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CLIFTONINGRAM LLP

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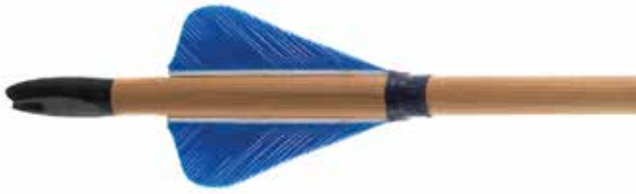
CITATION

[FAMILY LAW]

PIERCING THE CORPORATE VEIL



The latest Family Law case to hit the headlines is Prest v Petrodel Resources Ltd, where the Supreme Court had to consider when it is, and when it is not, appropriate to interfere with assets belonging to a company within the context of divorce proceedings.

A company is an independent legal entity and consequently assets belonging to a company are not necessarily available for division within matrimonial proceedings. However, generally the Family Courts have taken a fairly robust approach. Where a husband is self employed, by way of a limited company, the assets belonging to that company have habitually been taken to be assets belonging to the husband. It is this approach which the Court, in the first instance, took in this case.

In 'Prest v Petrodel' the parties were very wealthy and the husband had properties in London which were owned through his company. That company dealt with the international oil trade. The Court found that the husband's assets totalled £37.5 million and awarded the wife £17.5 million. In order to pay that £17.5 million, the husband was ordered to transfer properties belonging to his company to the wife. The company had not been directly involved in the proceedings up until that point, but following the Order, appealed on the basis that the properties owned by the company were not owned by the husband and it was not possible for him, therefore, to transfer them to the wife, even though he owned the company. If the proceedings had stopped at this stage, the wife would have been left with an Order for £17.5 million, much of which she would not have been able to get her hands on.

The Supreme Court, however, determined that the company was right, that in law the properties belonged to the company and therefore it could not be presumed that just because the company was owned by the husband, that the company would be able to transfer properties to the wife. In reviewing the law, the Court made it clear that it was only possible to force a company to transfer properties or assets belonging to it (known as 'piercing the corporate veil') if it could be shown that the company acquired those assets specifically to avoid an obligation to a third party. In other words, that putting them in the company's name in the first place was really all a bit of a sham. Here the Court ultimately found that the properties owned by the company were actually owned by the company on trust for the husband, thus he was the beneficial owner and consequently the Court had no difficulty in requiring the company to transfer the properties to the wife.

This case is a useful reminder of the law and that it should not always be assumed that spouses can get their hands on assets owned by a company belonging to the other spouse. At the same time, it is also a reminder to the owners of companies who might think to squirrel away money under the guise of 'company assets' that the Court is, where the circumstances show that the motivation is to deprive the wife of those assets, prepared to take them back.

[GET IN TOUCH]

For more information please contact Anne Deller at annedeller@cliftoningram.co.uk

[COMMERCIAL PROPERTY]

GETTING THE GREEN LIGHT

COMMERCIAL PROPERTY & THE GREEN DEAL

The Green Deal is a Government initiative to improve the energy efficiency of properties ideally so that the improvements should pay for themselves through savings in electricity and gas bills. This is known as the 'Golden Rule'. The Government hopes that the Green Deal will overcome the reluctance of the private rented property sector to undertake efficiency improvements.

The legislation for the Green Deal is the Energy Act 2011, which states that all buildings in the private rented sector must be raised to a minimum energy level before they can be rented out, no later than 1st April 2018 unless sufficient efforts have been made to reduce the rating as far as possible.

The expectation is that the requisite level will be E on the Energy Performance Certificate. Two thirds of commercial property in Great Britain is privately rented, and of that 18% is currently below this level. In reviewing their portfolios, landlords should check the energy rating of their buildings and make contingencies for upgrading if currently below level E.

Under the Golden Rule the cost of any works should be repaid in their entirety through lower energy bills for the building, however, research suggests this is unlikely to be obtainable for some upgrades. The most likely type of property to achieve the Golden Rule would be 1960's constructed industrial property, where the fabric of the building is relatively poor and there is a high consumption of energy.

Short of disposing of poor quality stock before the 2018 deadline, what particular features in current and future leases should landlords and tenants be looking out for?

1.SERVICE CHARGES

The cost of making a building more energy efficient is not something that will ordinarily fall within a service charge regime as it is considered an item of improvement rather than repair. Landlords may wish to widen the scope of their service charges by saying that, in providing services pursuant to the lease, they will use reasonable endeavours to minimise energy use and water consumption at the property, including giving consideration to all relevant renewable technologies.

By contrast, a tenant may seek to introduce some words of limitation such that the tenant will specifically not be liable to pay for upgrades to the building which are designed to achieve improved energy performance.

2.ALTERATIONS

The tenant may want to seek greater flexibility to carry out alterations which are energy efficient in order to reduce their own energy consumption, and also to enable them to sub-let in appropriate circumstances in the post 2018 regime.

Landlords frequently impose restrictions on what alterations a tenant can do. Where these alterations constitute improvements then there is an implied condition that the landlord's consent will not be unreasonably withheld. There may be circumstances where a tenant wishes to fund improvements under a Green Deal which goes beyond the end of the term of his lease, and so the landlord is left to pick up the cost through the energy bill for the property until such time as it is re-let. In such circumstances it may be reasonable for the landlord to withhold consent to improvements, unless the tenant gives an indemnity to the landlord in respect of the ongoing cost. On the other hand, is it reasonable for the tenant to give such an indemnity where the landlord is actually getting the benefit of the works that have been carried out?

3.REPAIRS

A lease of commercial property will often contain a tenant's repairing obligation and some have questioned whether the tenant is liable to carry out any works to bring a non-compliant building up to the requisite standard. At present, this appears to be unlikely as tenants generally are only required to carry out repairs where there is some actual item of disrepair, and there is no obligation for them to improve a property.

4.COMPLIANCE WITH GENERAL LAW

Leases frequently contain an obligation upon the tenant to comply with statute or other legislation in relation to their use of the premises. We will have to see the detailed regulations in due course but it should be noted that the law as it stands does not actually say that the work has to be carried out, merely that the premises cannot be let if the work is not carried out.

5.RENT REVIEW

Where premises are below standard a tenant may be able to argue that the landlord should accept a discounted rent for the property on review so as to achieve a letting of it before the rules apply from 1st April 2018. In considering the rent review provisions, both parties will wish to give particular consideration as to whether there any clauses in the lease which will oblige either side to carry out energy efficiency works.

Much of the detail of how the Green Deal will apply in a commercial property setting is yet to be published, so until then the true impact is uncertain. Nevertheless, owners, lenders and tenants should start to consider the likely implications and landlords of residential properties should also take note, as the regulations will apply to them as well...

[GET IN TOUCH]

For more information please contact pierstyson@cliftoningram.co.uk

[LAW]

RED TAPE

Hardly a day seems to pass when the newspapers are not reporting on the passing of some new law or regulation. So are we living through a period of ever more legislation or is this just an impression given by the media? After all we have the same number of MPs, working the same hours. How many more laws could they be passing?

In fact Parliament passes two kinds of legislation, known as primary and secondary. Primary legislation comprises the Acts of Parliament we are probably most familiar with. Over the last 50 years the number of such Acts of Parliament passed in a year has remained fairly unchanged with something between 40 and 50 usually being enacted annually or less than one a week.

However Parliament also passes secondary legislation often in the form of Statutory Instruments. Statutory Instruments are a form of legislation which allow the Acts of Parliament to be subsequently brought into force or altered without Parliament having to pass a new Act. They are also the means by which European Directives are incorporated in UK law.

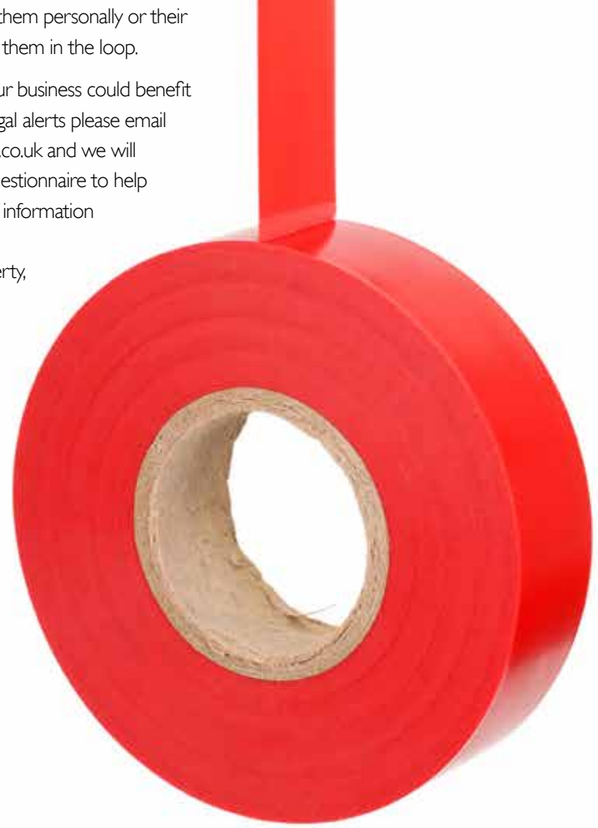
Even a cursory look at the figures demonstrates Parliament's growing fondness for this form of legislation. In 1970 Parliament passed 128 Statutory Instruments and by 1980 this had risen only slightly to 186. However in 1990, 1647 Statutory Instruments were passed and this trend has continued with Parliament increasing the number to 3326 Statutory Instruments last year. That's more than 10 for every day Parliament sat and an increase of 1788% over the last 30 years!

So as ignorance of the law is no defence, how are the general public meant to keep on top of all this legislation?

Let us do it for you.

We are subscribers to numerous on-line legal services that provide us with regular updates and news of changes in the law. We are currently building a detailed database so that we can identify the unique legal needs of our clients so should new legislation be passed that could impact on them personally or their business we can keep them in the loop.

If you think you or your business could benefit from these tailored legal alerts please email carlrae@cliftoningram.co.uk and we will provide you with a questionnaire to help pinpoint what type of information you want to be kept updated on e.g. property, employment, wealth management etc.



[INHERITANCE]

THE SPIRIT IS WILLING

MOST PEOPLE KNOW THAT INHERITANCE TAX IS A TAX CHARGED AT 40% ON THE WHOLE OF YOUR ESTATE WHEN YOU DIE. IF YOUR ESTATE IS WORTH MORE THAN THE INHERITANCE TAX THRESHOLD (CURRENTLY £325,000) THEN THE WHOLE OF THE ESTATE ABOVE THAT FIGURE WILL BE SUBJECT TO THE TAX.

There are, however, a number of exemptions of which you may be able to take advantage, effectively amounting to state-sanctioned tax avoidance! All outright gifts to individuals are free of inheritance tax provided you survive seven years from the date of a gift. If you do not survive the full seven years then taper relief may be available on the tax payable on the gift, but only in very restricted circumstances. The seven year rule will not apply if you retain any benefit from the property which you have given away, otherwise known as a "gift with reservation of benefit" in the inheritance tax jargon.

Gifts made to charity are exempt from inheritance tax whether made in your lifetime or on death (in other words in your Will). Although we encourage our clients to leave legacies to charities in their Wills there is much to be said for the gifts being made in your lifetime because not only will the gifts reduce the size of your estate (and thus save inheritance tax) but you may be able to claim Gift Aid for income tax purposes on gifts made during your lifetime which will not, of course, be possible on gifts made in your Will. Perhaps it is better to do both!

In part we say this because of a new reduced rate of inheritance tax (36% rather than 40%) which has been introduced and will apply to those individuals who leave 10% or more of their estate to charity. In making the calculation, the taxman disregards property that attracts other exemptions or reliefs (including the nil rate band of £325,000), assets passing to your spouse (which are also exempt) and so on. The calculations can, therefore, be very complex and it can be difficult to know exactly how to draft your Will to take advantage of this new allowance however we have developed specialist precedents to enable you to take advantage of this relief and please discuss this further with us if you would like to explore this. Essentially, if you get the sums right, large amounts can be left to charity without significant loss to your beneficiaries, the biggest loser overall being the Inland Revenue!

It is even possible for your beneficiaries (or you, if you are a beneficiary of someone else's Will) to get together after someone has died and agree to redistribute the estate (using what is known as a "Deed of Variation") to take advantage of this new rule. Again, if you would like to explore this further, please contact us as the potential savings are very significant.

A very important but often ignored tax allowance for inheritance tax purposes is that which applies to gifts made out of excess income. Inheritance tax is a tax on capital. If you have excess income in any given year and give away that excess income then, provided that the gift is of a regular nature, it is completely free of inheritance tax (no other exemptions need to be applied against it and the seven year rule does not apply). In principle, this is a very easy allowance to understand but in practice it is very difficult to obtain because detailed records are required. If this is something which you feel might apply to you then it is very important that you keep annual records of your income and expenditure and that these are accurate. We can certainly help you with the record keeping exercise as we know the information which is required to satisfy the Inland Revenue and can guide you in this process.

Perhaps the least known exemption is that which applies to payments made for the maintenance of dependent relatives. An obvious example would be paying for the school fees of your infant children. On the face of it, these appear to be "gifts" and would be taxable under the inheritance tax regime but are exempt as payments made to dependent relatives. How many individuals, however, find themselves helping out elderly relatives with their living expenses? If you are in this situation then you, too, might be able to claim an inheritance tax exemption. There are some surprising circumstances in which this allowance is applicable and if you would like to explore this further, please contact us.

[GET IN TOUCH]

For further information please contact petermcgeown@cliftoningram.co.uk

[PROPERTY]

PROPERTY LINE

THE PROPERTY COLUMN WHERE OUR RESIDENTIAL PROPERTY TEAM ANSWERS YOUR QUESTIONS ABOUT HOUSE PURCHASES AND SALES.

TO REPAIR OR NOT REPAIR?

QUESTION: I am buying a house and have read a lot about liability for 'chancel repairs'. My estate agent has told me not to worry about it as this will not be a problem from October 2013 because the law is changing. Is this correct?

ANSWER: The law on chancel repairs dates back the dissolution of the monasteries by Henry VIII, where certain properties were made to contribute to the repair/maintenance of the local church. As the law stands, if you buy a property that is liable to contribute, you will be bound by it even if it is not registered against your property at the Land Registry. However, after 13th October 2013 if the liability is not registered the church will not be able to enforce payment from a property buyer who has no notice or knowledge about it. The important factor here is that it only applies to people who buy after 13th October 2013 and if you complete before then the church may still have a claim against you, throughout your ownership and those of your successors if you leave the property to your children etc. You should talk to us and we can advise you on a specialist insurance policy which for a one off payment, will cover you and any subsequent owner of the property again the cost of chancel repairs.

LOVE NEST

QUESTION: I am buying a property in joint names with my boyfriend, for which I am providing the entire deposit. We're very happy together but my Mum thinks I ought to find out what would happen to the deposit money if our relationship broke down.

ANSWER: You should ask us to draw up a Declaration of Trust, which is a binding document and sets out who owns the property and in what shares. In your case, it would state your contribution towards the purchase price and if you were to ever go your separate ways, state how the sale proceeds are to be divided which could include the return of your deposit before any other proceeds are split. It might also be worth considering a Living Together Agreement too. This document would make it clear how you would own and share things that you buy for the house and how you pay the household bills. This agreement helps couples understand where they stand, both during the relationship and if it ends. Again, this document can be drafted by us.

A DAMP SQUIB

QUESTION: We are looking to buy a house that has been on the market for ages and is keenly priced. However there does seem to be a damp issue. We have mentioned this to the selling agent but he's shown no interest and not got back to us. Can you advise on what we should do?

ANSWER: Tell the agent you are unlikely to proceed unless you can get to the bottom of the damp problem, which will hopefully focus his mind and that of the sellers. We always recommend that a buyer arranges for the property to be surveyed and it would be wise to obtain a report from a damp expert with a quotation and detail of the work required. In their replies to the Property Information Form, the sellers should state whether there are any existing guarantees for damp proofing so you will know what work has been carried our previously. Consider if the sellers can make a claim under any existing guarantees or if that's not possible see if they will meet the cost of remedial works which could be done between exchange and completion.

[GET IN TOUCH]

For more information please email Tina Crow at tinacrow@cliftoningram.co.uk

> "The law on chancel repairs dates back the dissolution of the monasteries by Henry VIII..."

PRE-TERMINATION NEGOTIATIONS

New rules came out in July 2013 about "pre-termination negotiations," which include discussions, and any offer made, before the end of the employment, with a view to ending it on agreed terms.

Before the new rule, employers hesitated to make any approach to an employee because of their concern this may lead to their resigning from their employment and claiming constructive dismissal, on the grounds that the very nature of the conversation destroyed their trust and confidence in the company. Even a "without prejudice" approach was feared to have this outcome.

Under the new rule, any discussions intended to bring about an agreed termination will not be disclosable in proceedings for unfair dismissal based on capability, conduct, redundancy, illegal employment or some other substantial reason. However it is only in these proceedings that the protection applies, so if the claim is for anything else, such as discrimination, breach of contract or automatically unfair dismissal, then the discussions (and any offer) are still fully disclosable. This could have some strange results where there are multiple claims.

Employers will need to be very careful in deciding whether it is safe to use the rule. A statutory code of practice has been brought out which employers should follow carefully to remain protected within the new rule.

[GET IN TOUCH]

For more information please contact James Dyson in our Employment Department at jamesdyson@cliftoningram.co.uk

[FREE EVENT]

MAKE YOUR BUSINESS BULLET PROOF

YOU ARE INVITED TO A FREE EVENT FOR BUSINESS OWNERS AND MANAGERS ON THE ESSENTIAL LEGAL AND FINANCIAL STEPS NEEDED TO PROTECT YOUR BUSINESS AND EVERYTHING YOU HAVE WORKED SO HARD FOR.

EVENT DETAILS

Clifton Ingram Solicitors, Chartered Accountants Haines Watts and Santander Corporate Banking are hosting two events bringing together a unique and expert panel to provide insight into the potential threats and risks to your business and what you can do to mitigate them. The speakers will use practical case studies to illustrate the different strategies and steps available to you and by the end of the session you will have a clear understanding of:

LEGAL

- Intellectual property – how to protect your IP and not infringe others
- Employment Law – confidentiality and post-termination restrictions
- Terms and Conditions – trading terms, retention of title

ACCOUNTANCY

- Making /taking secure payments
- Detecting and preventing business fraud
- IT security systems reviews

BANKING

- Banking expectations for funding
- Protecting against interest rises
- Building Relationships with your Suppliers

WHERE AND WHEN

7.30am -10.30am

Please select your preference from the dates/venues below:

THURS, 17 OCTOBER 2013
Eden Room, The Forbury Hotel, Reading

THURS, 24 OCTOBER 2013
Warbrook House and Grange, Eversley

Breakfast will be served at each event. Places are strictly limited, so RSVP today to secure your place. Email melissabaxter@cliftoningram.co.uk or call 0118 912 0210.

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