KingsleySmith
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Newsletter
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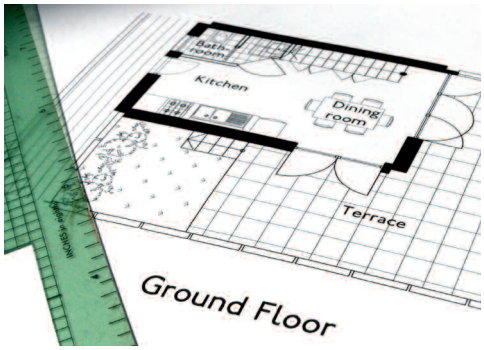
Your quarterly bulletin on legal news & views from Kingsley Smith Solicitors LLP

PLANNING PERMISSION – DON'T PANIC



Builders and homeowners who wish to delay the start of building projects in these troubled times can breathe more easily now that the time limits for extensions to planning permissions have been lengthened.

From 1 October 2009, an application to extend the life of a planning permission for up to three years can be requested, provided that the permission had not already lapsed as at 1 October 2009 and at the date of the application the development work has not yet commenced.

The new regime applies to listed building and conservation area consents as well as outline planning permissions and permissions relating to major developments. A fee of £500 is payable for an extension application for a major development, £50 for householder developments and £170 for all other extension applications.

The decision to accept or reject the extension application will rest with the planning authority. Whilst new drawings etc, will not need to be supplied, there is no automatic right of extension.

WOMAN LET OFF CREDIT CARD DEBT

A woman who owed a credit card company more than £8,000 has been excused from repaying her debt after a court ruled that the 'secret' commission paid to the credit card company by the company providing the payment protection insurance constituted an unfair contract term. As a result, the credit card agreement breached the Consumer Credit Act 1974.

The decision has been described as a 'bonanza for borrowers' that will allow thousands to avoid repayment of credit card debts, but the reality is less beneficial. The credit card company was unable to provide the court with a copy of the credit agreement originally signed by the woman, which must surely be an unusual occurrence. Had this been available, it is quite likely that the decision would have gone in the credit card company's favour.

Unfair contracts are unenforceable. If you have problems with consumer debt or are being pursued for payment under a contract that is unfair or which you entered into under pressure from the provider, please contact us and we may be able to help.

EMPLOYEE FACES COURT WRATH

An employee who left a conference business and who 'borrowed' his former employer's database, transferred one of its trading names to use for his own purposes and made use of some of the same conference speakers (asking them to speak 'again' at conferences he was organising, giving the impression that his business was the same business) found the court unimpressed recently.

It allowed an injunction against the ex-employee and accepted claims for breach of confidence, infringement of database rights and passing off (which is where a business represents itself to be another to benefit from the other business's good name) from his former employer.

The ex-employee, whose website described the Anglia Polytechnic University graduate as a graduate of 'Cambridge', faces a substantial, but as yet unquantified, claim for costs and damages.

Intellectual property developed whilst working for someone else belongs to the employer, unless there is an agreement to the contrary.

If you are concerned about misuse of your data or intellectual property assets, please contact us for advice.

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DAMAGES FOR WRONGFUL DISMISSAL

When an employee brings a claim for unfair dismissal to the Employment Tribunal (ET), there is a statutory cap on the amount of compensation payable. However, there is no upper limit to the level of damages that can be awarded when an employee pursues a claim for breach of contract or wrongful dismissal through the courts, even though in most cases the damages awarded are relatively modest, being based on the pay lost by the employee as a result of not having been given the notice to which they are entitled under their contract of employment.

In Edwards v Chesterfield Royal Hospital NHS Foundation Trust, Mr Michael Edwards, a consultant surgeon, was dismissed for gross professional and personal misconduct following a disciplinary hearing regarding allegations made against him by a patient. Mr Edwards' appeal against the decision to dismiss him was rejected. Mr Edwards' contract of employment stated that it could be terminated by either side by giving three months' notice and it contained a clause to the effect that matters of professional misconduct or incompetence would be dealt with under a procedure negotiated and agreed by the Local Negotiation Committee.

Mr Edwards claimed that his employer had not followed the correct disciplinary procedures and brought a claim of unfair dismissal to the ET. He then changed his mind and withdrew the claim, deciding instead to pursue a claim through the courts for losses arising from a breach of contract.

The County Court awarded Mr Edwards damages for wrongful dismissal in the sum of three months' salary, to cover his notice period. Mr Edwards appealed to the High Court, claiming more than £4 million for loss of past and future earnings because he claimed his employer's actions had ruined his career. He contended that the General Medical Council had investigated and dismissed the allegations made against him and had his employer followed the correct disciplinary procedure as laid down in his contract of employment, it too would have exonerated him. The High Court dismissed most of Mr Edwards' claim. Whilst an employer's failure to follow the correct disciplinary procedure is likely to render a dismissal unfair and entitle the employee to an award of compensation by the ET, under common law, damages for wrongful dismissal cannot normally exceed the sum payable to the employee in the event that his contract had been lawfully terminated – i.e. had he been given notice according to the terms of his contract. At common law an employer is entitled to dismiss an employee on contractual notice for any reason.

Mr Edwards was therefore awarded three months' salary plus what he would have earned during the time it would have taken to complete the correct disciplinary process.

This decision is a clear signal to anyone contemplating using the civil courts in an attempt to secure damages far in excess of the statutory level of compensation payable in a claim of unfair dismissal that such a strategy is unlikely to succeed.

We can advise you on all matters to do with termination of employment.

COMPANIES ACT CHANGES – PURCHASE OF OWN SHARES

There has been confusion about some of the changes in company law brought in by the Companies Act 2006, which was fully implemented on 1 October 2009.

One of the more beneficial changes for companies wishing to reorganise their share capital (perhaps because a founder shareholder is nearing retirement or to facilitate new investment) is the ability of companies limited by shares to purchase their own shares unless there is any specific restriction on or prohibition of this in their articles. This is a great benefit to companies, as a purchase of own shares can often be an efficient way to buy out the interest of a shareholder without requiring other shareholders to find substantial sums from their own pockets in order to finance it.

One of the less well-publicised aspects of this procedure can be found in Section 702 of the Act, which should be read by anyone considering a purchase of own shares. This makes it compulsory (for a period of ten years from the date of the transaction) to make available to any member of the public who requests them the details of any purchase of shares by the company, and makes it a criminal offence for access to this information to be refused. It is also a criminal offence (Section 658) for a company to acquire its own shares improperly.

We would expect the use of purchase of own shares to become more frequent and the issue of redeemable shares to become more common when companies are set up, to allow greater flexibility of exit routes for founder shareholders.

To bring your company's articles up to date or discuss any company law or reorganisation issue, please contact us.

GUIDANCE ON PREVENTING WORKPLACE HARASSMENT AND VIOLENCE

New guidance giving practical advice to businesses and employees on preventing workplace harassment and violence has been published following European level agreement between employer and trade union organisations on the necessity of raising awareness of this issue.

The guidance has been produced after collaboration between the Government and employers, trade unions and other relevant agencies.

As well as raising awareness of the issues, it provides employers, workers and their representatives with ways of identifying, preventing and managing problems of harassment and all forms of violence at work.

YOU'RE AN HEIR – NOW SIGN THIS!

Until the recent publicity afforded by television shows on the subject, many people might not have realised that 'heir tracing' companies exist, let alone that they research 'promising' estates by looking at public records and then contact potential beneficiaries of those estates.

The prospect of obtaining a windfall following a knock on the door by such a firm makes many people only too glad to sign the contract offered, but quite often these can involve very considerable sums being paid to the heir locators – a figure of 25 per cent of the inheritance is not uncommon.

It is often the case that your entitlement to an unexpected legacy can be achieved more economically. Many such approaches result from the firm researching into the background of substantial unclaimed estates and much of the work that is done can be done by an 'amateur' (especially one with an interest in genealogy) without great expense.

Here are some things to think about if you are approached by such a firm. Often, the details they give you will be scanty and will not include the likely value of the inheritance.

The withholding of critical information in order to make you sign the contract may make their agreement with you unenforceable.

Firstly, try to establish who the deceased is, your relationship to them and the value of the estate. The latter can normally be found with a little research, as wills are public documents. The more distantly related to them you are and the more other possible beneficiaries, the less you are likely to receive.

Do not rush! If the visit arises because of an unclaimed estate, the estate will not pass irrevocably to the Crown until 30 years after the death of the testator, so there is normally plenty of time. The Treasury Solicitor's website contains details of unclaimed estates (www.bonavacantia.gov.uk), which is a good starting place for your research.

If the approach arises through a solicitor, always ask the name of the solicitor.

We can help you understand your rights and negotiate with 'heir hunters'. Please contact us for advice.

SUPREME COURT RULES ON OVERDRAFT CHARGES

One of the first decisions of the new Supreme Court (which in October 2009 replaced the House of Lords as the highest court in the land) came as a disappointment to many bank customers who have suffered high levels of charges after they exceeded agreed overdraft limits.

The Court accepted the banks' argument that the British tradition of free 'in credit' banking (rare elsewhere in the world) is only possible because of charges levied on those who go overdrawn.

The decision means that tens of thousands of customers who had pending applications for refunds of charges will not now receive them.

For private customers who do not go overdrawn on their current accounts, the decision may well produce the welcome result that free banking will continue.

The Office of Fair Trading (OFT) has decided not to pursue further its investigation into the fairness of bank overdraft charges under the Unfair Terms in Consumer Contract Regulations. Whilst it still has concerns about the way banks operate current accounts, the OFT has conceded that a challenge to the banks on that basis has little chance of success.

The banks have recently announced a plan to phase out cheques: they already charge business customers up to 65p more for writing a cheque than for paying a bill electronically. Cheques themselves are scheduled to be consigned to history in October 2018, according to a recent announcement by the clearing banks.

PLANNING ERROR PROVES COSTLY

Adding facilities to one's home may raise the prospect of a more congenial lifestyle, but care must be taken when dealing with planning applications.

In a recent case, the owner of a dwelling built in 1995 decided, in 1998, to add a garage and a dormer window. The planning application was accompanied by a new (extended) site plan. Planning permission was granted but because there was no request for a change of use of the land, the planning approval did not, in law, increase the curtilage of the property.

Everything passed without comment until some time later, when a swimming pool and tennis court were built outside the original curtilage of the land. Unfortunately for the owner, the land outside the curtilage of the property was agricultural land and no application for change of use of the land had been granted. The council issued an enforcement notice, requiring the owner to return the land to use as agricultural land.

The owner of the house argued that the 1998 plan had increased the curtilage of the property, so use of land shown on the plan as being for residential purposes did not require permission for change of use.

The matter reached the Court of Appeal. The Court considered that planning permission for a new dwelling would contain an implied permission for a change of use if required. However, an extension to a dwelling does not necessarily do so.

In this case, the 1998 permission related to a development which was shown to be within the plans contained with the original planning application. The swimming pool and tennis court, however, were outside the original curtilage of the land. The 1998 permission had not extended that and had not created any permission for change of use of the land.

GOOD FAITH AND ERRORS IN DOCUMENTS

If you enter into a business contract in good faith and it subsequently transpires that the contract was incorrectly authorised or otherwise invalid from the perspective of the other party's internal regulations, where do you stand?

Two recent cases provide guidance on this contentious area.

In the first, a loan was advanced to a company by way of debenture, which is normal practice. When the lender wished to enforce the debenture, the company challenged its validity on the basis that the loan was authorised without the company's internal regulations being followed. Necessary notices convening the board meetings at which the loan was authorised were not given and the board meetings were not held in the Netherlands, as was required by the articles of the company giving the debenture.

The company argued that the board resolutions authorising the debenture were not properly passed and could not therefore bind the company. In the view of the court, the lender had acted in good faith and it was thus protected by legislation that will bind a company 'free of any limitation under the company's constitution'. The debenture was therefore enforceable against the company.

In the second case, a bank found itself exposed under a debenture and cross-guarantee because only one director had signed the documentation. Two signatures were required and the director had counterfeited his co-director's signature, this being usual practice for them when matters were agreed. However, on this occasion, there had been no agreement and the second director was unaware of the document. When the bank sought to appoint an administrator, after the company defaulted on its loan, the second director went to court to have the appointment set aside on the ground that the documentation for the loan had been forged.

Again, the court decided that the bank had acted in good faith. The forged document was enforceable against the company because the director who placed both 'signatures' on it had the ostensible authority of the other director to do so.

COUPLE SELL FARM TO PAY FOR CHANCEL REPAIRS

After fighting their case all the way to the House of Lords and losing, Powys couple Andrew and Gail Wallbank have been forced to sell their farm in order to pay for repairs to the chancel of their local church and their legal costs in fighting their case.

When the couple first acquired the property, they were only vaguely aware that it was 'rectorial property', which meant that it came with a legal obligation, under the Chancel Repairs Act 1932, to maintain the local church at Aston Cantlow. They thought this a mere technicality until they were presented with a bill for more than £200,000 for repairs to the 13th century church. They undertook a series of legal battles contesting the Church's demands.

Having lost their case, the farm was sold at auction for £850,000, but only after a payment of £37,000 had been made to the Church authorities in order to remove the legal obligation to maintain the church from future owners. Unless that had been done, the property was virtually unsaleable.

Mr Wallbank had inherited the farm from his father and had been unaware of the extent of the obligation attaching to the property until the demand was made by the local Diocese.

In any property transaction, it is essential to be aware of and understand any obligations attaching to the property or rights others may have over it.

INJUNCTION AGAINST A TWITTERER

A recent case saw the first injunction to be served via a social networking site.

An unknown individual, who was posing as the political blogger and solicitor Donal Blaney of Griffin Law, was served with a court order to prevent him from continuing under that guise and to require him to reveal his true identity.

The injunction, now referred to as 'Blaney's Blarny Order', was groundbreaking due to the fact that it was served via the Twitter website.

The injunction was granted on the basis that the Twitterer had breached Mr Blaney's copyright. It is understood that the unknown Twitterer contacted Donal Blaney two days after the injunction was served and a four-figure sum was agreed in settlement.

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