summer 2010

newsknight

the newsletter of Knights solicitors llp

Will Inheritance Tax relief be lost on a farm cottage if the elderly farm partner has to move out through illness?

There are many tests that have to be satisfied to obtain agricultural property relief from Inheritance Tax on a farm cottage, one of which is that it has to have been occupied for the purposes of agriculture throughout a continuous period of at least two years (or sometimes seven years) immediately before the death of the taxpayer.

Death often follows a period of ill health which might necessitate the taxpayer moving out of the property eg into a nursing home. However unfair it seems, HM Revenue & Customs have been known to argue in such circumstances that the property was not occupied for the purposes of agriculture even if it had been occupied for agriculture for decades before the taxpayer left.

The recent case of Atkinson v HMRC (2010) does offer some hope. In that case relief was given on a cottage which had been occupied by a partner in the farm business even though in the last four years he had resided in a care home following a stay in hospital.

The important facts in the case appear to be that:

- The cottage was let to the partnership of which the deceased was a partner.
- The deceased's possessions were stored at the cottage throughout the four year period and no-one else lived there.
- The deceased did visit the property from time to time and was still involved in conversations regarding the partnership and the farm business.

The decision might have been different had the taxpayer been mentally incapable and unable to have any involvement in the business, or if the taxpayer had occupied the farmhouse as opposed to a cottage (as the specific issues concerning farmhouses and the need for the farm to be run from the property were not relevant).

For further information please contact Kate Smith.
Email: **kate.smith@knightsllp.co.uk**

JUST CLICK "I AGREE"

An April Fools Day prank by Gamestation has shed further light on how many people don't read online terms and conditions.

On April 1st Gamestation inserted a new condition into their online terms which granted them a "non-transferable option to claim, for now and evermore the immortal soul of the customer". It went on to state that a notice claiming the soul may be sent in "six foot high letters of fire" and that collection of the soul may be undertaken by one of Gamestation's "minions". Gamestation in order to assess how much attention they were paying, allowed customers an opt-out if they clicked a link contained in the terms. Clicking this link would also entitle customers to a £5 voucher.

Amazing!

Of the 7,500 customers placing orders on the site that day not one clicked the link demonstrating that either they hadn't read the terms or they were more than happy to handover their immortal soul to a retailer as long as they got the video game they had ordered.

Whilst this was a prank it does show the danger in not reading terms and conditions (whether online or in physical form) whilst agreeing to contract on the basis of them. Whilst English law provides good protection for consumers in these circumstances (in as much as the terms have to be reasonable) this is not the same for businesses who are expected to understand what they are agreeing to: not having read a document is no defence.

Of course a more devilish interpretation of this story is that you can pretty much get anybody to agree to anything as long as its easier to click "I agree" than it is actually to read the text.

For further information please contact David Miller. Email: **david.miller@knightsllp.co.uk**

IMMIGRATION - can you prove compliance?

The London School of Economics estimates that there are over 600,000 illegal immigrants working in the UK with up to 3,400 employed by one of the largest medical contractors alone and an estimated 2,500 illegal immigrants working for Government Security. It is clear that public sector employers and contractors to the public sector including catering, cleaning and security are particularly vulnerable

Crackdown

It is fairly clear that post election the Border Agency will to be given greater powers to crack down on illegal immigrants and those who employ them. We have made a freedom of information request to the UK Border Agency with regard to the number and value of penalties which have already been imposed on employers in the two years since the Agency's powers were extended. It has been confirmed that a total of 3,876 employers have been fined with a gross penalty value in excess of £38 million. As the Agency's powers are extended further employers need to be increasingly aware of their obligations.

Penalty... £50,000 plus

If your business had an immigration audit tomorrow are you able to prove that each and every one of your employees is entitled to work in the UK? Have you undertaken your review of the obligations at the right time? One of our clients answered yes to both these questions but our audit discovered that 5 employees were working illegally and so had to be dismissed and remedial action was required in respect of a further 15 employees to satisfy the Border Agency's requirements. Had the audit been undertaken by the Border Agency a fine of more than £50,000 could have been imposed and restrictions placed on the employer preventing them from employing highly skilled migrants in the future. Contrast this with the audit fee in that particular case of £1,000.

What to do...

Our audit team is led by Lynne Ingram, Employment and Business Immigration Specialist and Vincent Fox, former Barrister and Immigration Presenting Officer for the Home Office. They will sit along side your Managers or HR function and audit your personnel files, produce a report, identify problems, regularising the situation where possible or advise on a fair dismissal proceedings and establishing systems which will ensure compliance.

For further information please contact Lynne Ingram.
Email: **lynne.ingram@knightsllp.co.uk**

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If you are interested in any of the articles featured in this issue of newsknight please get in touch. We would be pleased to hear from you. If you would prefer to receive your regular copy of newsknight via email, please confirm your email address details to **mail@knightsllp.co.uk.** If you would prefer not to receive any further copies of our regular free client newsletter, newsknight, please write to Yvonne Allen and let her know. You will then be removed from the distribution list. The articles in newsknight cover legal issues which we believe will be of interest to you. Although believed to be correct as we go to press, they must of necessity be broad in scope and not relevant to every case. For further advice and guidance please contact us and we will be happy to help. **For these and other news articles visit our website www.knightsllp.co.uk**

Knights solicitors llp

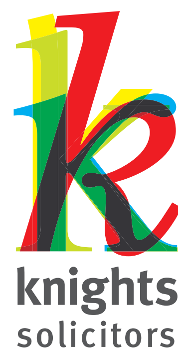
The Brampton
Newcastle-under-Lyme
Staffordshire
ST5 0QW
T 01782 619225
F 01782 620410

Eagle Tower
Montpellier Drive
Cheltenham
GL50 1TA
T 01242 524654
F 01242 524590

28A London Road
Alderley Edge
Cheshire
SK9 7DZ
T 01625 586686
F 01782 717821

Editor in Chief:
Chris Bolger

E mail@knightsllp.co.uk
W www.knightsllp.co.uk



Specialists in employment

Our employment team here at Knights goes from strength to strength with the introduction of *total hr solutions* and the recruitment of two senior Human Resources specialists adding further depth and breadth to the team. Whilst our 6 dedicated employment lawyers can guide employers through the myriad of ever increasing and complex employment legislation, harnessing staff potential (a key business asset) through development and providing incentives is best suited to skills in HR.

The employment team at Knights: (back l to r): Lisa Harris, Judith Doran, Mark Whitehouse, Lynne Ingram, Jane Capewell (front l to r): Isabel Hancock, Gareth Durnall, Vincent Fox, Christine Dyson

Our HR specialists, Jane Capewell and Judith Doran, are professionally qualified to the highest level. They are Fellows of the Chartered Institute of Personnel and Development ("CIPD") and have a wealth of experience in both the public and private sector providing a whole range of services including pay and reward schemes, performance management, job evaluation, managing redundancies and re-organisations, training / development and diversity.

Audit

Many businesses do not need full time HR support, nor can they afford or justify it - but Jane and Judith can be supplied by Knights when you need them, to undertake projects or just to assist in the conduct of a difficult grievance or disciplinary process. Experienced, professional and part of your team - without becoming a permanent cost to your balance sheet. There are a variety of payment options including our "Pay as you Grow" scheme, where employers can select how many hours of HR support they wish to pay for and "bank" each month - calling upon the services at the point when a need arises. Many employers are unsure as to their HR needs and we offer an audit to assess the level of support required which may be for a block of time or just one day a week or month.

Whilst our employment team provides the full range of employment services you would traditionally expect, such as the conduct of employment tribunal claims, advice on TUPE acquisitions and seeking an injunction when necessary we have developed a range of employment products which includes *total hr solutions*. Our total employment solutions product (TES) continues to be extremely popular and provides a comprehensive package of services covering every aspect of employment law for a fixed monthly fee. Employers can access as many or as few of the services they need - the core product contains:

- An audit
- The creation of bespoke contractual documents
- An HR manual
- Bespoke training
- A telephone helpline
- Insurance against claims covering both any award and solicitor's fees for representation
- Director's liability insurance
- Health and safety

For further information please contact Isabel Hancock. Email: **Isabel.hancock@knightsllp.co.uk**

Welcome...

Knights' Planning Team has been strengthened by the appointment of Rob Pattinson as a Consultant.
Rob has 20 years experience in both local authority and private practice and is an experienced advocate. He has represented developers, local authorities and interested third parties in public inquiries involving many types of development proposals from householder extensions to large mixed-use sites, and including large residential development sites.

Rob frequently advises developers on the prospect of obtaining planning permission and the application process, negotiates with local authorities and advises on planning obligation requirements. He also assists clients in promoting sites through the local development plan process.
Andrea Bruce, Planning Partner said, "I am delighted Knights is in a position to invest in its Planning team at this time. Whilst we already undertake some advocacy Rob's undoubted experience in this area will be an asset to the team and to clients."

Email:
rob.pattinson@knightsllp.co.uk

We welcome George Ross, who joined Knights in March.
He has a vast experience in the construction industry having worked for companies such as Norwest Holst, John Mowlem plc and Bovis Construction Limited, as Regional Director. It is, however, his vast experience as an adjudicator/arbitrator which brings him to us, having undertaken this work exclusively over the last 20 years. He is a Chartered Arbitrator, Accredited Adjudicator, Chartered Civil Engineer and Chartered Quantity Surveyor and now Trainee Solicitor! If he didn't have enough letters after his name already, George has taken a law degree and passed his solicitors' exams in order to take him up to another level as an international arbitrator.

He brings to our construction team his vast experience of working in the construction industry and in dispute resolution, particularly from the other side of the table as an arbitrator and adjudicator. He has extensive knowledge of the law and not inconsiderable drafting skills as well. He is almost a one-man construction unit!

In these difficult times, his joining us is opportune given the amount of construction dispute work which we are encountering at the moment, enabling us to provide an even better service to our clients.

Email:
george.ross@knightsllp.co.uk

We are delighted to announce that Mark Downie has joined the corporate and commercial department as a consultant specialising in intellectual property law. Over the coming months, he will be spearheading the expansion of this niche area of work.

Mark is a solicitor and comes to us from the Waterford, Wedgwood, Royal Doulton Group where he worked as a lawyer and company secretary for over 20 years. He is well known and very well respected within the pottery industry and has extensive experience of intellectual property law having protected these household brands on a worldwide basis. Having spent so much time working in-house, Mark is in a unique position to advise our clients on how to identify and then protect their intellectual property rights as well as helping them to explore ways in which they can benefit from using them. Many businesses do not fully appreciate the value of the intellectual property rights which they have and would benefit from seeking Mark's advice.

Email:
mark.downie@knightsllp.co.uk

The Community Infrastructure Levy - regulations are now in force

The new discretionary planning charge known as the Community Infrastructure Levy ("CIL") was introduced by the Planning Act 2008. The Community Infrastructure Levy Regulations 2010 ("the Regulations") set out the detailed provisions enabling local authorities in England and Wales to introduce a CIL in their areas. The Regulations came into force on 6 April 2010.

The CIL applies to new buildings above a certain size and the revenue from the CIL must be applied to infrastructure needed to support the development of the area. Infrastructure is defined as including roads and other transport facilities, flood defences, schools, medical facilities, sporting and recreational facilities and open space.

Local authority discretion

Individual local authorities can decide whether or not to impose the CIL in their area. In order to charge the CIL, the local authority must adopt a charging schedule that will apply in its area. CIL will be paid primarily by owners or developers of land that is developed, and will be based on a formula that relates the size and character of the development to the amount charged.

How much?

CIL rates will be expressed as pounds per square metre of development and will be levied on the net internal area of development. The actual rate of the CIL will be set by the local authority, and different rates of CIL can either be set on a geographical basis or by reference to the intended use of the development. The rates must take account of the total cost of infrastructure requiring funding from CIL; other sources of funding available; and the potential effect of CIL on the viability of development of the area. Draft charging schedules will be open to consultation and subject to approval at an examination in public before being adopted by the local authority. CIL will be index linked.

Exemptions and reliefs

Once a charging schedule has been adopted, any development which requires planning permission will be a chargeable development and CIL will be payable, unless exemptions or reliefs apply. The CIL will not apply to non-residential development with a gross internal area of less than 100 sq m. Relief from the CIL will be available to charities and any development that provides on-site social housing. The amount of social housing relief is calculated on the basis of a complex formula which depends on the area of the social housing as a proportion of the whole development.

In order to qualify for social housing relief, the housing must either be let by a registered social landlord, or by a local authority on a social rented basis; or be occupied on a shared ownership basis, provided that any premium paid for the unit does not exceed 75% of its market value, the annual rent is less than 3% of the unsold interest, and in any year the rent does not increase by more than the increase in the retail price index plus 0.5%.

Discretionary relief is available in exceptional circumstances if the local authority considers that the imposition of CIL will render a scheme uneconomic and as a result it may not go ahead. Discretionary relief however requires the existence of a Section 106 Agreement relating to the development, the cost of complying with which is greater than the CIL charge, such that paying the CIL charge would have an unacceptable impact on the development's economic viability.

CIL is a local land charge and will need to be entered in the local land charges register.

Right of appeal

The Regulations provide the right of appeal including against the calculation of the chargeable amount; the apportionment of liability; and determination of the deemed date of commencement of development.

Since CIL is a discretionary charge, the Government is expecting a phased take-up of CIL by local authorities. Since charging authorities must also prepare the introduction of the CIL and follow the prescribed procedure for adopting a charging schedule, it is expected that the CIL system will take at least 12 months to come fully into effect.

Guidance

The Department for Communities and Local Government has published two sets of guidance, "Community Infrastructure Levy: An overview" and "Community Infrastructure Levy Guidance; Charge Setting and Charging Schedule Procedures", and advise that they will be providing further guidance on specific aspects of establishing and running a CIL regime over the coming months. This is in addition to the new policy document for planning obligations, which is the subject of current consultation, the closing date for which is 21 June 2010. This will replace an earlier document issued in 2005 and form an annex to the new Development Management Planning policy statement in respect of which consultation closed in March.

For more information please contact Sue Marsh.
Email: **sue.marsh@knightsllp.co.uk**

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Permanently at your disposal but without a permanent cost. Whether your need arises from a short term staffing crisis or a longer term HR project, our team can become part of yours - but only for so long as you require.

Knights' employment unit has depth and breadth of expertise to guide clients through the myriad of ever increasing and complex legislation regulating the employment relationship. However we appreciate that employees are also the most valuable asset of any business and harnessing their potential is not always best suited to a lawyer's skills. For this reason our employment unit includes senior HR professionals who are better placed to deal with many day to day aspects of the employment relationship and add real value to your business.

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When is a Construction Contract not a Construction Contract?

The Housing Grants, Construction and Regeneration Act 1996 ("the Act") gives a party the right to take a dispute about a construction contract to adjudication.

However the Act requires that the contract must not only be evidenced in writing but that the contract must be a "construction contract" with "construction operations".

North Midland Construction (2009)
This recent case centred on whether certain works carried out at two coal fired power stations fell within the ambit of the Act. The defendants sub-contracted certain works to North Midland Construction PLC ("NMC"). The parties entered into two contracts for each power station - one for enabling works and one for civil works. The enabling works consisted mainly of preparatory works, such as securing the site, constructing temporary roads and installing temporary services. The civil works involved heavier construction works, such as piling, excavation and foundation earthing. Following a dispute over the final account, NMC wanted to exercise its statutory right to adjudication under the Act, which it could only do if these contracts were held to be "construction contracts" as defined in the Act.

What does the Act apply to?
The Act applies to contracts for "construction operations". These are defined but qualified by the exceptions. Important in this case, was the exception in relation to "assembly, installation or demolition of plant or machinery... on a site where the primary purpose is... nuclear processing, power generation or water effluent treatments."

Broad approach
If a broad approach was taken to the definition (as had been favoured in an earlier case. Any works that related to the assembly or installation of plant or machinery for a power plant would be excluded and this dispute would therefore be outside the scope of the Act.

If, however, a narrow approach was taken (as it was in another earlier case), unless the works directly related to the assembly or installation of plant for instance, they may not be excluded. On this view, since NMC's works were not the assembly or installation of the power plant or machinery, they were not excluded and the Act would apply.

What the Court decided
In deciding which view was to be preferred, the court looked at the records of the Parliamentary debate when the Act was being drafted. The court held that had Parliament wanted all works directly or indirectly linked to one of the excluded categories to be excluded, they would have inserted a catch-all provision into the Act. The fact that they had not done so indicated that they had not intended the Act to be excluded in circumstances such as this. As such, the court held that the narrow approach was to be preferred. The Act therefore applied to the sub-contracts and NMC were entitled to go to adjudication.

The case is an important reminder to parties entering a contract for construction works to consider whether the Act will in fact apply. If there is doubt, parties can consider drafting a contractual adjudication process rather than relying on the Act. The point is to avoid unnecessary and expensive litigation.

For further information please contact George Ross. Email: **george.ross@knightsllp.co.uk**

Threats and Intellectual Property Rights

Intellectual property is often the most valuable asset owned by a business and the law provides various ways to protect it. Trade marks, inventions, designs, trade secrets and goodwill are all types of intellectual property and a sound strategy to identify, protect and (if necessary) enforce these rights can prove vital to success. Some properties, such as trade marks and patents, can give powerful and exclusive monopoly rights to their owners and so the law also has a series of checks and balances to try to ensure that there is no abuse of such power. Among these checks and balances is the law governing groundless threats.

Be careful!
If you discover that someone is using a name, design or invention which appears to be identical to one you believe to be exclusively yours, you will want to stop them immediately. However be careful how you go about doing so. It is vital to consider all the circumstances carefully before any action is taken which might constitute a 'threat'.

The law on threats is intended to prevent a business suffering loss of legitimate trade by giving in to pressure from others claiming to have rights which they do not, in fact, have.

Unjustified threats
If your communication with a suspected infringer, written or oral, is understood to be a threat of infringement proceedings, a suspected infringer can bring an action against you. If the threat is not justified, the suspected infringer can seek:

- damages against you for the loss they have suffered as a result of the threat;
- an injunction preventing you from making further threats; and
- a declaration that the threat was not justified.

The threat does not have to be expressed: it can be implied, as the High Court decided in a recent and amazingly titled case - *Grimme Landmaschinenfabrik GmbH & Co KG v Scott (t/a Scotts Potato Machinery) (2009)*. In that case, even though a letter expressly stated that the Intellectual Property owner would not bring legal proceedings, the court found that the context of the correspondence read as a whole amounted to a threat.

The court considers whether an ordinary person receiving the communication would reasonably regard it as a threat. Simply notifying the suspected infringer that an intellectual property right exists would not be classed as a threat but care should still be taken as it can be easy to cross what is a fine line.

You would, however, be justified in threatening an action for the alleged infringement of your intellectual property rights if the suspected infringer carries out certain activities as set out in the Patents Act, the Trade Marks Act, Registered Designs Act and the Copyright, Designs and Patents Act and is found to have infringed your intellectual property rights.

And you would be able to defend a threats action if you could show that the threat you made was justified because the suspected infringer has actually infringed your intellectual property rights. However this defence does not apply if it can be shown that your intellectual property rights are invalid.

What to do
If you believe that someone is infringing your intellectual property rights, ensure that any communication you have with the suspected infringer is drafted very carefully. Similarly, if you are the recipient of any communication which appears to be demanding that you stop or modify what you regard as your proper business, then you should take advice about whether a groundless threat has been made against you.

For further information please contact Mark Downie. Email: **mark.downie@knightsllp.co.uk**

PROTECTION FOR THOSE WITH SPECIAL NEEDS ENSURE YOU HAVE DONE ALL YOU CAN

If you have a child, spouse or any member of your family who is potentially vulnerable as a consequence of a disability or special needs it is essential to ensure that you obtain expert advice and put in place appropriate planning, through your Will or perhaps by the establishment of lifetime trusts, to ensure that those who are dependent on you will receive full and proper financial care and support in the event of your no longer being able to provide it yourself.

Whether your spouse is suffering from Alzheimer's or has some other condition which makes him or her potentially in need of care, or whether you have children or friends with learning or other disabilities, it is important to be aware that advanced planning needs to be in place for the ongoing welfare of those you support.

If this is a concern for you then we would be happy to offer our help and advice and, if you are already involved with a charity or other institution, to work with that other body to ensure that you have done as much as you can.

For further information please contact Charles Jones. Email: **charles.jones@knightsllp.co.uk**

New partner

Knights are pleased to announce the appointment of Jessica Costello as a partner.

Jessica joined the tax, trust & private client department in 2007 to develop the contentious probate unit. Coming from a litigation background Jessica has experience in a wide range of civil and commercial disputes and is a member of the Association of Contentious Trust and Probate Specialists (ACTAPS) which promotes specialist knowledge and services in will, trust and probate disputes. She deals in particular with claims under the 1975 Inheritance Act, challenges to the validity of wills and trusts, actions for rectification of wills, removal of trustees and breach of trust claims.

Jessica is a Trustee of the Douglas MacMillan Hospice which provides hospice and community care services for people in North Staffordshire and the surrounding area. She is also a member of the management committee for the North Staffordshire Law Society.

Head of department, Charles Jones, commented, "I am delighted to welcome Jessica as a partner. Her promotion takes the number of partners in our tax, trust and private client department to six, and is in line with our policy of continuing to expand a department where we believe our ability to provide a comprehensive service, with in depth expertise in areas of key importance to our clients, is second to none in the area."