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SYDNEY MITCHELL SOLICITORS

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Court ruling helps to define insolvency

For what seems to be a relatively easy concept, the meaning of 'insolvency' has proven to be a surprisingly contentious issue for the courts over the years. This is important because when insolvency occurs, the courts can seek to overturn transactions which are deemed to be to the detriment of creditors.

In a guideline decision, the Court of Appeal has ruled that a property investment company that relied upon the inflow of new money, whilst building up long-term debts, was insolvent both on a balance sheet and cash flow basis.

The company specialised in introducing clients to property in Dubai. It operated no client account and investors' money was mixed in with its own cash. That practice had prompted an accountant to express the view that the company had treated many millions of pounds of clients' money as its own.

Following the collapse of the Dubai property market in 2008, the company went into insolvent liquidation with sums owed to investors estimated at up to £1.05 million. In the course of the preceding two years, the company had paid sums totalling more than £100,000 to its company secretary. It was ultimately not disputed that those payments were made in connection with transactions at an undervalue.

The company's liquidators sought recovery of those sums and an issue therefore arose as to whether the company was insolvent within the meaning of Section 123 of the Insolvency Act 1986 when the payments were made. A judge had initially ruled against the liquidators on the basis that the company had not at that stage passed 'the point of no return'; however, that decision was later reversed by the High Court.

In dismissing the company secretary's appeal against the latter decision, the Court of Appeal emphasised that there was no suggestion that the company was a Ponzi scheme. However, the reality was that it had relied upon the continued inflow of investors' money to maintain its cash flow whilst going deeper and deeper into long-term debt.

In any commercial sense, the company was insolvent in that, despite its apparently healthy cash flow, it would have been unable to cover all its liabilities had it ceased trading.

In those circumstances, it could not be said that the company was able to pay its debts when they fell due or that the value of its assets was greater than the amount of its liabilities. The company secretary had therefore failed to rebut the presumption that the monies paid to her were recoverable by the liquidators.

For advice on the proper segregation of client funds or any matter related to solvency or corporate governance generally, please contact Leanne Schneider-Rose on **0121 698 2200** or email **l.schneider-rose@sydneymitchell.co.uk.**

Who carries the cost of mental illness?

When the state becomes involved in paying for care, there are often complications, as a recent case illustrates.

It involved a mentally ill man who had spent almost half his life detained in psychiatric hospitals. He subsequently became the focus of a row between two local authorities over which of them should cover the heavy cost of caring for him after his discharge into the community.

In its decision, the Court of Appeal gave useful guidance on the correct approach to the concept of 'residence' under the Mental Health Act 1983 and ruled that the cost of the man's aftercare should be borne by Wiltshire Council on the basis that he was born in that county and was living there when he was first committed to hospital.

The man, aged in his 40s, was made the subject of a hospital order in 1995 and was not discharged until 2009, on condition that he resided under 24-hour supervision in a hostel in Hertfordshire. He was recalled to hospital in 2011 but discharged again in 2014 to the same hostel, where he continued to live.

Wiltshire Council argued that the man's aftercare costs should fall on Hertfordshire County Council on the basis that he 'resided' in the hostel within the meaning of Section 117 of the Act. It was also submitted that the man considered Hertfordshire to be his home and that he had no wish to return to Wiltshire.

However, the Court noted that there was no dispute that the man was 'resident' in Wiltshire when he was first discharged from hospital and that it was 'impossible to define' a moment thereafter when his residence might have shifted to Hertfordshire. There had been an unbroken chain of causation and the terms of his conditional discharge still derived from the original 1995 hospital order.

If you are having difficulties with your local council over the cost of care for a relative or family member, we may be able to help you realise a better outcome. Please contact Tracy Creed on **0121 746 3300** or email **t.creed@sydneymitchell.co.uk.**

Landlords keep rent paid in advance, rules Court of Appeal

The overturning of a High Court decision concerning rent paid for a period after the end of a lease has restored the status quo in such cases – to the relief of landlords.

The tenancy was on the normal basis requiring payment of the rent due quarterly in advance. The tenant applied to the landlord for a refund of the rent paid for the period after the termination of the tenancy and the landlord refused on the ground that there was no express provision in the lease to refund a proportion of the quarterly rent paid where notice was given during the period for which rent had been paid.

The High Court held that the 'overpayment' should be refunded to the tenant as it was a reasonable term to imply into the lease. This decision flew in the face of earlier judgments in similar cases, so it was no surprise that the landlord appealed against it.

The Court of Appeal accepted the landlord's assertion that in the absence of a term in the lease giving the tenant the right to a repayment in such circumstances there was no such right. It would, in the Court's view, have been obvious that the possibility existed of a loss due to a 'broken period' and thus the wording of the lease meant what it said – or, more correctly, did not mean what it did not say.

The case illustrates how important it is to make sure that the wording of a lease is clear and precisely reflects the wishes of the parties to it. The Court of Appeal is a very expensive place to resolve disputes over the meaning of a document.

For advice on any aspect of landlord and tenant law and assistance in making sure that any lease you sign means what you think it means, contact Sundeep Bilkhu on **0121 698 2200** or email **s.bilkhu@sydneymitchell.co.uk.**

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Relationship break-up and tax

Getting divorced is never a pleasant experience and couples going through the process have a lot to think about. Whilst management of the tax consequences of the split is not normally at the top of their priority list, these can be considerable, even where family income is fairly moderate.

For example, under the present rules one per cent of child benefit is added to the tax liability for every pound of income where income is in excess of £50,000. Where a couple have elected not to receive child benefit in order to avoid the charge, child benefit can be applied for again if the income level falls. It can be paid retrospectively for up to two years if the level of income would mean that there is no longer a clawback. Child benefit cannot be split, and the tax charge will be applied to the higher earner of the couple.

With tax credits, only one household can make a claim for any one child and a 'protective' application should be made if the split would make your income drop to the point at which you qualify for credits, as a claim can only be backdated one month. Under the new tax credit regime due to be introduced in 2017, maintenance received from a spouse will reduce entitlement to tax credits. Tax credits are unaffected by child benefit.

Older people can benefit from the extra Income Tax (IT) allowance known as the married couple's allowance, which is given if one spouse was born before 6 April 1935. It is given for the whole of a tax year in which a married couple have lived together. Where maintenance is paid in the circumstances in which one spouse was born before 6 April 1935, IT relief is given by way of a reduction in the tax payable from the year of separation. The reduction is a maximum of 10 per cent of the maintenance paid to a maximum of £3,040.

Income from jointly owned assets is taxable on the person beneficially entitled to it after the date of separation, so the presumption of an equal split of the income will no longer apply.

Capital taxes are also affected by divorce and separation. Most assets transferred post-separation are exempt from a charge to Capital Gains Tax (CGT) under the rule that exempts assets with a useful life not exceeding 50 years. However, post-separation transfers of assets will potentially be taxable after the end of the tax year in which separation takes place or, if a divorce is concluded within the tax year that separation takes place, after the divorce.

The main capital asset of a couple is usually the marital home. Although a couple who are not separated can have only one residence that qualifies for the CGT 'private residence' exemption, after separation each can qualify and, where the marital home is sold, the qualification period for the spouse that moves out of the property is extended for a further 18 months (this was 36 months until April 2014). However, where the property is transferred to the ex-spouse, no taxable gain arises, although if an election has been made for another property to be treated as the private residence, a taxable gain may arise on a transfer back to a former spouse.

Where a property is transferred into trust for children until they reach adulthood, it is normally possible to avoid a CGT charge arising on both the transfer into trust and the transfer from the trustees to the child or children.

Where there are business assets, a transfer can normally be made CGT-exempt through the use of 'gifts hold-over relief'.

Managing the tax issues on separation and divorce is an important issue. Please contact Mauro Vinti on **0121 746 3300** or via email at **m.vinti@sydneymitchell.co.uk** for expert advice on all issues relating to relationship breakdown.

SYDNEY MITCHELL GOLF DAY

We have pleasure in inviting you to our Charity Golf Day to be held at the **Robin Hood Golf Club,** St Bernards Rd, Solihull, West Midlands B92 7DJ on **Thursday 11 September 2014.**

Registration from 11.45 am onwards.

Shotgun start 1 pm.

The Stableford Competition will begin with a Shotgun start at 1 pm. Registration, tea, coffee and bacon sandwiches will be available from 11.45 am aiming to finish at 5 pm. A buffet will be served from 5.30 pm and prizes awarded at 6.30 pm.

PRIZES

1ST PRIZE · 2ND PRIZE · 3RD PRIZE

LONGEST DRIVE · NEAREST PIN · RAFFLE

HOLE IN ONE · £5000 HOLIDAY

You will be able to enter either a team or individually and the cost will be £280 + VAT per team or £70 + VAT per person (please ensure you complete your handicap so that we can match you with appropriate players).

BOOKING

Please complete all of the information requested below, either online at our Eventbrite page http://goo.gl/OWHzD3 where you can also pay by credit/debit card, or send your booking form to Linda Heyworth, Senior Marketing Manager, Sydney Mitchell LLP, Chattock House, 346 Stratford Road, Shirley, Solihull, B90 3DN with your cheque for the appropriate amount made payable to Sydney Mitchell LLP.

TEAM ENTRY

Please complete all team member names and handicaps

Company name	Telephone	Email

First name	Surname	Golf handicap

INDIVIDUAL ENTRY

First name
Surname
Golf Handicap

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