Issue 17 Autumn 2015

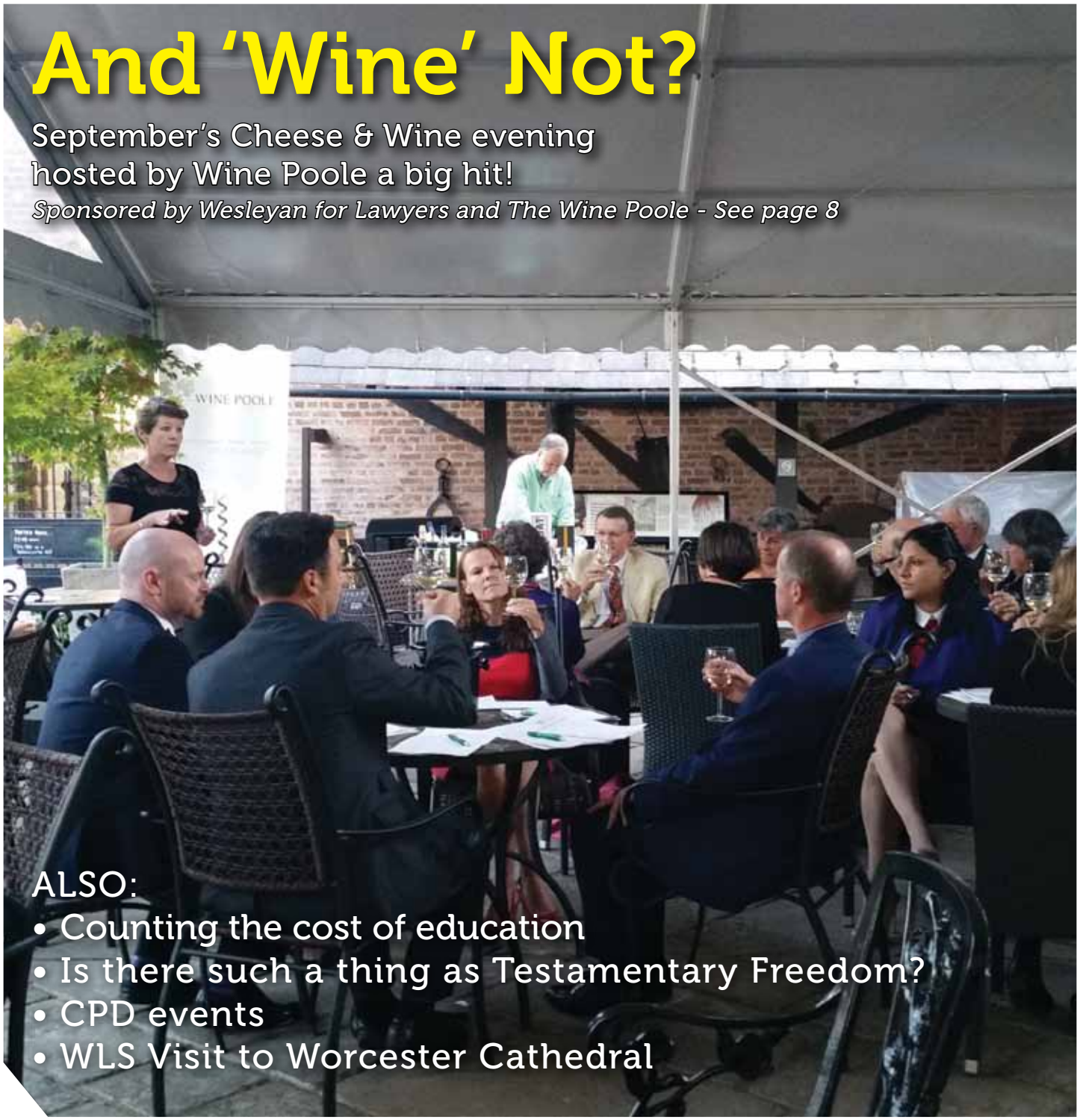
THE PEARS

THE Worcestershire LAW SOCIETY

And 'Wine' Not?

September's Cheese & Wine evening hosted by Wine Poole a big hit!

Sponsored by Wesleyan for Lawyers and The Wine Poole - See page 8



ALSO:

- Counting the cost of education
- Is there such a thing as Testamentary Freedom?
- CPD events
- WLS Visit to Worcester Cathedral

This edition...

THE PEARS

Issue 17 Autumn 2015

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Editor's Introduction

With the evenings beginning to draw in a warm welcome to this Autumn issue of the Pears, which sees summer out and where we were lucky enough to enjoy some outdoor events rounded off most recently in the idyllic settings of the Bewdley Museum for wine tasting and Worcester Cathedral for a climb up the tower in a guided tour.

As to future dates for the diary we have a number of upcoming events. Join us for CPD training on 13 October 2015 with Maxine Warr, Policy Manager in the SRA's Education and Training team, where plans to reform the process for qualification as a solicitor and the approach to continuing competence will be discussed, details can be found on page 14.

For those competitive amongst us the inter-firm bowling challenge is back for its annual appearance, to take place on 12 November 2015 and the Annual Gala Dinner & Awards Ceremony will be held on 11 March 2016, where guest speaker Garry Richardson and MC Phil Mackie will be joining us in what's promised to be a spectacular evening at Stanbrook Abbey.

We also look forward to seeing you in pre-Christmas gathering at our pint after work on 10 December 2015 at 6pm, Brown's, Quay Street, Worcester.

For further details and dates of future events please take a look at pages 7 and 10, or on our website or follow us on twitter. We hope to see you there.

Kirsten Bridgewater,
Editor, for and on behalf of the WLS

kirsten.bridgewater@mfgsolicitors.com

President's Foreword

Time is certainly flying this year. I have been in office for over four months already and we are now into the Autumn season. As a Committee we have been working hard to put together a programme of events and seminars over the coming months, and full details of those (and how to book) can be found in this edition of The Pears. There is something for everybody, and many of our events and training are offered free of charge. A separate flyer should also be finding its way to you in the post / DX, and it is very much hoped that members will support those events where possible. I would particularly like to mention the upcoming and ever-popular inter-firm bowling event on 12 November in Worcester, and also our inter-firm quiz being held on 1 February 2016 at Spice Fusion (near Ombersley). I would strongly advise you to book early for those events, which are always very popular!

In September we held a very pleasant wine-tasting evening at Bewdley Museum, as well as a tour of Worcester cathedral (including a climb of the impressive tower, with staggering views right across Worcestershire). Both events benefitted from glorious evening sunshine, and I hope those members who attended enjoyed the events as much as I did.

As a Society we have been trying to reach out and engage more with our members (and indeed firms who are not currently members) since I took over as President, and you may well have noticed a great deal more activity on our various social media platforms, particularly Twitter, Facebook and LinkedIn. If you have not already "connected" or "followed" us, please do so (and encourage your colleagues to do so as well) – that is by far the best way to keep informed of the events we are organising as well as the other benefits we offer to our members. Photographs from our various events are also posted on our social media accounts, so it is a great way to stay in touch with us and with other members you meet through our events.

Our website (www.worcestershirelawsociety.com) is undergoing further work and, in the coming weeks, it will be re-launched. I hope that this will provide a useful tool for busy practitioners, with lots of information and useful resources available all in one place. Watch this space for further announcements!

In wider news, I see that the Justice Secretary Michael Gove has made an offer to suspend the government's latest cut to criminal legal aid fees. However, he will withdraw the gesture should criminal defence solicitors resume their nationwide boycott in protest at the Ministry of Justice's reforms. At the time of writing this, no agreement has yet been reached. Also, the Law Society has criticised the government's plans to further increase court and tribunal fees, with our national President Jonathan Smithers quite correctly highlighting the impact such a move could have on access to justice for those on limited means. It seems that in these times of further austerity, the Court system and legal aid is an easy target to provide further savings. We must all do what we can to resist these unwelcome moves.

I hope you enjoy this edition of The Pears and, as ever, please do keep in touch with the Society using the ways mentioned. I hope to see you all at one of our upcoming events.

Kevin Joynes
President

Law firm mfg Solicitors makes £1,000 donation to Prostate Cancer UK

Worcester legal firm mfg Solicitors has donated £1,000 to Prostate Cancer UK to assist with the charity's ongoing research and awareness campaigns.

Run to raise funds for Prostate Cancer UK and thank them for their generous donation.

The generous donation follows the firm's participation in the recent Sanlam Go Dad Run – a series of 5k runs for men and boys aimed at raising funds for the charity.

Javed Ahmed, a paralegal at mfg, ran the Worcester event, held at Worcester Racecourse, with the 27-year-old also meeting event ambassadors and Olympic legends Colin Jackson, Derek Redmond and Canadian sprinter, Donovan Bailey.

Javed said: *"Sanlam are next door to our offices on The Tything so we were really involved in the pre-promotion of what was a fantastic event for the city.*

"The event was great fun and saw hundreds of people raising funds for what is an amazing charity.

"I was delighted to play my part of behalf of the firm and hope that our donation will go some way to helping Prostate Cancer UK's research programme and their ongoing drive to raise awareness."

Lauren Tunnicliffe, Corporate Engagement Manager at Sanlam, added: *"Bringing Go Dad Run to Worcester was important to us as we have a long tradition of working in this business community. We were delighted to receive support from MFG to help promote this cause, they have always been strong partners of ours for charitable events and long may that continue.*

"Furthermore, as wealth planners, our role as adviser is to help our clients plan for the future and often to consider the unexpected. Raising awareness of illnesses such as prostate cancer is an important part of our corporate responsibility. Helping to avoid the unnecessary death of any man, be it a brother, son, father or husband is something we are proud to be involved with."

Mark Bishop, Director of Fundraising at Prostate Cancer UK, said: *"We're delighted that representatives from mfg Solicitors took on the Go Dad*

"With over 40,000 men diagnosed with prostate cancer each year in the UK and one man dying every hour, it is our aim to help more men survive the disease and enjoy a better quality of life."

Wealth management experts Sanlam also organised 5k runs in London, Cardiff, Bristol, Warrington and Llangefni.

Prostate cancer is the most common cancer in men. More than 10,000 men die every year from this male-only disease, and 300,000 men are living with prostate cancer in the UK.

Prostate Cancer UK works to get men in all areas of the country the early detection, effective diagnosis and better treatments that will beat this disease.

Search Men United, or visit *prostatecanceruk.org/menunited*

Left to right - Nick Playford, Maynard Burton and Iain Morrison

New appointment as mfg Solicitors strengthen agricultural offering

Worcestershire law firm mfg Solicitors has added to its agricultural division with the appointment of a respected land and farming expert.

Nick Playford has joined the firm, which has its main offices in Worcester and Kidderminster, as an associate working closely with partner Susan Morrissy and head of department, partner Iain Morrison.

An agricultural specialist who has attained the Fellowship of The Agricultural Law Association, Mr Playford, 34, joins mfg from Warwickshire and Oxfordshire practice Brethertons and will play a key role in increasing mfg's already strong presence in Worcestershire where he is supporting new and existing clients.

Iain Morrison, partner and head of the agricultural and rural division, said: "Nick is a wonderful addition to our team. Nick has a land management degree and is well-regarded in the rural business and farming communities, he lives and breathes the industry after coming from a farming family. He has exactly the type of credentials we look for as we plan for the future and further growth."

Nick Playford, added: "Joining mfg is a dream move for me. The firm's presence in the rural sector is stronger than ever and it's fantastic to have the opportunity to serve such a diverse number of clients, but also to play a role in developing what we can offer farmers, landowners, farm tenants and rural businesses."

mfg Solicitors has an eight strong agricultural and rural team spread across the region – including at their offices in Telford and Ludlow. It includes 2 partners, 3 associates and a support team of six.

Autumn Programme 2015

We have arranged a number of exciting events and training for our autumn programme 2015

- **13th October** – 5p.m. CPD training "A new approach to continuing competence for solicitors" by Maxine Warr, Free to members, booking essential.

Hold the date, further information coming soon:

- **12th November** – Inter firm Bowling & food, Extreme Bowling, Perdiswell, Worcester.
- **A "Pint after Work"** will be relaunched in November, watch this space!
- **January 2016** – CPD training "Risk Management for trust and estate professionals"
- **VEYO Presentation**
- **Legal Awards and Annual Dinner** – Friday 11th March 2016, Amazing Venue Stanbrook Abbey – Guest Speaker Garry Richardson (Sports Presenter Radio 4)

Keep up to date and follow us on
twitter https://twitter.com/i/notifications,
LinkedIn https://www.linkedin.com/company/worcestershire-law-society?trk=nav_account_sub_nav_company_admin
Facebook https://www.facebook.com/worcs.law

Best Wishes
Sue Harper
Administrator to Worcestershire Law Society
07973 846561

Cheese & Wine night launces law firm's new networking events

I-r: Jeremy Syree (Ballard Dale Syree Watson), Katie Griffiths (Free Radio), Lance Turner (Harris Lamb) and Sally Morris (mfg Solicitors).

Worcester law firm mfg Solicitors has launched a bi-monthly programme of networking and social events for professionals across the city.

The first event, attended by 40 invited guests, was a Cheese and Wine evening held at the Bottles Wine Bar & Merchants in New Street.

Aside from networking opportunities guests were able to taste a variety of Chardonnay wines, cheeses and charcuterie and heard from wine expert and owner of Bottles Richard Everton who explained the history and the background of the wines available.

James Hayes, partner at mfg Solicitors, said: *"We have launched a really different programme of networking events here in Worcester.*

"As one of the city's largest, most established law firms, we were keen to bring more professionals and Worcester business owners together. The first event was a huge success and the team at Bottles were tremendous hosts."

Mr Hayes, a respected commercial lawyer with clients across the UK, added: "The feedback has been exceptional and we are already looking forward to August's event which will again have a food theme."

The law firm's next events, which will take on different themes, will take place in August, October and ending the year with an event in December.

Thursday 10th September at Bewdley Museum, Load Street, Bewdley DY12 2AE, saw an excellent evening had by all at the Wine Tasting and Cheese evening, sponsored by Wesleyan and hosted by Wine Poole.

Wine Poole is an independent wine merchant in Warwick, supplying quality wines from all the major wine producing countries in the world.

Social Events & Training
Autumn 2015

THE Worcestershire LAW SOCIETY
ESTABLISHED 1841

CPD training "A new approach to continuing competence for solicitors"
Presentation by Maxine Warr 13th October 2015 at 5p.m. MFG, Kidderminster.
Free to Members - sponsored by Wesleyan

Inter-firm Bowling Challenge 12th November 2015 at 7p.m.
Teams of 4, Bowl Xtreme, Perdiswell, Worcester.
Family, friends, colleagues and partners welcome.
£20 each to include food & prizes – sponsored by Wesleyan

Pint after work 10th December 2015 at 6p.m.
Brown's, Quay Street, Worcester.
Come and meet us for a drink after work, first drink on us!

2016 Legal Awards nominations late November!

Coming soon - Hold the date

CPD training "Risk Management for Trust & Estate Professionals" 21st January 2016
Veyo Presentation coming soon
Quiz Night 1st February 2016
Annual Gala Dinner & Awards Ceremony 11th March 2016
Amazing Venue Stanbrook Abbey
Guest Speaker Garry Richardson (BBC Radio 4 Sports Presenter)

For further information and bookings contact
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Regular updates on Twitter, Facebook and LinkedIn

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Law Firm's thriving employment team takes on HR Specialist

A county law firm has strengthened its employment division with the appointment of a widely respected human resources expert.

Samantha Haller-Evans has joined mfg Solicitors as HR Services Manager – a newly created role that will support the expansion of the firm's employment law services.

The HR specialist has built a strong reputation throughout her career which includes over 23 years at Brintons Carpets Ltd in Kidderminster, most recently as Group HR Manager.

Based at the firm's Worcester office, she will report to partner and head of division, Sally Morris.

The first non-legal professional in the division, she will guide and advise clients through a variety of HR and employment matters – including HR strategy, operational HR matters, performance management and employee engagement initiatives.

Sally Morris, partner and head of employment at mfg Solicitors, said: *"Samantha has a first-rate reputation in HR and personnel matters and her appointment helps take our established employment law services to another level.*

"She is ambitious and brings a wealth of technical HR experience to the firm. That will be essential as we expand our client base and offer them new HR-related services.

"Her role is to work closely with employers across Worcestershire and the wider West Midlands in a variety of areas.

"Vitally, Samantha can act as a firm's interim HR Manager and help establish key HR practices and procedures, including conducting an HR health check. Those are exciting options we've never been able to offer."

Samantha Haller-Evans added: *"I've joined a high profile team with an exceptional level of talent and I am pleased to bring a variety of different skills and experiences to mfg.*

"Working alongside Sally, I am determined to play my role in the growth of the division and the firm. We have exciting times ahead."

The appointment of Mrs Haller-Evans is the latest in a string of new faces at mfg in 2015. The firm has also expanded its private client, taxation, rural affairs and commercial property divisions in recent months.

mfg Solicitors has eight offices across the West Midlands. Their Worcestershire offices are in Worcester, Kidderminster and Bromsgrove. In Shropshire they have main branches in Telford and Ludlow.

Counting the cost of education

Every parent would like to give their children the best start in life. That may include private school or helping them through university.

According to the 2015 Independent Schools Council Survey, day school fees are currently an average of £12,522 a year, a 3.7% increase on last year. Wesleyan has calculated that if the average day fee continues to increase by the same amount each year, it could cost those putting their children into private education this year more than £200,000 by the time they leave at 18.

If your children decide to go to university, then the costs will continue to increase. As well as the maximum £9,000 a year tuition fees, other living expenses mean students could graduate with an average debt of £40,500*. If your children decide to follow you into a legal career, then the costs could be considerably more.

Research by Wesleyan has shown that lawyers anticipate paying 82%** of their child's total university costs, which could amount to £33,210 when they graduate.

PLAN AHEAD

While the basic costs of looking after a child will be absorbed into your day-to-day expenditure, paying for school and higher education will need more careful planning and the sooner you can start this, the better.

Review any assets or investment portfolios you may have to see if they will cover the predicted costs. This will help you determine whether you need to make additional contributions or seek new investment opportunities.

SMART SAVING

With any investments you make, it is important to make sure you have access to the funds when you need them. If you're saving for school fees, you will need the money on a regular basis, while funds for university costs can be locked away for a longer period of time.

An Individual Savings Account (ISA) will allow your money to grow free of capital gains and income tax, while providing easy access. A cash ISA is best if you will need to access the money in the short term, while stocks and shares ISAs are designed for medium- to long-term savings.

Because of their tax efficient nature, there are limits to how much you can save into an ISA each year. For the tax year 2015/16 this is £15,240. You are able to save the full amount in cash, stocks and shares, or any combination of the two.

ALTERNATIVE INVESTMENTS

If you have the capital available, you may decide to invest a one off cash lump sum. Invested in the right way, future fees could be covered from the returns.

For regular, longer term savings, there is the option of direct investment in unit trusts. This can be a tax efficient option because investors can use their annual Capital Gains Tax allowance, which allows them to make a certain amount of gains each year before they have to pay tax. For the 2015/16 tax year this is £11,100.

CONCLUSION

Putting your children through private education and university is undoubtedly a big financial commitment. As well as savings and investments, it may also be worthwhile to explore whether schools have any bursaries, grants or scholarships available to help with the cost. These details should be available from the schools themselves or the local education authority.

Whatever you decide to do, it is best to take professional advice from a financial consultant to ensure your financial commitments match your personal circumstances.

** 'Analysis of the higher education funding reforms announced in Summer Budget 2015', published by the Institute of Fiscal Studies, July 2015.*

*** Survey of 388 doctors, lawyers, dentists and teachers by Censuswide, Feb/March, 2015*

The above does not constitute financial advice and is for general information only.

Wesleyan provides specialist financial advice and solutions for lawyers and law firms. For more information visit ***www.wesleyan.co.uk***

CPD Training

Tuesday 13th October 2015 at 5p.m
Venue, mfg solicitors Adam House, Birmingham Road, Kidderminster, DY10 2SH
Free to Members of Worcestershire Law Society
Presentation by Maxine Warr

A new approach to continuing competence for solicitors

With the help of the SRA's online toolkit and other resources, many firms have already chosen to adopt the new approach to continuing competence which provides solicitors with the ability and flexibility to determine their own learning and development according to their needs. Solicitors and their employers have been able to adopt the new approach from 1 April 2015. It will become mandatory for all solicitors on 1 November 2016 and replaces the existing CPD scheme.

The session will explain:
The SRA's approach to the education and training of solicitors including plans to reform the process for qualification as a solicitor and the background to the new approach to continuing competence

The SRA's new approach to continuing competence and in particular
- *How you can meet the requirements of our new approach*
- *Information on the Annual Declaration process*
- *The benefits of adopting the new approach*
- *A demonstration of our online tool kit*
- *An opportunity to ask questions on our new approach & implementation*

Maxine Warr is a Policy Manager in the SRA's Education and Training team. She has lead the SRA's Training for Tomorrow programme to reform the SRA's regulation of the education and training of solicitors and was responsible for leading the project to reform the CPD

Book your place now as numbers are limited. FREE TO MEMBERS.

NB. The venue will be confirmed by e mail once numbers are confirmed.

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PLEASE PHOTOCOPY, COMPLETE AND RETURN TO THE SECRETARY THOMAS EVANS, THURSFIELDS SOLICITORS,42, FOREGATE STREET, WORCESTER WR1 1EF DX 716251 (WORCESTER)

Name: _____

Firm: _____

Telephone: _____Email _____

Please reserve _____ places for the CPD training on Tuesday 13th October 2015 at 5.p.m.

free will?

Is there such a thing as testamentary freedom? Barrister Araba Taylor and leading litigation solicitor, Robert Weston, the partnership responsible for winning a positive judgment in the landmark Walker v Badmin case, discuss a series of will-related cases and reflect on the impact those decisions will have in the long-term.

You can't take it with you and you can leave it to whom you please. Or can you?

In theory, it is lawful for people to disinherit their children, especially if they are no longer dependent on them, and 'give it all to charity' or some other unexpected beneficiary. However, *Ilott v Mitson* (2015) shows how far the court can alter the provision made by a will, when exercising the structured interference with testamentary freedom conferred by the Inheritance (Provision for Family and Dependants) Act 1975.

In Scotland they have 'forced heirship' entitling children to an inheritance. In England and Wales, however, the Inheritance Act is the only - and limited - way forward for a disinherited child or dependant to get an inheritance. Before Ilott, adult children generally got short shrift from the court, unless they could make out some sort of proprietary claim to part of the estate (as in *Espinosa v Bourke* [1999] and Re *Goodchild* [1997]) and / or establish some weighty moral obligation upon the deceased to make provision for them. Nevertheless, Mrs Ilott's legal team successfully navigated the hurdles of eligibility, the mandatory assessment criteria in section 3 and the unpredictable exercise of discretion as to the nature of any award.

The CA in *Ilott* found the deceased's conduct towards the applicant morally lacking and used its powers under the Inheritance Act to cure this dereliction of duty. This approach is diametrically opposed to that taken in Re *Jennings* [1994] and Re *Coventry* [1981] and broadens the judge's discretion considerably. Further, the original exercise of discretion, which in principle cannot be interfered with on appeal unless it is 'clearly wrong', was indeed interfered with, to the loss of the unexpected beneficiaries, three animal charities.

Overall, the outcome of an Inheritance Act claim has become less predictable than ever. Where adult children are concerned, the courts are perhaps keeping up with the times and dancing to the tune of today's 'blame culture'.

Self-supporting adults who cannot make an Inheritance Act claim are now left with little option but to challenge the validity of the will, but with no guarantees of success. In Re *Butcher (Deceased)* [2015], the claimant was not a blood relative of the testator and the will was upheld in favour of the unlikely beneficiary, not a charity, but a builder who had once emptied the deceased's guttering. In Re *Walker (Deceased)* [2014], the claimants were the deceased's daughters and in pole position to inherit, whilst the principal beneficiary was her much younger, co-habiting boyfriend, whose claim succeeded.

Can a Letter of Wishes make a difference? The testatrix in both *Ilott* and Re *Walker (Deceased)*, had left one. In an Inheritance Act claim, it will be for the judge to decide what weight such an expression of wishes should be given. By contrast, in Re Walker (Deceased), where the validity challenge was based on lack of capacity, the rationality of the Letter of Wishes assumed enormous importance in establishing that the deceased knew what she was about. It may not have the standing of a will and is not subject to the same formal requirements but, in an appropriate case, it can be hugely decisive.

Robert Weston
Robert is a partner and head of the contentious probate team at Midland law firm mfg Solicitors. With nearly 30 years' experience in litigation, Robert has built a national profile and is recognised in the Legal 500. He has an impressive track record of litigating in all courts, including the House of Lords. Contact **robert.weston@mfgsolicitors.com**

Araba Taylor
Araba is a specialist Chancery practitioner of 28 years' standing. She mainly does the family side of Chancery work, including co-ownership disputes, family businesses, family property, trusts, elderly client/capacity issues, wills and inheritance. Contact: **araba.taylor@fennerschambers.com**

Probate Case Management or Probate Accounts

Many probate professionals refer to probate software as "probate case management."

This is a misunderstanding of the nature of probate software.

What is the cause of this misunderstanding?

Most software suppliers to the legal marketplace are not able or lack the vigour to replicate the full complexity of estate administration, which is primarily an accounting function. They therefore supply the case management tools that are readily available to them which they sell as "probate case management."

Case management is concerned with workflows, mailmerging and task management. It is certainly a useful tool in the day to day management of events. It does not however lend itself to managing the finances of the estate.

The fundamental question to ask is: how useful is case management without an accounting system based on a professional database from which it can suck financial data. One discerning solicitor likened it to "trying to catch fish without bait."

The reality is that case management is at best about 20% of the estate administration - the bulk of which is financial accounting.

Law firms who buy 'probate case management' are unwittingly selling themselves short. You will still need a tool to log the assets and liabilities of an estate. Many firms use spreadsheets to record the financials of an estate. Spreadsheets are useful but an inherently high risk tool, in contrast to a probate specific accounting system.

Spreadsheets are not inherently multiuser. Stuck on the sole computer of the user, they cannot be used on a central server by more than one user at a time without the risk of data being overwritten by one user over another.

Creating management reports with information using all data from all cases from separate spreadsheets is not feasible.

Inadequate management reporting is a significant risk factor for the firm, and is likely to alarm the auditors. The law society might look askance at such a practice, and you definitely will not win Lexcel accreditation.

Probate accounting involves a plethora of financial details, such as:

- logging the assets and liabilities
- separating capital and income
- dealing with post death income and accrued income
- paying the gas bill and funeral expenses
- dealing with post probate adjustments
- an easy way to account for an abatement of assets
- dealing with capital gains/losses and revaluations
- accounting for packaged products such as ISAS and PEPS
- listing the market value of equities and their dividends
- calculating the cash value to the beneficiary who does not want shares
- auto calculating the net or gross tax of equities, gilts and unit trusts
- listing the foreign shares and calculating the tax due under the double taxation agreement
- constantly recalculating the money due to the residuary beneficiaries

These accounting functions clearly require a dedicated probate accounting system. By contrast a spreadsheet is a blunt instrument. Only an experienced practitioner with a depth of knowledge can manage this work in such a manner. An experienced probate practitioner could even hypothetically manage the work on the back of an envelope. Not of course a recommended practice.

"I think I found the problem with your spreadsheet -- it's a sudoku."

Financial information needs to be held in such a manner that it can easily be understood by any other member of the team. In an efficiently run firm, work needs to be easily delegated to a probate assistant when necessary. Otherwise taking on new work is limited, and you will be in deep trouble if you fall ill and require an assistant to pick their way through your spreadsheet.

An effective solution needs both case management and an accounting database, working in harmony with each other. The result is a profitable private client department. A number of probate managers have reported achieving gross profits in excess of 70% for their department as a direct consequence of using the Isokon accounting system combined with an integrated Isokon case management component.

Isokon

For further information please contact: **Gregory van Dyk Watson**, Managing Director of Isokon Limited.
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Isokon was founded by Gregory van Dyk Watson in 1999. The company has invested 44,000 man hours in development of the product over the last 15 years. The company is currently the leading supplier of software for Probate and Private Client work. Isokon is used by 36% of law firms who do private client work. It is used by more than 2,000 individual users. It is used for the most complex estates, as well as basic estates. Isokon is based on an accounting database engine with an integrated Isokon case management component.

Qualified One Way Costs Shifting – Leave no stone unturned

"One lesson from the costs war is that lawyers leave no stone unturned when it comes to arguing about costs." – Jackson LJ

The issues which have arisen thus far in recent cases have clarified the boundaries of this new regime in a number of ways.

The Scope of QOCS

The Court of Appeal rejected the first initial challenge that the QOCS rules were ultra vires in the case of *Wagenaar v Weekend Travel Ltd & Serradj [2014] EWCA Civ 1105* and in doing so also confirmed the retrospective nature of the rules. Importantly in this case they allowed an appeal from the finding that QOCS applied in respect of the costs of the additional claim. This limited the scope of the QOCS provisions to the Claimant's claim against the Defendant. It was held that the costs of an additional claim for a contribution and/or indemnity were not covered by the QOCS rules. This ruling is likely to have significant consequences for areas such as medical negligence, road traffic accidents and workplace/construction site claims where additional claims are common.

In Landau v (1) The Big Bus Company (2) Pawel Zeital, unreported 31st October 2014, the Claimant's claim was dismissed at first instance and on appeal. The Claimant sought to argue that he had the benefit of QOCS protection in respect of his appeal. His insurance policy for the substantive claim did not extend to the appeal and a "new form conditional fee agreement" was entered into for the appeal. Thus it was argued there was no pre-commencement funding arrangement for the appeal which constituted different "proceedings" to the substantive claim. Costs Master Haworth found that an appeal constituted the same "proceedings" as the substantive claim and therefore that the initial funding arrangement disapplied the QOCS protection. In any event the QOCS rules could apply to multiple proceedings arising from the same "matter" and so the QOCS exclusion would have applied even if the appeal had been considered separate proceedings. A note of caution with this case is that the Claimant was unrepresented at the hearing and so the area may be ripe for further argument.

This appears even more likely in light of *Casseldine v The Diocese of Landaff Board for Social Responsibility (A Charity) unreported 3rd June 2015* in which Regional Costs Judge Phillips found the exception to QOCS did not apply where the Claimant's original CFA which would have triggered the QOCS exception was cancelled and the proceedings were brought under a new style CFA by the Claimant's new solicitors. The Judge distinguished *Landau* and noted that it was not binding on him in any event. His approach applied a purposive test to the question and held that because the Claimant could not have recovered a success fee from the Defendant the purpose to which the QOCS exception was directed did not apply and accordingly the exception would not apply notwithstanding that the Claimant had formerly entered into a CFA which allowed for a recoverable success fee. It appears highly likely that questions as to the scope of the QUOCS exception will be back before the Court sooner rather than later.

Finally, even where the QOCS protection is held to apply, the costs awarded to the Defendant can be set off against a Claimant's damages. The rules however are noticeably quiet as to whether any set off can applied in respect of any interlocutory costs orders in the Claimant's favour.

Fundamental Dishonesty

The other fertile area for consideration is that of fundamental dishonesty as an exception to QOCS protection. The questions appear to be how procedurally should the issue be dealt with and how dishonest is fundamentally dishonest?

In *Gosling v Hailo & Screwfix, unreported, Cambridge County Court 29th April 2014.* the Claimant had succeeded in his personal injury claim against the First Defendant but had discontinued his claim against the Second Defendant. The Second Defendant had made an application following the discontinuance for a finding of fundamental dishonesty. The application was predicated on surveillance evidence demonstrating the Claimant had deliberately lied about his ongoing symptoms to exaggerate his claim for damages. Disclosure of that evidence had caused the Claimant to significantly reduce his schedule of special damages and remove a future care claim.

The case addressed the important procedural point about how, in the absence of a trial, a finding of dishonesty can be made and the costs of doing so. HHJ Moloney QC addressed the issue of proportionality and declined to consider allegations of dishonesty related to the accident circumstances because these would require a trial, the costs of which would have been disproportionate. However in respect of the dishonesty related to the exaggeration he felt able to make findings in the absence of hearing live evidence from the Claimant. There was a clear concern that Claimants should not be allowed to escape such a finding by saying it would cost too much to establish dishonesty, thereby blunting the force of the QOCS exception.

It appears from this case that a Judge tasked with such an application without having heard the trial has four questions to decide. First, is it proportionate to undertake an investigation into the allegations of dishonesty? Second, how should this be done procedurally? Either by a trial or on the papers by way of an application. Third, whether there was fundamental dishonesty. Finally, the extent of the costs order which should be enforceable.

In respect of this third question, HHJ Moloney QC drew a distinction between dishonesty which went to the root of the matter and that which was collateral and should not deprive a Claimant of costs protection. This analysis used a purposive construction of the term fundamental bearing in mind that the QOCS rules were introduced to protect those *"deserving"* of such protection. His conclusion was that the dishonesty as to quantum which he broadly considered to have accounted for 50% of the value of the claim was *"fundamental to a sufficiently major part of the claim".*

What do the Courts consider fundamental? In *Nama v Elite Courier Company, unreported Central London County Court 5th March 2015* the dishonesty was that a purported "independent witness" who supported the Claimant had in fact been a passenger in her car who was known to her and she had lied about this. Importantly the Judge accepted that the claim would have failed in any event on liability and so the dishonesty had not changed the outcome, interestingly had rejected the Claimant's evidence on the circumstances of the accident as containing the *"inconsistencies which are often found in road traffic accidents"* rather than being dishonest. The dishonesty had only been regarding the relationship with the witness and had only gone to credibility. Finally, the witness had not actually attended Court and their evidence had only been before the Court as hearsay evidence. Despite this the Judge considered whether the Claimant was deserving of the costs protection.

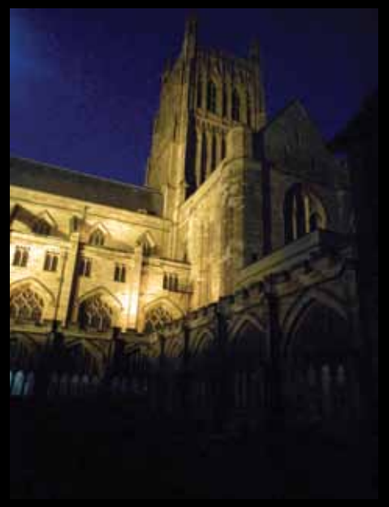
Would a failure to provide certain disclosure such as bank records or tax records therefore be sufficient to support such a finding? There is likely to be significant differences of opinion as to what is fundamental. However at present the cases appear to demonstrate that once dishonesty is proven to the Courts, it may be difficult for a Claimant to argue that they were only a little dishonest and not fundamentally so.

Nick Robinson
Barrister
Ropewalk

ROPEWALK CHAMBERS

WLS Visit to Worcester Cathedral

A guided tour of Worcester Cathedral and a climb up the tower on 30th September 2015 @ 6.30 p.m.








Is an Expert Determination always the final answer?


Chris Makin

In previous articles I have written about How Many Routes to Resolution, about the number of ways in which disputes may be resolved. One such route is expert determination ("ED") which, in my experience, is not used often enough except in dispute resolution clauses in share purchase/sale agreements. ED allows the parties to choose an expert with the technical knowledge to understand the issues; it is confidential; the cost is usually very reasonable; and it can be fast. One of my EDs took over seven years, largely because we were waiting for the tax commissioners' decision on some foreign trusts but, by contrast, I have just finished a share purchase/sale ED which took only four weeks, including three rounds of submissions.

All in all, I am a big believer in EDs.

One of the advantages is that it is almost impossible to challenge the expert's decision. It may seem odd that, after carefully prepared submissions and responses, all that the parties get from the expert is a one-line letter saying "X shall pay £Y to Z by (date)." But the parties wanted finality, and with a non-speaking determination that is what they get. And they get it without hurt feelings, so that it is more likely that they will do business together again in future.

Why is it virtually impossible to challenge an ED? The answer comes from Kendall on Expert Determination, where the words of that wonderful wordsmith, Lord Denning, are quoted. Here is the extract:

In Campbell –v- Edwards [1976] 1WLR403, decided in 1975, Lord Denning MR excluded challenge on the grounds of mistake altogether, except possibly in the case of speaking decisions. The case was about a challenge to a surveyor's decision on the surrender value of a lease. The surveyor was duly appointed by the parties under the lease. The surveyor's valuation had been £10,000 but the tenant later found two more surveyors who said that the valuation should be much lower, £3,500 and £1,250 respectively. The Court of Appeal dismissed the tenant's appeal and held that the parties were bound by the honest valuation fixed by the agreed valuer. Lord Denning said:

"It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything."

Fraud or collusion unravels everything… Fine words, and so very sensible.

But what if there was no fraud, no collusion, yet the valuer's decision is so clearly wrong, or the valuer has acted in such an incompetent way that his decision ought to be challenged?

This was the situation with the very recent Court of Appeal decision in Begum –v- Hossain [2015] EWCA Civ717. The facts were simple. These two ladies had set up business together operating an Indian restaurant through a limited company. They fell out. A settlement agreement was reached, whereby Ms Begum's shares were bought by Ms Hossain at a value decided by a Mr Oxford, from a business transfer firm. In defence of my profession of chartered accountancy, I stress that Mr Oxford was not an accountant!

There was a very precise set of instructions in the settlement agreement, and an important element was that the valuer should look at all the books and records of the business, including handwritten records of takings. Although these records showed a very different story to the official records, one party warranted that they were a true record. In other words, it seems that the parties had been fiddling their taxable takings, but that the valuer most consider those handwritten records.

Mr Oxford did not follow the instructions in the settlement agreement. For one thing, he produced a report with reasons, contrary to the instruction that a non-speaking determination be produced. That allowed one to see that he had purposely ignored the handwritten records, on the grounds that it would require an expert accountant (me, for example!) to interpret them, despite the fact that the instructions gave him permission to engage an expert accountant.

There was more, and the – very short – judgment is a good read. The Court of Appeal found that Mr Oxford's valuation should be set aside, on these grounds explained by Mr Justice Roth (interestingly, the most junior member of the bench):

"The question is simply one of construction of the express terms of the Settlement. The valuer is to arrive at a fair value of the shares, having regard to the books and records of the Company, which include the handwritten takings. That means, as a matter of ordinary construction, that he is required to arrive at his valuation by considering the content of all those documents and not simply some of them. If he felt that he would like the assistance of an accountant, he was entitled to obtain it at the parties' expense. In this case, Mr Oxford did not follow that mandate and the Valuation must therefore be set aside. Accordingly, I would allow this appeal."

The question is indeed a simple one. Mr Oxford was under contract to carry out certain duties, and in a particular way. He didn't do as he was told. He broke the contract by issuing a determination with reasons – first mistake – and that led the parties to see that he hadn't used the handwritten takings records, which were warranted as being correct, and which, one assumes, would have implied a different value to that produced.

The moral is that expert determination is a skilled process, and that in choosing one's valuer, regard should be had to their competence. For the record, I was one of the first five experts to be accredited as expert determiner by The Academy of Experts, the only professional body which issues this qualification, and I am now an examiner in ED at The Academy.

Final thought: I wonder if Mr Oxford ever got paid…

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ACCREDITED FORENSIC ACCOUNTANT & EXPERT WITNESS

Chris Makin has practised as a forensic accountant and expert witness for 23 years, latterly as Head of Litigation Support at a national firm. He has been party expert, SJE, Court appointed expert and expert adviser in hundreds of cases, and given expert evidence about 70 times. He also performs expert determinations.

Chris is a fellow of the Institute of Chartered Accountants where he serves on the Forensic Committee, and as an ethical counsellor; he is a fellow of the Chartered Management Institute, a fellow of the Academy of Experts where he serves on the Investigations Committee, and an accredited mediator. He is also an accredited forensic accountant and expert witness.

He practises as an expert witness and mediator from West Yorkshire and his rooms at 3 Gray's Inn Square, London WC1R 5AH. He has mediated a vast range of cases, with a settlement rate to date of 80%.

Law Society: Court closures will inhibit access to justice

The Law Society today responded to a Ministry of Justice consultation on proposals to close 91 courts and tribunals, which is one fifth of courts and tribunals across England and Wales, and integrate or merge 31 more.

Our response reflects solicitors' views on the likely adverse impact of the proposed closures on local communities, the justice system and the legal profession.

Law Society president **Jonathan Smithers** commented:

'A majority of these proposed court closures will make it more difficult for a significant number people to get to court, and the closures will more adversely affect people living in rural areas, those with disabilities and lower income families.

'Combined with the further planned increases in court fees and reductions in eligibility for legal aid, many of the proposed closures will serve to deepen the inequalities in the justice system between those who can and cannot afford to pay.

'No matter who you are, no matter where you live, everyone in England and Wales must be able to access legal advice and the justice system.'

We have produced an interactive map that shows the impact the proposed closures would have on local people, as told to us by solicitors who serve their local communities.

The Law Society's concerns fall into five main areas:

1. Access to justice

It will be more difficult for many people, victims, witnesses and defendants, to get to a court or tribunal if the proposed closures go ahead. To ensure equal access to justice, we should all be able to get to a local court within a reasonable time and without incurring unreasonable expense. All of the proposed closures set out in the consultation paper will result in court users travelling further, at greater cost.

The government proposals rely on travel to court by car, but many people will have to use public transport which in many cases is circuitous and expensive. For instance, a return journey from Aylesbury where the court is up for closure, to the proposed alternative, Milton Keynes, costs £71.30, takes over 2.5 hours each way and involves two changes.

Solicitors told us that many of the travel times stated in the Ministry of Justice proposals are misleading and do not take sufficient account of local geography or transport infrastructure, particularly in rural areas where services may run infrequently and may not be direct.

2. Impact on court users

The increased travel time to proposed alternative courts would have an adverse economic and logistical impact on a range of people who use the courts: the judiciary, jurors, HM Courts and Tribunals Service staff and the prison and probation services.

Many of the courts the Ministry of Justice is proposing to close have a much higher than average volume of work and our members tell us that there are already long waiting times, backlogs of work and trials delayed or postponed as a result. It is unclear how the proposed alternative courts, many of them already busy, will handle the extra workload.

3. Use of technology

Part of the rationale for the proposed closures is that better use of technology can improve the court service and reduce the need for in-person hearings. The Law Society agrees that a modernised court service and efficient use of technology would benefit all court users. However, these facilities are not yet in place across all courts nor in the proposed alternative venues. It would be better to modernise the courts with new technology, assess how it is working and then consider savings, rather than the other way round.

4. Legal aid contracts

The Law Society is concerned that the court closures will lead to our members being unable to meet the requirements of the legal aid contracts through no fault of their own. This could leave people who qualify for legal aid unable to access legal advice in some areas.

Legal aid solicitors bid for contracts based on the geography of the existing courts and some fear they will be financially unable to fulfil their contract if courts close in their region. In these cases some solicitors told us they will withdraw their tenders altogether.

5. Methodology

The Law Society is concerned about the lack of transparency and reported errors in the information provided in the Ministry of Justice's impact assessment.

Neither the consultation paper nor the impact assessment sets out the criteria used to identify the courts and tribunals proposed for closure or consolidation. The algorithm used to calculate travel times is no longer available to the public, having been taken offline in 2014. The Ministry of Justice declined a Law Society request for further information.

Solicitors pointed out a worrying number of factual errors in the consultation document. For instance, that there are miscalculations on the current usage of some courts and an over-estimation of the capacity of alternative courts to take an additional workload. One solicitor told us of Burton Magistrates Court that is proposed for closure: "They have worked out the usage figures based on four court rooms when there are only three. The fourth court is little more than a cupboard and is not secure."

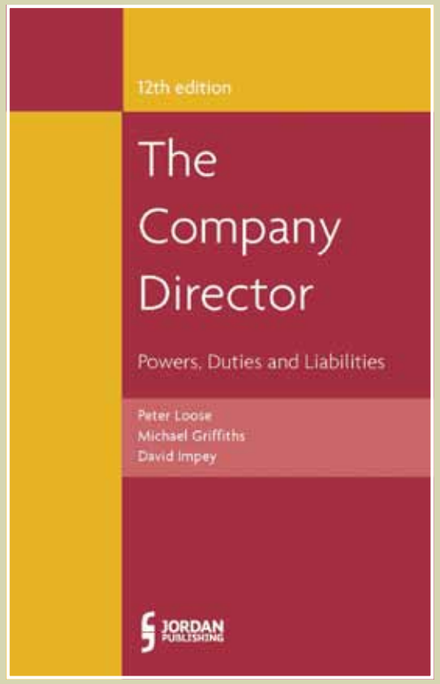
In other cases the Ministry of Justice include what we believe to be inaccurate information about court facilities, for instance claiming a court proposed for closure does not have technology when in fact the technology has been installed. Further examples are given in our response.

The proposal to use alternative public buildings for court proceedings is currently untested. Solicitors expressed a range of concerns, including security and whether there would be adequate, appropriate facilities such as video link, witness/defendant segregation and interview rooms in public buildings. These facilities would need to be installed, at cost. We do not understand why Ministry of Justice is proposing to close purpose-built courts and use public buildings that, in many cases, have inferior facilities.

Alternative approaches

The option of re-allocating work from extremely busy courts to courts that are currently under-used does not appear to have been considered - transferring cases from courts with backlogs of work and overly-long waiting times to those with spare capacity would represent an efficient use of the court estate. In our submission, we suggest a number of ways to do this.

Book Review



THE COMPANY DIRECTOR
Powers, Duties and Liabilities
12th edition

By Peter Loose, Michael Griffiths and David Impey

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AN ESSENTIAL REFERENCE ON THE ROLE AND RESPONSIBILITIES OF THE MODERN COMPANY DIRECTOR

An appreciation by **Phillip Taylor MBE** and **Elizabeth Taylor** of Richmond Green Chambers

If you are a company director or a practitioner in company law or a director, here's a book you should make a point of purchasing. Recently launched in a new twelfth edition from Jordan Publishing, 'The Company Director' is a long established, classic work, which at the same time, is bang up to date.

It is only a little over three years since the last edition appeared and significant changes from the Companies Act 2006 have taken place, as the three authors, Peter Loose, Michael Griffiths and David Impey remind us.

Also, Parliament has just passed the Small Business, Enterprise and Employment Act 2015 which adds a new dimension to corporate governance. Now established as a definitive work in this field, "The Company Director" presents in one convenient volume a detailed explanation and clarification of the powers, legal responsibilities. And, yes, the liabilities of executive and non-executive company directors within a continually changing legal landscape, where, as the authors also point out, some uncertainties remain as to what the law really means!

The book covers a number of other significant changes. The provisions of the Small Business Enterprise and Employment Act are thoughtfully discussed, together with the recently revised rules on corporate security... the new mechanisms for making complaints to the Company Names Adjudicator... and the most recent changes to the company buy-back regime. The most recent case law is also examined in detail.

Indeed, the book excels as a work of reference to virtually everything a company director needs to know. The first two chapters outline the history and nature of companies past and present, including commentary on 'the corporate veil.' Subsequent chapters deal in detail with such matters as the appointment, powers, duties and liabilities of directors, plus shareholder relations, terms of service and meetings.

Also presented is a clear and detailed discussion of the Bribery Act 2010 and the Corporate Manslaughter and Homicide Act 2007; (very topical in view of the recent Volkswagen debacle). And then there's the final chapter which contains as succinct a summary as you'll find anywhere on the oft referred to issue of corporate governance. This contains the UK Corporate Governance Code, a very useful checklist for board effectiveness, and more besides, including a comment on corporate social responsibility (CSR).

CSR is described as 'an up and coming buzz phrase' in the opinion of many, except possibly avid readers of the Harvard Business Review, for example, who may remember the concept discussed as far back as the 70s and probably before; so, as some might say, less up and coming than old hat.

Be all this as it may, this book is described quite rightly as a highly respected tome... heavy on the practical side of the law' and therefore an essential research tool for a range of professionals, from barristers and solicitors to company secretaries and accountants, as well as, of course, company directors and corporate law students aiming for a first.

The law is stated as of July 2015.

Good and bad news for Residential Landlords

Landlords must be aware of new regulations relating to alarms and boilers

Stephen Boyle, Senior Solicitor in Commercial Property at law firm Hart Brown<http://www.hartbrown.co.uk/>, outlines the changes in regulations for multi-let properties with common heating systems, and the new Smoke and Carbon Monoxide Alarm (England) Regulations due to come into force

Residential landlords get some good news and bad news this month. The good news is that the deadline for registering multi-let properties that have a common heating and cooling system with the National Measurement Office has been extended from 30 April, 2015 to a more manageable 31 December, 2015. The regulations require landlords of multi-let properties to install separate meters for each occupier so that individual tenants pay for the amount of energy that they actually use, rather than a fixed share of a communal bill.

The bad news is that from 1 October 2015, the Smoke and Carbon Monoxide Alarm (England) Regulations come into force. Residential landlords must install smoke alarms on each floor of a property that is used as living accommodation. There is a slight kink in the wording of the regulations that might catch the unwary; the regulations require that the landlord "ensure that each prescribed alarm is in proper working order on the day the tenancy begins if it is a new tenancy."

Checking alarms a day or week before the new tenants move in would be a breach of the strict terms of the regulations, so landlords should beware of agents checking properties on their behalf in advance of a new tenancy beginning. If the alarms are not checked on the day the tenancy begins, the landlord will be the one facing a fine of up to £5,000.

As the title of the regulations suggests, carbon monoxide alarms are also to become a must have feature in properties which have a solid fuel burning appliance. The Aga and wood burning stove that look so attractive in the agent's particulars now come with a requirement that the landlord fit, and check, carbon monoxide alarms in any room containing such a device.

What's so "big" about data anyway?

Big Data, a phrase so full of buzz that it should be given its own bee hive, has undoubtedly affected the way the world looks at information. But if you strip back the hype and look at it objectively, can Big Data really be of use for law firms?

For many legal practices (even the big ones) the term Big Data means very little.

Let's put it into context;

- *3.5 billion – the number of searches per day on Google*
- *1.5 million – the number of requests per second handled by Amazons Web Services Division*
- *288 billion – the number of emails sent per day across the globe*

With those sorts of numbers it's easy to see why the term Big Data can be dismissed by the legal market but the point is not the size of the data but the type that it is. How we collect and analyse the data is as important as what it tells us.

The characteristics of Big Data include volume and velocity (not only the amount but the speed at which it is accumulated) and variety and veracity (the different types of data and the state it appears in - for example the amount of unstructured data that resides within emails). All of this is relative to the business or individual who is handling the data. Businesses who naturally have data at the core of their operation (like law firms), will experience volume, velocity, variety and veracity in their data at some point or another, the skill is how to handle and interpret that data to provide you with relevant and meaningful information.

To this end the term "Big" is misleading, in fact it is better referred to as business intelligence and when painted in that light, Big Data suddenly becomes very relevant to law firms.

For the legal market Big Data is really just the analysis of the Practice as a business - from accounting data and client trends to referral tracking and department benchmarking - there is a lot of varied data produced by law firms on a daily basis that can not only help track market trends but the performance of the firm too.

As an example by combining readily available website data with information from a CRM system, firms can begin to see client buying and research habits – much in the same way that retailers track consumer behaviour before and after a purchase. They can begin to understand the when and where of a purchaser's psyche, what triggers an engagement and what tactics are most effective. This allows a greater understanding as to why purchase decisions are made, the journey that the buyer goes on during the decision making process and helps firms determine what they need to do to guide the purchase process.

Similarly with all the penalties and fines in place by the government for failure to submit forms or data in the correct format and in a timely manner it can be highly beneficial for a firm to understand which departments, and specifically individuals, are the biggest "digital" offenders (late submissions, rejected forms etc.). Ensuring they are sufficiently trained to minimise business risk and avoid costly fines.

These are just two small, practical examples of where data analysis can help shape a firms performance and direction - with the wealth of tactical and strategic knowledge available to law firms there are plenty more areas where data can help.

So for many law firms data is not "big" but it can be clever.