We are aware of people like this who have left six-figure sums languishing in current accounts for years, earning little or no interest, and others who have incurred entirely avoidable tax liabilities. In our view these individuals were poorly advised, whatever the outcome of their "legal" matter.



## Court rules that shareholders can also be employees

The Court of Appeal has ruled that there is no reason in principle why a person who is a director and shareholder of a company could not also be one of its employees and benefit from the legal rights that go with being an employee.

The case is important because it means that such directors, even if they are a controlling shareholder, could qualify for compensation payments from the National Insurance Fund if their company becomes insolvent.

The case involved two director/shareholders from two separate companies. They each received salaries, paid tax and national insurance as an employed person and said they had an oral contract of employment with their companies.

When their two companies became insolvent they were deemed by an employment tribunal not to be employees under the Employment Rights Act 1996 and so were not entitled to redundancy payments or any other compensation from the National Insurance Fund.

The case then came before the Court of Appeal which has now ruled that there is no reason in principle why a shareholder or even a controlling shareholder could not be an employee under a contract of employment.

The court gave some guidance to



help determine whether or not a shareholder could also be classified as an employee. It would be necessary, for example, to determine whether the contract of employment was genuine or just a sham. Inquiries should be made as to what work had actually been done under the contract and whether the shareholder in question was actually an employee at the time of the insolvency.

The court also said that questions such as whether a person had a controlling interest in a company or the extent of his personal investment should not ordinarily be of any special relevance in deciding whether or not he had a valid contract of employment.

This is a very important ruling and will influence the way these issues are decided in future. Please contact us if you would like more information.

Dissatisfied with the service our clients were receiving from third party financial advisers, in 1999 we decided to set up our own Financial Planning department, offering high-quality impartial financial advice tailored to our clients' particular needs. From the start we invested in the most up-to-date technology and made sure that our charging arrangements were fair and transparent.

We have always offered our clients a choice between paying a fee or allowing us to retain commission. We have never mis-sold an endowment policy or provided inappropriate advice in order to secure a 'sale'. Our financial planning staff are professional advisers, not salesmen.

Given the quality of the service provided, and the fair way in which we treat all our clients, it is not surprising that our Financial Planning department has gone from strength to strength and now attracts work from outside the firm's own client bank.

In response to this demand we have decided to expand the department and as a crucial step in this direction we have successfully recruited Dean McCarthy (Dip PFS) as our new Head of Financial Planning.

Dean, pictured above, was formerly a Director of Cobalt Private Finance in London and has often been quoted in the national papers and on the BBC's website in relation to financial planning matters. We wish him every success.

# Financial crisis means 'many wills now out of date'

The current financial crisis together with the housing slump means many people may find that their wills are out of date and need to be redrawn.

That's the warning from the Law Society which says that provisions made in more prosperous times may no longer be appropriate.

One of the potential problems is that people who want to provide for someone by leaving them certain assets may find those assets have shrunk in value and are no longer sufficient to achieve the desired result.

The President of the Law Society, Paul Marsh, said: "Those wanting to leave friends and family in a secure position

## Assets may have shrunk in value

after they pass away might find that what they have left in their will has considerably less value than when their solicitor wrote it.

"With homes losing value people may need to look again at their wills, especially if they have included tax planning provisions which are no longer appropriate.

"The same goes for shares and other assets. The value of the assets in a person's will might have fallen significantly since it was drafted and so



the will may need to be rewritten."

It is also possible that the changing relative values of cash, property and shares mean that some beneficiaries may receive a greater proportion of your estate than you anticipated and some may receive less.

It may be necessary to change the will to redress the balance and ensure that your estate is divided in a way that meets your wishes.

Mr Marsh said: "It is essential that anyone with a will who has not looked to update it recently goes to their solicitor to review it and, if needs be, change it to reflect their current financial situation.

"A solicitor is best placed to advise on any necessary amendments, as well as provide guidance on tax planning. Reducing the tax burden on the assets you wish to leave in your will has an even more relevant benefit for your family and friends in the current economic climate.

"If you do not have a will, now would be a good time to write one or risk leaving friends, families or other intended recipients of your assets with nothing."

Please contact us if you would like more information about wills and probate matters.

## Partners could be personally liable for firm's debts

The recession is highlighting the risk some partnerships face as they try to keep their businesses afloat despite falling orders and rising debts.

Many may find that if their business becomes insolvent, they could be personally liable for its debts. It can mean partners not only lose the business they have spent years building up, they may also lose their personal savings and even their homes in some cases.

This is an issue that many partners put to the back of their minds when business is good but it quickly comes to the fore when times get difficult as in the current economic downturn.

The answer could be to consider restructuring the business as a Limited Liability Partnership (LLP).

There are several advantages in becoming an LLP – including possible tax benefits - but the main one in the current economic climate is that it



helps to ensure that liability lies with the business itself rather than with the individual partners. The personal assets of each partner should be protected in most circumstances if the business fails.

LLPs need to be drawn up properly to be effective so partners wishing to protect their interests should seek legal advice.

Please contact us if you would like more information.

## Husband tried to use bankruptcy to avoid paying any maintenance

A court has annulled a man's bankruptcy order after the judge decided that he was simply using it as a way to avoid having to pay maintenance to his former wife.

During the divorce proceedings the wife had obtained an order for interim maintenance. The husband then successfully issued a petition for his own bankruptcy saying that he was unable to meet his debts. The wife immediately applied for the order to be annulled because she believed it was simply a device to enable him to avoid paying maintenance. After a long and complicated hearing, the judge questioned the husband's honesty and



agreed to annul the order. The husband then took the case to the Court of Appeal but it too ruled against him after hearing that at the time he petitioned for bankruptcy, he had assets of £1.2m and debts of only £136,000.

The court held that with such substantial

assets, the onus was on him to prove that he was unable to pay his debts. He had not been able to do this and so the judge at the original hearing had been right to conclude that the husband was able to pay his debts at the time he was petitioning for bankruptcy. His motive had simply been to defeat his wife's maintenance claim and so the decision to annul the bankruptcy had been correct.

Please contact us if you would like more information about this or any aspect of divorce proceedings.

# Collaborative Law - a new approach to resolving family break-downs

Most people agree that a courtroom battle is the worst possible way for divorcing and separating couples to sort out their differences.

Aside from the enormous cost, the adversarial nature of the proceedings can destroy the parties' relationship for ever. Fortunately there is now a better alternative.

'Collaborative Law' helps divorcing couples to resolve disputes through face-to-face negotiations with lawyers present. It was introduced from America in 2003 but as yet there are only about 1200 solicitors in England and Wales who are qualified to offer the service because specialist training is required.

Of the 2,800 collaborative cases opened during 2006 and 2007, 85% were settled, with at least two thirds settling sooner than they would have with a more traditional approach. Fiona Dutton was one of the first solicitors in Surrey to sign up to this new regime and now has a lot of experience of the practice and procedure involved.

She says: "The collaborative process offers couples the



opportunity to reach a settlement without going to court whilst continuing to maintain a good relationship with each other. Negotiations are conducted in four-way meetings with both couples and their respective lawyers present. It assists in helping couples to communicate better and gives them more control over the process whilst still receiving the benefit of legal advice. The result is a more dignified and respectful environment for clients and lawyers alike."

If you would like to receive more information about Collaborative Law please email [F.Dutton@bells-solicitors.co.uk](mailto:F.Dutton@bells-solicitors.co.uk) or telephone us for an appointment.

**Reach a settlement without going to court**

## Homeowner wins contract dispute with her builder

A recent dispute between a homeowner and a builder has highlighted the fact that consumers are not necessarily bound by a contract if the terms are considered by the courts to be unfair.

This can apply even if the consumer has signed the contract confirming that they have read and understood it.

The case involved a homeowner who engaged a builder to add an extension to her bungalow. She signed a contract saying that if a dispute were to arise between them then it should be resolved in accordance with the Arbitration Act 1950. This effectively meant that rather than going to court, they would appoint an arbitrator to settle the matter.

A disagreement then arose over the cost of the work. When negotiations broke down, the builder sent a Notice of Arbitration. The homeowner refused to take part in appointing an arbitrator because she wanted the dispute to be settled through the courts. The builder then appointed an arbitrator who found in his favour.

The homeowner refused to accept this and took the matter to court. The case centred on provisions in the Unfair Terms in Consumer Contracts Regulations 1999. It states that: "A contractual term which has not been individually negotiated shall



be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer."

The judge held that the arbitration clause was unfair because it was intended to remove the homeowner's right to take legal action through the courts. It also created an imbalance between her as just a layperson and the builder as an experienced professional – particularly as she would have had to pay the arbitrator a fee of £2,000 to settle a dispute about a sum of only £5,000.

Of course, consumers should always read the small print and understand what they are signing because on most occasions they will be bound by the terms of the contract. However, when those terms are considered to be unfair as in this case, it is possible to take legal action and win.

Please contact us if you would like more information.

## New Bill designed to update rules relating to trusts

A new Bill to update the law relating to trusts has been introduced in the House of Lords.

The Perpetuities and Accumulations Bill will modernise the rules which restrict how long a person can control the future ownership of property (perpetuities) and how long trustees can add income to capital (accumulations). The rules are designed to prevent people locking wealth away indefinitely.

A spokesman for the Ministry of Justice said: "The Bill will restrict the rule against perpetuities to trusts and simplify its operation by introducing a single 125-year period. It will remove restrictions on accumulations except for charities, which will be subject to a 21-year limit.

"Other than a limited right to opt in to a 100-year period, the changes will not affect pre-existing trusts or wills."

The Bill will implement recommendations put forward by the Law Commission in a report published in 1998. Sir Terence Etherton, chairman of the Law Commission, welcomed the Bill and said reform of this ancient area of law is long overdue.

Please contact us if you would like more information about trusts.

# Bank will pump extra £14bn into mortgage lending

Northern Rock is to increase its mortgage lending by up to £14bn over the next two years.

The nationalised bank plans to make £5bn available this year and a further £9bn in 2010.

The Chancellor Alistair Darling says this is one of a series of moves designed to rebuild the banking sector and revitalise the housing market by making more mortgages available. Some mortgages will be provided at up to 90% of the value of the property being purchased. The average value of new mortgages is currently £112,000. At that rate, the extra £5bn being made available this year could fund the purchase of 44,600 homes of average size.

Announcing the increased funding, a Government statement said ministers wanted to see a well functioning mortgage market where "lenders lend responsibly and borrowers have access to a wide range of mortgages that they can afford to repay".

The extra funding from Northern Rock may not have a



dramatic effect on the depressed property market but it is nevertheless a step in the right direction and gives some ground for optimism for those looking to buy or sell a house.

Both buyers and sellers who are thinking of re-entering the market may find that the system has changed considerably since the last time they moved home – mainly because of the introduction of Home Information Packs (HIPs).

HIPs are intended to simplify and speed up the process by obliging the vendor to provide potential buyers with important information such as the results of local searches and evidence of title as soon as the property is put on the market. This was the kind of information that each buyer used to have to find out for themselves.

Anyone selling a home regardless of its size must now provide a HIP for potential buyers. Please contact us if you would like more details about HIPs or any aspect of buying and selling a house.

## Don't pay too much for your Home Information Pack

House sellers who get a Home Information Pack (HIP) from an estate agent are being urged to ensure that the price isn't being inflated by hidden charges.

The warning from the Law Society comes after a Channel 4 News investigation found that some estate agents were adding more than £100 to the cost of a HIP. This is because many agents hire outside providers to supply the HIP and then add on a commission fee for themselves when billing the client.

Law Society President Paul Marsh said: "The cost of the HIP charged to the home seller by the estate agent could be much higher than necessary

and more than the agent actually pays the HIP provider. Because of these hidden referral fees the estate agent is overcharging the seller and making a secret profit.

"Sellers should ask for details of the exact costs to discover if the agent is charging them more than they should be, and more than the HIP actually cost the estate agent.

"They should also ask if the estate agent is receiving a hidden commission from the HIP provider, which would mean the estate agents are keeping part of the cost themselves.

"If the agent is paying £300 to the HIP

provider and then charging their client £400 the client is paying an extra £100 unnecessarily. With the other costs involved in selling, these added costs are unwanted extras.

"If sellers do find their agent is charging extra for their HIP they should ask their solicitor if they can provide a HIP instead, as solicitors are required to be fully open with their clients about fees. The added benefit of using a solicitor is that they are all strictly regulated and required to follow stringent rules, unlike estate agents."

Please contact us if you would like more information about the cost of Home Information Packs.

### PROPERTY

- ESTATE AGENCY
- RESIDENTIAL CONVEYANCING
- LANDLORD AND TENANT
- BUSINESS LEASES
- PROPERTY DEVELOPMENT
- RE-MORTGAGES
- COMMERCIAL PROPERTY

### LITIGATION

- COMMERCIAL DISPUTES
- PARTNERSHIP DISPUTES
- PROPERTY DISPUTES
- DEBT COLLECTION
- CONSUMER PROBLEMS
- ACCIDENT COMPENSATION

### COMPANY/COMMERCIAL

- SHARE PURCHASES/SALES
- TERMS & CONDITIONS
- ASSET PURCHASES/SALES
- COMMERCIAL AGREEMENTS
- COMPANY PROCEDURES

### FINANCIAL PLANNING

- SAVINGS AND INVESTMENT
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### FAMILY

- DIVORCE / SEPARATION
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- WILLS AND PROBATE
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### EMPLOYMENT

- COMPROMISE AGREEMENTS
- REDUNDANCY
- UNFAIR DISMISSAL
- CONTRACT DRAFTING
- RESTRICTIVE COVENANTS

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