

Allan Janes

solicitors



LEGAL REVIEW

Your quarterly bulletin on legal news & views from Allan Janes Solicitors

www.allanjan.es.com

Allan Janes LLP

recently acted for clients The Landmark Trust in their acquisition of Llwyn Celyn. Llwyn Celyn is a rare survival



of a remarkably complete, Grade I listed, high status late 15th century farmstead, located in the Llanthony Valley in the Brecon Beacon's National Park.

Llwyn Celyn is considered to be of outstanding importance, not just to Welsh and British Heritage, but also internationally, and a textbook example of the development of the Welsh Manor House, representing all key developments in British domestic architecture between the 15th and 18th centuries.

As will be seen from this recent photograph, the property is in a state of dire need after years of neglect and is regarded

by the Welsh Government historic environment service - CADW as 'The most important at risk occupied historic house in Wales'.

Peter Collier, Partner and Head of our Commercial and Property Department, says "This case presented a number of legal complexities and took some 3 years to bring to a successful conclusion. Our client, as a national charity with expertise in such matters, was asked to intervene to find a means to acquire and rescue the property for the national benefit, as the previous farming owners had been unable to repair the house. The purchase was conditional upon planning being granted for the existing farmstead to be moved to a replacement farmhouse and buildings to be built on neighbouring land retained by the sellers, who will also continue to farm the land acquired by our client.

In view of the sensitive nature of the location, the local consent was referred to the Welsh Assembly for confirmation. The purchase was funded by grants from both CADW and the National Heritage Memorial Fund."

Donations to the Landmark Trust can be made online at www.landmarktrust.org.uk, or by calling 01628 825920.

Strong year for M&A activity

2012 has seen a surprising amount of activity for Allan Janes' Corporate Department, despite an

unfavourable economic backdrop.

The firm has advised on a number of management buy-outs and disposals in the automotive, IT and healthcare sectors during 2012 and further potential deals are in the pipeline for 2013.

Allan Janes Corporate Partner, Iwan Emanuel, reports "Like many other market sectors, M&A

activity has been pretty subdued recently, due to fears of Eurozone Armageddon and banks' limited appetite for lending, but there are deals to be done, and we have been fortunate to have advised on a number of complex transactions in the past year, with substantial deal values.

Whilst traditional bank funding for deals is still scarce, asset-backed funding is readily available, and a number of venture capital houses are actively looking for investments.

Vendors will have to be realistic about valuations, and some form of loan note or deferred consideration is often required to get the deal through, but there remain opportunities for sensibly-priced businesses to be bought and sold."

Allan Janes will be running seminars in 2013 on the processes and pitfalls of selling a business, and anyone contemplating buying or selling a business, or preparing their business for sale, is welcome to contact Iwan at: iwan.emanuel@allanjan.es.com.

ALLAN JANES SOLICITORS

21-23 Easton Street
High Wycombe
Buckinghamshire
HP11 1NT

Tel: (01494) 521301
Fax: (01494) 442315
Email: enquiries@allanjan.es.com

'Passing off' tests

When another firm uses a trading style that you think is a copy of yours, you might consider that an action for 'passing off' is appropriate.



Passing off occurs when a business represents itself in a way that causes buyers to confuse it with another business and therefore damages that other business.

Claims are usually in respect of lost profits on sales.

A recent case, in which a skincare manufacturer failed in its action for passing off against a very small business that manufactured nail care products, shows the sort of considerations the court will take into account when making its judgment.

The following factors were considered relevant:

- The small size of the defendant firm's customer base and the limits on its reputation and goodwill, evidenced by the fact that most of its customers dealt with the directors personally;
- The lack of evidence that the publicity in the press received by the defendant had had an impact on the claimant's business;
- The fact that the two companies operate in different areas of the beauty industry;
- The lack of evidence that the defendant's mark would confuse members of the buying public generally;
- The absence of 'side-by-side' display of the two companies' products, which might increase the probability of confusion; and
- The existence of evidence that customers understood that the two businesses were unconnected.

In order to be successful in an action for passing off, it is necessary to show that confusion in the mind of a buyer is a likely outcome. It is also necessary in any action for damages to be able to quantify the resulting loss. In this case, as in many similar instances, a better solution could probably have been achieved by negotiation.

Unreasonable delay breaks contract

In troubled times, a purchase 'off plan' can be risky, as a recent case that arose after a contractor went into administration illustrates.

In 2007, a developer contracted with a number of people to sell flats that it was building in Birmingham. The flats were due to be completed by the end of April 2009. The prospective buyers paid deposits in the usual way. However, in 2008 the contractor retained by the developer went into administration and work on the development ceased.

Work recommenced later, but the necessary ground works and other enabling works were not completed until April 2010, by which time the prospective purchasers had already notified the developer of their intention to withdraw from their purchases. The development was eventually finished in April 2011.

The developer refused to refund the deposits and served notices to complete their purchases on the putative buyers.

The matter reached court, where the decision turned on whether or not the prospective purchasers were entitled to treat their contracts as having been repudiated by the developer, allowing them to reclaim their deposits.

The claim that the contracts were repudiated was based on the implied term that the flats would be ready for

occupation within a reasonable time and the express term in the contracts requiring the developer to use 'all due diligence' to arrange the completion of the flats.



The court decided that the time taken to complete the work was not reasonable. The failure to progress was the fault of the developer, which had procrastinated over recommencing the work when the original contractor went into administration. This was a breach of the requirement to use all due diligence to complete the project.

For most contracts, time is not 'of the essence' unless specifically stated to be so. However, this does not mean that an unreasonable delay in completion of a contract will not be regarded as breaching it.

Contact us for advice on the law relating to building and development.

Guidance for employers on maternity rights and redundancy

The Advisory, Conciliation and Arbitration Service (ACAS), in partnership with the Equality and Human Rights Commission, has published new guidance to help employers understand the rights of women who are pregnant or on maternity leave when workplace redundancies are necessary.

The need for better understanding of this area of employment law is illustrated by the fact that the ACAS helpline receives more than 15,000 calls a year on the subject and that there were 1,900 claims lodged at the Employment Tribunal in 2011/2012 that related to unfair dismissal or detriment related to pregnancy or maternity leave.

The guidance contains a useful check list for managing the process fairly and sets out the law that applies if you are reorganising and/or need to make employees redundant and this includes someone who is pregnant or on maternity leave. It gives advice, including examples and useful dos and don'ts, on how to manage the situation correctly, including:

- checking that the redundancy is genuine and necessary;
- ensuring you consult and keep in touch;
- establishing non-discriminatory selection criteria; and
- considering alternative work.

If you are contemplating making redundancies and would like individual advice on managing the process, we can help you.

Private residence election requires factual basis

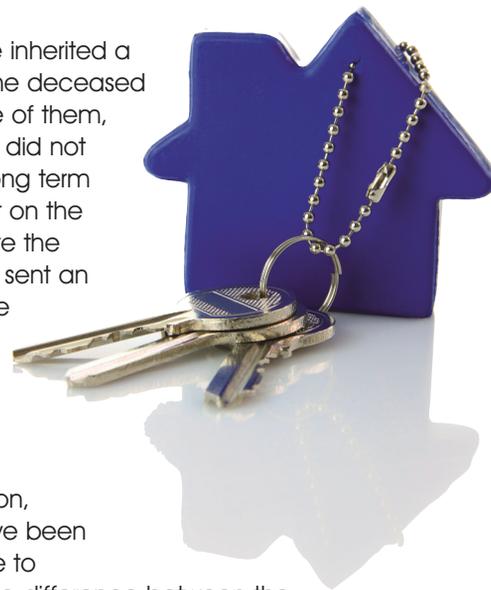
When a couple inherited a house from the deceased parent of one of them, they decided that they did not wish to retain it in the long term and subsequently put it on the market. The week before the property was sold, they sent an election to HM Revenue and Customs (HMRC) to have it treated as their principal private residence.

The effect of the election, if successful, would have been to eliminate the charge to Capital Gains Tax on the difference between the net sale proceeds of the house and its value when it was inherited.

However, HMRC rejected the election. The prime reason for doing so was that the couple had not assembled reasonable evidence to substantiate their claim that the property had been their residence.

It was established that, as a matter of fact, they had never moved into the property. Nor could they demonstrate any periods of residence in the house, which was only six miles away from their own home.

The moral of the story is that where a principal private residence election is to be made, evidence should be assembled to support it and establish that there is a factual basis (demonstrated occupation as a residence) for the claim.



Agreement set aside when only one side meets obligations



When two young men who were friends and sometime business associates decided to buy a flat together in 1997, they arranged it so that the property was registered in

the name of the one who had paid the larger share of the deposit. He took out a mortgage and the arrangement was that his friend would carry a somewhat larger share of the incidental costs, so they expressly agreed that they would own the property in equal shares. The second man did not, however, make a greater contribution towards the running costs and, indeed, over time he paid less than his friend.

The two men fell out in 2008. When the property came to be sold, they had different views as to how the proceeds should be split. The question for the Court was in what proportions was the flat (now worth considerably more than the £188,000 purchase price) owned?

When the lower court found that the agreement between the two men that the flat should be owned equally overrode the evidence that their contributions to the costs of ownership were far from equal, an appeal was almost inevitable.

In the Court of Appeal, Lady Justice Arden concluded, "In my judgment, the agreement did not apply in the events which unfolded. It only covered the case where there was a slight imbalance in contributions."

In the Court's view, the 50:50 agreement was predicated on the second man paying a greater share of the ongoing expenses and was no longer valid when this did not occur. The agreement had to be considered as a whole, and whereas one of the men had met his obligations under it, the other had not. It could not therefore be considered to be enforceable. The Court ruled that a 75:25 split was appropriate.

If you are buying a property with someone else, it is wise to get your rights and obligations agreed in advance in a proper manner. Contact us for advice.

Assignment of lease alone not a TUPE transfer



The Employment Appeal Tribunal (EAT) has ruled (*Lom Management Ltd. v Sweeney*) that although the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) may apply when the lease of a commercial property has been assigned, this will only be the case if, on the facts, a business has also been transferred which is intrinsically linked to the property and satisfies the definition of 'economic entity' within the meaning of TUPE Regulation 3(2) – i.e. 'an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'.

Joanne Sweeney's father was the tenant of MacConnell's Bar in Glasgow, which was owned by a brewery. Miss Sweeney was a student who also worked part-time for her parents as a duty manager. In December 2010, the lease of the premises was assigned, with the consent of the landlord, to Lom

Management Ltd. Miss Sweeney was away on holiday when this occurred. On her return, she found that she no longer had a job at the pub.

Miss Sweeney brought a claim for unfair dismissal on the ground that she had been dismissed by reason of a business transfer to which TUPE applied. The Employment Tribunal (ET) found that it was a 'classic transfer of undertakings situation' and upheld her claim.

Lom Management Ltd. appealed against the ET's decision on the ground that the burden of proof that TUPE applies is on the claimant and Miss Sweeney had not provided any evidence in support of her claim. The EAT agreed. The fact that a lease is assigned from one person to another does not, of itself, show that TUPE applies. The ET had erred in law because it had failed to ask whether an economic entity existed prior to the assignment of the lease and whether or not that economic entity had transferred in whole or in part to the new tenant. Miss Sweeney had failed to discharge the burden of proof that TUPE applied in her case and the appeal was therefore upheld.

When a business or a part of a business changes hands, employment issues can become complex and it is important to take advice early on to avoid the pitfalls. We can guide you through the process in order to ensure compliance with the applicable employment law.

When a charitable gift backfires

Making a bequest to a charity is relatively common. However, sometimes this can backfire spectacularly, as happened in the case of a Cheshire man who bequeathed a property to the RSPCA in his will and included the wish that it should be preserved as a sanctuary for animals.

The property was a haven for wild animals of all sorts and it was his stated wish that it be kept as a safe place for them. Instead of acceding to the man's wish, the RSPCA sold the land for

development. It had the right to do so because his wish as expressed did not bind the charity to take any particular course of action with regard to the land.

If you are intending to make a gift in your will and want to make sure that your wishes with regard to it are binding on the recipient, the will must be worded appropriately. Merely expressing a wish that a gift is put to a particular use will not necessarily suffice. If you want to ensure your

estate is passed on as you wish it to be, it is essential to have the appropriate documentation in place.

We can advise you on your individual circumstances.



Allan Janes

solicitors

21-23 Easton Street, High Wycombe,
Buckinghamshire, HP11 1NT

Tel: (01494) 521301 Fax: (01494) 442315

Email: enquiries@allanjan.es.com

www.allanjan.es.com

