

spotlight

Comerton + Hill
Solicitors

WINTER 2005

Welcome to your Winter 2005 edition of Spotlight.

May we take this opportunity to wish all our clients and business associates a Prosperous and Successful 2005!



The New Year brings with it a host of legal issues that will come into force during the next few months. So, whether you are an employer or an employee, you should ensure you are aware of how breaking legislation may affect you in your business and personal life.

In addition, we have outlined for you some information to help support you in your business dealings, namely how to manage your debtors more

effectively and whether or not contractual disputes require court action. In relation to your personal affairs you can also benefit from our simple guide to Trusts.

If you have any queries on how any of the issues affect your particular circumstances, feel free to contact me or one of my colleagues on 028 9023 4629.

Dan Fitzpatrick, Partner

ATTENTION ALL EMPLOYERS

NEW STATUTORY DISMISSAL, DISCIPLINARY AND GRIEVANCE PROCEDURES EFFECTIVE FROM APRIL 2005

As of April 2005 all employers are subject to new statutory procedures in relation to dismissal, disciplinary and grievance procedures. In brief, there are now two sets of procedures: a standard procedure and a modified procedure for use in particular circumstances. Failure to follow the relevant dismissal procedure will render a dismissal automatically unfair (subject to normal qualifying service periods).

Furthermore, failure by either the employer or the employee to follow the correct procedure may result in either increased compensation payments or in employees being barred from bringing Employment Tribunal proceedings.

In brief, the new statutory provisions outline:

- the statutory requirements relating to disciplinary and grievance issues
- what constitutes reasonable behaviour when dealing with disciplinary and grievance issues in the workplace
- how to produce and use disciplinary and grievance procedures
- a worker's right to bring a companion to grievance and disciplinary hearings

These procedures will apply to all employees regardless of length of service and will impact on a broad range of your employment issues.

To ensure you are planning for these changes effectively, please contact Dan Fitzpatrick, who will be glad to support you in reviewing your existing documentation, practices and procedures or by providing tailored training to your managers.

For further information please contact Dan on 028 9023 4629 or email solicitors@comerton.co.uk

TRUSTS A SIMPLE GUIDE

What is a Trust

A trust is a device where assets are held by one or more persons (Trustees) for the benefit of others (Beneficiaries). The individual who sets up the Trust (the Settlor) assigns assets to the Trustees who hold them in accordance with the terms of the Trust. A Trust can either be created by Deed during the Settlor's lifetime, or by a Will.

Why set up a Trust?

Creating a Trust offers many benefits, including:

- Safeguarding assets where the Beneficiaries are too young (and possibly not even born) and /or irresponsible to manage their prospective assets
- Providing for your family, in particular successive generations
- Limiting the interest which your Beneficiaries will receive
- Determining exactly when the Beneficiary will benefit from the Trust
- Entrusting gifts earlier than might otherwise have been possible
- Retaining the Settlor's interest over the assets in the Trust
- Accumulating tax benefits
- Maintaining flexibility of the destination of the assets in the Trust
- Taking care of Beneficiaries with learning disabilities

Types of Trusts

Trusts can be highly flexible and can be adapted to meet your specific needs. There are three main types:

1. The Life Interest Trust

The Beneficiary receives an income from the Trust Fund throughout a specified period. Thereafter the income or capital of the Trust goes to another Beneficiary (often the next generation).

2. The Accumulation and Maintenance Trust (A&M)

All the Beneficiaries must be under 25 to qualify for this type of trust and are usually members of the same family. Until the Beneficiaries reach 25, the Trustees usually have discretion over whether to expend or retain (accumulate) income. When a Beneficiary reaches 25 they will either receive a share of the Trust assets or income from them.

3. The Discretionary Trust

The Trustees are given responsibility to share the Trust capital and income between a class of Beneficiaries (such as a family) during the life of the Trust (usually up to 80 years). It is customary for the Settlor to notify the Trustees how they wish the Trustees to distribute the Trust assets and income.

How is a Trust Taxed?

A gift into a Trust has Inheritance Tax and Capital Gains Tax consequences for the Settlor.

Therefore, careful thought and advice is needed before deciding which type of Trust to select.

The taxes that have to be considered are:

Income Tax

In broad terms, the tax paid will be at the same rate of tax of the recipient Beneficiary. If income is accumulated (as may be the case with A & M and Discretionary Trusts) tax will be paid at the "trust rate". There may be an opportunity to recover the additional rate tax.

Capital Gains Tax

The rate of tax for Trusts is the "trust rate" (currently 34%).

Inheritance Tax

In a Life Interest Trust the Life Tenant is treated as owning the Trust Property, so in the event of their death, the Trust Fund is taxed as part of their estate. There is no such liability with an A & M Trust. The tax regime for Discretionary Trusts is more complicated, with a potential charge to tax arising once every ten years and when capital is paid out to Beneficiaries. However, the rates of tax are low and currently no more than 6%.

Managing a Trust

It is the duty of the Trustees to see that the Beneficiaries receive their appropriate dues and to manage the Trust and its assets during its lifetime. Key responsibilities should include:

- Regular reviews of Trust investments
- Management and maintenance of the assets
- Preparation of Annual Tax Returns
- Management of the distribution of Income
- Preparation of Annual Trust Accounts

Setting up and managing Trusts can be a complex and time-consuming task. However, the long-term benefits are well documented. Contact our specialist in this area, Brian White, to discuss how a Trust can benefit you and your dependents.

Comerton & Hill solicitors Helps the Fight against Ageism



Comerton & Hill Solicitors has just become the smallest organisation in Northern Ireland to receive a stamp of approval from Age Positive, the Government-backed campaign which promotes age diversity in the workplace. We are now among the ranks of over 100 Age Positive employer champions across the UK, whose aim is to demonstrate a commitment to ending ageism in the workplace.

The chair of Age Positive Northern Ireland, Bryan Johnston, said: "The campaign is all about emphasising the business benefits of age diversity and employer champions play a key role in this through leading the way in best practice.

"Other local businesses should take stock of the policies which have secured Comerton & Hill employer champions status and realise you don't have to be a big business to use best practice."

Pauline Turpin, a grandmother of seven and court clerk at Comerton & Hill, said she was pleased the contribution of older people in the workplace was beginning to be recognised.

"I enjoy my job and like the fact that it takes me out and about, and also gives me the opportunity to meet new people all the time," she said.

Dan Fitzpatrick, partner at Comerton & Hill, said: "We are well aware of the benefits of employing a mixed age workforce, and of what more mature employees bring to the job."

"Traditional notions about older people are rapidly changing, and I have found my older staff to be dedicated and enthusiastic, responding well to every new challenge."

(Taken from Belfast Telegraph, 01 November 2004)

CONTRACTUAL DISPUTES: To Court, to court...?

You enter into contracts every day. Whether you are riding on the train, getting a haircut or buying a newspaper, contracts are an everyday fact of life.

It's the same in business. Buying a business, entering into a lease or agreeing supplier terms are all your contractual agreements.

And just as people seldom go to court over a bad haircut, often the court is not the best solution for your contractual disputes.

Why not court?

There are several reasons why you may be wise to avoid court proceedings:

- **Expertise** – judges are lawyers, and it may be the case that a more aptly experienced professional such as an accountant, surveyor, or doctor would be the better judge.
- **Speed** – the court process is slow. Business life isn't.
- **Formality** – the rigid rules and regulations of court procedure may not suit practical business people.
- **Expense** – the courts are not cheap!

Your alternatives to court

One way of counteracting potential disputes is to provide for an alternative form of resolution within the contract itself. For example, a lease might refer rent review disputes to a surveyor. Or in a company dispute, the contract might refer a share valuation to an accountant. The surveyor or accountant will then use his expertise to resolve the issues.

Usually the agreement will say that the finding of the expert is "final and binding except in the case of manifest error". This is to ensure that the expert determination is given precedence thereby potentially avoiding disgruntled parties appealing to the court anyway.

The courts will not normally want to interfere anyway. They prefer to see a contract as expressing the parties' wishes and therefore beyond their interference.

When can a court get involved?

A circumstance in which the court may step in is concerning the detail of challenges to the expert opinion reflecting a "manifest error".

There are a few well documented principles for challenging expert opinion, which stress

- the importance of being able to rely on the expert's final certificate
- that the final certificate is upheld except in the case of "manifest error"
- that "manifest error" should be interpreted in a

commercial context to mean a "plain and obvious error"

- that the error must relate to the expert's finding or procedures in making it
- that the court take into account the parties' technical knowledge.

A recent case:

Invensys plc –v– Automotive Sealing Systems Limited.

In this automotive industry case, a sale and purchase agreement provided that disputes would be determined by an expert whose decision would be "final and binding except in the case of manifest error". The parties also agreed the expert would give his reasoning.

When the expert made his finding one party didn't like it. They thought part of the finding contained errors. Their solicitors wrote to the expert asking for his reasoning. The expert provided a short letter but said he did not have to enter into correspondence. And so matters ended up in court.

In the High Court, Mr Justice Thomas restated all the principles. He said it was not enough that the expert had made a mistake. There had to be an obvious error in determination. It was not enough that another view could be taken. The court could look at all the documents and refer to the submissions but in this case "it is not enough for the purchaser to show that its interpretation is right; it has to show that the expert's interpretation of the agreement was obviously wrong". Clearly this may be difficult if the expert has not given any reasoning.

The court upheld the expert.

And finally

There are alternatives to dispute resolution by courts. The courts will not interfere, except in rare cases. However, one solution to help you avoid making the decision of whether to go to court or not lies in effective legal planning. Contracts should be well considered and drawn up in conjunction with experienced solicitors and with the needs of the business in mind. In addition, they should clearly set out how experts give their findings – and, in with reasoning – as without reasons any error may be beyond challenge.

Contact Dan Fitzpatrick for further details of how we can help ensure your contracts are drawn up professionally and without error.



How you can get more from your debtors!

If you are a business which suffers from late or non-payers, the recent Late Payment of Commercial Debts (Interest) Act 1998 may be the answer to your prayers. The Government brought in the Act to help small businesses who were having difficulties recovering their debts – typically from larger organisations. The Government designed the Act to hit the poor-payers where it hurts: their pockets.

Is it in force?

The Act is currently in force and was introduced in 3 separate stages:

- Small businesses (less than 50 employees) against large enterprises (including public authorities)
- Small businesses against large or small businesses (and public sector)

- All enterprises (and public sector) and the public sector against each other

What does it mean?

In short, it gives businesses a right to

- charge a higher rate of interest on unpaid commercial debts (provided they are entered into within the relevant time period)
- claim compensation
- recover interest for late payments

How do I claim it?

Because it's an Act of Parliament, it does not have to be specifically expressed in the contract because it will automatically apply under the Act. As always, however, it is best to have this incorporated into your contracts.

What kind of debt qualifies?

The debt must be a commercial one – that is where both parties are acting in business. Consumer credit transactions will therefore not qualify for this interest.

When does interest accrue?

Interest can run from three points, depending on how your contract is drafted:

1. An agreed date;
2. A fixed occurrence (i.e. delivery of the goods)
3. 30 days from (i) the day after the supplier has performed his duties – e.g. delivery or (ii) 30 days after the buyer has received notice the supplier is claiming a sum due (for example receipt of an invoice)

How much?

Interest can be claimed at the rate of 8% above the

official dealing rate of the Bank of England. This is 4%, so theoretically interest on the debt can be lawfully charged at 12%!

How does compensation work?

Compensation can be claimed as a fixed sum as well as accruing interest as follows:

- If the debt is less than £1,000, £40;
- If the debt is £1,000 but less than £10,000, £70;
- If the debt is more than £10,000, £100

Can I contract out of the Act?

You can only contract out of the Act if your contract provides for other substantial solutions to late payment. If they are deemed to be insubstantial, then those terms will be void and the terms of the Act will automatically apply.

Substantial remedies are deemed to be those which:

- compensate the supplier for late payment;
- prevent late payment;
- are a reasonable solution for the supplier and it would be fair and reasonable to override the right to statutory interest

If you are a small business owner this could be a saving grace for your business in the short term. And, if you are a persistent offender, then you must reassess your cash-flow issues or set aside a fund for your potential future interest claims!

Call Mervyn White for more information on 028 9023 4629.

Comerton & Hill Solicitors: AT A GLANCE

- An established and independent law firm specialising in Northern Ireland corporate legislation
- Over 35 years experience advising local, regional and international companies, and professional advisors on all areas of corporate law
- An extensive local network of high-quality legal and corporate contacts throughout Northern Ireland, Southern Ireland and the UK
- Act for a number of Northern Ireland's top companies including HSBC, NIIB (Bank of Ireland), Maxol & Lombard North Central (NatWest)
- ISO 9001 accredited
- Home Charter Scheme member

SERVICES OFFERED

- Insolvency & Bankruptcy
- Employment Law
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- Landlord & Tenant Law
- Corporate Legal work, including shares and corporate securities
- Probate
- Personal Injury Litigation