

# Blandy's

2009 Issue 1 [www.blandy.co.uk](http://www.blandy.co.uk)

BRIEFING



Welcome to Blandy's Briefing. Last year was a memorable one for the firm as we celebrated 275 years in business. Our Anniversary Garden Party was held at Englefield House, by kind permission of the Benyon family, on one of the few sunny evenings of the summer. We are sure that all those who attended will agree that the setting, overlooking the deer park, was wonderful.

During his speech Richard Griffiths announced that he was stepping down as Senior Partner after 14 years at the helm and handing over to Simon Dimmick. Richard remains at the firm as a partner in the commercial property team and continues to sit as a part time employment judge. On behalf of everyone here we thank him for all he has done during his time as Senior Partner.

Last Summer few could have predicted the scale of the turmoil about to engulf the financial markets. As a firm we have experienced many economic downturns but we enter 2009 at a time of unprecedented economic concern for everyone.

We have always tried to operate the firm efficiently, and with a loyal and diverse client base we feel well placed to weather the stormy conditions ahead. However, we don't take the situation lightly and our aim continues to be to deliver a high quality service at realistic rates to help our clients through these difficult times when belts are being tightened and budgets cut.

Whether clients require business, private client or financial services, we are the only firm in the region who can provide all three. Many clients who start out using our business services also turn to us for legal and financial support away from work, while many of our private clients also come to us with their business needs.

In January many business clients were among those invited to the launch of our new Care Service, designed to look after the legal and financial concerns of those requiring long term care. It was a rare event where more people turned up than had booked and serves as a great example of a service appealing to a broad section of our client base. You can read more about the new service inside.

In this edition we will also be looking at the work of our Dispute Resolution team which provides support for a wide range of commercial and private client disputes and our Probate Tax and Trusts team which specialises in inheritance tax planning and probate matters.

If you would like more information on any of the issues raised, or any other legal needs you may have, please contact us.

*Philip D'Arcy & Nick Burrows - Joint Managing Partners*

## INSIDE

Focus on Dispute Resolution  
Focus on Probate, Tax & Trusts  
Focus on Insolvency &  
Corporate Recovery



**BLANDY & BLANDY**  
solicitors

# Focus on dispute resolution



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## Our Dispute Resolution team

*The team deals with all forms of commercial and private disputes including insolvency and credit management issues. The team's lawyers have experience in both the High Court and County Court as well as in resolving disputes through alternative methods such as arbitration, negotiation and mediation. The team's advice always takes into account the economics involved, the most effective means of obtaining a resolution and the appropriate forum.*



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## Quote:

*"Enjoying "a fine reputation" in the field of dispute resolution, this Reading-based group handles shareholder and partnership disputes, contractual issues, IP disputes and professional negligence matters. The firm acts on behalf of both companies and individuals and also has a significant property litigation team. The group is recommended for its excellent case management."*

**Chambers Guide to the Legal Profession 2009**

## Preventative Credit Management

In today's challenging economic climate good credit management is more important than ever. So how can you reduce the risk of poor credit in your business?

**Ensure you have suitable Terms of Business and provide them to all clients before the contract commences**

### Terms to include:

- Payment terms
- Effect of default
- Retention of title
- Interest on late payments
- Recovery costs
- Exclusion clauses

**Ensure you have set procedures on opening accounts for clients**

### Procedures to consider:

- **Credit Vetting**
  - Credit reference agencies
  - Register of county court judgments/IVAs/Bankruptcy
  - Central index of winding up petitions
  - Companies House – check if accounts up to date
  - Bank/Trade references
  - Consider personal guarantees for new companies
- **Know your customer and obtain accurate details. Are they a ...?**
  - Sole trader
  - Partnership
  - Limited Liability Partnership
  - Private limited company
  - Public limited company
- **Account application procedures**
  - Highlight to clients that references may be sought
  - Incorporate & obtain agreement to your trading terms
  - Set a credit limit
  - Verify that the signatory has authority to contract

### Upon acknowledging orders:

- Ensure that you emphasise payment terms
- Send acknowledgments to a named, responsible person

**Ensure you include the following essentials when invoicing your clients:**

- Payment terms
- Due date
- Delivery date
- Accurate description of content of invoice
- Order number





# Options for funding litigation

The costs of litigation can be substantial and, since they are largely determined by the issues that arise in a case rather than the value of the claim, they can be disproportionate to the value at stake and may not appear to warrant the benefits of a successful claim.

The Government wishes to encourage access to justice and has taken steps to increase the availability of funding for claims. Banks and insurers have responded by offering a number of funding and insurance arrangements.

## **“Before the Event” Insurance**

This can be taken out before a claim has arisen to provide payments for the client’s legal costs if a claim arises in respect of any of the insured risks. For example, claims arising as a result of a breach of directors’ duties, or insurance cover for individuals in respect of a claim against their employer.

These are often sold with other policies and it is not uncommon for clients to be unaware that they have the benefit of the cover.

Typically policies have a limit on the cover provided and will not cover the risk of paying an opponent’s costs if the case fails.

## **Litigation Funding**

This is a loan facility to fund the client’s solicitors’ costs and disbursements and is repayable from any proceeds gained from the litigation. Typically no other security is given. Litigation funding will not cover any liability the client may incur to their opponent in a case.

A variant is an advance to meet an order for security for costs where the Court orders a claimant to provide security for the opponent’s litigation costs. This funding enables the order to be met – whether by the funder paying the money into Court or providing a guarantee that it will be paid.

## **“After the Event” Insurance**

This insures the client against the risk of losing and being liable to pay the opponent’s legal costs. The insurer will assess the client’s case

and quote a one-off premium for cover. If the claim is successful the cost of the premium can be claimed from the opponent. However, the recovery of the premium from the opponent cannot be guaranteed.

## **Tactical benefits of insurance**

As well as providing financial assistance and transfer of risk, funding and insurance offer tactical benefits to clients. For example the fact that they have full funding will demonstrate to an opponent that they will be able to complete the litigation process if necessary. Where after the event insurance has been taken out the opponent will have an incentive to resolve promptly, since early settlement will normally reduce the level of premium payable.

Cover is available for a wide range of legal actions including contract disputes, intellectual property, professional negligence, landlord and tenant, director disputes and insolvency issues and we are happy to make recommendations.

# Resolving professional negligence claims



With professional negligence claims increasing anyone providing or receiving professional advice should consider how best to protect their position in case of a dispute.

The first stage in any claim is for the claimant to write a letter setting out the basis of their claim and their losses. The facts must be consistent with any which may be contained in potential proceedings so it is important to assess the claim in as much detail as possible at this early stage.

Potential defendants receiving complaints and the threat of issue of proceedings should evaluate the strength and genuine value of the complaint to determine whether to make an offer of settlement. Offering early settlement is not viewed as a sign of weakness. Both the professional negligence pre-action protocol and the Court rules of procedure encourage offers to be made at an early stage by both parties.

Below we look at four ways to help resolve disputes swiftly:

**Preservation of evidence** – Each party must list and disclose any relevant documents. These include entries on calendars, emails, files held on computer and paper documents. To gain the full benefit from legal or expert advice on the strength of a claim, and to support your position with evidence, you should think broadly about what constitutes such a document and preserve all of them.

**Finding an expert** – In most cases expert evidence is required. The court may appoint an expert to advise it on the technical aspects of the professional advice given or it may direct the parties to appoint their own. Experts are often appointed many months into a case and can provide an insight that, had it been given earlier, might have led to rapid settlement. It may be useful to involve an expert early on before significant costs are incurred, when settlement is easier.

The quality of expert instructed is important and solicitors specialising in professional negligence claims will have contacts that they can recommend.

**Advice on the strength of the claim** – Having appointed an expert and provided your solicitor with all the relevant evidence you should be able to gauge the strength of any claim you have against your adviser or that a client has against you. The earlier this advice is given the better, provided that the cost of reviewing the evidence is proportionate to the claim. If it is not you should consider whether to settle instead.

**Settlement options** – The number of cases in which one party continues fighting to recover costs incurred is significant. By following our advice you should be able to make an informed decision early on. It will also enable you to put your case robustly in a mediation or other settlement meeting.

Disputes can be particularly stressful. By working with an experienced solicitor you can alleviate some of the strain and put yourself in the best possible position to achieve a good result.

Contact **Emma Banister Dean** or **Jacques Smith**.

## Contested probate

### Limitations on the disposal of your estate

It is said that English law upholds the right of anyone to make whatever Will they see fit. However it also provides a number of remedies for disappointed beneficiaries that can impact on the way an Estate is divided.

### In what circumstances can a successful claim be brought?

There are two types of claim that can be brought. The first asks the court to say that funds or property belong to someone else and should not be dealt with under the Will. An example might involve a property, held in the deceased's name, in which a third party claims a beneficial interest. This depends on

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# Focus on probate, tax & trusts



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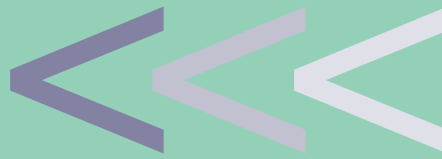
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Our large Probate Tax and Trusts team is consistently rated as one of the top private client teams in the Thames Valley.

The team's core areas of expertise include advising on estate tax planning in conjunction with the preparation of Wills and Trusts; administering estates when someone dies and dealing with elderly client issues such as a Lasting Power of Attorney and Receiverships. They are particularly respected for dealing with complex issues that most other firms do not have the expertise to handle including work with an international dimension, including offshore assets.

#### Quote:

"I really do thank you for all you did. Your motto certainly seems to be: "The difficult we do at once, the impossible may take five minutes."

It is so good to have such a friendly and efficient office at the end of the telephone when you're dealing with unfamiliar matters."

Miss W, Reading

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establishing that there has been an "arrangement" reached between the parties that the property should be shared beneficially. Another is where the deceased made a promise which they should not be entitled to break.

One case involved an elderly childless widow who employed her gardener at a very low wage. Gradually the work increased until he was caring for her full time. He was paid little, but was constantly reassured that "one day all this will be yours". In the event, she had not made a Will leaving him anything. The court decided that, were it not for the promise, he would not have acted as he did and ordered the Estate to pay £200,000 compensation.

The second type of claim allows disappointed beneficiaries to bring a claim where a Will or intestacy fails to make "reasonable provision" for them. Claimants are limited to current or former spouses and civil partners; children of the deceased; anyone who lived with the deceased as husband, wife or civil partner for two years immediately before the death and anyone maintained by the deceased immediately before the death.

In a recent case a husband with an Estate of £1M left his wife the right to live in their home for the rest of her life and an inheritance of £50,000. He left the rest of his Estate, including the house, to their two children. The widow was upset, particularly as she had a fractious relationship with the children. We advised her that she should not be any worse off as a result of her husband's death than if they had divorced and secured her the

property plus a substantially increased lump sum.

In another case a man left his second wife in a similar situation. He tried to ensure that his Estate went to his own children rather than passing, via his new wife, to her children by a previous marriage. However, in doing so, he failed to make reasonable provision for her. We were able to ensure that she was properly provided for.

The right to do as you wish with your Estate is heavily curtailed by this Act which governs those who may be "entitled" to inherit, whatever you may wish. To avoid disputes you should consider anyone who may have a claim on your Estate when you are making your Will.

Contact Philip D'Arcy

# Business succession

During the development of a business it is important to consider the issue of succession, either on retirement or death. A properly structured plan ensures that this can take place smoothly protecting the financial security of the owners of the business and their families. Issues to be considered include:

## Business Structure

In deciding on the most relevant structure for a business, owners should consider each option from a practical and a tax perspective and identify the advantages and disadvantages in relation to their own circumstances.

It is important to ensure that a business is appropriately structured and documentation correctly drafted to reflect the owner's position and ensure that the valuable Inheritance Tax Reliefs which may be available are not jeopardised.

## Succession Planning

This should consider the death of an owner as well as the appropriate "exit" strategy on their retirement since the issues to consider will be different.

A decision will need to be made on whether the business is to pass to family members, the co-owners, or if the business is to be sold. The documentation must accurately reflect this.

On retirement a business owner will not only need to ensure that they have built up a sufficient retirement fund but, if the business is to pass to non-family members, it is essential that there are also sufficient funds for the co-owners of the business to purchase it.

## Wills

It is vital to have appropriately drafted Wills in place to ensure the smooth succession of a business on a proprietor's death. In particular it should contain the necessary powers for the Executors to continue running the business during the administration period.

Valuable Inheritance Tax reliefs may be available in relation to the owner's business interest on death and a correctly drafted Will can ensure that these are optimised.

A Will can be structured to incorporate a trust of the business assets which will enable long term tax planning and a possible "double use" of the inheritance tax reliefs available.

## Insurance Arrangements

Appropriate insurance can be an efficient way to make sure funds are available to cover the smooth succession of a business following the death of a proprietor, or its protection in the event of the death of a vital member of staff. It is important to check that the arrangements are in place for the benefit of the correct beneficiaries and are written in Trust where appropriate.

## Pensions

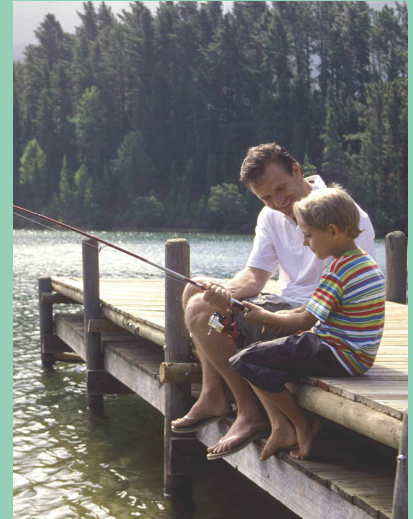
Business owners should consider suitable pension arrangements to support their "exit" strategy on retirement.

A retirement fund provides security if their business does not perform as expected and gives flexibility on whether and when to sell the business. It can also allow the business to be passed to the next generation by replacing the income lost as a result.

## Inheritance tax planning opportunity for unmarried couples

The Finance Act 2006 introduced substantial changes to the Inheritance Tax (IHT) position of Trusts created during an individual's lifetime and on their deaths. Although many of these changes have proved to be restrictive some of them have produced unexpected advantages. One such example is a possible IHT saving for unmarried couples, on the death of the survivor, if their Wills are structured appropriately.

The IHT position of an unmarried couple is very different to that of a married couple. In particular, spouse exemption for IHT purposes is not available. There is however, an IHT saving opportunity in respect of unmarried couple's estates provided that the appropriate Trust is incorporated in their Wills. It should be noted that such a structure will not produce an IHT advantage on the first death but could avoid an IHT charge on the death of the survivor.



## Changes to inheritance tax

In 2008 legislation was introduced for transferring Nil Rate Bands between married couples and civil partners.

- This must be claimed by the executors of the second Estate within 2 years from the end of the month in which the death occurred.
- Documentary evidence is required, usually copies of the Marriage/Civil Partnership Certificate for the couple, Death Certificate of the first person, Will and Deed of Variation (if any) for the first person and Grant of Probate in the first Estate.
- The percentage of the first Nil Rate Band which is not used is applied to the second person's own Nil Rate Band, giving a proportionate increase.
- If you are seeking to rely on this for your Inheritance Tax planning, accurate records will need to be kept when dealing with the first Estate.
- If you already have 'tax planning' Wills with Discretionary Trusts, we advise that you keep these. They provide great flexibility, particularly where there are second marriages. They could save additional Inheritance tax for business owners and can be used to protect your children's inheritance from future long-term care fees. Finally, they can be reversed after your death if no longer appropriate.

The Nil Rate Band for the 2008/09 tax year is £312,000

# Wills - are you and your family protected?

Early on in the year is traditionally a time to sit back, take stock of your situation and plan ahead for the future.

For everyone with a family, spouse or partner it is important to make sure you have a properly prepared and up to date Will and have completed a Power of Attorney.

Without these documents you run a very real risk of leaving those who depend on you in great financial and emotional difficulty if something were to happen to you, yet it still amazes us how many people we encounter (many with young families) who have neither.

If you were to die without a valid Will your spouse would not automatically receive the whole of the estate. If your children or parents are still alive your spouse will only receive part of it, with the remainder going to your children or even, in certain situations, your parents.

If you were to lose mental capacity without having first appointed an attorney, somebody would need to apply to the Court of Protection to be appointed to act for you. This is a costly and lengthy process which, in our experience, can easily take over six months to complete. In the meantime no one would be able to access



your finances or make important decisions on your behalf.

Situations like these can have unfortunate consequences for everyone and cause serious financial problems and family disputes.

We all live busy lives and in the current climate we are more careful than ever with our finances, however these should not be excuses for inaction. Making or reviewing a Will and

drawing up a Power of Attorney need not be expensive or time consuming, but they can make a difference and will give you and your family peace of mind from knowing your affairs are all in order.

If you take just one thing away from reading this newsletter, let it be a commitment to take action now. **Call us on 0118 951 6800.**

## Help for those facing long term care

For many of our older clients, one of their greatest concerns is meeting the cost of care in later life, should it become necessary. Given that we have an ageing population and the perhaps inevitable restriction on State provision, it is not surprising that they have such concerns.

Therefore we are pleased to announce the launch of Blandy's Care Service - a comprehensive service designed to help manage all of our clients' financial and legal needs if they require long term care including: Wills; Powers of Attorney and Court of Protection matters; Advice on eligibility for State funding for care; Trust, Tax & Estate planning; Advice on meeting the cost of care; Investment advice; Liaising with the care provider; Selling a property; regular reviews and ongoing advice.

### How our service works

Following an initial meeting, which is without cost or commitment, clients are allocated an experienced member of our team who will coordinate all relevant aspects of the advice on their affairs and liaise regularly with all the members of our team, the care provider and, most importantly, our client and their family, to ensure their needs are met both at the outset and in the future.

We will prepare a report and, when we have an agreed way forward, can implement our recommendations, including completing any forms and handling all other relevant procedures, to remove the burden, as much as possible, from our clients and their families. Thereafter, as part of our ongoing service, we meet at least annually with our clients and their

family to ensure their needs are still being met.

We are experienced in looking after the needs of elderly clients and have the expertise and experience to advise on this complex and sensitive subject, including solicitors who are members of Solicitors for the Elderly and financial advisers who are CF8 qualified.

To find out more about Blandy's Care Service, or to arrange an initial meeting, please telephone Graham Phillips on 0118 951 6934, or email [graham.phillips@blandy.co.uk](mailto:graham.phillips@blandy.co.uk)



# Insolvency & corporate recovery

*Our Insolvency and Business Recovery team is experienced in dealing with recovery and turnaround situations as well as formal insolvency procedures. We can provide constructive business solutions for licensed insolvency practitioners, commercial lenders, professional advisers, credit providers, company directors and partnerships, as well as clients in financial difficulty, responding quickly and effectively to all your needs.*

Contact Debbie Brett or David Few on 0118 951 6800

## Greater transparency for creditors in pre-packaged administrations

On 1 January 2009 new guidelines came into force for administrators involved in pre-packaged sales - that is where a sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator, and the sale takes place on or shortly after his appointment. By the very nature of a pre-pack sale the unsecured creditors of a company are not given the opportunity to consider the sale before it takes place, and risk being paid nothing as a result of the sale. There is a perception that the process therefore disadvantages unsecured creditors.

The guidelines state that administrators should disclose certain information to creditors including any valuations of the business which have been obtained, any alternative courses of action that were considered, the price paid and the name of the buyer. The provision of this information is designed to ensure that creditors receive a detailed explanation and justification of why the pre-pack sale was undertaken. It will certainly do no harm to ensure that all those involved in pre-pack sales have their minds focused in each case on the circumstances that

warrant the sale by an administrator without the prior approval of creditors. If the administrator keeps a detailed record of the reasoning behind the decision to undertake a pre-pack sale it will assist him should any disgruntled creditor challenge his conduct.

## A warning for Landlords

From a Landlord's perspective, when a tenant company goes into Administration, things can look bleak. Legal proceedings to protect the Landlord's position cannot be commenced or continued without the Court's permission or the Administrator's consent.

A recent Court of Appeal case has further restricted Landlords' rights in respect of their leases. In that case, the Administrator had granted a licence to the purchaser in a pre-pack sale, in breach of the terms of the existing lease. The Landlord asked the Court for permission to terminate the licence.

The Court has a duty to balance the interests of the Landlord with the interests of the other creditors. It held that the Landlord stood to lose very little as the purchaser was paying a monthly rent (which was more than the Landlord would have received from the insolvent tenant), whereas, if the purchaser was prevented from trading from the premises it would not be able to collect in the book debts for the benefit of the other creditors. Consequently, despite the breach of the lease, the Court refused to grant the Landlord permission to bring proceedings to terminate the licence.

This case is a warning to Landlords that their rights under a lease may be severely restricted if the other creditors' interests outweigh theirs. It illustrates the importance of Landlords taking legal advice early in cases of tenant insolvency to maximise their prospects of recovering the property or securing ongoing rent.

## Our services include:

Charities  
Cohabitation  
Commercial  
Commercial Property  
Corporate  
Dispute Resolution  
Education  
Employment  
Environmental  
Family & Divorce  
Financial Services  
Insolvency & Business Recovery  
Intellectual Property  
Licensing  
Long Term Care  
Planning  
Probate Tax & Trusts  
Residential Property  
Wills & Inheritance Tax Planning

Details of our services and profiles of our solicitors are available on our website [www.blandy.co.uk](http://www.blandy.co.uk) or telephone us on 0118 951 6800

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