The Detail

Meade King

The newsletter of Meade King Solicitors | Summer 2009

Welcome!

As many readers of this newsletter will have noted the name of this issue of the Meade King Newsletter has changed. *The Detail* will continue to provide up to date information with regard to legal developments and what is happening at Meade King.

To celebrate the launch of *The Detail* and the new Meade King website (www.meadeking.co.uk), a bottle of champagne awaits the lucky reader chosen at random from those providing correct answers to the following questions:

1. In which year did Lionel Bigg enter into partnership with Herbert Henry Meade-King?
2. Which partner has been described as a ‘bright and tenacious operator’ by *Chambers Guide to the Legal Profession*?
3. What is the sixth feature central to the Meade King approach?
4. What is now the minimum age for a company director?
5. Which partner has been described by *Chambers Guide to the Legal Profession* as ‘technically great’ and ‘very useful in a scrap’?
6. What percentage of people in the UK do not have a Will that reflects their personal and financial circumstances at the time of their death?

Please provide your answers by e-mail to sjb@meadeking.co.uk or by post to Shelley Belton, Meade King, 11-12 Queen Square, Bristol BS1 4NT.

Land registration – *The final push*

The history of registration

There have been attempts to introduce a system of land registration in England and Wales since as early as 1862, although the present (and only successful) system dates from 1925.

Although this system has now been operating for more than 80 years, nearly a third of the land area in England and Wales remains unregistered, with some areas better covered than others. (In Bristol nearly 80% of land is registered, compared with only 62% in Bath & North East Somerset).

In fact compulsory registration on the sale of land for value was phased in across different regions of the country over a long period of time, and it is only comparatively recently that all transactions have triggered first registration. It is only compulsory to register land when certain trigger events take place (such as a sale), and it is only within the last 10 years that certain other events (such as a mortgage or gift) have triggered compulsory first registration. As a result, there are still many properties (which have not changed hands for decades) that remain unregistered.

The Land Registry’s aim is for the whole of England and Wales to be registered by 2012.

Recently the Land Registry has launched an initiative to encourage owners of land that is not yet registered voluntarily to apply for first registration. As an incentive, fees are reduced by 25%. It should also be borne in mind that there are significant advantages for owners of land to have their property registered.

Why should I register?

Ownership of unregistered land is proved by reference to the deeds to the property, a paper record showing a chain of conveyances to the present owners. It is therefore only possible to prove that you own the property in question by physically showing the deeds to whoever needs to know (e.g. a prospective purchaser). There is no central register containing a record of who owns unregistered property. A system relying on paper documentation is especially vulnerable to such documents being lost, mislaid or damaged by fire, flooding etc. Inevitably deeds need to be sent from one party to another from time to time making them vulnerable to going missing in the post.

The Land Registry on the other hand records all registered properties electronically, in a central register that can be viewed by any person at any time. The names of the owners of the property are clearly recorded, and ownership of property is therefore much easier to prove. Some other benefits to registration are as follows:

- Because the registered title includes a plan, clearly showing the extent of the property registered, this helps protect the land from encroachment by adjoining land owners. Since 2003 it has become very difficult to prove adverse possession against an owner of registered land.

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- All of the rights and covenants affecting the land are referred to in a single document, simplifying the title and making it much easier to understand.
- Potential purchasers of land increasingly expect it to be registered. Many now insist upon unregistered land being registered before they will proceed with the purchase. If you try to sell unregistered land you may find that the process of having to register the land first will hold up the transaction.
- If the deeds to unregistered land go missing then it can be very difficult to prove title. Again this may well cause delays in any transaction involving the land. Since all documents relating to registered land are stored electronically, there are no documents to be lost.
- Registration of land is relatively straightforward and inexpensive, with registration fees starting from as little as £40.

How do I know if my property is registered?

If you have purchased, mortgaged or been gifted property since 1998, then it will have been compulsory for that property to be registered. If you have owned property, however, for a longer period then it is possible that it may still be unregistered. If you are unsure then for a nominal fee it is easy to check with the Land Registry to see if the property is registered or not, by carrying out a search of the Index Map. This is the Land Registry's central register, which records all registered property.

If your property has a postal address searches can usually be carried out without a plan, but sometimes if the property description is not precise enough, or if the property in question is a parcel of undeveloped land, then a plan may be required.

Please contact us with details of any property that you think may be unregistered, and we shall be happy to check with the Land Registry free of charge.

My property is unregistered – how do I register it?

We shall be happy to discuss with you your requirements for registration, and advise you on how to do this. It may be relatively inexpensive to register your property, depending upon the complexity of the title. We shall be happy to provide you with a quote for registering your property.

Summary

The benefits to registering land are clear, providing you with a Government backed guarantee as to the title, recording evidence of ownership in a public register, and simplifying the process for future transactions involving the property.

For more information please contact Simon East on 0117 923 4013 or by email at sre@meadeking.co.uk.

Adjudication in the recession

Adjudication was introduced by the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) to provide a speedy albeit rough and ready method to free up payments due under construction contracts to avoid undue financial hardship and insolvency of construction companies.

Adjudication is fast track and (unless and until overturned in subsequent litigation or arbitration) provides a binding decision which can be enforced through the courts.

It was designed and for the most part has succeeded in speeding up recoveries in relatively simple monetary claims and/or those where liability is not really disputed. It has its problems with complex disputes but this is primarily due to the time afforded to an adjudicator for him to make his decision.

Its procedure is usually as follows:

- The party wishing to bring the adjudication (the referring party) serves a notice of adjudication on the other party (the responding party). The notice should set out the current dispute between the parties.
- Within the next 7 days and unless agreed between the parties or pre-determined by the contract the referring party will seek appointment of an adjudicator usually through a nominating body such as RICS or RIBA.
- A Referral Notice is then sent to the adjudicator and the responding party. This should include particulars of the dispute, the referring party's position and its supporting documents.
- The responding party is usually given a right to respond and make its submissions.
- There may be further submissions and/or a meeting/site visit with the adjudicator.
- The adjudicator then makes his decision, if possible within 28 days from the date of the Referral Notice. This time period can be extended.

Unless specifically provided for or agreed the parties bear their own costs in the adjudication, although the adjudicator can decide who pays his fees and expenses.

The speed and relative cheapness of the procedure can be attractive to contractors who may otherwise be deterred by the time and costs incurred in litigation or arbitration. It may also be of benefit to insolvency practitioners where the contractor has entered into a formal insolvency procedure such as a Company Voluntary Arrangement ('CVA') an administration or a liquidation.

Having secured a financial award from an adjudicator the successful party (whether a contractor or its insolvency practitioner) will look to recover from the employer.

It might be that the paying/losing party just pays. However with the current climate there is a risk it will choose not to do so.

It may argue that it is intending to start court proceedings to overturn the adjudicator's decision and so request a stay of any enforcement of the adjudicator's award on the basis that the contractor may (because of its financial position) be unable to repay amounts due under the adjudication if the court subsequently finds in favour of the employer.

This situation recently came before the courts in *Mead General Building Ltd v Dartmoor Properties Ltd* [2009] EWHC 200 (TCC).

The judge in this case refused to stay the enforcement of the adjudication award given in favour of the contractor and in doing so set out important guidance.

Simply because a CVA is in place does not of itself mean that the court should automatically infer that the party in question would be unable to repay any sums paid out in accordance with any judgment given to the employer.

Additionally if the contractor's financial position is due, or in large part due, to the failure by the employer to make payment of the amount awarded by the adjudicator this can be taken into account by the court in deciding whether to stay enforcement.

In Mead the court found that the failure to pay was the principal reason for the contractor's financial difficulties and so refused a stay. Obviously different circumstances would apply if the contractor is in financial difficulty for other unconnected reasons such as the effect of the recession generally on the construction industry.

In summary, adjudication may be a quick and relatively cheap way of collecting a debt due to a financially strapped contractor. But beware. The employer may be able to stay enforcement of an award if it had its own counterclaims and can show that its failure to pay was not the cause of the contractor's insolvency.

For more information please contact Phil Burbidge on 0117 923 4026 or by email at pjb@meadeking.co.uk.

PUWER to the people

A recent ruling by the House of Lords sets a boundary upon the employer's responsibility for the safety of equipment used by employees in the course of their work.

Jean Smith, a care worker employed by Northamptonshire County Council, was injured when the edge of a wooden ramp gave way as she was wheeling a disabled client out of the client's home. Ms Smith was using the ramp properly in the course of her employment, and her legal representatives claimed that the collapse of the ramp amounted to a breach of the employer's duty to Ms Smith under the Provision and Use of Work Equipment Regulations 1998 (PUWER), under which the employer is under a duty to ensure that any 'work equipment' is maintained in an efficient state, efficient working order and in good repair.

The ramp in this case was owned by the NHS. Ms Smith's case relied on PUWER which provides that the requirements imposed by the regulations apply to any equipment which is 'provided for use or used by an employee of his at work'.

The judge who heard the case at first instance determined that the Council had 'control' of the ramp, but the House of Lords rejected this finding. In the leading speech Lord Monks said:

'Employers will need to demonstrate that the work activity concerned has been properly risk assessed.'

'They did not provide it. They did not own or possess it. They did not have any responsibility or indeed any right to repair it.'

In this case, it appears that the Council had carried out an appropriate inspection for risk assessment purposes, and did not identify any problem with the ramp. As a result, the House of Lords accepted that the Council was not responsible to Ms Smith for the failure of the ramp.

Following the Smith judgment, it remains the case that employers may be responsible for the failure of work equipment which is used by their employees even where the employer is not the owner. All will depend on the facts. Most importantly, the employer is still bound by the duty under the management of Health & Safety at Work Regulations 1999 to carry out a risk assessment which will:

- Identify the hazards arising from work activities
- Decide on the likelihood of harm arising from those hazards
- Determine what action needs to be taken to control the risks
- Enable the employer to put in place the controls which are required to safeguard the employees' health and safety.

The conclusion to be drawn from this case is that an employer will not be found automatically responsible for injury caused by faulty equipment used by employees in the course of their duties where the owner does not own or control the equipment. However, he will need to demonstrate that the work activity concerned has been properly risk assessed.

For further information please contact Judith H Kelly on 0117 923 4033 or by email at jhk@meadeking.co.uk

The return of the CVA?

The recent high profile (and high value) Company Voluntary Arrangement ('CVA') entered into by JJB Sports could prove to be just one sign of a resurgence in the use of CVAs as a mechanism to restructure companies struggling in the current economic climate.

In the JJB case 99% of creditors agreed to the proposal, despite there being no moratorium imposed upon creditors of large companies to protect such companies while a CVA is under consideration.

A renewed interest in CVAs comes following a period of sustained criticism of the 'pre-pack' administrations that have for some time been the mechanism of choice for companies facing financial difficulties.

The practice of 'pre pack' administrations arose as it provided a means of maintaining the value of a business pending a sale. The process involves the company being placed in administration and the business then sold shortly after the appointment of an administrator, often to former directors or others associated with the company.

The practice has caused some discomfort among creditors, commentators and politicians concerned that the pre-packaged sale of a business involves no true accountability to creditors. Those creditors often see a 'pre-pack' as an exercise conducted solely for the benefit of the directors that allowed the company to become insolvent in the first place.

In a report of the Business and Enterprise Select Committee MPs last month sought to address 'concerns about illegitimate, self-serving alliances between directors and insolvency practitioners'. The report took the view that:

'Prompt, robust and effective action is needed to ensure that pre-pack administrations are transparent and free from abuse'.

Notwithstanding the negative views expressed by politicians and creditors alike the reality is that administrators are governed by a very strict legislative framework that has in recent months been extended by way of a new statement of practice and an ethical guide.

The new Statement of Insolvency Practice sets out 17 different heads of information which must be disclosed to creditors, including the source of the administrator's initial introduction, the extent of any prior involvement, marketing activities carried out, valuations obtained and the alternatives considered by the administrator. The new ethical code imposes further controls where there may be any perceived threat to objectivity.

The attraction of the CVA is that in contrast to an administration (a 'pre-pack' or otherwise) creditors in a CVA are able to vote for or against particular proposals and seek to negotiate modifications. There is a duty of full and frank disclosure and a meeting of creditors to consider whether the proposal for a CVA should be accepted. In short a CVA gives creditors a choice.

It remains to be seen if the CVA – for many years the Cinderella of corporate insolvency procedures – may be set for a resurgence.

For more information please contact Keith Mahoney on 0117 923 4027 or by email at kwm@meadeking.co.uk.

Varying a will after death

Many people assume that the contents of a will are sacrosanct. Some may be surprised to learn that it is possible to vary the terms of a will, or the provisions applicable to an estate under the intestacy laws after the death of the deceased.

So why would someone want to vary a will?

A will made some years ago may contain bequests to beneficiaries who have pre-deceased the testator. Alternatively, the deceased's financial situation may have changed and the failure to update may mean that it is no longer tax efficient.

Section 142 of the Inheritance Tax Act (IHTA) 1984 enables the terms of a will, or the provisions applicable to an estate under the intestacy laws, to be varied so that the varied provisions take effect as if those terms had been included in the deceased's last will. Any deed of variation must be made in writing within two years from the date of the death of the deceased by those who would otherwise benefit from the varied assets. Since August 2002 formal elections to the Board of the Inland Revenue are no longer required. Instead of elections, a statement needs to be inserted in the Deed of Variation made by all the relevant parties that they intend Section 142 (1) of the IHTA 1984 to apply to the variation. In the event that more tax is payable as a result of the variation, then a copy of the deed has to be delivered to HM Revenue & Customs (HMRC) within six months of the date of the deed informing HMRC of the additional tax payable.

Deeds of Variation are an extremely valuable tool for beneficiaries who would like to re-organise some of the gifts made in a deceased's will, perhaps with a view to reducing inheritance tax. Please note that beneficiaries adversely affected by the Deed of Variation must agree to it and sign it. Where minors are involved this obstacle may be difficult to overcome.

For more information please contact Richard Boulding on 0117 923 4031 or by email at rjb@meadeking.co.uk

Employment news round up

WTR 48 hour opt-out retained

The debate on whether the UK opts out of the Working Time Regulations ('WTR') of a 48 hour maximum working week has concluded in favour of the opt out remaining in place.

Employers still need to ensure however that the workers agree to opt out through a relevant agreement such as a contract of employment or collective or workforce agreement.

This years increases to the National Minimum Wage

From October 2009 the new hourly rates of pay will be:

- Workers aged 22+: £5.80 (from £5.73)
- Workers aged 18–21: £4.83 (from £4.77)
- Workers aged 16–17: £3.57 (from £3.53)

The Government has also announced that from October 2010 the adult rate will be extended to 21-year-olds, following a recommendation made by the Low Pay Commission (LPC).

The LPC have also proposed that information on employers who have shown wilful disregard for minimum wage laws should be available and that there should be a minimum wage for apprentices. The Government has committed to developing these proposals and to consider the practical implications.

Suspension of the Statutory Redundancy Payment increase

In April's Budget the Chancellor announced that the weekly maximum for statutory redundancy pay would increase from £350 to £380. This change was supposed to take effect from 1 October 2009 but it has not yet been confirmed when this increase will take effect.

Employment Tribunal claims are on the increase

Recent statistics show that ET claims have increased by 43% in the last year. In 2007 and 2008 the ET dealt with 189,303 claims, which in itself was a 65% increase on the previous year.

The most common type of claim is an equal pay dispute, followed closely by WTR claims and then unfair dismissal claims. Given the current economic climate and consequential job losses this increase is only likely to continue so employers are advised to be cautious and to take steps to minimise the risk of claims.

Lying litigants

In *Daleside Nursing Home v Mathew* the EAT concluded that where at the heart of a claim there is an explicit lie the Employment Tribunal should find that the Claimant acted unreasonably in bringing or conducting the claim and more encouragingly should make an Order for costs against that Claimant.

It is hoped this will result in a reduction of 'nuisance value' claims on the basis that the 'nuisance' Claimant will run the risk of covering the Respondent's costs. Given the historic reluctance of the ET to make costs orders however, we would expect that the 'lie' will need to become obvious during the course of the proceedings and it should be remembered that the case does not cover all unreasonable behaviour of Claimants.

For further advice and assistance in employment matters please contact Nicola W Hughes on 0117 926 4121 or by email at nwh@meadeking.co.uk

Charity dragon boat racing

On Sunday 27 September Meade King will be entering a team in the Bristol Harbour Dragon Boat Festival.

We will be aiming to raise funds for our charity of the year CLIC Sargent.

Every 24 hours ten children are diagnosed with cancer or leukaemia. CLIC Sargent keeps families together when the unimaginable happens by providing clinical, psychosocial, emotional and financial services in hospital, at home and in the community across the UK.

If you would like to sponsor us you can do so by visiting our 'just giving' website www.justgiving.com/meadeking

Alternatively, come and cheer us along at Baltic Wharf on race day. The first race is at 10.30 am and the final will take place at approximately 3.00 pm.