insight

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The latest legal news and views from B P Collins LLP | Issue No. 24 December 2014

New intestacy rules are a timely reminder to make a will

When it comes to new year resolutions, near the top of your list should be a commitment to making a will. Paul Lowery, partner in the wills, trusts and probate team, explains why it is so important and the impact that new intestacy rules will have.

"Recent statistics reveal that 61% of people in England and Wales die without a valid will, which means many people run the risk of their assets being distributed differently from the way they may have wished," said Paul.

"In turn, that can lead to family disputes and distress for all concerned at an already difficult time. Given that the start of a new year is often the time when couples decide to take their relationship to another level by marrying or committing to a civil partnership, we say it's also the perfect opportunity to make your wishes very clear in the event of your death."

New inheritance laws, which came into force on 1 October and are part of the Inheritance and Trustees' Powers Act, now offer greater protection to married couples and civil partners where one spouse dies without making a will.

Where a person has no children and is married, the rules allow for the surviving spouse to inherit their entire estate, whereas previously, he or she would have received £450,000, plus half of the rest, with the remainder going to other family members, including parents and siblings.

For those with children, the surviving spouse will now inherit the first £250,000 together with any chattels as before, as well as half of the remaining amount. Previously this would have gone into a life interest trust, with the spouse only being paid interest. The remainder will be inherited by any children, going into a separate trust if they are under 18.

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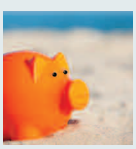

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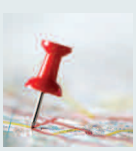

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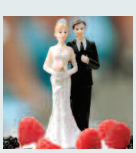

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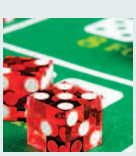

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In addition, step-children still have no automatic right to inherit, while for adopted children, the new reforms remove a rule which meant children lost their right to inherit from a parent's estate when they turned 18, if they were adopted by another family before that age.

Paul welcomes the changes as a positive step forward in simplifying a very complex situation, but says they are no substitute for making a will and you should take expert advice to ensure those you want to benefit from your wealth actually do so.

"In some cases, the new intestacy rules may be at odds with what the deceased perhaps intended to do with their estate," he added.

"For example, if you die leaving a spouse or civil partner and a child from your marriage, your partner will now benefit from a greater amount of money. By the time he or she dies, there is no guarantee any of that money will be left to be inherited by your child.

"The only way to be sure is to talk to a solicitor and make a will before it's too late."

He says he would also like to have seen the changes applied to co-habiting couples, concluding: "When the consultation originally took place, the Government was considering including unmarried couples, provided they had lived together for a minimum period, such as two years, and it's a shame the reforms haven't delivered on this."

Evie, 52

When Evie moved in to co-habit with her partner, neither of them thought about making a will. Although they had promised to leave each other "everything", it was only after Evie died that Alex realised he had no legal claim on any of her estate because they had failed to legalise their plans.

As they had no children and Evie's parents had already died, her estate was shared between two half-brothers who live thousands of miles away in Australia, leaving Alex with nothing.

New trustee powers

Also changing under the reforms are two statutory provisions concerning the powers of trustees.

Previously, trustees who were administering a trust could only pay out a "reasonable" amount of income for a minor beneficiary, whereas now they can pay as much as they think fit.

In addition, trustees now have an enlarged statutory power of advancement, which means that if they are administering a trust – and not just for minors – they can now advance the full entitlement, at their discretion, to a beneficiary. Previously, they were only allowed to advance half the beneficiary's entitlement.

The new powers will only apply to trusts set up after 1 October 2014.

Lewis, 26

Lewis freely admits that his teenage years were "a mess" as he drank to excess and failed university. Now he has settled into a steady job and wants to buy a house with his girlfriend.

With a baby on the way, he doesn't want to wait until he is 30, which is the age he can officially gain access to the money his grandparents left him in a trust. The new reforms allow his trustees, at their discretion, to draw on the full sum to help him start his new life.

To speak with a member of the private client team at B P Collins LLP about making a will or for advice about a trust, call 01753 279030 or email privateclient@bpcollins.co.uk

Rise in deceased estate claims prompts warning

Clients are warned about the potential risk of "DIY probates" after recent High Court statistics revealed that the number of claims for mishandled deceased estates has tripled over the last year.

Wills and litigation expert Craig Williams says many people aren't aware of the legal implications of taking on the role of executor and the fact they can be sued for their mistakes if anything goes wrong.

The claims ranged from theft of assets by executors and fraudulently favouring some beneficiaries above others, to simple mistakes made by representatives in navigating the rules and procedures that apply to estate administration.

"Often family members choose not to take advice from a solicitor in order to save the estate money but doing so can be a false economy if the executor's actions are challenged," said Craig.

"To the testator, we would say take great care in choosing who you appoint, and to the potential executor, we would urge them to take professional advice when the time comes to handle the probate."

He believes the increase in estate administration claims, together with a similar rise in the number of contested probate claims, is also partly due to today's more complex family structures, larger estates, and the availability of information online.

One solution, he says, is to appoint a professional executor alongside a lay person, ensuring all legal procedures are followed, therefore reducing the risk of litigation.

"Getting proper advice when writing your will can help to ensure that all potential claims on an estate are addressed at an early stage," said Craig. "While giving careful consideration, with a professional, to the appointment of your executors can help the probate process to run more smoothly," he concluded.

New year, new beginnings?

The start of a new year often heralds the start of a new and exciting chapter, as many of us set a "wish list" for the next 12 months. While some of these may be learning a new skill or joining a gym, other new year resolutions may be life changing. If so, then family law expert Sue Andrews has some timely words of advice.

Perhaps romance has knocked on your festive front door and a loved one has popped that question; or you and your partner made plans over Christmas cocktails to move in together in 2015.

If so, then hopefully you will be looking forward to a great new year. It's easy to become caught up in the excitement of the moment but it is important to think carefully about the legal implications of such decisions. While I have no desire to be a party pooper, it is important that you take legal advice before you sign on the dotted line.

For example, one of the most common misconceptions people make is to think that if they move into a partner's home and contribute to the mortgage and the household bills, it confers an interest in that property.

The reality however, is that if you aren't married then you don't have the same rights as those who are, or who are in a civil partnership. If you are planning to move in together, our advice is to think about having an agreement, setting out each of your rights and responsibilities in relation to the property.

If you are planning to buy a house with a partner – or indeed a friend – then you should consider how that property is owned. For instance if you are contributing more in terms of the deposit or mortgage repayments and are to be entitled to a greater share, you need to ensure that the documentation reflects this because if not, you may find the property is owned equally.

If parents are providing monies to help with the purchase then unless those funds are a gift to both parties, consideration needs to be given to how the legal title is held and whether a loan agreement or other agreement needs to be prepared. This actually applies whether you are married, in a civil partnership or living together.

> "I often hear people say a pre-nup isn't romantic or that seeking one, implies a lack of trust. My view is that the opposite is true."
>
> Sue Andrews

For those planning to marry or enter a civil partnership in 2015, you might want to think about a pre-nuptial agreement and if so, I suggest that you discuss this as early as possible.

Such agreements are especially valued by people not marrying for the first time and who want to safeguard their assets to pass on to their children, or where one or both parties has significant assets that they want to protect.

I often hear people say a pre-nup isn't romantic or that seeking one, implies a lack of trust. My view is that the opposite is true. A pre-nup should spark a discussion about what you both want to achieve and what would be a fair and realistic way of dealing with matters in the event of separation.

An open, honest and frank discussion at the outset is a great basis for a marriage. It's important to note the emphasis on the word "agreement", since it's not about one party imposing terms on another.

Of course, for some, there may have been new year resolutions of a different kind – for instance one that will see an initial separation on the road towards divorce.

Often people will reach the conclusion at different times that their relationship has broken down and one party may have been contemplating divorce for a while. If so, the other may need time to come to terms with what is happening.

My advice would always be not to rush into the formal process. I can usually tell if someone's not sure they want a divorce and in such circumstances I might advise counselling or family therapy. It also helps to take legal advice early on to help you understand not only your rights and obligations, but also what your financial future is likely to look like.

Respect and communication are key. It is important to try and keep the channels of communication open. Remember that whatever your present feelings, you once loved your partner. They may not be in the same emotional place as you are. Giving them time and space is likely to result in a more timely resolution.

To speak in confidence with a member of our matrimonial team, call 01753 279091 or email your enquiry to familylaw@bpcollins.co.uk

Changes to Immigration Rules

A series of amendments to the Immigration Rules took effect in July. Here, our top ranked business immigration team highlights just some of the key changes to be aware of if you are an organisation employing workers from abroad.

Changes to Tier 1 (Entrepreneur) category

Migrants who wish to set up or run a business in the UK must now have £200,000 or £50,000 disposable funds in their possession, depending on their circumstances at the time.

Those who are already in the UK under the Tier 4 or Tier 1 Post Study worker category will require £50,000 to switch into the Entrepreneur route, while other applicants will require the greater amount. The money must come from one of a series of approved sources outlined in the new rules changes.

The Home Office has also made other changes to the Tier 1 Entrepreneur categories, including that Tier 1 (Entrepreneur) Migrants are only permitted to work for their own business and cannot be self-employed but working for another employer.

Changes to Tier 1 (Graduate Entrepreneur)

This route is for graduates who have been awarded a Bachelor's Degree or higher, and are endorsed by a UK Higher Education Institution or by UK Trade and Investment, who have confirmed that the applicant has a genuine business idea.

Changes to Tier 5 (Government Authorised Exchange)

The Tier 5 (Youth Mobility Scheme) is for those who want to live and work in the UK for up to two years, and are from Australia, Canada, Japan, Monaco, New Zealand, Hong Kong, Korea, or Taiwan and are aged between 18-30.

The Tier 5 (Temporary Workers) category includes charity workers, creative or sports workers, workers under an international agreement and religious worker.

A new 12 month "Mathematics Teacher Exchange" scheme between England and China is now included under the Tier 5 (Government Authorised Exchange) Visa allowing those who want to come to the UK for a short time for work experience, training, research or fellowship.

Changes are also being made to the list of approved English Language Tests that applicants must complete to demonstrate their English language ability, and to the immigration rules relating to private and family life.

New tenancy checks trialled for landlords

If you're a private landlord or managing agent, then you need to be aware that new legislation is now being trialled in the West Midlands which could affect future tenancy agreements.

From 1 December in the trial area, the Immigration Act 2014 requires private landlords, or agents acting on their behalf, to take responsibility for making sure that any new tenants have the right to rent property in the UK. If successful, the legislation may be extended nationwide during 2015.

Although many private landlords already make checks on tenants' identity and credit status, not all do so. The Government says the new measures mirror existing and long-standing requirements on employers to ensure that an employee has a right to work here and it is not asking landlords to become immigration experts.

Private landlords will now have to obtain and copy documents which demonstrate an individual's right to rent in the UK, such as a passport or biometric residence permit. In most cases there will be no need for landlords to contact the Home Office. The Government has provided a set of services to help landlords conduct the checks, including online resources and a local rate telephone helpline for general information.

The Home Office will be able to impose a civil penalty, which could be up to £3,000, on landlords or agents who are responsible for undertaking checks and fail to do so, or who knowingly allow illegal immigrants to rent their properties.

For more information on the Immigration Act or the Rules which may affect your business, visit our website using the search term "immigration" or email enquiries@bpcollins.co.uk

The holiday pay merry-go-round

Following a recent landmark case at the Employment Appeal Tribunal (EAT), when workers won the right to include regular overtime in holiday pay, employment partner Jo Davis hosted a round table event for employers to identify the options and give delegates the chance to see what others were doing to address the issue. Here, she shares her findings.

The EAT ruled on three test cases against the engineering company Amec, industrial services firm Hertel and maintenance company Bear Scotland. Employees had said they consistently worked overtime, but that was not included in holiday pay, meaning they received considerably less pay when on holiday compared to when they were working.

The EAT followed recent European Court decisions that established that employees must be paid their normal pay when on holiday to ensure they were not deterred from taking holiday.

As such, any payment for tasks workers perform under their contracts must be paid during the four week period of leave provided by the Working Time Directive.

However, the decision has led to concern and confusion among businesses as to how to handle this from a practical standpoint, especially as the decision may be appealed.

What should be included in the holiday pay calculation?

It was generally accepted that regular overtime (regardless of whether it is guaranteed or voluntary) and commission should be included in holiday pay calculations. It is unlikely (but not impossible) that this position will change on appeal, especially given the guidance from the European Courts on this issue.

What constitutes "regular" will have to be considered on a case-by-case basis but the additional payments must be regular enough to be considered part of an employee's "normal" pay.

The position is less clear regarding bonuses, although I suggested that annual discretionary bonuses which are paid to all employees, irrespective of performance, needn't be accounted for.

What is the best reference period?

While the UK has a 12 week reference period, it was agreed that a 12 month reference period provides a fairer outcome and less of an administrative headache.

Can you "break the series of deductions" by making one correct payment?

The EAT has prevented employees from bringing claims for underpaid holiday going back several years. It has done this by stipulating that they can only claim for periods of backdated holiday pay where there has been a gap of not more than three months between the holidays for which the worker wants to claim an under-payment.

This is complicated because the EAT suggested that the extra 1.6 weeks' holiday provided under UK law (which doesn't attract the enhancement) is "additional" and therefore taken after the four weeks' leave provided for under EU law.

By reaching this decision, the EAT closed off most claims for holiday pay dating back before the start of the year and so didn't have to address whether a one-off correct payment could break the chain of deductions.

Among the options discussed by round table members were:

a. Reducing the financial exposure of including overtime in holiday calculations by no longer offering overtime pay at a premium rate;

b. Annualising hours to include an amount for average overtime worked (a generally unpopular solution);

c. Negotiating out of current overtime provisions in contacts and increasing annual salaries;

d. Replacing overtime payments with time off in lieu;

e. Make a one off additional payment at the end of the year taking into account overtime and commission earned during the preceding year to reduce the risk of historic claims.

Is it best to be proactive or reactive?

The majority of delegates decided to wait and see the outcome of any appeal rather than take proactive steps to minimise their risk.

As we now know that Unite, who backed the employees, are not going to appeal the ruling on the "series of deductions" point, this seems to have been the right decision.

For more information on the implications of these rulings, speak to a member of the employment team on 01753 279029 or email employmentlaw@bpcollins.co.uk

Statistics* show that there are now around 2.42 million first generation family-owned businesses in the UK – the highest number since 2008. Each year, they contribute £180 billion to the economy, a figure that is predicted to rise by 21% to reach £218bn over the next four years.

For some individuals, the vision will be to create a family firm that will last for generations, while others will simply wish to achieve success and sell the business to fund future projects or life dreams. Whichever is your goal, Simon Deans, partner in the corporate and commercial practice, has some timely words of advice on...

Family planning – the business way

When you start a business, the focus tends to be on the immediate tasks in hand – funding and product development, customer service, employees and premises. Exit planning is likely to be a long way down the list yet, at a time of growing acquisition activity, an attractive offer can create unexpected divisions between business founders and stakeholders, including management and investors.

While most company founders believe they share objectives, they should ask themselves what would happen if an offer of £5 million was made for the business. How would this fit with any long-term objectives? Is it the intention to pass the company to the next generation? Would all the participants be aligned on the outcome?

These questions underline the importance of discussing issues early on so the business owners discover any divergence in long term-goals.

The future outcome is just one of many areas which need careful consideration. For example, when setting up the company structure many husband and wife partnerships will each award themselves shares.

It's something that can deliver tax benefits but it is also a move which can be fraught with disaster if the couple fall out or get divorced, with huge implications for the business, its employees and its customers.

Employing family members can also be a challenge. While it may seem an obvious choice to offer a job to a newly-graduated offspring or an unemployed sibling, what happens if errors are made or the business is sold?

Just because they are related, it doesn't mean family members won't feel aggrieved at the potential loss of a future career, especially if they are watching a parent walk off with a significant sum in their pocket.

Family or not, they may demand to be treated like any other employee or expect a share of the proceeds and if the situation isn't handled correctly then the wider relationship could be damaged and any sale compromised.

Ongoing dialogue between stakeholders and legal advisers is essential to ensure potential issues are acknowledged and dealt with early on to head off potential problems.

After all, a business owner who decides to announce his impending retirement doesn't want to discover when it's too late that no-one else in the family wants to take over.

When considering an exit plan, it's important to step away from day-to-day operations and ensure that all issues such as refinancing activity, share buy-back or ventures into new markets have been correctly managed and completed. An experienced lawyer will help

you have open and honest discussions with all concerned on a regular basis to ensure an action plan is in place and any issues are addressed.

This is important because any potential buyers will always undertake rigorous due diligence prior to acquisition. Any problems could not only delay the sale but result in a drop in price or, in the worst case, a lost deal.

With the economy on the rise, business acquisition activity is picking up significantly and even if selling isn't in your plan today – ensuring everything is in order might just make the difference between maximising the value of the business – and losing a life-changing opportunity.

*Statistics from a report by Barclays Business and the Centre for Economics and Business Research

Sharing the passion

M&C Saatchi Mobile is a leading full-service mobile marketing agency, with offices worldwide.

The company was initially founded in 2006 as Inside Mobile, but three years later the owners decided to sell a stake in the business to M&C Saatchi (UK) Ltd and, after a competitive pitch, chose B P Collins to help them achieve a smooth exit.

James Hilton, global CEO, M&C Saatchi Mobile, said: "The level of detail, understanding and tenacity of B P Collins shone through. In our first meeting, corporate partner David Smellie unravelled so many considerations for us, demonstrated his experience in every element of the sale and informed us of the pitfalls that we might face.

"One thing that really struck us about B P Collins is their forward thinking – the team was already thinking ahead to issues in the final stages of our business, whilst we were still trying to get our heads around day one."

James Hilton

"Crucially however, he gave us the confidence in what we needed to fight for and what to concede on – there was no contest between B P Collins and the other law firms."

Smellie and his team handled the sale of 60% of the shares from the owners of Inside Mobile to M&C Saatchi (UK), involving a share purchase agreement and a shareholder's agreement, as well as a number of complicated articles, including rights to sell the remaining 40% of shares in Inside Mobile in the future.

Working as a team with the sellers and their other professional advisers, a successful sale was achieved with additional protection and the successful rebranding of the joint organisation to M&C Saatchi Mobile. In 2012, B P Collins also advised M&C Saatchi on the buy-back of shares from one of the owners.

Hilton concluded: "One thing that really struck us about B P Collins is their forward thinking – the team was already thinking ahead to issues in the final stages of our business, whilst we were still trying to get our heads around day one. We're really thankful now that they raised these points at the time, as we now realise how important they were.

"I've always felt that they shared our passion and most importantly – they care. In the future, if there is anything either in my work life or private life, they will always be my first port of call."

B P Collins LLP advised

the shareholders of
Pinewood Studios based

Propshop (Model Makers)

on the sale of the
entire share capital to

Voxeljet AG

B P Collins LLP advised

niche manufacturing
world leader

TMD Holdings Limited

on the reclassification
of its share capital and adoption of
new articles of association

Happy ever after?

"A tenancy agreement requires just as much commitment and effort as a marriage." That's the view of commercial property partner Michael Larcombe, who explains how to ensure a fulfilling and lasting relationship from the start.

A tenancy agreement is a vital part of business property, setting out the rights and obligations between the landlord and tenant, protecting both parties' property and finance.

I like to use the analogy of a marriage and see a tenancy agreement as a long-term contract which is fine in the beginning, but as time passes there may be implications in the future.

Where marriages and families evolve so too do businesses, and premises which once were ideal may become too small, their location may no longer be ideal, and the agreement too inflexible.

The law is very strict when it comes to leases, which makes them extremely difficult to get out of.

By preparing properly at the start by engaging with a specialist commercial property lawyer – a marriage broker if you like – you can ensure that any agreement is future-proof and capable of adapting to your changing circumstances.

Doing so ensures that both landlords and tenants of business premises know their respective rights and responsibilities and potential bear-traps can be avoided along the way.

Engaging with an expert at the start of the contract can ensure that the best terms are negotiated early on, and possible hazards anticipated in advance.

Negotiations

The cost of the rent will always be at the heart of any agreement, but there are many more issues which need to be identified and agreed, such as:

- How much rent-free period can you negotiate to allow you to move in and fit the premises to your specific requirements?
- Is there a service charge, and if so, is there potential for capping or limiting it? For example, it's important to try to negotiate limitations on your responsibility for repair; well-presented site décor may be masking a multitude of sins that could prove costly later in a tenancy.

Dilapidations

Dilapidations are a classic cause of anxiety and over a 20 year lease, a tenant can find themselves paying refurbishment costs which are entirely disproportionate to their lease. A property could, for example, be a listed building with a lead roof that becomes beyond reasonable repair and needs replacing.

A landlord will undoubtedly want to pass those repair costs onto a tenant in order to preserve the value of their investment and although there will be a number of get-outs, the cost of finding them – reactively – will not be insignificant. Proactive advice, on the other hand, is priceless.

Recriminations around "failure to repair" at the end of a term, though common, are best avoided and negotiating a cap on dilapidations is the most sensible approach.

Outside your control

Sometimes disputes can appear to be outside of a tenant's control – not least in multi-tenanted premises. For example, taking an assignment on premises that already have tenants in occupation of other parts of the building is not uncommon.

However, in some cases, organisations can find themselves indirectly exposed if their agreement stipulates vacant possession of the whole building at the end of the term. In such cases, even parking spaces can present a challenge; in instances where someone has innocently forgotten an imminent lease expiry and parked overnight, a tenant can face legitimate arguments about whether vacant possession has actually been delivered up.

It's a potential nightmare scenario – but with good, early advice, it need not end in an acrimonious split. Treat your tenancy agreement with the same attention you would a marriage contract; take advice from the outset and you may just avoid a major incident that may have significant consequences on your business.

That way, for better or worse, you can rest assured your business rests on solid foundations.

For landlord or tenant advice call 01753 279087 or email your enquiry to comproperty@bpcollins.co.uk

Government urged to take action on the green agenda

Top players in the environment, waste management and renewables sectors came together recently to debate the hot topics of the day at B P Collins' annual Environment Round Table. Hosted by Adrian Moorhouse, leading performance expert, the discussion ranged from a critical view of the Government's lack of support for green issues to the "foolish" policies of the renewables industry.

Attendees

Peter Charlesworth,
Carbon Statement
Roger Edwards,
Biffa
Andrew Hillier,
ICE Energy Technologies Limited
Jerry Hughes and Chris Bourke,
Auditel (UK) Limited
Peter Prior,
Summerleaze Ltd
Philip Steele,
nCube
Diane Yarrow and Alex Zachary,
B P Collins LLP

Talking about the downturn in environmental commitment, Roger Edwards said: "Five or six years ago, my local authority customers had a general commitment to sustainability and environmental best practice and, when our bids were evaluated, we scored against some worthwhile criteria.

"That has literally fallen off the edge of a cliff, now it is all about finance, the environment has become a 'nice to have', but it's not going to win you the job."

His view was shared by many of the other delegates, including Andrew Hillier, who commented: "At a high level the UK Government has lost all interest in the green agenda, there are occasional soundbytes and policies which have been in pipeline for some time, but in reality the focus is just not there. In the last 12-15 months it has become totally disinterested in the green agenda, it will be interesting to see if that focus changes going into the election next year."

Jerry Hughes accused the Government of paying "lip service" to the problem by resorting to financial penalties for non-compliance with environmental regulations. In reality he said, many companies simply prefer to pay the fines because they can't afford to implement the necessary activities to reduce their carbon footprint.

Tax and renewables

Peter Prior called on the Government to introduce a tax on fossil fuels to make them more expensive and said the renewables industry had pushed expensive renewables far too hard rather than backing cheaper alternatives and was now "reaping the reward of those foolish policies".

"The industry has managed itself extremely badly by pursuing bad policies and not taking account of costs, which was always bound to lead it into disrepute and hasn't done itself any favours. They have picked winners and for every winner you pick you get 10 losers," he said.

Alex Zachary wanted to see the Government creating "favourable conditions" for innovators to develop the right sustainable solutions; while Chris Bourke said companies would only implement energy saving measures if they could see real bottom line benefits to their businesses.

Roger Edwards argued that taxes work much better than other incentives because they create a level playing field, but said the problem is that the Treasury creams off the benefit instead of reinvesting it in the sector.

The sustainability legacy

Diane Yarrow recalled that pre and post London 2012, the sustainability legacy was "massive" but now, as the publicity driver has faded away, so too has interest in the topic and the focus has returned to costs.

Philip Steele said there was a "national problem" with energy, continuing: "The future doesn't look too good so we have to consider different sources for the cost effective and efficient supply of energy. To a certain extent, it means changing the way we work – making that change and getting it through to Government is the key thing."

Peter Charlesworth said the majority of companies were refusing to acknowledge the fact that energy prices are set to rise significantly over the next five years and while increasing energy costs would help increase interest in the renewables sector, it would have a knock-on effect as price increases were passed on to customers.

He concluded: "The best technology has to win because it is better, not because it is incentivised."

The final word went to Roger Edwards, who concluded with a hope that an increasing economy would see a return to greater margins, leaving enough money in the kitty to invest in new ideas for the future.

Is your claim in with a chance?

Can you claim through the courts for a lost opportunity? Simon Carroll, associate in the litigation and dispute resolution team, looks at what the courts consider when faced with a "loss of a chance" case.

Whether an individual or a business, you can claim through the courts for a loss of chance. Very often, but not exclusively, these claims will concern professional negligence or a contractual dispute.

Claims for loss of chance can, however, be difficult and unpredictable, especially in the context of a lost opportunity to litigate.

In assessing claims and damages, a court will often have to speculate on one party's loss to such an extent that the claimant can end up committing to expensive litigation without any real idea of what the ultimate damages award may be.

Although a claimant may consider they have a strong claim and be entitled to some redress if wrongly deprived of the opportunity of pursuing it, how should they best assess their prospects and whether or not to proceed?

Unlike in criminal proceedings, civil courts won't hold a trial within a trial to determine if the lost claim would have succeeded.

Therefore a claimant needs to show that the lost claim had a real and substantial prospect of success. The court will then attempt to evaluate the loss by assessing the likely damages that might have been awarded. From there, it will apply a percentage reduction to reflect the inherent or specific uncertainties which would have been involved in a trial.

The calculation isn't scientific and the court will usually decide the award based on the evidence before it.

Lawyers in litigation

The recent case of Chweidan v Mishcon de Reya highlighted just how difficult it can be to assess damages in loss of chance cases.

Following his dismissal by JP Morgan, former trader Russell Chweidan appointed the City firm of solicitors to act on various employment and discrimination claims. During the course of the litigation, Mishcon failed to take a number of steps that resulted in some claims not being able to be pursued.

Chweidan brought a £350,000+ claim for the lost opportunity to litigate but, as he was unable to show how the lost litigation would have turned out, his claim was at best for a loss of chance of winning.

At the High Court, Mrs Justice Simler assessed the evidence and considered both the prospect of the appeal succeeding and the chance of Chweidan's underlying claim succeeding, once the case was sent back to the lower court.

She ruled that the chance of a successful appeal was 50% and the chance of the underlying claim succeeding was 33% - reducing his overall chance of winning to 16%. This was increased by 2% to reflect the value of the possibility of an early settlement if the claim had gone ahead.

Overall, she ruled that there was an 18% chance that Chweidan's unfair dismissal case against JP Morgan would have succeeded and awarded him 18% of the likely claim value of £357,574, resulting in damages of £64,363. She also awarded 18% of £10,000 likely interest accrued after the Tribunal judgment, resulting in a total sum of £66,163.

Impossible to predict

While the final figure was much less than the original claim, it demonstrates the uncertainty surrounding the evaluation of lost chance claims. It can be almost impossible to predict accurately what awards might have been given based on how witnesses might have behaved and how points might have been argued.

Careful consideration needs to be given to what and how evidence is to be put before the court – such claims need to be carefully contemplated and tactical negotiations considered from the outset.

The missed masterpiece

This second example cites a private art collector who wished to buy a painting at auction.

Having briefed an art dealer to bid on his behalf, the buyer would have expected the dealer to have completed the necessary paperwork to allow him to participate on sale day. As the dealer failed to do so and was unable to bid, the art collector considered claiming for loss of chance, as the dealer's actions had lost him the opportunity to acquire the painting.

Although there would have been no guarantee that the dealer would have secured the painting, the claimant could have showed the court that his bid would have had a substantial prospect of success as the price paid was well within the budget limit he had set.

For legal advice on making a claim call us on 01753 279039 or email disputes@bpcollins.co.uk

Avoiding a courtroom colour clash

Recently, luxury gentlemen's outfitter Thomas Pink rolled up its very elegant sleeves for a courtroom battle with lingerie chain Victoria's Secret.

It successfully sued the underwear store – which bills itself as having "the world's sexiest lingerie" – for using the trademarked term "PINK" in its new range of fragrances, toiletries and clothing.

The gentlemen's outfitter claimed that Victoria's Secret's association with the colour was tarnishing its brand and well-established reputation. It had previously registered PINK as a community and UK trademark.

In response, Victoria's Secret had claimed that its own name and positioning were strong enough so that customers would see the word Pink in the context of their famous brand and it was wrong to suggest this would muddle the masses.

In the High Court however, Mr Justice Birss disagreed, finding that Thomas Pink's luxurious reputation could be risked by the lingerie store's "sexy, mass market appeal". He said there was every risk Victoria's Secret's use of the trademark would lead consumers not to buy products from the claimant that they may have done otherwise.

The battle raised eyebrows because it arrived at a different outcome to the one earlier this year involving Cadbury's and Nestlé, when the former was finally refused permission in its latest attempt to trademark its iconic colour purple. It had wanted to stop other chocolate companies from using the colour in their own sweet wrappers.

Cadbury's had originally tried to trademark the purple shade in 2004, but failed because Nestlé opposed it, and since then the two confectionery giants have been involved in numerous court cases.

In April, the Supreme Court upheld a 2013 decision by the Court of Appeal, which ruled that Cadbury's formulation did not comply with the requirements for trademark registration and it was attempting to register "multiple signs" involving the colour.

Simon Carroll, an associate in the litigation practice, says both cases highlight the need to seek legal advice early on.

"We often see businesses investing considerable time and money in developing their brands, without thinking enough about whether they can be legally protected at a later date," he said.

"Unfortunately, it is often only years later – as shown by the Cadbury's case – that true brand value and potential is realised.

"In an area where case law changes rapidly, it's important to regularly revisit legal advice to understand what can and cannot be protected and to keep an eye on the market to ensure challengers can be headed off very early."

B P Collins tops the rankings in legal directories

The end of the year heralded success for the firm after being named as a "regional heavyweight" for the first time in the 27th annual Legal 500 league tables and achieving top tier status in an unprecedented five practice areas.

The ranking underlines its growing stature as a regional law firm, recognised as one of only 25 law firms named across the South East, and the depth of expertise and skills across both the firm's corporate and commercial and private client teams.

The business immigration team went straight into the top tier in its first year of operation, alongside the dispute resolution and commercial litigation team, employment law practice and the personal tax, trusts and probate group which, said the report authors, "epitomises the qualities of a good and knowledgeable practice".

The firm also celebrated as five of its practice groups were awarded a band one ranking in the latest 2015 edition of legal "bible" Chambers UK.

The corporate/MA team, the employment group and the litigation practice all rose to the number one spot, where they sit alongside the environment and real estate litigation teams.

Chris Hardy, B P Collins' senior partner, said: "Our rankings in both directories are a significant achievement which we should all be very proud. We always seek to deliver excellence in everything we do and to have the accomplishments of both our private client and commercial teams recognised and rewarded by Chambers and Legal 500 is extremely satisfying.

"As we continue to strengthen our teams, we look forward to continuing to providing an even better service to our clients in the year ahead."

13

awards given at this year's Pride of Bucks ceremony, co-sponsored by B P Collins LLP

176

cups of coffee and pieces of cake bought by staff during its World's Biggest Coffee Morning, raising £413 for Macmillan Cancer Support

26

major appeals completed for life-saving equipment at local hospitals by Scannappeal, supported by B P Collins LLP

The festive period is traditionally a time of reflection and here we highlight some of the charities and community projects that B P Collins LLP has supported throughout 2014. Thank you to our employees, business network and clients who have volunteered their time or helped support these worthwhile causes this year

£6,941

raised during 2014 for SportsAid at the Bucks Sporting Lunch Club, co-sponsored by B P Collins LLP

82

stylish staff members took part in the annual Jeans for Genes Day celebrations, helping raise £258 for Genetic Disorders UK

50,000

people diagnosed with epilepsy in the UK. B P Collins LLP supports Epilepsy Society at various fundraising events and donates each time a client completes a feedback form online

592

pieces of fruit used to blend smoothies sold to staff in support of BBC Children in Need, raising over £300 towards supporting disadvantaged children and young people across the UK

£2,827

raised for Age UK Bucks following the opening of the private garden belonging to Lord Carrington in August, sponsored by B P Collins LLP

17

employees completed the 2014 GX Fun Run and, through the firm's Gold Sponsorship, helped raise funds for Kids in Sport and Home-Start (Slough)

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Write to us at B P Collins LLP, Collins House, 32-38 Station Road, Gerrards Cross Buckinghamshire SL9 8EL Tel: 01753 889995 Email: enquiries@bpcollins.co.uk
Practice group leaders: Commercial property, Michael Larcombe | Corporate and commercial, Simon Deans | Employment, Jo Davis | Environment, Diane Yarrow
Family, Sue Andrews | Litigation and dispute resolution, Matthew Brandis | Notary public, David Wilkinson and Martin Silverman | Wills, trusts and probate, Paul Lowery
Property litigation, Sarah McLoughlin | Residential property, Chris Hardy

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