

"WE WANT TO BE TOGETHER ... FOR THE TIME BEING"

Couples, especially young ones these days often live together either before marrying or with no intention of getting married. If they buy a house together it is important that they make suitable arrangements to deal with the situation should the relationship end.

The property rights of married couples are determined under the Matrimonial Causes Act 1973 and invariably dealt with on an application by one or other party for ancillary relief within divorce proceedings. However, there is no corresponding legislation which deals with the rights of unmarried couples.

The problems that can arise were graphically illustrated in the case *Stack -v- Dowden* which came before the House of Lords earlier this year. Mr. Stack and Miss Dowden purchased a property together in August 1993. The property was transferred into their joint names but nothing was mentioned in the Transfer about their respective beneficial interests. In November 2002 Miss Dowden served a Notice of Severance on Mr. Stack. Had the Transfer provided that they held the property as joint tenants in equity then the effect of the Notice of Severance would have meant that thereafter they held as beneficial tenants in common in equal shares.

Mr. Stack's lawyers argued that he and Miss Dowden were entitled to share the proceeds of sale equally. Miss Dowden claimed that she had made a greater contribution towards the purchase of the property and was accordingly entitled to a greater share of the proceeds of sale.

The House of Lords decided in favour of Miss Dowden. The proceeds of sale, said the House of Lords, should be divided 65% to Miss Dowden and 35% to Mr. Stack. In a lengthy judgement the House of Lords reviewed numerous earlier authorities going back over the last 40 years or so. Even then the case exercised the minds of three Lord Justices of Appeal in the Court of Appeal and a further five Judges in the House of Lords and no doubt left the parties with a hefty legal bill.

The lessons to be learned from *Stack -v- Dowden* are firstly that couples need to consider carefully between themselves the basis on which they intend to own their property and secondly the need for solicitors acting for co-habiting couples to give comprehensive advice. If this is done the likelihood of a lengthy and costly dispute arising should the relationship end will be minimised.

SHOSHANA GOLDHILL —Partner

across from another property. Nor can such a right be acquired through passage of time.

Whether wind turbines are cost efficient is, of course, an entirely different issue. I think I would carefully check the pros and cons before installing one.



ANTON BILINSKI — Litigation Assistant

BLOW THE WIND BLOW

With people ever more conscious of their carbon footprint we are seeing something of a fashion for wind turbines on houses. This raises an interesting legal question: does a house owner have a right to wind? Tricky one, eh?

In an 1893 case the Court decided that there is no natural right of access to air blowing

LONDON TO BRIGHTON BIKE RIDE

At an ungodly hour on Sunday 17 June 2007 three partners, two members of staff and one husband all set off from London on the 54 mile bike ride to Brighton in aid of the British Heart Foundation. As you can see they all made it and not looking too worse for wear — at least by the time the photo was taken! In the process they raised £591.



From left to right: Tom Harrison, Rhodri Rees, Anthony Marris, Alison Helbert, Shoshana Goldhill and Simon Goldhill.

Contents

We want to be together ... for the time being	1
Til death do us part ... and what about a pre-nup?	2
Farmers' corner	2
What a load of rubbish!!!	2
The new power of attorney	3
Commercial lease negotiations	3
Flood alert	3
Speeding motorists re-visited	4
Enjoy your holiday?	4

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TILL DEATH DO US PART ... AND WHAT ABOUT A PRE-NUP?

Pre-Nuptial Agreements (or as we lawyers like to call them ante-nuptial contracts) have been around for quite a long time without ever really catching on. There are a number of reasons for this. The main one is probably that the last thing people tend to think of when they are about to get married is suggesting to their intended that he or she should sign an agreement making financial provision for when they get divorced. Frankly it is not very romantic and hardly gets the union off on the right footing.

Leaving aside any feelings of distrust that a pre-nup agreement might engender there is a more mundane reason for their lack of popularity. A pre-nuptial agreement will always be subject to the discretion of the divorce court to override the agreement and impose the court's own division of the matrimonial spoils. This should not, however, be seen as a reason for avoiding a pre-nup. Slowly but surely the courts are moving towards a recognition that pre-nuptial contracts should be enforced other than in cases where obvious unfairness would result.

At one time the court viewed such agreements with disfavour partly because they were thought to undermine the institution of marriage by contemplating divorce and partly because there was perceived to be a public interest in ensuring that a former spouse, invariably the wife, received appropriate financial provision. It also has something to do with the reluctance of judges to see their jurisdiction eroded.

Over the last 60 years or so the number of people getting married has declined and the number of marriages ending in divorce has escalated. In 1940 there were a little under 534,000 marriages celebrated. By 2002 this figure had fallen to 293,000. In 1970 the Courts pronounced 62,900 divorces and 30 years later divorces were running annually at over 160,000. Clearly the percentage of marriages ending in divorce has inexorably grown and with it the risk of one party to a marriage losing out financially on divorce.

In 2002 a High Court judge declared that any agreement or arrangement entered into by a husband and wife, whether before or during the marriage, which contemplated

or provided for their separation at a future time is against public policy and void. However, in 2003 another judge ruled that a wife who had entered into a pre-nuptial agreement entitling her to £120,000.00 on divorce could not claim that she was entitled to £1.6 million. Critical to the Judge's reasoning were the following:-

- * the wife had understood the pre-nuptial agreement when she signed it.
- * she was properly advised on the terms of the agreement before she signed it.
- * she was under no particular pressure to sign the agreement, indeed it was her own father who had suggested it to the husband who had himself been under pressure to sign.
- * she knew at the time of the agreement that she was expecting a child and
- * there had been no unforeseen change of circumstances such as would make it unfair to hold her to the agreement.

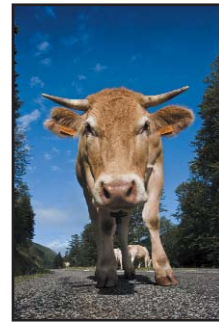
The law has shifted over the years and pre-nuptial agreements are no longer actively frowned on by the courts on public policy grounds. A number of foreign jurisdictions have no problem in enforcing such agreements. Provided a pre-nuptial agreement is entered into at least a month before the wedding day and both parties provide full disclosure of their means and receive adequate independent legal advice then the overwhelming likelihood is that the courts will no longer disregard them. Indeed there are significant advantages not least the probable avoiding of lengthy bitter disputes over money and property on divorce and the inevitable cost of such proceedings. Far better that the parties know in advance where they stand rather than submit to the lottery of court proceedings.

I am increasingly being asked to advise on and draw up pre-nuptial agreements for my clients. I strongly recommend that anyone contemplating marriage consider carefully the potential benefits of entering into a pre-nup. The cost is not at all prohibitive and the potential saving in terms of legal costs on divorce and emotional reserves are considerable.

SHOSHANA GOLDHILL —Partner

FARMERS' CORNER

Of all occupations you might think that of farmer was a pretty tranquil one. Accordingly it is surprising how often their livestock get them into bother.



Mr. Wharton farms in Norfolk. One of his cows escaped into the highway where Mr. Gardner promptly drove into it. The brief details I have of this case do not extend to the extent of respective injuries suffered by

Mr. Gardner and the cow. However, the Judge at Norwich County Court found in favour of Mr. Wharton. He concluded that the farmer had not been negligent in failing to fence in his cattle. The driver, however, was negligent because he drove too fast and failed to keep a proper look out.

The Judge evidently believed that people driving in the countryside should expect to come across the odd stray cow and exercise due caution.

TOM HARRISON — Partner

WHAT A LOAD OF RUBBISH!!

Did you know that you can be taken to Court for not disposing of your rubbish properly? Well you can, as clients of ours found out recently.

They were the unwitting victims of a sharp eyed officer from the local council who spotted documents bearing their address amongst some discarded rubbish dumped on a remote bridleway 7 miles from their home. It was difficult for our clients to recall what they had done with the papers but they certainly denied leaving them on the bridleway.

I was able to persuade the Magistrates that the Council had insufficient evidence to justify a conviction. My clients were quite properly acquitted of the offence. This case highlights the risk we all run if we fail to ensure our rubbish is properly disposed of.

JENNIFER CARPENTER — Partner

From the 1st October 2007 the new Mental Capacity Act came into effect replacing the old Enduring Power of Attorney (EPA) with the new Lasting Power of Attorney (LPA). It is now no longer possible to create an EPA although existing EPA's as at the 1st October 2007 will still be effective and operable.

The new LPA's provide very much wider powers and duties than the old EPA's and they come in two separate forms. The first is the property and finance LPA under which a person can appoint Attorneys to handle their financial affairs. This will enable someone making a property and finance LPA to give specific instructions as to how they want their financial affairs to be managed. This can be very helpful especially for those with fairly complex investments.

The other form of LPA is the personal welfare LPA under which the appointed Attorneys will be authorised and

empowered to make decisions about the donor's healthcare and medical treatment. It is now possible under a personal welfare LPA to stipulate whether or not you wish to be given life saving treatment in the event of a fatal illness.

Recent research indicates that three out of four people have made no arrangements as to what should happen if they lose the capacity to make important decisions. In the run up to the 1st October we did receive a surge of new instructions mainly from people wanting to make EPA's before they cease to be effective.

Now that EPA's are no longer available I am strongly recommending my clients to make LPA's. It goes without saying, of course, that it is even more important for our private clients to keep their Wills up to date. It never ceases to astonish me how many people have never actually made a Will.

MELANIE PRATLETT — Partner

UPDATED REGULATION OF COMMERCIAL LEASE NEGOTIATIONS

Landlord clients sometimes come to us grumbling about their non-paying tenants; meanwhile tenants come to see us complaining that their landlords are trying to refurbish their properties at their expense. Help may now be at hand following the introduction of the third edition of the Lease Code 2007 following on from which the British Property Federation (BPF) has launched a government backed Commercial Landlords Accreditation Scheme (CLAS).

Any commercial landlord can apply to join the scheme which entitles members to display the CLAS logo on their promotional material to show they comply with the new Code.

The Lease Code itself comprises three documents:-

1. Leasing Business Premises: Landlord Code — which covers negotiations, deposits, guarantees, length of term, break clauses, renewal rights, rent reviews, assignment, service charges, repair, alterations and ongoing management.

2. Leasing Business Premises: Model Heads of Terms — which provides a checklist of what has been agreed between the parties.

3. Lease Business Premises: Occupier Guide — which is for tenants in relation to negotiations and general leasing issues.

Whilst it would be inappropriate for many small commercial landlords to join CLAS I anticipate that the Code will encourage a greater focus on negotiations which will help to identify any outstanding issues at an early stage in the transaction. Tenants in turn will be encouraged to adopt a less "them and us" attitude thereby freeing up time which can be spent making their businesses more profitable.

If all else fails, our litigation department is always here to help.

ANTHONY MARRIS —
Commercial Property Solicitor

FLOOD ALERT

With recent headlines about flooding, clients may be worried about whether that new house which ticks all the boxes could be subject to flooding or other potential hazards. It is sometimes difficult to assess whether a property would be at risk given that with proper drainage some low lying property in East Anglia might be at a lesser of a risk than properties in the centre of Saffron Walden!

Fortunately the range of pre-contract searches is far greater than was previously the case. At Adams Harrison we carry out a desktop Envirosearch which will highlight whether the property is liable to flooding and, if so, the risk. The search also screens for previously potentially contaminative uses including, for example, houses built on the sites of former petrol stations and the like.

Additionally we can carry out a plan search which shows in map form all planning applications made within a certain radius within the last five years together with current and future planning policies for the area. In this way clients can assess whether the nature of the area is likely to change before they make a decision to purchase.

Remember that a property which is at risk of flooding could get very expensive to insure and as a result difficult to sell on at a later date.

JULIA FENNELL — Head of Residential Conveyancing, Saffron Walden



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SPEEDING MOTORISTS RE-VISITED

What do you do if you receive a notice through the post saying that your car was photographed travelling at an excessive speed by a speed camera? The police have power to demand of the owner of the vehicle details of who the driver was at the time.



The owner of the motor vehicle can be prosecuted for not giving this information. He can be fined and given penalty points on his licence. Before the 24th September 2007 the vehicle owner was at risk of 3 penalty points. Many motorists realised that this could save their driving licence particularly if the speed involved was a high speed. It was easier to take the 3 points rather than to suffer higher points because of a high speed or even run the risk of a discretionary disqualification from the Magistrates.

That loophole has now been closed and a car owner who fails to give this information if the car is snapped by a speed camera since the 24th September 2007 will now automatically suffer 6 points. I anticipate Magistrates may still impose discretionary disqualifications instead of the 6 points. Even 6 points could have serious repercussions if someone already has points on his licence. If a new driver gets 6 points on his licence within the first 2 years of having passed his test, the DVLA will take away his full licence and he will revert to being a learner driver.

It is no longer worth ignoring a notice from the police requiring details of the driver. It is going to be better now to provide details of the driver and for the driver to take the penalty points for the actual speed registered by the speed camera.

Many drivers still try to use what is known as the "Hamilton" defence. Christine Hamilton and her husband, Neil, (the former MP) claimed that they could not remember who was driving the car because between them they travelled together so many miles it could have been either of them.

Magistrates are becoming far more sceptical about the "Hamilton" defence. They now expect the car owner to know exactly who was driving his car at any particular time. It is for you to make sure that you can say to the police who was driving it.

The Courts have to accept that sometimes there may well be a genuine situation where someone does not know who was driving a car but you are going to have to come up with a pretty persuasive story to show why you do not know who was driving on a particular occasion. Perhaps it is the case that you have been on holiday and left the car with your two teenage children and can only assume that one of them had borrowed it. However, to persuade the Court that this is genuine you are going to have to produce evidence to support what you are saying such as a holiday booking form to show that you were definitely out of the country.

It will not be enough to say that you cannot remember that far back as any notice that the police send out has to be sent out within 14 days of the offence and that must go to the vehicle owner registered at DVLA. It is particularly important that you keep the records of your car up-to-date at DVLA. If you sell a car do not rely on the buyer to tell DVLA. Better to spend 32 pence for a first class stamp than risk a hefty fine and 6 points on your driving licence. If you move house make sure that you tell DVLA without delay.

Equally the "lost in the post" defence is less and less likely to succeed. All the police have to show is that they sent out the notice. Unless the motorist can satisfy

the Court that he did not receive the notice he will be committed.

Recently there has been a tendency for the police to prosecute people "taking the rap" for a friend or relatives speeding penalty points. The charge is perverting or attempting to pervert the course of justice and the punishment invariably is a term of imprisonment.

It's getting more and more difficult to beat the system.

PAUL CAMMISS —Partner

ENJOY YOUR HOLIDAY?

It is astonishing how many people jet off on holiday to some exotic location only to return disgruntled and spoiling for a fight with someone, usually the tour operator. For one man the problems started rather sooner.

In July this year a Mr. Weedon booked a skiing holiday for himself and his party of three adults and six children. He paid a substantial deposit for all except the one infant in the party. He subsequently discovered to his chagrin, that the school would not have the children out during exam time. He cancelled the holiday for the six children and one adult (who presumably had to stay behind to look after the kids).

The tour operator forfeited the deposits as cancellation charges and Mr. Weedon sued for his money back. He lost. The Judge at Cambridge County Court said the contract terms were clear and fair. Could have told him that, couldn't we.

PAUL CAMMISS —Partner