

**WALKING A TIGHTROPE**

When insolvency is a possibility

**LEVY ON DEVELOPMENT**

New charge for developers and owners

**CHEAT'S CHARTER**

Taking the law into your own hands

MOVERS AND SHAKERS

Staff changes within the firm

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CITATION

[EMPLOYMENT LAW]

RETIREMENT AGE UNCERTAIN

The Default Retirement Age (DRA) of 65, introduced in 2004, is now destined to be scrapped on 1 October 2011, according to Government proposals, recently published in its 'Programme of Government'.

Under the current rules, an employer can retire an employee on reaching 65 by giving at least six months (but not more than 12 months) notice, informing the employee of the intended retirement date and of their right to request to continue working. Provided the procedure is carried out correctly, it is virtually impossible for the employee to challenge the notice. This process will be swept away by the new rules.

The cut off point for the service of a retirement notice will be 6 April 2011 and so any retirement notice given to an employee after that date, or which expires on or after 1 October 2011, will no longer have the immunity that it enjoys under the current rules. In the future, the employee will be able to challenge a retirement notice and the employer will have to justify it as being a proportionate means of achieving a legitimate aim, which is the



current defence open to any employer who, on the face of it, breaches the Age Discrimination Regulations. This defence will not necessarily be straightforward.

The employer can dismiss any employee for reasons based on conduct, capability, redundancy or some other substantial reason and he may still be able to rely on one of these reasons for the dismissal. However, if he decides to go the 'retirement route', and then fails to justify his actions to a tribunal, it is likely to be found an unfair dismissal and also age discrimination, because the employer would not then be able to rely on one of the normal grounds. He has to make his choice at the time of dismissal.

The Government's proposals are still subject to consultation. This ends on 21

October 2010. The response is expected about November 2010.

FOR NOW AT LEAST EMPLOYERS CAN STILL RETIRE AN EMPLOYEE SAFELY PROVIDED:

- notice is served in correct form
- notice is served before 6 April 2011
- it gives an intended retirement date of 30 September 2011 or earlier
- the employee has reached 65 by that date

[GET IN TOUCH]

James Dyson or Alison Gair, Employment Law Department 0118 912 0300

WILL WRITER HEADS TO JAIL

David Nash and disgraced former solicitor Nicholas Butcher, co-owners of Will Makers of Distinction Limited, began 3½ year jail sentences at the end of July after they admitted stealing hundreds of thousands of pounds from the estates of deceased clients.

Together, Nash and Butcher stole in excess of £400,000 from the estates, money which should have passed to the relatives and friends of the deceased clients.

Unfortunately, this is not the first time that a Will-writer has been jailed. In May this year, Will-writer Martin Lloyd was jailed for 2½ years after stealing tens of thousands of pounds from a dead man's estate, spending it on a luxury cruise on the QE2 for himself and his wife. Some of the money stolen was also used to fund Mr Lloyd's gambling addiction. The money in question had been left by the deceased in his Will to, amongst others, a number of charities including a 60% share in favour of Cancer Research UK. The charity received nothing.

Not all Will writers are bad! However, Will-writers remain entirely unregulated while solicitors, in addition to holding academic qualifications, work in one of the most regulated industries in England and Wales. All solicitors are required, by law, to hold professional indemnity insurance

which can be used to compensate individuals. No insurance payouts were available to the people defrauded by Nash, Butcher and Lloyd.

Clifton Ingram LLP's Contentious Inheritance team is comprised of specialist trust and probate solicitors who are experienced in handling claims arising from badly drafted Wills, investigating and monitoring the administration of estates conducted by lay individuals, Will-writers, solicitors and other professionals and related professional negligence. The team act for individuals and charities alike. In all cases, early intervention is advisable to prevent matters spiralling out of control.

[GET IN TOUCH]

Peter McGeown or Stuart Adams
Contentious Inheritance Team on 01 18 978
0099 stuartadams@cliftoningram.co.uk



RUNNING ON EMPTY

DIRECTOR'S DUTIES AND POTENTIAL LIABILITIES WHEN INSOLVENCY IS A POSSIBILITY

When a company is experiencing financial difficulties its directors face a difficult balancing act of managing the company's business and stakeholder expectations, whilst also considering their own personal liabilities.

If a company is insolvent or on the verge of insolvency it is essential that directors are aware of the duties they owe to creditors, as in certain circumstances the directors can be personally liable if the company goes into insolvent liquidation and they have failed to carry out their duties with the appropriate level of skill and care. Directors should ensure that they know what their duties are and that they act correctly to minimise any such risk.

When a company is solvent the duties of the directors are to act in the best interests of the company and its shareholders. Where a company is insolvent or facing insolvency the directors' duties switch to ensure that the company acts in the best interests of its creditors whose interests become paramount.

Directors can be personally liable for wrongful trading if, during the period they are a director, the company continues to trade when the director knew or ought

to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation. If found guilty of wrongful trading a director can be ordered by the court to pay to the company an amount equal to the losses it has suffered as a result of the continued trading.

Liability for wrongful trading can be avoided if the director can show that he took every step that he ought to have taken with a view to minimising the potential loss to the company's creditors.

Directors must seek professional advice at the earliest opportunity if they believe that the company may be getting into financial difficulty. Timing is crucial as the directors will be judged on when they knew or ought to have known that there was no longer a reasonable prospect of avoiding insolvent liquidation. They will also be judged on the actions they take or ought to have taken to minimise the loss to the company's creditors.



TO PROTECT THEMSELVES THE DIRECTORS SHOULD:

- Take professional advice and ensure that such advice is both documented and followed.
- Ensure that the most accurate and up to date financial information on the company's affairs is available so that the directors can evaluate the trading and financial position of the company and the viability of its business.
- Hold regular board meetings and keep detailed minutes of the strategy being followed by the board and the steps they are taking to minimise potential losses to creditors.
- Keep in regular contact with the company's bankers to ensure that facilities are sufficient to meet the company's cash flow requirements and inform major creditors of the financial condition of the company, and where appropriate seek their support for the continued operation of the company.
- Directors of companies experiencing financial difficulty often ignore or take too long to see the warning signs. Taking professional advice at the earliest opportunity not only protects the directors from potential personal liability, it also increases the options available for the rescue or turnaround of the company.

[GET IN TOUCH]

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[INHERITANCE]

CLIFTON INGRAM SHOWS EXPERTISE IN COMPLEX CASES



In one of our successful cases a hairdresser who inherited £380,000 from two elderly sisters will have to repay the money after a judge ruled that an earlier Will leaving their combined estates to their family and friends was binding.

The finding effectively redistributes the sisters' combined estates to 15 beneficiaries named in their identical 1991 Wills, depriving their hairdresser, Jill Fraser, of the money.

This is only the third successfully contested mutual Wills case in the last 80 years.

In brief, it was the Claimants' case that the two elderly sisters, Mabel Cook and Ethel Willson made an agreement as to the disposal of their property and executed Wills in substantially identical

terms pursuant to that agreement. Mabel died first aged 83 in 1995 without having revoked her Will. Ethel lived for a further 11 years until her death in 2006. Ethel inherited everything under Mabel's Will. Shortly before her death Ethel made her final Will in different terms leaving the bulk of the sisters' joint estates to her friend and hairdresser, Jill Fraser. Fortunately the sisters spoke constantly and openly about their 1991 Wills and the 'binding' agreement they had reached not to revoke them.

The Claimants successfully argued that the 2006 Will was ineffective, and that the joint estate must be held under the terms of the identical Wills made by the sisters in 1991.

The Judgment makes it clear that the concept of mutual Wills is very much alive. Will-makers must be aware of the binding nature of the agreement and the consequences which this will have. If mutual Wills are desired by Will-makers, it is preferable if the terms are clear on the face of the Will.

Due to increasing public interest in disputes concerning Wills and inheritances, this case has already been widely covered in the media. It is a just result for the beneficiaries and evidence of our expertise in this complex area of law.

[GET IN TOUCH]

If you would like further information on this topic or to discover how our Contentious Inheritance team can help you then please contact Jonathan Davis on 0118 978 0099.

COURT OF APPEAL SUCCESS

In 2004 we were approached by a vulnerable man with severe learning disabilities. He alleged that he had been the victim of childhood sexual abuse at the hands of a Roman Catholic priest. Although we believed him it was obvious that there would be major legal and evidential hurdles to be overcome in bringing a claim for compensation. Not least of these was the fact that the priest was now dead and so we couldn't sue him directly.

We decided to issue a claim against the church both as the abuser's employer and also on the ground that there had been negligence for failing to take any preventative action whatsoever even though there had been allegations made against this priest by others previously.

In 2009 this case finally made it to the High Court. The judge accepted the evidence that our client had been abused. He also accepted that there had been previous allegations made to the church. Despite this, the judge decided that the church could not be held liable because our client was not a 'member of the congregation'.

In March 2010, our appeal was heard by Lord Neuberger the Master of the Rolls. He decided that the trial judge had been too restrictive in his application of the law and he held that the church did indeed owe a duty of care not just to members of their congregation but to any child with whom the suspected abuser was known to be associating.

Our appeal succeeded.

Commenting on the appeal, Carl Rae, Solicitor Dispute Resolution said "I doubt if there are many law firms that would have had the principled leadership that enabled us to invest so much time and effort into a claim which seemed to have such meagre prospects."

[COMMERCIAL PROPERTY]

LEVY ON DEVELOPMENT

Community Infrastructure Levy (CIL) is a new charge which local authorities will be empowered - but not required - to levy on most types of new development.

The new arrangements are intended to create a fairer and simpler system of charges and were introduced in the Planning Act 2008 which came in to force on 6 April 2010.

CIL is a tax payable primarily by owners or developers of land as a result of the grant of



planning permission for 'development', the definition of which is "anything done by way of or for the purpose of the creation of a new building or anything done to or in respect of an existing building".

The purpose of CIL is to help fund local infrastructure, for example roads, flood defences, medical facilities, open spaces and schools.

It is important to note that CIL does not replace the section 106 obligations (s106 Town and Country Planning Act 1990) and both will run parallel to one another. Charging authorities are not obliged to levy CIL and so section 106 agreements will still need to be in use. Further, CIL is not intended to cover, for example, affordable housing so a section 106 agreement is still needed there. However, the CIL regulation

is defined to mitigate the risk of double charging and CIL will not be payable until after commencement of development.

THERE ARE A NUMBER OF EXCEPTIONS:

- new buildings and enlargements to existing building below 100 sq meters
- charitable institution where the chargeable development is used wholly or mainly for charitable purposes
- social housing
- discretionary relief by the charging authority if the development meets strict criteria

[GET IN TOUCH]

Tim Read, Head of Commercial Property on 0118 952 3561 timreed@cliftoningram.co.uk

[FAMILY LAW]

CHEAT'S CHARTER?

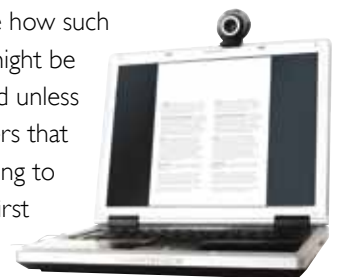
In a recent divorce case before the Court of Appeal Mrs Imerman's brothers downloaded information from Mr Imerman's computer and passed it to her lawyers.

In this article it is assumed it is the wife obtaining documents relating to the husband, although that is not always the case. It has been accepted for some time that, provided a Wife does not actually break into a filing cabinet or an office, she can use documentation she

finds to ensure that the husband does not hide money from the court contrary to both parties' obligations to provide full disclosure. Case law established the Hilderbrand rules, which required the original documents to be returned to the husband but allowed the wife to retain copies.

In the Imerman case that practice has been strongly criticised. In his judgment Lord Neuberger, Master of the Rolls, went so far as to refer to the Statute of Marlborough which was made in 1267 and says you cannot take the law into your own hands but must seek justice

from the 'Kings Court'. Wives then must not snoop about their husbands' offices or, as in this case, relatives should not access the husband's computer and download documents, but must apply to the court for appropriate search orders. Not only could this add to the legal costs, it is difficult to see how such an application might be made or justified unless the wife discovers that there is something to look for in the first place!



[GET IN TOUCH]

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[NEWS]

TALENTED TEAM

We are delighted to announce that Stuart Adams, a solicitor in our Tax Planning, Wills & Probate and Contentious Inheritance department, recently gained Higher Rights of Audience and became a Solicitor-Advocate. This means that Stuart is qualified to represent clients as an advocate in all civil and criminal courts in England and Wales including the Supreme Court, a right which was previously reserved for Barristers only.

Congratulations to Stuart Adams and Emma McCarthy who passed the Society of Trust and Estate Practitioners (STEP) finals.



» Stuart Adams
and Emma McCarthy

Peter McGeown, head of our Tax Planning, Wills & Probate department, said "This is a tremendous achievement as the study and the examinations are hard work. The STEP qualification is now globally recognised as the blue riband amongst private client practitioners. We now have eight fully qualified STEP members in the team. Few other firms of a comparable size have more than one member!"

Congratulations also to Stephanie Rose, Partner Tax Planning Wills & Probate, who has recently been appointed to the board of directors of the national organisation, Solicitors for the Elderly and to Shakila Mushtaq who recently qualified as a solicitor and joins the Commercial Property team



» Stephanie Rose
and Shakila Mushtaq



Will Aid > During November last year we drew up basic Wills for a donation to Will Aid. All of the figures have just been totted up and we are pleased to announce that we raised £6,470 for the WillAid charities and were ranked as the 8th top performing firm in the country!



NEW FACES

Our corporate recovery and insolvency department has been strengthened with the appointment of Barry Niven.

Barry brings with him a wealth of experience in corporate re-structuring and all corporate insolvency procedures. Based in the Reading office he will be advising insolvency practitioners, charge holders, creditors, directors, companies and LLPs on a wide range of insolvency related matters.

INHERITANCE TAX SEMINAR IN CONJUNCTION WITH CANCER RESEARCH UK

CANCER RESEARCH UK



Come and join our seminar to find out what effective steps you can take to protect your estate.

At this special event we will also hear from one of the leading scientists at Cancer Research UK, Dr Eric O'Neill, Junior Group Leader of Radiation Oncology & Biology at Oxford University. Dr O'Neill's work looks at how tumours respond to standard therapeutics and more importantly to understand why some tumours appear resistant to therapy.

Date: Thursday 21 October

Venue: Phyllis Court,
Henley on Thames

Time: 10.30am – 1pm
Light lunch will be served

TO BOOK: To reserve your place, please email Linda Morse lindamorse@cliftoningram.co.uk or call 0118 912 0210.

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