Script

SYDNEY MITCHELL SOLICITORS

Issue 30 • Summer 2012
www.sydneymitchell.co.uk

Changes to employment dispute resolution

The Enterprise and Regulatory Reform Bill has now been laid before Parliament. The Bill is a central element in the Government's plan to achieve strong, sustainable and balanced growth and includes several measures aimed at facilitating workplace dispute resolution and improving the employment tribunal (ET) system.

These include:

- a requirement that prospective claimants contact the Advisory, Conciliation and Arbitration Service (ACAS) to attempt a conciliated settlement before taking their claim to the ET
- the extension of limitation periods to allow for the conciliation process
- the appointment of 'legal officers' to decide certain types of cases, provided all the parties to the proceedings consent in writing
- changes to the composition of the Employment Appeal Tribunal so that cases are heard by a judge sitting alone, unless ordered otherwise
- a power for the Secretary of State to limit the level of compensation awarded in unfair dismissal cases
- a power for the ET to impose financial penalties on employers found to have breached a worker's rights where the breach has one or more 'aggravating features'
- restricting the definition of a 'qualifying disclosure' in whistleblowing cases to those disclosures believed to be made in the public interest
- renaming 'compromise agreements' as 'settlement agreements'.

Says Norman Rea, "Clearly, flesh will be put on the bones of some parts of the Bill as it makes its way through Parliament and when regulations implementing individual provisions are drawn up. Whether or not it fulfils the Government's aim of 'transforming the dispute resolution landscape' is likely to depend on the ability of ACAS to perform its enhanced role.

You can find the Enterprise and Regulatory Reform Bill in full and follow its progress through Parliament at **http://bit.ly/MnzybQ**

For assistance, please contact Norman Rea at **n.rea@sydneymitchell.co.uk** or telephone **0121 746 3300**.

In this issue

Maintenance payments should be based on need

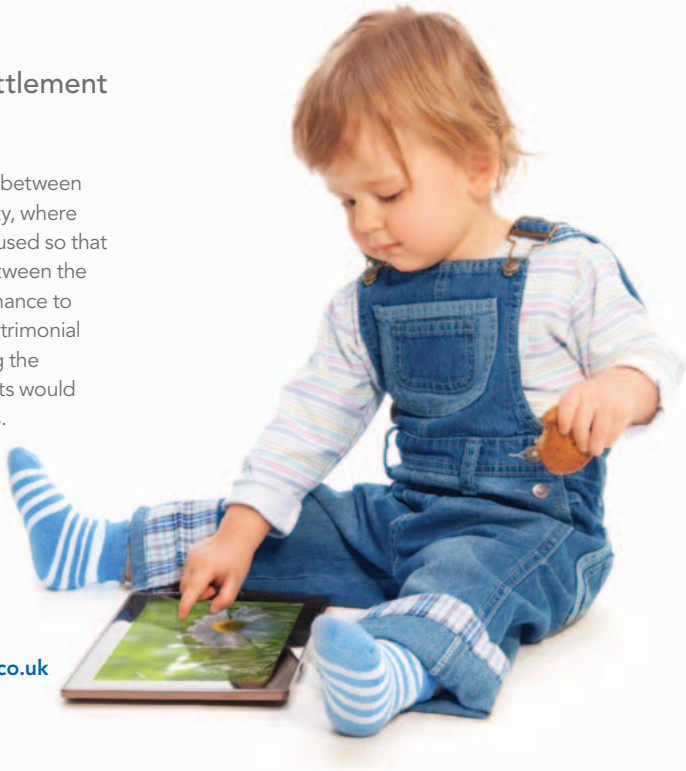
Helpful guidance on the calculation of periodical payments (popularly known as maintenance payments) in a divorce settlement has been provided by a High Court judge in a recent case.

In deciding a contested claim for maintenance, Mr Justice Mostyn expressed the view that the law relating to property acquired during the marriage is 'reasonably clear'. However, the law relating to periodical payments is, by comparison, not so clear. He therefore gave his views on how these should be calculated, in the hope that this will result in more cases being settled out of court.

In the judge's opinion, a claim for periodical payments should be settled by reference to the principle of need alone, although there should be some room for discretion in assessing those needs, which 'are elastic in concept'. His view is that the principle of sharing, which could give rise to additional maintenance over and above need, should not be applicable other than in the most exceptional circumstances.

For the judge, one vital distinction between the division of matrimonial property, where the sharing principle is commonly used so that there is equal division of assets between the couple, and the amount of maintenance to be paid is that by definition the matrimonial property has been acquired during the marriage whilst periodical payments would be met from post-divorce earnings.

It remains to be seen whether the judge's guidance will be followed in future disputes, but any attempt to facilitate resolution of contested cases is to be welcomed. For all Family Law advice, please email Mauro Vinti on **m.vinti@sydneymitchell.co.uk** or telephone **0121 746 3300**.



The swap and the unsophisticated client

Findings by the Financial Services, post PPI, show that the banks have again been mis-selling causing a new wave of litigation.

The position is even more shocking when it has been alleged recently that not only have the banks been mis-selling but that they have been fixing the interest rates between inter-bank lending which then has a direct result on the costs of lending to business and the public generally.

In short, the Banks have been mis-selling products and then, it appears, manipulating the interest rates to their advantage.

Contrition has hit the bank and the Banks have accepted that there were wide ranging shortcomings in the sale of swaps and that in appropriate circumstances they will compensate but only those who were "unsophisticated" clients.

The big question will be who was an "unsophisticated client". The one thing for certain is that the banks will construe the term as narrowly as possible.

Swaps

In 2006 to 2008 Banks often made it a requirement of borrowing that the borrower enter into an Interest Swap Derivative Agreement.

The principle of the Agreement was that interest rates would be swapped to mitigate any rise in interest rates payable on the loan agreement within certain parameters.

Often the agreements were extremely complicated, technical and provided for extensive breakage costs in the event that the borrower wished to exit the Swap.

It would not be unusual for breakage costs to be in the tens of thousands, if not hundreds of thousands of pounds, if indeed there was a break clause at all.

Richard Cooper an Associate at Sydney Mitchell, said

"We are acting for a number of clients who were mis-sold an Interest Rate Swap often as a condition of lending.

We are finding that in many instances the Bank did not advise our clients of the risks associated with the Swap.

Indeed, in some instances we are finding that the banks misrepresented the nature of the Swap, and may have breached the Financial Services Conduct of Business Services."

Directors of business and individuals who believe that they have been mis-sold an Interest Swap Agreement should seek immediate legal advice. At Sydney Mitchell LLP, Richard Cooper or Kam Majevadia can be contacted on **0121 746 3352** for an informal chat to see whether they are able to help businesses to seek redress from their Bank on a **NO WIN NO FEE** basis.

SYDNEY MITCHELL
SOLICITORS

Reverse takeover agreement upheld in part

Failure of a single term does not necessarily cause the whole agreement to fall down, as a recent High Court judgment shows.

ParOS plc and Worldlink Group plc entered into an outline agreement for a type of merger known as a 'reverse takeover'. This involved ParOS, a company listed on the Alternative Investment Market (AIM), acquiring the entire share capital of Worldlink, an unlisted public company, in exchange for shares in ParOS. The transaction would have given the former owners of Worldlink 99 per cent ownership of ParOS.

The deal would have allowed Worldlink to bypass the lengthy and costly process of applying for a listing on AIM. ParOS had become a 'shell company' on AIM, meaning that it had disposed of its operating business.

Under the terms of the outline agreement, Worldlink would be required to pay ParOS's costs should the deal fall through. However, if Worldlink were to pull out prior to re-registering as a private company (one of the stages required for the transaction), it would pay only a 'break fee' of £12,500 per week from the date of the outline agreement, with a cap of £150,000. There was also an exclusivity period during which Worldlink was not to enter into negotiations with any other party. The terms were later varied by agreement such that instead of ParOS acquiring Worldlink shares, it would acquire the company's assets.

In the event, Worldlink withdrew from the transaction, listing instead on the Frankfurt Stock Exchange. ParOS subsequently issued a claim against Worldlink for some £720,000 in fees and costs, and claimed breach of the exclusivity clause.

The High Court ruled that although there was a breach of the exclusivity clause, this did not cause the failure of the transaction. Nominal damages were awarded for this and for another minor breach by Worldlink.

Nor did the variation in the clause relating to share acquisition bring down the whole agreement. The Court held that the rest of the agreement still applied, including the provisions regarding the payment of the break fee.

Accordingly, the Court awarded ParOS £150,000 for the break fee, £4 in nominal damages, and dismissed the rest of the claim.

"This case shows that the courts interpret agreements according to what they say, rather than what is intended by the parties," says John Irving. "It is also illustrative of the problems that can arise when one term of an agreement is varied without reviewing the whole document. Anyone thinking of revising an agreement already in place should always take legal advice before continuing."

Contact John Irving at j.irving@sydneymitchell.co.uk or telephone **0121 698 2200**.

No damages when contract breach follows allegation

When a sporting goods distributor terminated its distribution/licensing agreement with a manufacturer, the distributor claimed that the termination was because the contract had been repudiated by the manufacturer. The distributor sought damages for the loss of profit for the remaining term of the contract.

It is usual in such cases for the court to assume that when a party to a contract wishes to terminate it, it has the right to do so as long as the termination can be justified at the time the issue is argued. It is not necessary that the reason for termination is made explicit at the time the contract is terminated.

After lengthy legal proceedings, the manufacturer successfully defended itself against the accusation that it had repudiated the contract on the grounds originally claimed. However, some time after the dispute started, the distributor discovered that in 2007 the manufacturer had given a licensing agreement over its trade mark to a Latvian company. This action would justify a claim for repudiation of its contract.

The court ruled that whilst the 2007 breach did justify termination of the contract by the distributor, there could be no claim for damages resulting from it. Roth J said, "The alleged breach... cannot be the cause of the termination and thus of the loss that flowed from the termination."

So, despite the fact that the manufacturer had committed an act that would have justified a claim for repudiation and damages, the distributor was denied damages on the ground that the evidence it presented did not support its original claim.

An appeal seems likely.

Pending clarification of the issues involved, it is important to consider carefully the ground on which any termination of contract is effected as your right to damages may depend on it.

Contact Peter Adkins for advice on any contractual dispute. Please email **p.adkins@sydneymitchell.co.uk** or telephone **0121 698 2200**.

Acceptance of risk stymies injury claim

A pregnant woman who was injured when the horse she was riding veered through a hedge and threw her onto the road has lost her claim for damages for her injuries.

The woman was an experienced rider, but was riding the horse using a bitless bridle. This was used because the horse had a sore mouth. The woman had not used one before so had undergone a trial in an enclosure before deciding that she was able to control the horse. She then set off with the owner of the animal, who was riding another horse.

After a while, the woman felt confident enough to ask the horse's owner if she could bring it to a canter, but when she did so, she lost control of the animal and the accident happened.

The Court of Appeal concluded that the caution demonstrated by the initial practice session and the woman's experience of horses showed that she had voluntarily accepted the risk of riding the horse. The owner was not therefore to blame for her accident.

Says Jonathan Simpson, "The law relating to injuries caused by animals is extremely complex and such cases often reach court.

If you allow people contact with animals you own or control, we can advise you of the steps to take to minimise the risk of a successful claim against you if an animal causes an injury."

Please contact us at **pi@sydneymitchell.co.uk** or by telephone **0121 698 2200**.

Advance directive made by eye movements upheld

It is open to anyone to make what is popularly called a 'living will', a document more commonly known as an 'advance directive' or 'advance decision'.

Advance directives can include a direction that life-sustaining medical treatment should be withdrawn in certain circumstances. They are often used to communicate a wish that life-prolonging medical treatment should cease if a person has no hope of recovery from an illness.

In a recent case, an advance directive to refuse life-sustaining treatment was upheld by the Court of Protection in a decision in which the judge emphasised the need for clarity of language in such documents.

The advance directive was made in November last year by a 67-year-old man who was suffering from motor neurone disease. He communicated his wishes by way of eye movements. At that time, he was believed to have the necessary mental capacity to create a directive, but by the time of the Court of Protection hearing in early May 2012 that capacity had been lost.

One of the man's carers raised doubts as to the recording of the decision, which had been carried out using a form downloaded from the Internet. This appeared to have an expiry date of 2 May 2012. An urgent application was made to the Court of Protection, which upheld the validity of the document, thus making it possible for doctors to remove the man's artificial feeding tube. The judge hearing the case emphasised the importance of clarity in such documents and recommended that charities and others providing pro-forma advance directive forms should review them in the light of her comments.

If you wish to appoint another person to make decisions about your medical treatment in the event that you lose the capacity to do so yourself, this may be done by executing a Personal Welfare Lasting Power of Attorney rather than an advance directive. Such a document can give a person of your choosing power to make a range of decisions relating to your personal welfare if you become incapacitated, including where you will live and decisions regarding medical treatment.

If you would like to discuss the options available regarding the arrangements you can make to allow your affairs to be managed for you should you no longer be able to do so, contact Tracy Creed at **t.creed@sydneymitchell.co.uk** or telephone **0121 746 3300**.

Providing trusted legal advice for generations

SYDNEY MITCHELL SOLICITORS

Contact us

Apsley House
35 Waterloo Street
Birmingham
B2 5TJ

Tel: 0121 698 2200
Fax: 0121 200 1513
DX 13054 Birmingham 1

Chattock House
346 Stratford Road
Shirley, Solihull
B90 3DN

Tel: 0121 746 3300
Fax: 0121 745 7650
DX 13856 Shirley 2

Shakespeare Building
2233 Coventry Road
Sheldon, Birmingham
B26 3NL

Tel: 0121 700 1400
Fax: 0121 722 3127
DX 21801 Sheldon

e: enquiries@sydneymitchell.co.uk
www.sydneymitchell.co.uk