

REGULATORY LAW & DISPUTE RESOLUTION

ALL CHANGE FOR BUSINESS TENANCIES

On 1 June 2004, important new changes to the law come into effect concerning business tenancies.

The Landlord and Tenant Act 1954 (the "Act") is being amended to provide new rules and procedures concerning how landlords and tenants to business tenancies can 'contract out' of the Act and what they can now do when a 'protected' tenancy comes to an end.

In very brief summary, here are some of the major changes that will take place:

A new procedure (and new forms) for 'contracting out' of the provisions of the Act must be followed, which will include the removal of the expense under the existing regime of applying to the Court for a 'contracting out' order;

Landlords wishing to serve a section 25 notice to terminate who do not oppose the grant of a new tenancy will now have to set out their terms for a new lease (such as rent, term, etc) in a new-look section 25 notice, thereby necessitating the earlier input of agents where they are used;

When a business tenancy protected by the Act comes to an end, under the new regime not only tenants but also landlords will be able to apply to Court for a decision on whether and upon what terms a new lease should be granted and the parties may agree between themselves to extend the time for doing this;

From 1 June, tenants as well as landlords will be able to apply to Court for an interim rent whilst the new lease negotiations are ongoing. This mechanism has traditionally been the preserve of landlords under the old system, sometimes to the detriment of tenants where open market value rent is falling;

Tenants no longer need to serve counter-notices to section 25 notices, but landlords must still give a counter-notice where a tenant requests a new tenancy.

The new system is intended to be fairer and more cost-effective overall in the majority of cases, although it remains to be seen whether this will be borne out in practice.

For more information on changes to the Act, please see the article on our website at www.rollits.com/n_articles.php.

NEW BANKRUPTCY AND INDIVIDUAL INSOLVENCY REGIME

On 1 April 2004, some important changes came into force in relation to the insolvency legislation applying to individuals. Below is a summary of some of the most important changes, brought about by the Enterprise Act 2002:

To encourage an "enterprise culture", bankrupts will usually be discharged in one year, rather than the three which normally applied under the old regime.

Whilst the new "fast-track" bankruptcy may encourage the enterprise culture, it may also encourage irresponsible personal borrowing. To address this concern the new legislation allows the Official Receiver (the "OR") or the Secretary of State for Trade and Industry to apply to the Court for a Bankruptcy Restriction Order ("BRO") where the circumstances of the bankrupt's insolvency suggest he or she has been irresponsible, reckless or otherwise culpable. A BRO will shackle the irresponsible debtor for between two and fifteen years after discharge, for example by imposing £500 credit limits and/or restricting him/her from involvement in company management. BROs, it is anticipated, could be avoided in circumstances where the debtor offers a Bankruptcy Restriction Undertaking ("BRU") in place of what would be ordered by the Court under a BRO.

The OR or the Trustee in Bankruptcy (the "Trustee") can discharge bankrupts early by serving a 28-day notice upon creditors. Early discharge is subject to creditors' objections, for which there is also a new appeals process. If the bankrupt fails to co-operate, the OR or Trustee can apply to the Court to suspend discharge from bankruptcy. An order made by the Court on such application will extend the normal one-year lifespan of the bankruptcy.

Another notable change is a new three-year time constraint within which the OR or Trustee must realise the bankrupt's equity within his/her home (if applicable) for payment into the bankruptcy and onwards to creditors. This change has been introduced to redress the perceived injustice arising when a debtor went bankrupt having little or no equity in his house, the bankruptcy being "forgotten" but coming back to haunt the bankrupt many years later upon attempts to sell the house.

It remains to be seen whether the Government's notion of encouraging responsible risk-taking by businesses on the one hand, but discouraging irresponsible borrowing by individuals on the other, will succeed. Some commentators have observed that the OR will only pursue BROs/BRUs in cases of extreme irresponsibility and that many cases might therefore slip through the net.

If you would like more information on this topic, or require assistance with any bankruptcy or related matter, please do not hesitate to contact either Ralph Gilbert in our Hull office (01482 323239) or Richard Hugill in York (01904 625790).

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MEDIATION - NEW GUIDELINES FROM THE COURT OF APPEAL

In a landmark decision handed down by the Court of Appeal on 11 May in the case of **Halsey v Milton Keynes NHS Trust** the Court had to consider the effect the refusal of one party to submit to mediation had on that party's ability to recover costs at the conclusion of the case. Mediation is a method of resolving disputes otherwise than through the normal trial process and usually involves reference of the dispute to a third party mediator who assists the parties on a without prejudice basis to reach a mutually satisfactory settlement of their dispute.

In the Halsey case the only ground of appeal was that notwithstanding that the claim was dismissed the Judge was wrong to award the Defendant its costs since it had refused a number of invitations by the Claimant to mediate. Although in this case the Court decided, on the particular facts, that the refusal to mediate was not unreasonable, the Court gave some very helpful guidance as to the general approach that should be adopted in such cases.

It is clear that the Court will now encourage parties to mediate but will not compel them to do so. Where a party refuses to consider mediation in a case where the Court is of the opinion that the dispute is suitable for mediation it is likely that there will be a penalty in costs. Although normally the order at the conclusion of the case will be that costs should follow the event, this general rule may be departed from where one party has unreasonably refused to mediate, although the burden will be on the unsuccessful party to show why there should be a departure from the general rule. In deciding whether a party has unreasonably refused to mediate the Court will have to consider issues such as the nature of the dispute, the merits of the case, whether the costs of mediation would be disproportionately high, whether mediation had a reasonable prospect of success and the extent to which other settlement methods had been attempted.

The Court also made it clear that in its view most cases are suitable for mediation. Cases which would not be suitable for mediation include those which allege fraud, where some immediate injunctive relief is necessary to protect the position of one of the parties or where a binding precedent on a point of law would be useful.

The clear message to come from this case is that whenever parties have a dispute they must consider whether the case could be submitted to mediation. Failure to mediate may well result in a party winning the case but losing out on costs.

At Rollits we are fortunate to have three qualified and accredited Civil Mediators, David Watson, Sheridan Ball and Michael Scanlan and two Family Mediators, Sheridan Ball and Karen Myles.

For further information on mediation please contact David Watson on 01904 625790 or Sheridan Ball on 01482 323239.

PART 64 CPR: BEDDOES TIME FOR TRUSTEES

The consolidation of costs provisions within the CPR, sweeping away the old rules, meant that litigating trustees could no longer automatically expect to be indemnified for their costs out of the trust fund.

Under the new rules, in the face of possible litigation, trustees must consider the very real risk of personal liability for any costs incurred if they actively participate in unsuccessful litigation. In an attempt to soften the impact of the repeal of Order 62, however, the Department for Constitutional Affairs (previously the Lord Chancellor's Department) introduced Part 64 CPR in 2003.

In essence, Part 64 allows a trustee to receive the Court's backing both for a proposed course of action and also for steps already taken during proceedings. Such Court approval comes in the form of directions (known as 'Beddoes Directions' after the case of *Re: Beddoe Down & Cotton* (1893) which first dealt with the jurisdiction of the Court to hear such applications from trustees).

An application is made to the Court under Part 64 CPR, entirely separate from any other proceedings, requesting that directions be given by the Court incorporating the intentions of the trustee. If it is decided that the trustees' proposed actions are justified, directions will be made by the Court incorporating such proposals. Such directions may cover the entirety of the proceedings or may be limited to a specific stage, at which point a further application will be required. In any event, the trustee will be acting in accordance with Court directions and not simply of his own accord, thereby removing the risk of being personally liable for costs in the event of an adverse conclusion to proceedings.

As the application is distinct from the main action, Beddoes Proceedings must be dealt with by an impartial and unconnected Judge with no knowledge of the current state of play in the main litigation. As the Judge will be independent of the main action, evidence in support of the application will have to be filed at Court. Such documentation must include, at the very least, evidence of the value of the trust's assets, witness statements from the trustees giving a detailed explanation of the significance of the proposed litigation or other course of action for the trust and why the court's directions are required and also evidence of the advice of a qualified solicitor as to the prospects of success. If full disclosure of all relevant information is not made, any directions given by the Court will be tainted and the trustee will be at risk of being personally liable for costs.

Such collation of information will undoubtedly mean initial costs are substantial. However, 'front loading' is becoming the norm and should not put off any potential Beddoes Applicant. Should a trustee decide not to utilise Part 64 and engage in litigation without the protection of Beddoes Directions, the risk of personal liability for the costs of that litigation is high. As it is considered that a trustee will be able to recover the costs of the application from the trust fund unless the Court finds it unreasonable for such an application to have been made, it would be a foolish trustee who decides against the protection of Part 64 simply because of a high initial outlay.

INFORMATION

**If you have any queries on any commercial disputes please contact:
George Coyle at Hull on (01482) 323239
David Watson at York on (01904) 625790**

This Bulletin is for the use of clients and will be supplied to others on request.

It is for general guidance only. It provides useful information in a concise form.

Action should not be taken without obtaining specific advice.

We hope you have found this bulletin useful. If, however, you do not wish to receive further mailings from us, please write to Mrs. Pat Coyle, Rollits, Wilberforce Court, High Street, Hull, HU1 1YJ.

**The law is stated as at 1 June 2004
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