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LEGAL REVIEW

Your quarterly bulletin on legal news & views from Allan Janes Solicitors

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Untaken holiday – all is not lost

Most employers consider that when it comes to holiday entitlement employees must "use it or lose it" and to an extent that is true.

The basic position under UK law is that statutory holiday must be taken in the year in which it is accrued. An exception to this is where the employee is prevented from taking their holiday, either by the employer's refusal to allow them to take it, or as a result of leave including maternity leave and long-term sickness absence.

However, in the recent case of *Max-Planck-Gesellschaft v Shimizu* this exception was extended further. The court decided that where a worker

does not exercise the right to take holiday, the holiday is not lost unless the employer 'diligently' brought it to the worker's attention that leave will be lost.

Going forward, we recommend that all employers should monitor the leave taken by employees and ensure that staff are reminded regularly, accurately, and in good time to take holiday, or risk losing it.

Failure to do this could lead to costly claims for backdated holiday pay.

Please contact Charlotte Braham on charlotte.braham@allanjanes.com for advice on any employment law issue.

Charlotte Braham

The Wills and Inheritance Quality Scheme

We are delighted to announce our accreditation as a member of The Law Society's Wills and Inheritance Quality Scheme.

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WIQS accredited firms are recognised by the Law Society as providing the highest standards of Will preparation and Estate administration by adhering to the best practice standards laid down by the scheme.

We take pride in the quality of the service we provide to our clients. Our Head of Department, Alex Stanier, is already a full member of the Society of Trust and Estate Practitioners, and we believe this new accreditation further underlines the skill, expertise and friendly service, that we bring to our private client work.

The Law Society Will Accredited Wills & Inheritance Quality

We regularly advise on all aspects of Estate Planning whether your concern is care fees, inheritance tax, or simply making sure your estate goes to the right people! We also administer all types of estate, including those with significant inheritance tax burdens or cross-border issues.

You can find more information about the WIQS Protocol, and what it means for you, on the Law Society Website.

Record IHT haul spells warning for families

News that HM Revenue and Customs (HMRC) collected a record £5.1 billion in Inheritance Tax (IHT) in 2017 will come as a warning for many people, the near half billion pound increase over the previous year being largely due to more homeowning families being drawn into the IHT net.

With the average house price in the UK now more than £217,000 (and more than double that in London) and with an IHT threshold (although there are extra reliefs for the family home) of £325,000, there is a distinct danger that anyone with reasonable savings and other assets will leave an estate that exceeds the threshold.

Fortunately, IHT is a tax which is usually avoidable with planning and if action is taken in good time.

For advice on how to make sure your family wealth passes to those you choose, not to HMRC, contact Alex Stanier at alexstanier@allanjanes.com for assistance.

Elder care crisis looms as dementia risk ignored

A report published recently by Solicitors for the Elderly (SFE) makes worrying reading as it highlights the growing gap between the number of people expected to develop dementia and the number who have created a lasting power of attorney (LPA).

An LPA can be used to give another person the ability to administer your affairs should you lose that capacity and can be set up to allow management of both financial and health and welfare issues.

In practice, when there is no LPA the results can be a mess. Dementia is a progressive disorder and it is usual for the erratic behaviour to start gradually and worsen. Much damage can occur before the family seize the nettle.

With an LPA, the whole process can be dealt with in a much more orderly fashion.

According to SFE, there are more than 12 million British residents at 'high risk' of developing future incapacity. However, fewer than one million people have made a health and welfare LPA.

All adults should consider making an LPA appointing one or more attorneys so that their affairs can be managed by a responsible person and their care needs met. Failing to do so can cause a great deal of stress for their family.

For advice on all matters relating to elder care and estate planning, contact Alex Stanier at alexstanier@allanjanes.com for advice.

Failure to control knotweed proves costly for landowner

Japanese knotweed is a very considerable pest – 'indisputably the UK's most aggressive, destructive and invasive plant', according to the Environment Agency – as it can cause damage to buildings, spreads easily and is difficult to eradicate. As well as its potential for physical damage, its presence can also reduce the value of a property.

It is the responsibility of an owner of land which has knotweed growing on it to control it and to prevent it from spreading to adjacent land.

A recent case was brought by the owners of properties affected by knotweed because Network Rail had failed to stop it from spreading from land it owned. Whilst no actual damage was done to any building on the property owners' land, they sued Network Rail for the diminution in value of their properties caused by the knotweed.

Network Rail argued that there was no liability on its part because no actual damage had been done, but the Court of Appeal rejected that argument, concluding that 'nuisance' had been established. In order to show this in such cases, it is necessary that there has been an interference with the owner's legal rights – this does not mean there has to be any physical damage.

Network Rail was aware of the presence of the knotweed and should have understood that a risk of damage to nearby property existed.

If you have knotweed growing on your property or if there is knotweed near you which you fear will spread to your land, contact Richard Harriman at richard.harriman@allanjanes.com for help and advice.

Can a will be valid if you can't read it?

One of the requirements for a will to be accepted as valid is that the person who makes it must have 'knowledge and approval' of its contents…in other words, they must understand what the will says and what it means in practice.

It might seem, therefore, that a will in a language the testator could not read would be difficult to validate, but that was not the view of the High Court in a recent case.

The son of a couple who had executed 'mirror wills' contested his late mother's will. The will, written in 1998, gave her estate to his younger brother. He argued that she could not have

understood the will, which was written in English, as her command of the language was insufficient to give her knowledge and approval of its contents.

However, the Court ruled that in the absence of any evidence to the contrary or any suspicious circumstances surrounding its execution, the will should stand.

The bar is set high for those who wish to challenge a will on the basis that the person making it lacked knowledge and approval, with the burden of proof resting on those seeking to invalidate it. However, in a case like this, the provision of a signed and certified translation in the language of the person creating the will is a sensible precaution.

To ensure that your estate passes to those you choose, contact Alex for advice on email: alex.stanier@allanjanes.com or call 01494 521301.

Failing to pay fines can mean more than financial penalties

Business owners and directors who fail to pay fines can lose in more ways than just financially. When a Derbyshire company fell foul of the Health and Safety Executive following a near-fatal accident to one of its employees, the fine that resulted after the investigation amounted to more than a quarter of a million pounds.

The company went into liquidation because it could not afford to pay the fine. However, the Insolvency Service then found that the director of the company had formed a new company which was undertaking similar work. As a result, the director was disqualified from being directly or indirectly involved in the formation or management of a company for six years.

The Insolvency Service has teeth, merely creating a 'phoenix' company in similar circumstances is fraught with danger. Contact Clive Hitchen at clive.hitchen@allanjanes.com for assistance.

Unilateral mistake – High Court rectifies terms of commercial lease

Signing leases is a serious business and both landlords and tenants are expected to live with their terms, however onerous they may be. However, as a High Court case illustrated, judges have the power to rectify terms if an obvious mistake has been made.

A retailer and a property company had conducted long and detailed negotiations in respect of a proposed lease of commercial premises. Various draft leases had passed between them and it had been agreed in principle that the retailer would pay 50% of the rent for the first three years of a 20-year term and that there would be five-yearly rent reviews, fixed at 2.5% (the initial rent and rent review clauses). However, in the lease that was eventually completed, the initial rent clause had been deleted and an entirely new rent review provision inserted.

After the retailer launched proceedings, the Court noted that its representative had been driving his car in France when he agreed completion terms on the phone. He had relied on the property company's representative, whom he trusted, to talk him through any significant changes to a previous draft of the lease. The Court, however, found that the representative had not drawn his attention to the amendments to the initial rent and rent review clauses.

In the context of a lease the small financial details of which had been closely negotiated, the only explanation for a lack

of outcry on the retailer's part was that neither its senior management nor its representative had noticed the changes. The Court reached the unattractive, but inescapable, conclusion that the property company's representative knew, or at least suspected, that a unilateral mistake had been made but had decided to take advantage of the situation. In those circumstances, the Court ordered rectification of the lease so as to reflect the initial rent and rent review terms that had previously been agreed.

If you think you have been taken advantage of or had misrepresentations made to you in any property agreement, contact Clive Hitchen at clive.hitchen@allanjanes.com for assistance.

Adjudication proceedings in liquidation? Court says no

When a company enters liquidation, one of the principles that has to be observed is that creditors of the same class have to be treated the same way. There is, however, an exception to the rule under the Insolvency Rules 2016. If a company in liquidation owes money to a person or organisation and is also owed money by them, then an automatic 'set-off' applies and only the net balance is taken into account in the liquidation. This applies by rule of law and cannot be legally overridden.

When a contract between an electrical company and a subcontractor ended in dispute, with each side claiming that the other had wrongly terminated it, this was followed by the subcontractor going into liquidation. The subcontractor invoked the adjudication provisions in the contract with regard to allegations of breach of contract. It also claimed damages.

The electrical company argued that the adjudicator did not have jurisdiction because the relationship between the companies was now governed by the Insolvency Rules. The court agreed, deciding that once a company enters liquidation, there will only be a single claim for the net balance and no separate enforcement proceedings can be taken. The adjudicator did not have jurisdiction to determine the matter.

When construction contracts get contentious, taking legal advice is important, especially where the finances of either party to the dispute are difficult. Please contact Clive Hitchen at clive.hitchen@allanjanes.com for assistance.

Employment status – mutuality of obligation

Letters of appointment do not always reflect reality and are sometimes couched in terms that are deliberately designed to disguise an employment relationship. As a recent decision of the Employment Appeal Tribunal (EAT) showed, however, their impact can be decisive if they are not proved to be a sham *(Hafal Limited v Lane-Angell)*.

The case concerned a woman who worked for a charity that provided appropriate adults to assist those detained in police stations. She was initially taken on as a volunteer but later began to be paid for her work. Her letter of appointment stated that her engagement was on a 'bank basis', that there were no guaranteed hours and that the charity would use her services as and when required, and only if she were available.

The charity operated a 'three-strikes' rule, whereby it dispensed with the services of those who had given notice of their availability to work but who failed to answer telephone requests to do so on three occasions. After that rule was applied to her, the woman launched an unfair dismissal claim. Following a preliminary hearing, an Employment Tribunal (ET) found that she was an employee and so her claim could proceed.

In upholding the charity's challenge to that ruling, the EAT noted that the ET had paid little or no regard to the woman's letter of appointment. There was no evidence that it was a sham designed to create the impression of casual work where an employment relationship in fact existed. The woman acknowledged that she had worked on a bank basis, her argument being that the position had evolved over time to become something more formalised.

The woman had not been under an obligation to provide any or any minimum number of dates on which she would be able to work and the three-strikes rule, although in the nature of a sanction, was clearly only applicable to those who had expressed their availability to work but who could not be contacted. The mutuality of obligation required for an employment relationship was not present and the EAT substituted a decision that the woman was not an employee.

We can advise you on any contractual matter. Please contact Charlotte Braham on charlotte.braham@allanjanes.com for advice.

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