THE SORRY TALE OF THE FARMER WHO DID NOT MAKE A WILL

The recent case Thorner -v- Curtis (2007) highlighted the problems that can arise when someone dies without having made a will.

Peter Thorner was a farmer who owned a substantial farm worth around £2.4m and agricultural assets worth another £650,000. In addition to that he had cash assets worth around £620,000. He made a will in 1997 leaving the majority of his estate to his nephew David Thorner. This will was destroyed and when Peter died in November 2005 he did not leave a will. The result was that his estate passed to his nearest blood relatives who were his sisters. His nephew brought a claim on the grounds that he was entitled to the farm because Uncle Peter had promised it to him and in reliance on that promise he had worked on the farm for 28 years in the expectation that it would pass to him.

The legal basis for the nephew's claim was the principle of proprietary estoppel under which the Court is asked to conclude that if the Claimant can prove expectation, reliance and detriment and it is unconscionable to deny his claim then he will succeed. Proprietary estoppel has had a colourful and chequered history and numerous cases have come before the Courts with each one being dealt with on its own particular facts.

I cannot give full justice to the facts in this short article, however, the outcome was that the Judge found in favour of David Thorner and awarded him the farm. He was satisfied that it would have been unconscionable to deny him the fruits of his legitimate expectation upon which he had relied to his detriment.

These cases provide plenty of grist for the lawyers mill and we are constantly exhorting our clients to avoid uncertainty by first of all making a will and subsequently keeping it up to date. We recommend that wills are lodged with us for safe keeping to avoid the risk that they may become lost or destroyed.

MELANIE PRATLETT — Partner

'DON'T PUT YOUR DAUGHTER ON THE STAGE MRS. WORTHINGTON'

You probably read in the newspapers about the mind boggling pay out of £5 million in damages to the actress Lesley Ash after she contracted, wait for it, Methillin Sensitive Staphylococcus Aureas or MSSA to you and me.

This was the largest ever pay out for a hospital acquired infection and astonishingly amounted to the equivalent of the total amount of damages paid to all other sufferers of hospital infections for the last four years. For those of you trying to come to grips with the figures I can tell you that the size of the award was largely attributable to Ms. Ash's loss of earnings and potential future earnings.

When Noel Coward offered his advice to Mrs. Worthington one has to assume that he had not heard of MSSA.

TOM HARRISON —Partner

FLOOD ALERT — CONTINUED

We return to watery matters not because we have webbed feet here at Adams Harrison but to alert you to a new Flood Risk Assessment report which at a cost of less than £20 can you give you up-to-date information on the risk of flooding.

Not only is this useful on a purchase — one of the key features is the property's insurability and the number of insurance claims made in that particular postcode area given by Norwich Union — but it is important on a sale, particularly if the property is near a river or stream. The report can be included in a HIP (see article on page 3) thus giving reassurance to the prospective buyer at an early stage in the process.

JULIA HUTCHINGS —
Residential Property Solicitor

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Adams HARRISON solicitors

THE MOBILE AND THE CAR

The law about mobile telephones in a car is becoming much stricter and motorists need to be very careful.

When the Government became concerned about the use of mobile telephones it introduced a fixed penalty but many people continued to use mobile telephones. The law was then tightened up and it became an offence punishable not only with a financial penalty but also with the endorsement of 3 penalty points on the driver's licence. Again drivers continued to use mobile telephones while driving ignoring the risk of incurring penalty points.

That law continues to be in force but the Crown Prosecution Service has now indicated a new approach. It will now be pushing for motorists using a mobile telephone to be charged with dangerous driving. It seems to me that this will certainly be a real risk if there is an accident which occurs while a motorist is using a mobile telephone.

The implications for the motorist are particularly severe. Dangerous driving can carry imprisonment up to a maximum of 2 years. In addition there is an automatic disqualification for a minimum of 12 months and once that disqualification is finished the motorist has to undertake an extended driving test before he is free to drive as a fully qualified motorist again. The extended driving test is effectively a double driving test, twice as long as the standard driving test.

Employers can also find themselves dragged into Court proceedings. If a motorist claims that he felt obliged to use his mobile telephone because of his employers attitude to the amount of work that he has to get through and that he is being given insufficient time to carry out his day to day duties an employer could find himself facing a potential offence of aiding and abetting his employee to drive in a dangerous manner.

Even if you have a total hands-free facility in your car remember that it seems well established that the use of a mobile telephone distracts you when driving and if you have an accident the police can check to see whether your mobile telephone was in use at the time. This has every prospect of increasing potential penalties for motoring offences and leaves you again open to a charge at the very least of driving without due care and attention.

The only safe way is not to use a mobile telephone in the car.

PAUL CAMMISS —Partner

CONGRATULATIONS!

Congratulations to Julia Fennell who married Scot Hutchings on 21st March 2008 at Spain Hall, Finchingfield and recently returned from honeymoon in China. Julia qualified as a Solicitor in 2005 and joined Adams Harrison in May 2007. She leads the Residential Conveyancing team in our Saffron Walden office and as you will see from her articles elsewhere in the newsletter is now using her married name.

ARE YOU UP TO SPEED ON PLANNING?

Over the last few years much has been happening in your local council's planning department. I draw your attention to three particular aspects.

1. Local authorities now have to draw up a Local Development Framework (LDF) in place of the old rather monolithic district plan — this is a suite of documents comprising a Core Strategy, various development control policies some of which are general and others which are site specific. If you want to make a planning application consult these documents before you start so as to ensure the maximum chance of success.

2. A new website has been created to provide and channel planning information — go to www.planningportal.gov.uk and click on "General Public". You will notice you can make an application on line — indeed were you to instruct an architect to make an application he or she would in all probability do this anyway — so as to ensure that the application ticked all the boxes and was not at risk of being rejected. From 1st April 2008 — a new development — there will be just one application form for use nationwide, rather helpfully called 1APP!

3. Building Regulations Control — this is now being brought much closer to planning. The importance of proper paperwork cannot be understated as you will need all of this in apple pie order when you come to sell. Fortunately a lot of this can be done on-line via the Portal (see above) and independent inspectors (including NHBC for new homes) can be instructed rather than having to liaise with the local authority's control officer who may have a number of other matters to attend to while your newly laid concrete is going off.

Please contact us if you would like any guidance. We find more and more clients approach us with legal points on planning applications.

ANTHONY MARRIS —
Commercial Property Solicitor

HOME INFORMATION PACKS — AN UPDATE

Everyone will be aware that you now have to order a costly Home Information Pack (HIP) when you market your property for sale regardless of the number of bedrooms it has. What you may not know is that we as solicitors are preparing more and more of the packs. Recent research from Searchflow the largest search information provider shows that almost three quarters of instructions come direct from sellers or via their estate agent.

Why is this? There are a number of reasons and they include the following:

1. Estate agents want to market and sell property not fiddle around collating information they are not familiar with. As soon as we give them the go ahead they can do this without having to worry about HIPs.
2. Clients are concerned to ensure that the information is accurate — after all they do not want to be taken to task after completion for incorrect information which has not been properly checked.
3. Clients like to be confident that if they change marketing strategy the HIP will remain available for their use.
4. Clients are keen to ensure that their HIP complies with the regulations. We are well placed to explain with confidence the different documents which need to go into the HIP so as to ensure that when a sale is negotiated the relevant information is to hand.
5. We can provide a variety of payment options to suit individual requirements. Clients can be certain that they are not being sold the HIP that best suits the provider or pays commission back to the introducer.

The moral of the story is — if you are thinking of marketing your home for sale give us a ring before getting tied up with HIPs that aren't really appropriate to your needs.

JULIA HUTCHINGS — Residential Property Solicitor

SICK OR ON HOLIDAY?

Under the Working Time Directive every worker is now entitled to a minimum of four weeks annual leave. However, there has been some uncertainty as to whether the entitlement continues to accrue if the employee is off sick. Happily we have the Advocate General of the European Court of Justice to put us right on this one. In a recent decision the Advocate General's recommendation leads to the following conclusions:-

Sick staff will still accrue annual leave under the Working Time Direction even though they are off sick. The result of this is that staff will be entitled to take holiday leave once they return to work, even if this means taking it in a subsequent holiday year;

If the employee's employment is terminated he or she will still be able to claim payment of money in lieu to cover the holiday that was not taken during the sick leave. It is not clear whether this would also extend to untaken holiday carried forward from the previous holiday year.

Is this all clear to you so far? No, nor me.

The Advocate General's decision is pretty murky and we can expect the European Court of Justice to sort things out in due course and this does not necessarily mean by following the Advocate General's advice!

TOM HARRISON — Partner

INCREASE IN SICK PAY AND MATERNITY PAY

On 1st April 2008 The Social Security Benefits Up-rating Order 2008 came into force, increasing statutory sick pay from £72.55 to £75.40, and the prescribed rate of statutory maternity pay, statutory paternity pay and statutory adoption pay from £112.75 to £117.18.

HARASSMENT AT WORK

In 2006 the House of Lords (in the case of Majrowski -v- Guy's and St Thomas' NHS Trust [2006] UKHL 34) found that an employer can be liable for the acts of its staff in connection with harassment committed by them against colleagues. The Protection from Harassment Act 1997 states that a person must not pursue a course of conduct which amounts to harassment of another; and which he knows or ought to know amounts to harassment of the other. The above mentioned case widened the scope for employees to bring claims where they had been harassed in the workplace by a work colleague or boss. These claims are brought in civil courts and not before Employment Tribunals.

Employers do not have to be overly concerned about facing possible litigation for alleged harassment by employees in the workplace as a recent case before the Court of Appeal has made it clear that merely an 'unpleasant' incident will be insufficient to amount to 'harassment'. In Sunderland City Council -v- Conn the Court of Appeal overturned a County Court s decision that a manager's conduct towards an employee on two separate occasions was a course of conduct amounting to harassment under the Act. The court held the conduct must 'cross the boundary from the regrettable to the unacceptable'. It had to be sufficiently serious conduct to be regarded as criminal. Even though in this case one of the incidents of alleged harassment was sufficient to satisfy this test and amounted to 'harassment'; as there must be a 'course of conduct' one incident of proven harassment was insufficient for Mr Conn's case to succeed.

This decision is reassuring for employers as the Court of Appeal in this case made it clear that unpleasant, bad-tempered conduct by a manager to staff does not necessarily cross the line to justify harassment' within the meaning of the Act. However, threats of physical violence against an employee by a member of staff or management, causing the employee to become scared and threatened, would amount to 'harassment'. But this sort of thing would have to happen more than once to give the employee the right to bring a claim under the Protection from Harassment Act 1997.

JENNIFER CARPENTER — Partner

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YESTERDAY ALL MY TROUBLES SEEMED SO FAR AWAY!!

Everyone will have followed the unfolding drama in the High Court culminating in March in an award to Heather Mills worth £24.3 million. The general consensus is that former Beatle Sir Paul McCartney came out of the case rather better than Ms. Mills.

The case was interesting for various reasons and not just because of the personalities involved. It is widely believed that on marrying Ms. Mills, Sir. Paul rejected the advice that he insist upon a pre-nuptial settlement tying Ms. Mills to a fixed financial entitlement in the event of divorce. Whether this did him any harm in the long run I suspect no one will ever know.

Secondly, the case was unusual in that Heather Mills dispensed with the services of her Solicitors, Mishcon De Reya, before the final hearing. An odd decision, and probably one which she now regrets. However, she did retain the services of a family lawyer acting as her 'McKenzie Friend'. His role was limited to offering her advice in Court but he could not conduct cross-examination or address the Judge, Mr. Justice Bennett, directly.

Thirdly Mr. Justice Bennett decided to publish his full judgement all 58 pages, despite Heather Mills' objections. For those of you who are interested the judgement can be found at www.judiciary.gov.uk.

Finally the case ended with a furious Ms. Mills pouring a jug of water over the immaculately coiffured head of Sir Paul's Solicitor, Fiona Shackleton. No one has yet done that to me I am relieved to say.

REBECCA VAREY — Solicitor

FOURTH TIME — UNLUCKY

A less publicised, but probably more important recent divorce case is Crossley -v- Crossley. In this case, a middle aged couple, each wealthy in his/her own right, each previously married and divorced (the wife three times...), entered into a pre-nuptial agreement with the help of experienced lawyers. They agreed that if the marriage broke down, they would each walk away with what they brought into the marriage. They split up after 14 months. Despite the agreement, Mrs. Crossley tried to make a claim for a financial settlement from Mr. Crossley.

The Court of Appeal agreed with the trial judge, that the parties had to exchange financial information (the dreaded forms E) but Mrs. Crossley first had to persuade the court that the pre-nup should not be upheld, before she could progress her application. Lord Thorpe in the court of Appeal said, 'if ever there is to be a paradigm case in which the court would look to the pre-nuptial agreement as not simply one of the peripheral factors but as a factor of magnetic importance, it seems to me that this is just such a case.'

Pre-nups are undoubtedly the way of the future and I urge you to consult our Family department if you think a pre-nup may help you! If you are already married a pre-nup is not an option, but an ante-nup: why not?

SHOSHANA GOLDHILL — Partner

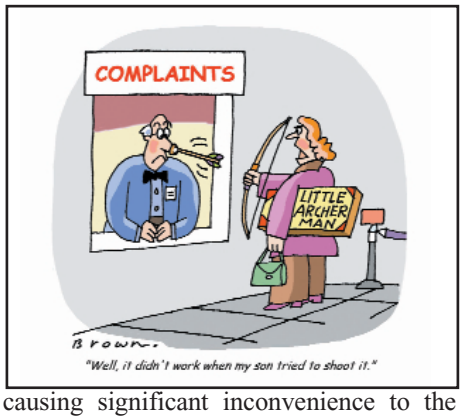
FAULTY GOODS AND NEW REMEDIES

New regulations came tiptoeing into force in March 2003 but seem to have been largely overlooked. Up until then consumer protection was to be found in the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982. The changes were introduced by the Sale and Supply of Goods to Consumer Regulations 2002.

The new regulations added some extra clout to the consumer's existing remedies. There is now a very helpful presumption that goods which do not conform with the statutory requirements within six months of delivery did not conform at the date of delivery. This presumption will not apply if the seller can prove that the goods did actually conform at the contract date or where the presumption is incompatible with the nature of the goods, for example consumables.

These new remedies permit the buyer either to require the seller to repair or replace the goods or to reduce the purchase price by an appropriate amount or to rescind the contract altogether. This makes a significant difference to the existing statutory provisions in the 1979 and 1982 Acts.

Where the presumption of non conformity arises the seller must repair or replace the goods within a reasonable time and without causing significant inconvenience to the buyer. This must be done at the seller's expense. If the seller fails to comply within a reasonable time with the duty to repair or replace the buyer will then become entitled to require a reduction in the purchase price or rescission of the contract. Rescission simply means returning the goods and getting your money back.



Under the pre-existing law once a buyer had taken delivery of goods it was often difficult to rescind the contract. No longer.

As ever the law moves inexorably towards further protection for the consumer and the old maxim 'caveat emptor' is yet further eroded.

TOM HARRISON — Partner

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