

THE CITATION

CLIFTON INGRAM: KEEPING YOU POSTED WITH NEWS OF THE LAW | SEPTEMBER 2008

DISPUTE RESOLUTION

LANDLORDS BEWARE

As a private landlord are you potentially facing a large fine you know nothing about?

Developments in housing law often fail to get the attention they deserve. Many people who own residential property which is privately rented do so through managing agents who keep their clients informed of the ever more onerous legal requirements on landlords. But if you rent out your own property where can you find this information?

The most recent change in housing law to have slipped under the radar for many private landlords was the Tenancy Deposit Scheme introduced under the Housing Act 2004. The laudable idea behind this was to prevent the problems that occur when a tenancy comes to an end and the dilapidations deposit becomes returnable. Often the landlord wants to make deductions for repairs and replacements which the tenant believes should fall into the category of "fair wear and tear" and do not therefore constitute legitimate deductions. The Tenancy Deposit Scheme was intended to introduce a dispute resolution process so that these disputes are taken out of the court system.

There are two types of scheme that have been created – "custodial" and "insured". In a custodial scheme the landlord pays the deposit to a scheme administrator within 14 days of receipt and this is then paid back direct to the tenant at the end of the tenancy provided there are no problems. In an "insurance" scheme the landlord holds the deposit but pays an insurance premium to the scheme administrator. This guarantees the return of the

deposit should the landlord fail to do so at the end of the tenancy.

It is for the landlord to decide which type of scheme to enter; however this is not an option for landlords but is compulsory. For any assured shorthold tenancy entered into since 6 April 2007 (and this includes the renewal of a pre-existing tenancy) a landlord has just 14 days from receipt of the deposit to enter a scheme. If the landlord fails to do so he will be facing a fine of three times the deposit and will be unable to use the court's accelerated possession procedure. Even if a landlord subsequently joins a scheme, he will still face the possibility of a fine.

On top of all of this as of 1 October 2008 landlords will also have to provide prospective tenants with an Energy Performance Certificate. Failure to do so could give rise to a £5,000 fine. If you are uncertain as to whether or not your tenancy complies with current laws and regulations our team would be happy to advise.

GET IN TOUCH

For further information please contact Carl Rae, Dispute Resolution Team on 0118 912 0209
carlrae@cliftoningram.co.uk



SHAREHOLDERS AGREEMENTS, WHY ARE THEY SO IMPORTANT?

Although company law provides a balance of rights between shareholders, these may not be appropriate to every situation.

Frequently therefore the shareholders of private companies in particular wish to adopt special arrangements between themselves to govern aspects of their relationship and/or the manner in which they wish to administer their company.

This may be done by special provisions contained in the company's Articles or by separate agreement ("a shareholders agreement") or more commonly by a combination of the two. A shareholders agreement is a contract between the individual shareholders of the company. It is governed by the principles of ordinary contract law and therefore more flexible than the Articles, which are primarily the creation of statute.

In the event of differences arising between shareholders, it is easier to enforce rights under a shareholders agreement than take action pursuant to the Articles. A shareholders agreement provides evidence of the intention of the shareholders and will be highly influential in resolving any disputes.



The advantages of having a shareholders agreement include:

- certainty of rights amongst shareholders and reduction of the likelihood of disputes;
- recognition and protection of the respective positions of the shareholders and creation of the desired balance between them (for example, by giving individual shareholders the right to be or appoint directors or to veto certain decisions);
- regulation of the decision-making processes (for example, by providing for particular majorities or consents for key decisions and the procedures to be adopted in the event of deadlock);
- incorporation of protections for minority shareholders or investors;
- recording the arrangements to apply between shareholders in certain eventualities (for example, if a shareholder wishes to transfer shares or leave the company or dies);

- recording the arrangements between the shareholders in relation to their business plan, provision of finance and dividend distribution;
- incorporating restraints on shareholders competing against the company and poaching the company's clients and employees when leaving.

Particular situations in which a shareholders agreement should be considered include:

- where there are two equal shareholders;
- where there are major shareholder(s) and one or more minority shareholders;
- in venture/development/investment capital situations.

[GET IN TOUCH](#)

For further information please contact Bill Annan, Corporate Services Department on 0118 912 0228 billannan@cliftoningram.co.uk

THE GRANNY ANNEXE

A common scenario we are facing nowadays is the situation which arises when an elderly parent or parents wish to live with one of their children, perhaps in an annexe to be built onto the child's property.

Often the elderly parent is finding it difficult to manage in their own home and whilst perhaps not needing full time care is looking for somewhere smaller and easier to live in with the comfort of knowing that help and support are very near at hand from one of their children.

These arrangements are often very satisfactory but great care needs to be taken to avoid legal and taxation pitfalls.

First, how the construction of the annexe is to be funded? Presumably it will be from the proceeds of the sale of the parent's home. But will the parent acquire a share in their child's property in which they will be living? If not, then the money they are paying could very well be treated as a gift for inheritance tax purposes and, what is more, significant problems could arise in connection with the inheritance tax "gift with reservation of benefit" rules and the income tax "previously owned assets tax" rules. Alternatively it could be interpreted as a loan from the parent to the child – and a loan is an asset of the parent's estate.

Furthermore, if the parent does not own a share of the property then there are significant security of tenure risks for the parent. For example the child could have mortgaged the property. Of course it is not contemplated from day one that there will be any dispute between the parties but a dispute may arise and the parent may find him or herself without a home. Conversely, the child who owns the property may die prematurely and the parent might then find him or herself in conflict with the executors of his deceased child's estate or with the widow.

Perhaps a solution is arrived at whereby the parent pays for the construction of the annexe and acquires a share in the child's property, but is that the end of the matter? Frequently not. What will become of the parent's share of the property on his or her death? If the parent has more than one child then the balancing needs and expectations of the various children will need to be catered for in the parent's Will. If not and the Will, perhaps, simply leaves the estate to be divided equally between the children, the child who owns the property in which the granny annexe has been built might find him or herself forced to sell the property so as to satisfy the legacies under the parent's Will. Alternatively, and perhaps just as unsatisfactory for the child concerned, the child may be forced into a position where they have to buy out their parent's share in the property (effectively purchasing an annexe which they no longer need) to prevent them having to sell their own home.

Perhaps a solution is that the parent's Will is changed so that the annexe

passes to the child with whom he or she has been living but then this might create unfairness with the other children if this increases one child's share of the estate. Careful Will drafting can balance distributions of an estate between children in these circumstances. In many cases the parent may wish in any event to adjust the shares of their estate passing to their children to reflect the time and effort expended by one child in looking after their elderly parent. Predictably, this sort of issue is often a source of considerable conflict within families and careful guidance is required at every step of the way.

As if this were not enough, the ownership structure will need to be set up so as not to fall into any capital gains tax traps and, again, this is an area which we are increasingly finding that urgent advice is required.

In many cases in the past two or three years we have been called upon to advise on arrangements such as those described above after they have been entered into by which time it is often difficult to unscramble unsatisfactory arrangements without unpalatable taxation consequences or potential disputes within the family arising.

The watchword, as ever, must be to seek appropriate advice before entering into arrangements of this type which, in light of the ever ageing population, we are now seeing on a more regular basis.

GET IN TOUCH

For further information contact Peter McGeown or Stephanie Rose, partners in the Tax Planning, Wills and Probate Department on 0118 978 0099.

IS IT POSSIBLE TO END UP PAYING TWO ESTATE AGENTS COMMISSION?

In this slow housing market when time can be important and every penny counts sellers now have to consider their sales strategy. Part of this may be the instruction of more than one estate agent - after all competition makes sense doesn't it?

However the consequences of misunderstanding the terms of the contract could prove costly. So before you sign a contract with agents it makes sense to take a few moments to understand its terms.

The estate agent is normally required to be the 'effective cause' of a sale in order to earn commission. This means that it is not enough to show that the sale has taken place, the estate agent must show that it was as a result of his efforts. The courts insist that unless clearly excluded this requirement is implied into every commission agreement.

However, certain estate agents' terms are defined by law, for example 'sole agency' means that the agent is entitled to commission if during the period of the sole agency agreement unconditional contracts are exchanged for the sale of the property even if

the buyer is not found by the agent, but by another agent. However the term 'sole selling rights' means that the estate agent is entitled to commission in the same circumstances but also if the buyer is found by any other person, including yourself.

Both these definitions remove the 'effective cause' requirement and could depending on the terms of each agreement signed mean that you could end up paying two sets of commission.

So perhaps you have given your only estate agent a specific time to find a buyer and exchange contracts. That has expired and before instructing a second agent you have terminated the contract - having complied with the provisions in the agreement which of course you checked before signing. On termination the first agent should be asked to provide a list of all applicants introduced by them who will trigger a claim for commission if they buy your property - after all you do not want to pay two sets of commission!

Finally as from 1 October 2008 estate agents must

belong to an approved independent redress scheme under the Consumers Estate Agents and Redress Act 2007. The approved redress scheme will then deal with all complaints relating to the buying and selling of residential property in the UK including those relating to home information packs (HIPS).

Hopefully you will never need to recourse to the Ombudsman. Each contract will be enforceable on its own particular terms. Question unclear terms and if you are uncertain take the contract away to consider before you sign it. This will enable you to take advice on its terms and you should view with suspicion anyone who refuses to allow you to do so.

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For further information please contact
Carl Rae, Dispute Resolution Team
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MORE YOU NEED TO KNOW ABOUT MATERNITY RIGHTS

Important changes to maternity rights will become effective this autumn relating to an employee's entitlement during maternity leave.

You may be aware already that different rights apply during the first six months of maternity leave, known as 'ordinary maternity leave' (OML) and the second period of six months, known as 'additional maternity leave'

(AML). Very broadly, under the current rules, an employee retains all her contractual rights and benefits during OML, with the exception of the right to remuneration, defined as wages or salary. She therefore retains other contractual benefits, such as company car, accommodation, insurance benefits, laptop/mobile (if they can be used for personal purposes), club membership etc. During the period of AML, however, these benefits and other contractual rights are lost and only a few features of the employment relationship remain. Similar rules apply to adoption leave.

Those due to give birth (or adopt), on or after 5 October 2008, however, can expect

substantially enhanced rights during the period of AML, as these are to be upgraded to those applicable during the period of OML.

Employees in this position, therefore, will be able to retain company cars and other contractual benefits for the full maternity leave period.

The position with regard to payment of Statutory Maternity Pay (SMP) will remain the same (for now) and therefore this will continue to be payable for the first 39 weeks of maternity leave – at 90% of normal weekly earnings, for six weeks, followed by the standard rate (currently

£117.18 per week) for 33 weeks.

In time the payment period may be extended to the full year of leave.

What is not clear at this stage is how pension benefits are to be treated. There are inconsistent decisions as to whether these are part of remuneration or not. However, so long as any payment is being made (including SMP), pension benefits must, likewise, be provided, ie at least for the 39 weeks that SMP is payable.

Other grey areas include the payment of bonuses, where consideration will need to be given to the terms of any bonus scheme. However, it does seem reasonably clear now that, while an employee is on maternity leave, she is not additionally entitled to receive sick pay or to take paid holiday in order to boost her income.

Although you can still recover most SMP you have paid, there is no doubt that some employers will suffer a considerably increased cost burden when these changes take effect. If an employer knows that an employee is going to be giving birth on or after 5 October, they should start planning now, to ensure that contractual benefits that are not wages or salary can be provided during the full period of maternity leave.

GET IN TOUCH

For further information please contact James Dyson, Head of Employment Law at jamesdyson@cliftoningram.co.uk or call 0118 912 0300.



TALENTED TEAM

Increasingly our team at Clifton Ingram are getting recognition for their standing in the legal profession. Here is just a selection of recent achievements:



We are delighted to announce that Peter McGeown, head of the tax planning wills and probate department at Clifton Ingram, has been elected chairman of the Thames Valley Branch of the Society of Trust and Estate Practitioners (STEP). STEP is a unique professional body whose members are the most experienced and senior practitioners specialising in trusts and estates, executorship, administration and related taxes. Peter is also a member of Solicitors for the Elderly. For advice on all aspects of trust and estate administration Peter can be contacted on 0118 978 0099.

Marilyn Young, partner and head of the family law department, has been recognised within the 'Leaders in their Field' category by Chambers and Partners. The Chambers Guides list the top lawyers, providing independent rankings in over 60

specialist areas of law based on interviews with lawyers and clients. The qualities on which rankings are assessed include technical legal ability, client service, commercial astuteness, diligence and commitment. Inclusion in the guide is based solely on the research team's findings; no-one can 'buy their way in'.



Congratulations to Kelly McCarthy who passed the Society of Trust and Estate Practitioners final with a distinction and is now a full member of the society.



INHERITANCE TAX SEMINAR

This seminar is designed to give an update on Inheritance Tax and explore ideas for the protection of your wealth

Date:

Thursday 30 October, 2008

Venue:

Warbrook House,
Eversley, Hants

Time:

Morning session
10.30am-12.30pm
Afternoon session
2.30pm - 4.30pm

Light refreshments will be served

To reserve your place at this free event please email Linda Morse at lindamorse@cliftoningram.co.uk or call 0118 912 0210 stating which session you would like to attend.

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