



ARNOLD • THOMSON
LAWYERS FOR THE COUNTRYSIDE

The Field Leader

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Winter 2008

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Changes like the seasons...

YOU MAY HAVE READ ME IN print here before complaining about too many and unnecessary rules. One of the fascinations of the English law is that it changes not only substantively by matters handed down from Parliament but also by ever

evolving case law decided in our courts and tribunals. The case law is often open to different interpretation and can lead government departments to adopt subtle changes which nevertheless can have far-reaching effects.

Keeping up with the changes is difficult for all of us. I hope that the articles by my colleagues which follow will help you keep abreast of some recent changes – both in the fundamental law and also government interpretation - which may affect you.



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In agreement with Mediation

IN THE PRESENT ECONOMIC climate it is almost inevitable there will be an increase in not only commercial disputes but also private disputes.

For many people the immediate response when a dispute arises is to instruct a solicitor to issue proceedings at Court and proceed to a trial.

However, this can often take months or years of costly litigation and stress with no guarantee of a satisfactory outcome. For most people this is unacceptable.

Over the last few years the courts have been actively encouraging parties to use alternative dispute resolution in order to find settlement terms which are satisfactory to both sides. There are many forms of alternative dispute resolution but the most commonly used process remains mediation.

Mediation is a flexible process which is conducted in a confidential manner whereby an appointed person actively assists the parties in working towards a negotiated settlement. Ultimately however the parties remain in control of the decision to settle and the terms of

resolution.

Mediation differs from litigation in many ways but crucially because in a Court of law both parties are bound by the Judge's final decision regardless of how unsatisfactory that may be. Mediation is also considerably more

view, in the present climate, that any person who is unfortunate enough to find themselves in a dispute should carefully consider making an offer to mediate prior to proceedings being issued or immediately thereafter. If successful it cannot be emphasised enough how



“Mediation can often be appropriate for parties who have **no wish** to litigate but have a **genuine dispute** which needs to be resolved”

economical than full blown litigation. Although the potential disadvantage is that, despite having participated in the mediation, a settlement may not be reached and the matter may proceed to Court in any event. However, it is estimated that settlements are achieved at mediation or shortly thereafter in about 85% of cases.

Whilst the Court actively encourages parties to use mediation once proceedings have been issued, it is my

beneficial the mediation would be in terms of savings in costs and stress. Mediation can often be appropriate for parties who have no wish to litigate but have a genuine dispute which needs to be resolved.



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The Elderly Farmer

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“ It is going to be a matter of fact, extent and degree in each case **whether the vacating** of an (agricultural) property for remedial work, or because of ill health, puts the **availability** of relief at risk ”

ONE OF THE BASIC CONDITIONS for Agricultural Property Relief for Inheritance Tax is that a property must be “occupied for the purposes of agriculture”.

What is the position if a farmer is elderly and has to leave the farmhouse to live in a care home, perhaps passing the practicalities of the farming work to other members of the family? When the farmer dies, is his estate still entitled to the relief?

We have noticed more stringent questions being raised by H.M. Revenue and Customs in these cases. One thing is certain – the fact that a farmer’s name is still on the partnership deed or the accounts makes no difference, if the property in question is no longer “occupied”. Nor does it matter whether the Single Farm Payment goes to the farmer rather than to someone else in the family or to the farming partnership.

Until now, HMRC usually accepted that family members might be acting in some sense as informal “agents” for a sick or elderly farmer who had to move out to a hospital or care home. This was never more than an unofficial concession, but the definition of “occupation” in section 117 of the Inheritance Tax Act 1984 does not necessarily require physical presence. Now, however, there is a tendency to see the farmhouse as the “place where the working farmer lives” – not quite the same thing as “occupation”. Lawyers love such plays on words, but these fine

distinctions are important where a lot of tax is potentially at stake.

Very recently, HMRC have produced a new draft chapter on Agricultural Property Relief for the Inheritance Tax Manual. This is freely available on the internet, as is the manual itself – go to www.hmrc.gov.uk and use the search engine. The draft makes the comment that “a person who leaves an agricultural property vacant is not

farming operations, or did the farmer carry on the business from a room in a care home?

It is very interesting that HMRC brackets together absence through illness and a farmhouse being unoccupied for repairs or remedial work, for example after a fire. That suggests that the same sort of timescales can be called into argument. We might be able to ask, “What would have

“ the definition of ‘**occupation**’ in section 117 of the Inheritance Tax Act 1984 does not necessarily require physical presence. Now, however, there is a tendency to see the farmhouse as the ‘**place where the working farmer lives**’ ”

physically in occupation and may not be in occupation for the purposes of agricultural relief. It is going to be a matter of fact, extent and degree in each case whether the vacating of a property for remedial work, or because of ill health, puts the availability of relief at risk”. Where a “working farmer” (not a term used in the present Act, incidentally) is absent from the property – perhaps because old age or incapacitating illness has overtaken him or her – then, to quote again from the draft Manual “any desire on the part of the transferor to return will be relevant but this should be viewed in the light of how realistic such a return might be”. Is the farmhouse still the centre of the

happened if there had been a major fire in this building at the time the farmer had to move into the care home? How long would it have taken to put matters right?”

There is no doubt that the arguments are becoming much keener and professional help, sometimes over a protracted period, will almost always be needed. Here at Arnold Thomson we have had a number of cases of this type and are well placed to assist.



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Asbestos and Residential Property

THE CONTROL OF ASBESTOS REGULATIONS 2006 ('the Regulations'), whilst generally regarded as controlling the use and management of asbestos in the commercial buildings, can also be applied to certain types of residential property.

Where you own residential property with no common or communal areas used by others, then you are only required to use competent and qualified contractors to carry out repairs involving the removal and disposal of certain types of asbestos. If you do so, then the builder or contractor becomes responsible for complying with the Regulations as they relate to disposal.

If, however, the property includes communal or common areas used by others, then you may be a 'duty holder' according to the definition in the Regulations, i.e. the person responsible for ensuring that the guidelines in the Regulations are complied with. This may extend to anyone who owns the freehold of a block of flats or is responsible for the maintenance of communal areas (e.g. in a block of flats or a house conversion). Communal areas would include areas such as staircases, entrance halls and roof spaces, but can also extend to gardens and outbuildings used communally. Individual flats and rooms let within a residential property do not fall within the scope of the Regulations.

Where property does fall within the Regulations, the duty holder (usually, but not always, the owner of the freehold) must check whether any asbestos is present in the property, locate it and assess its condition. Once this has been done, the duty holder must carry out a risk assessment of the asbestos and then make (and act on) a plan to manage any risk. Ideally, the check and assessment should be dealt with by a qualified surveyor, since an inadequate or incomplete survey can leave the duty holder at risk for failing to comply with the Regulations. This is not, however, a legal requirement and you may, if you feel competent to do so, inspect the property yourself. Older



“Once the existence of asbestos has been identified, the risk, and management of it, must be documented, bearing in mind various factors.”

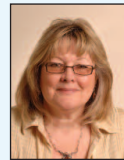
properties (i.e. built before the mid-1980s) are more likely to be at risk than modern properties.

Once the existence of asbestos has been identified, the risk, and management of it, must be documented, bearing in mind various factors. Primarily, the regulations require the duty holder to be aware of the existence of asbestos, and to have a plan for the management where necessary. It is not always necessary to remove asbestos: some installations present a smaller risk than others, and if the asbestos installation is in good condition, it may be more harmful to remove it than to leave it in place and monitor its condition.

Where it does prove necessary to remove asbestos, high risk category asbestos may only be removed by a contractor who is licensed for its removal and disposal.

This article is only intended as an overview of the impact on the Regulations as they apply to Residential Property. Information relating to the impact on Commercial premises and full details of how the regulations apply to Residential Property may be obtained from the Health and Safety Executive website:

www.hse.gov.uk/index; publications & newsletters may also be downloaded from www.hse.gov.uk/pubns/asbindex



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Energy Performance Certificates

From 1st October all commercial buildings that are constructed, sold or let will require an Energy Performance Certificate (EPC). The new regulations aim to encourage the reduction of carbon emissions as part of the UK Climate Control programme.

When are EPCs required?

It is the act of selling, letting or construction of a building that triggers the requirement to provide an EPC. Existing occupiers and tenants will not therefore require an EPC unless they assign or sublet. Interestingly EPCs are not required on a lease renewal, extension or surrender although it is expected this will alter in due course.

What if the EPC is not provided?

As buyer or tenant, there is no risk of enforcement. However, when you sell,

assign or sublet you will have to provide one so there is a financial advantage to ensuring the seller or landlord provides one. Also you may bear the cost of the Landlord obtaining the EPC as generally service charge provisions are wide enough to enable Landlords to pass on the expense. As seller or landlord, you are liable to a fine of up to £5000 if the EPC is not made available before completion. There are transitional arrangements in place only for those commercial buildings marketed prior to 1st October- they must have an EPC

as soon as possible but no later than 4th January 2009.

Which buildings are exempt?

Some buildings are exempt – the main ones being stand alone buildings of less than 50sq m; buildings which are to be re-developed and planning permission has already been obtained to demolish; or buildings 'with low energy demand'. To qualify as a 'building', it must have a roof and walls so part of a building can qualify. The building must also use energy to condition the indoor climate,

Continued on page 4

ie. have heating or air-conditioning. Many small industrial units have no heating or air-conditioning and will not need an EPC on sale or letting. If however, a small office area with heating or air-

by the newer EPC and vice versa. The existence of a common heating system is a factor in considering how many EPCs are required for a multi-let building. If there is one, one EPC may be

“There are still many uncertainties as to how the regulations are to be implemented, for further advice please contact us”

conditioning has been installed and is not used separately, then an EPC will be required on a sale or letting of the whole. If the office area is to be used separately from the unit, then an EPC will only be required in respect of the part to be sold or let.

Validity of EPC

An EPC for a commercial building is valid for 10 years, although if another EPC is obtained within that period, the earlier one will be invalid. Landlords will therefore need to consider carefully whether to restrict a tenant's right to obtain one. If an EPC is required for part of a building, an earlier EPC will remain valid except for any transactions relating to the specific area covered

prepared for the whole building and used when any part is sold or let. If there is no common heating system, then there will need to be a separate EPC provided for each part designed for independent use.

There are still many uncertainties as to how the regulations are to be implemented. For further advice please contact Christine Simkins or Jacqueline Hibbett.



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Inheritance Tax Changes

INHERITANCE TAX (IHT) is paid if the taxable value of your estate when you die is over £312,000 (2008-2009 tax year). The first £312,000 of a person's estate is known as the IHT nil rate band (NRB).

Following recent changes made to the rules relating to IHT, the unused part of a spouse's or civil partner's NRB can be transferred to the surviving spouse/civil partner. This is known as a transferrable nil rate band. The beneficiaries of the

matter how long before then their spouse or civil partner died. If however both spouses or civil partners died before the 9th October 2007, no allowance can be transferred.

The overall effect of these new rules is that spouses and civil partners between them now have a NRB that can be worth up to double the amount previously available. It is of course the beneficiaries of the surviving spouse/civil partner that benefit, as they will potentially pay less

an NRB of £325,000 plus £162,500, or £487,500 in total.

If the first spouse or civil partner's estate was worth only £100,000 and everything was left to the surviving spouse or civil partner, none of the first spouse's or civil partner's estate would have used any part of their NRB and so 100% of the NRB is available to the surviving spouse or civil partner when they die. (i.e. currently £624,000)

“As a result of the new rules, that unused NRB can now be transferred to the surviving spouse or civil partner and used in working out the IHT liability on the estate of the survivor, when he or she dies.”



surviving spouse/civil partner benefit from this because, where assets are transferred between spouses or civil partners, they are exempt from IHT. Therefore if, on the death of the first spouse or civil partner, he or she leaves all his or her assets to the survivor, the NRB is not used. As a result of the new rules, that unused NRB can now be transferred to the surviving spouse or civil partner and used in working out the IHT liability on the estate of the survivor, when he or she dies.

These new rules apply where the surviving spouse or civil partner died on or after 9th October 2007. It does not

tax on their inheritance than they would have had to pay in the absence of the new rules.

For example, if the first spouse or civil partner left assets worth £150,000.00 to their children with everything else to the surviving spouse or civil partner and the NRB on the death of the spouse or civil partner was £300,000.00, one half of their NRB is unused and is available for transfer. If, when the surviving spouse or civil partner dies, the NRB had increased to £325,000.00, the extra amount available would be 50% of £325,000 or £162,500, giving the estate of the surviving spouse or civil partner

CONCLUSION

It may be the case that if married couples or civil partners have currently used the quite complex method of using up the NRB by setting up an NRB discretionary trust in their Wills, they might now wish to consider reducing that complexity by reverting to a simpler style of Will where they give everything to each other and then pass their assets to their children on the second death.

It is important in making use of the new unused NRB rules to have available the necessary paperwork and records of the administration of the estate of the first spouse/civil partner to die – this will include amongst other things their Death Certificate/Marriage Certificate/Will/Grant of Probate.

N.B. The rules relating to the unused NRB become complicated by re-marriage of the surviving spouse and/or divorce.

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