



Welcome to the November/December edition of Poole Alcock Insight

This issue contains articles on:



Company News - Poole Alcock awarded as top conveyancer



Employment - Menopause in the workplace



Conveyancing - Reminder to stay alert to property fraud



Litigation - Unwanted Christmas gifts and your rights to cancel the contract



Wills and Probate - What happens to my 'digital assets' when I die?



Family - Bank of Mum and Dad – Financial support from third parties and divorce

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POOLE ALCOCK AWARDED AS TOP CONVEYANCER FOR CUSTOMER SERVICE IN THE UK

We are hugely proud to have taken home awards in five categories from the national ESTAS awards which were held in October – including Gold for the West Midlands Region, and Bronze for the national award of Best Regional Group.

The ESTAS Customer Service Awards are the most prestigious awards in the property industry calendar and are based solely on verified customer reviews. The awards recognise the customer service of conveyancers, agents and brokers based on ratings from clients who have been through the whole moving experience. This year’s results were calculated from over 200,000 customer review ratings.

We Won:

- Best in County – Cheshire
- Best in County – Staffordshire
- Gold Winner – West Midlands Region
- Bronze Winner – North West
- Bronze Winner – Best Regional Group





TV property expert Phil Spencer, who has hosted The ESTAS every year since their inception in 2003 addressed the live audience:

"You've had to work incredibly hard, you've had to adapt your businesses, you've had to absorb considerable costs to follow the protocols and to enable things to happen safely. Quite simply delivering great service has never been more challenging so The ESTAS Awards for 2021 are the most well deserved ever in their entire 18-year history!"

Conveyancers were recognised in counties and regions around the UK.

Simon Brown Founder of The ESTAS said:

"When we started we wanted to create a set of property awards which were completely pure, where winners were selected solely on customer service ratings from actual transactions. Eighteen years on ESTAS is now the customer review platform of choice for property professionals and the most prestigious award an agent, a conveyancer or mortgage broker can win in the property industry."

At Poole Alcock we take our levels of customer service very seriously because we know clients have a choice. We have always been very proud of our personal service. The awards are a reflection of Poole Alcock's 'Committed to Excellence' pledge, through which we put into practice our core values. This has resulted in independent feedback showing that over 90% of our clients would recommend us.

OUR 'COMMITTED TO EXCELLENCE' PROMISE TO YOU:

We promise to you, our client, that:

1. We will always rigorously assess what you need when we first speak to you about your case. We will look at the wider picture and cater for any individual requirements you may have.
2. We will explain, without unnecessary jargon, your options, our advice, timescales and what is likely to happen in your case.
3. We will be transparent on costs; there will be no surprises.
4. We will always treat you with respect and courtesy. We will call you when promised and will not keep you waiting if you come to see us.
5. Where possible, we will speak with you instead of sending lengthy emails or letters to you.
6. There will be no delays in your case caused by us.
7. Any concerns or complaints will be taken seriously and acted upon promptly.
8. We will ask you, as your case progresses, how we are doing.

If you value excellent customer service, we would be delighted to act on your behalf.

Please call us on 0800 389 7093

REMINDER TO STAY ALERT TO PROPERTY FRAUD



WRITTEN BY

CHERRY RIDDLES DIN,
PARTNER - HEAD OF RESIDENTIAL
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Cherry Riddlesdin is a Partner and the Head of the [Residential Conveyancing Department](#) at Poole Alcock. Cherry originally joined Poole Alcock in 2005 and qualified in 2007. After spending some time with another prominent law firm, she returned to Poole Alcock in 2014. She is focused on achieving each client's objective, and has a practical, proactive approach.

IF YOU ARE PLANNING A MOVE, OR A
REMORTGAGE, PLEASE GET IN TOUCH
WITH CHERRY

She and her team would be delighted to help you.

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The huge amounts of money involved in property transactions make them a prime target for fraudsters, especially when home movers are often at their most stressed and overwhelmed, and therefore vulnerable.

At Poole Alcock we are constantly talking with our clients and reminding them at different stages of the process to be vigilant throughout the transaction, and we have a number of processes in place to prevent fraudsters being successful. However, it is worth noting a couple of recent incidents that have been reported in the media over the past few weeks, highlighting how easy it could be to get caught out.

In the first instance, a home buyer was tricked into sending £640,000 to the criminal's bank account, when they believed they were sending it to their solicitor to complete their purchase. This scam works when the criminal intercepts genuine emails between the buyer and solicitor, and inserts their own bank details. These emails can be particularly hard to spot because the criminals may have been monitoring previous emails, collecting all the information relating to the house purchase so that their email gives every impression of being genuine. Additionally, the criminals will have set up a spoof email

address which will look incredibly similar to the genuine email address to avoid arousing any suspicion.

At Poole Alcock:

- We will never give our full bank details out by email.
- We will post a letter to you at the start of your transaction including all our bank details, bar the last four digits of the account number. These last four digits will then be texted to you when we require you to send any money.
- We encourage you to call us before you make a bank transfer – using the telephone number you have always previously called us on – to verbally check the details you have been given. Only then should you make the payment.

The second episode was a different scam, where the owner – Reverend Mike Hall – had been away from his property for some time. When he returned, the key would not work in the lock and he discovered a new family had moved in. That family had bought the property in good faith but the fraudsters had impersonated Rev. Hall, selling the empty house and making away with all the proceeds of sale.

Properties that are empty, or without any mortgage registered against them, or where the owner doesn't live at the property (such as a rental property) are particularly susceptible to this type of scam.

When we are instructed on any matter, we go through a number of sophisticated checks to ensure that we are confident that the person who is instructing us is who they say we are – to avoid situations such as this. Our ID checks are carried out using facial recognition technology to ensure that the person presenting the ID is the same person as shown in the ID photograph, the data from the

ID document is verified against the data recorded by the individual authorities, and the technology also checks the documents for any signs of tampering, or other signs that the documents may be fake.

To protect yourself from this scenario, aside from co-operating with any identification checks that your conveyancer is asking you to complete, there are two quick and free ways to protect yourself:

- The Land Registry record your contact address against the legal title of your property, and you can have up to three addresses registered including an email address. It is important that you make sure that this is always kept up to date – if the Land Registry or anyone attempting to 'deal' with your property needs to contact you, they will use the address on the Register, so it is important that the address(es) recorded here are up to date.
- Secondly, the Land Registry offer a free 'property alert' service, which will also notify you if anyone submits any application to the Land Registry for your property. It takes minutes to set up, but could have helped to prevent the above scenario. In Rev. Hall's case, the buyer's solicitor should usually carry out a final search of the Land Registry's register up to a week before completion. If Rev Hall had signed up to the Property Alert service, he would have received emailed notification that something was happening with his property and may have been able to step in before the sale completed and stopped it going through.

To set up your own alert, visit

<https://propertyalert.landregistry.gov.uk/>

As ever, if you have any concerns or questions about how to protect your money and your property, speak with your conveyancer today.

RECENT TESTIMONIALS:

"We just would like to once again thank you for all your help in the selling of our previous property and the purchase of our new-build home. Your service was excellent from start to finish and we could have not done it without you."

Mody and Michael Acebedo

"Nicola and her team provided excellent service and they overcame numerous obstacles to get our purchase through. Cannot thank them enough."

James and Susan Blakeman

"James and the team were amazing and extremely supportive throughout the process. As first-time buyers, they made our life a lot easier and I would highly recommend choosing Poole Alcock as your solicitor."

Megan Shepherd

"James' team were amazing and extremely supportive, the process was quick and efficient. I cannot thank them enough."

Ms Stockton

"Tania and her team have been brilliant! Chloe was always happy to answer any questions or queries I had and together they made the entire process as stress free as possible! Would highly recommend."

SB

"Tanya and her team [were] always there at the end of the phone, right up until completion"

Anonymous

"The service was superb, in particular the communication. Every week we received information and updates and our purchase was managed very efficiently which resulted in us moving house within 8 weeks. Exceptional service."

Gillian Fox



WHAT HAPPENS TO MY 'DIGITAL ASSETS' WHEN I DIE?



WRITTEN BY

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Verity helps clients with drafting Wills, preparing Lasting Powers of Attorney, applications to the Court of Protection and the Administration of Estates (also known as Probate). She consistently gets fantastic feedback from clients for her level of knowledge and high standard of service, couple with a sympathetic approach.

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When making a Will, we all think of the obvious when we think of our 'assets'. Our house, our money, our car, our jewellery, stocks and shares, etc.

But not all of us would automatically think about our 'digital assets', and what would happen to these when we die.

With so many more elements of our life moving online in one way or another, it is important to consider how our internet presence may be affected by our passing.

What are digital assets?

There is no single definition in law as to what a 'digital asset' is. But in summary, it's anything 'non-tangible' that holds some sort of value to you.

Examples might be:

- Social media – Facebook or Twitter accounts.
- Cloud stored files – photos, documents, music etc.
- Crypto currency – the big one currently being 'Bitcoin'.

Some of these may have a financial value (cryptocurrency, intellectual property etc.), others it might be sentimental value. Either way, if you want to decide who has control over these when you're no longer around, they should be considered as part of making a Will.

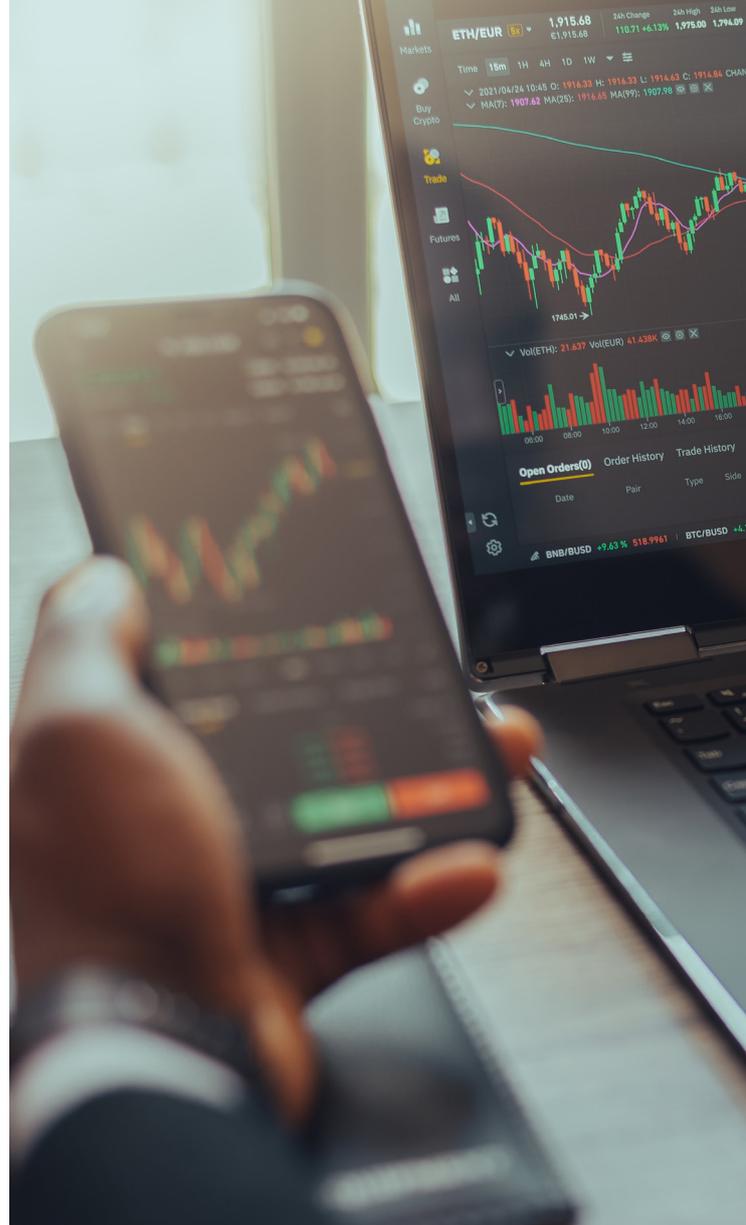
Possible problems

Probably the most common issue that comes up is with access. How to log into computers or accounts without access to passwords. Cryptocurrencies can have particularly complex means of access which, unless you're 'in the know', can be very challenging.

Further, a lot of our digital presence is not something we ever actually have much control over. How many of us have skipped to the end of the 'terms and conditions' and selected 'agree' without reading through the fine print?

A lot of social media sites where we upload data ask you to agree that they will own your files (e.g., photos, videos, etc.) once they are uploaded.

Similarly, library services where you can store music, books, etc. (such as Kindle or iTunes) only provide you with a 'licence' to use those files – you never actually own



them. In many cases this 'licence' ends when you die – so you might not be able to share your favourite music collection with loved ones after your passing.

Also, there is a lot of uncertainty about legal property rights when it comes to digital assets – there is a lot of conflicting information from the technology providers as to what a loved one does when one of their users dies.

Things you can do to help

As I write this, the Law Commission of England and Wales is reviewing the rules and regulations when it comes to digital assets. But in the meantime, you can take certain steps to make life a little easier for your loved ones after your death.

- **Prepare a 'Digital Inventory'**

This is effectively a simple list of all digital accounts that your family may need access to. It might be that you have several thousand pounds of Cryptocurrency that your family know nothing about, or they might not know where (i.e. the device or online cloud platform) you store your treasured family photos.

Keeping a list of where things are is useful for all sorts of assets – a list of who you bank with, insure with, and what utility providers you use, can be an incredibly helpful tool for your family if you were to pass away. This can be doubly useful if you use it to point them in the direction of your digital assets.

- **Provide (secure) access information**

Whilst I would never recommend telling anyone your passwords (definitely keep them secret!), it can be useful to have access to this information after you have passed away.

One way to do this safely is through an online 'safety deposit box'. Keeping a secure list of your usernames, passwords, and other key information for accessing cryptocurrency (e.g. how to access the digital wallet or where to find the digital key) would be incredibly useful to anyone trying to deal with your affairs. Some people keep a simple document with this information recorded – but be careful that this is not left in an unsecure place.

It is also important that such information is not included within a Will – as after probate this becomes a public document.

- **Nominate a 'Legacy Contact'**

Our online social presence is in increasingly huge part of our everyday life. Whether you post every social interaction you have on Facebook, or only carefully curated selfies on Instagram, when we pass away these platforms can be a wonderful way to be remembered.

A lot of these organisations offer a 'legacy contact' service. This way, you can nominate someone in advance to turn your account into a memorial account – for people to share photos and memories. It's often worth thinking carefully about who you would want to have access to these sites if you were no longer around.

It's important to consider all assets when putting together your Will – often those that are intangible have some of the most sentimental value. If you would like more information on the different things that should be considered when making your Will contact us today on **01270 653 177**.



MENOPAUSE IN THE WORKPLACE



WRITTEN BY

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EMPLOYMENT SOLICITOR

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The Menopause

The menopause generally occurs in women between the ages of 45 – 55, with the average age in the UK being 51. For many people symptoms last about 4 years, but in some cases symptoms can last much longer. There are 3 different stages to the menopause: perimenopause, menopause and post-menopause.

As a natural part of the aging process, all women will go through the menopause at some point in their life. Many will experience symptoms that have an impact on their day-to-day activities, including work. The symptoms of menopause can vary in severity and can be physical (for example, hot flushes, heavy periods and headaches) and

psychological (for example, difficulty sleeping, memory loss, confusion and depression).

Whilst there has been some progress in recent years, it's still clear that more needs to be done to ensure it is no longer held taboo. Various surveys carried out show that, historically, women have been (and remain) somewhat reluctant to discuss this with employers for a range of reasons. This has a knock-on effect and can lead to a reluctance to apply for promotion or take on extra responsibilities but can even cause some to reduce their hours of work, seniority or even to look to leave their jobs entirely.

Simply raising awareness of menopause in the workplace will only go so far. Employers should be doing what they can to create a culture of trust and openness and should look to how they will handle such conversations to ensure these are dealt with both sensitively and confidentially.

As women over 50 are the fastest growing demographic of employees with significant skills, knowledge and experience, it is really important for employers to be aware of the potential impact the menopause might have in the workplace and what they can do to support those impacted by it.

Not only is it the right thing to do – there's clear benefits to a business in retaining and promoting valued, highly

skilled and experienced team members. The costs to a business of getting this wrong is also something that should be considered.

The law

Currently, there are no specific protections covering the menopause itself. The menopause is not a protected characteristic under the Equality Act 2010 (EqA) and there are no other targeted legislation that specifically covers this either.

Notwithstanding this, there have been an increased number of Tribunal claims which do cite the menopause. The way in which these claims are presented would have to fall within the parameters of existing protections, which include:



- **Unfair dismissal**

An employer can only dismiss an employee with over two years' service for one of five potentially fair reasons; Capability, Conduct, Redundancy, Illegality and Some other Substantial Reason. In doing so they would also need to ensure that a fair procedure is followed.

A common area where employers get this wrong is in connection with capability as a reason for dismissal. Case law has repeatedly shown that employers should take medical information into account where ill-health has been presented by an employee. So, where an employee is suffering with menopausal symptoms, employers should take this into account when making any decisions during any such procedures. It's also worth remembering that a capability procedure should be to facilitate and encourage improvement – employers should consider what adjustments can be made to support this.

- **Constructive Dismissal**

Constructive dismissal is where an employee resigns in response to a fundamental contractual breach by the employer. Again, an employee will need two years' continuous service to be eligible to pursue such a claim. Depending on how the employer responds to an employee experiencing the menopause or where a grievance has been raised alleging unfair treatment and this isn't appropriately investigated, this might be seen as a breach of the implied term of trust and confidence leaving the employee free to resign and that they have been constructively dismissed.

- **Discrimination**

There are three main types of discrimination: direct discrimination, indirect discrimination and harassment. Direct discrimination is where an employee is treated less favourably because of a protected characteristic. Indirect discrimination is where a provision, criteria or practice is discriminatory in relation to a protected characteristic. Harassment is defined as unwanted conduct that has the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

- **Age**

Given that the menopause impacts women of a certain age, there is a risk for an age discrimination claim if employers are not mindful of their treatment of such staff and where that treatment puts them at a disadvantage, where they are treated less favourably because of their age or where comments are made that are offensive or humiliating.

- **Sex**

Unfair treatment to an employee because of their sex could lead to a sex discrimination claim. Employers should also be aware that unwanted comments or behaviour about someone's menopause symptoms could count as harassment or sexual harassment depending on the nature of such behaviour.

- **Disability**

Menopause itself is not considered a disability but many women are left to rely on the protections afforded by these provisions. A person has a disability if they satisfy the definition under section 6 EqA i.e. a physical or mental impairment that has a substantial and long-term (lasts or likely to last 12 months or more) adverse impact on a person's ability to carry out normal day-to-day activities. Therefore some women suffering with severe symptoms are likely to fall within this definition.

Under disability discrimination there are two other considerations to employers:

- Discrimination arising from a disability under section 15 EqA. Here, a person is treated unfavourably because of something linked to their disability.
- The duty to make reasonable adjustments to remove or alleviate any disadvantages suffered by those with a disability. This might involve employers providing desk fans, permitting time off for GP appointments and/or recording absences related to the menopause differently.

- **Health and safety**

Employers have a legal duty to ensure the health, safety and welfare of their employees. Employers may need to carry out the necessary risk assessments and to consider whether adjustments to working conditions might promote the health and well-being of those suffering with symptoms of menopause.

Proposals for reform:

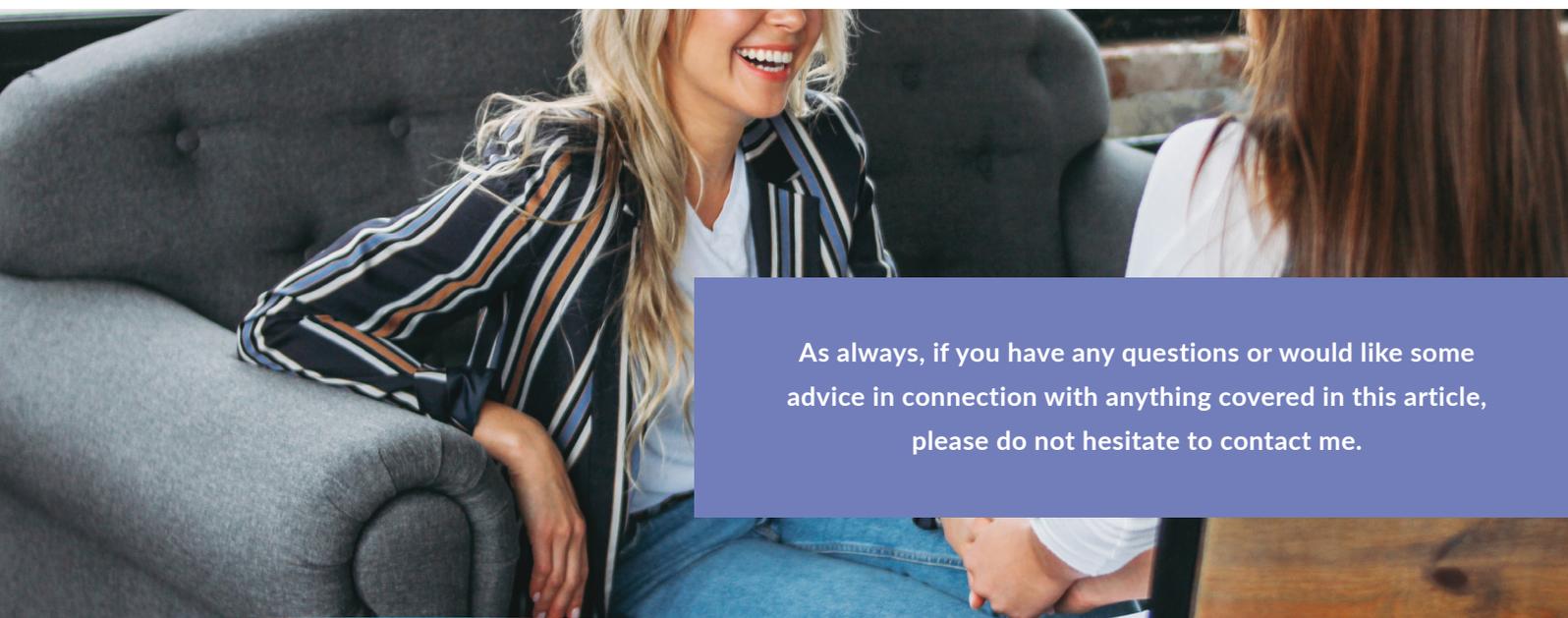
The case law in this area can be quite inconsistent and there are various hurdles to overcome in terms of being eligible to pursue some of the claims listed above. For example, needing two years' service to qualify for an unfair dismissal or constructive dismissal or needing to satisfy the definition of a disability to be protected from discriminatory treatment when suffering from menopausal symptoms. The health impacts of the menopause for some women can certainly be serious enough to satisfy the definition but for others this might not be the case. That said, some query whether it's even appropriate for the menopause, which is a natural stage in their life, to be considered a disability.

The House of Commons Women and Equalities Committee has launched an inquiry into this and general workplace issues surrounding the menopause. The inquiry is looking into existing discrimination legislation and workplace practices to consider whether enough is being done to protect women experiencing menopausal symptoms.

The Committee may seek to change the EqA to recognise menopause itself as a protected characteristic (as is the case with pregnancy and maternity), if the outcome of the inquiry shows that the current legislation is not working.

Top tips for employers to help manage menopause at work include:

- Create and implement a menopause policy. Ensure this is a working document, don't just draft it, print it and leave to gather dust on a shelf somewhere. Ensure this is communicated to staff so everyone knows and understands it. Seek feedback on how this might be improved.
- Provide training for managers so they feel comfortable in dealing with any concerns in a sensitive way. This will in turn assist with creating a culture of trust and openness. Employers and line managers are not expected to be medical experts - a good level of knowledge, understanding, support and compassion will be sufficient but will have a massive impact.
- Make adjustments where appropriate – especially low-cost environmental changes such as providing desk fans etc. Some of the changes might be low-cost but can certainly make a big difference.
- Be aware of employment laws that can relate to menopause issues at work such as the risks of sex, disability or age discrimination.



As always, if you have any questions or would like some advice in connection with anything covered in this article, please do not hesitate to contact me.



UNWANTED CHRISTMAS GIFTS AND YOUR RIGHTS TO CANCEL THE CONTRACT

WRITTEN BY



ANNA KUCKOVA,
TRAINEE SOLICITOR -
LITIGATION

Anna Kuckova is a trainee solicitor with the Firm and is currently enjoying her time in our Litigation Department.

Anna has had exposure to a variety of different cases and has enjoyed liaising with clients and strengthening her skills, gaining experience not only from our in-house team but also from barristers who specialise in certain areas of work. Here Anna explores an area that has been relevant to one of her recent cases regarding the Consumer Rights Act and the contractual position when consumers purchase goods.

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Another Christmas period is fast-approaching and, as is always the case with the festive period, we are all looking for special items to gift to our loved ones. If, however, you are the type of gifter, like myself, and purchase goods or services online which often result in items not fitting or not being particularly what you had expected, then you may find this article helpful.

Under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 consumers have certain cancellation rights. Yet, despite enjoying the enhanced statutory consumer protections, such cancellation rights are balanced by certain rights of the trader.

Your rights to cancel the contract

Despite Brexit, the key consumer legislation derived from the EU directive still applies. Therefore, if you entered into a 'distance contract' with a trader to purchase goods in your capacity as a consumer (i.e. online purchases), you will have 14 days (the 'cooling off period') to cancel the contract without giving the trader any reason at all. However, such right to cancellation can only be exercised by the consumer who is a party to the contract. This will, for example, be the person who purchased the goods and/or services, not necessarily the receiver; therefore, instructing the receiver to just utilise the invoice and arrange the cancellation themselves may not work.

The general rule is that the 14 day cancellation period starts running the day after the contract is entered into, yet exceptions apply depending on the type of the contract. For example, the 14 day cancellation period in sale of goods contracts would commence the following day after the goods come into the physical possession of either the consumer or the receiver identified by the consumer. So, for instance, if the possession of your Christmas present is taken by the receiver directly, you would have 14 days after they receive the items to cancel the contract.

If there are multiple goods ordered from the trader under one contract, or if the goods consist of multiple pieces, the cancellation period starts running the following date after the last of the goods or last of the piece is delivered to the consumer or comes into the physical possession of their receiver.

Different calculation rules apply to contracts which involve supply of digital content or regular delivery of goods (i.e. subscriptions). Traders' terms and conditions should also be checked as longer cancellation periods may apply. Rather than routinely 'ticking' that you have read the trader's terms and conditions upon checkout, you should always review the contract and any cancellation terms.

If the goods consist of an item with a significant value, you may even consider seeking a legal advice on your cancellation rights if it becomes disputed and if it is cost proportionate for you to do so.

The 14 days cancellation period includes public holidays, Saturdays and Sundays although the cancellation period would probably be extended to the end of the next working day if it ends on one of those days. Extended cancellation periods may also apply if the trader fails to provide the consumer with the information about their right to cancel. Furthermore, missing the standard cancellation period does not affect other cancellation rights of the consumer which may apply in situations

where, for example, the goods are of unsatisfactory quality or not as described. In such cases, the standard contractual limitation of 6 years would apply in bringing a claim against the trader for breach of express or implied terms.

However, unlike in the statutory cancellation period where no reason for cancellation has to be given, the cancellation of the contract for breach of the terms after the expiry of the cooling off period is naturally more complicated and may lead to a litigation dispute. As such, if the goods are unwanted for any reason, it is important to act fast and cancel the contract for purchase sooner rather than later (if possible) to eliminate the risk of any unnecessary disputes.

As the trend grows more popular, I think it is important to highlight that one of the exemptions to the usual rules outlined above relates to personalised items or items specifically made to the customer's specifications. In these circumstances, there is no automatic right to return the items without reason. Clearly, if there is a problem with the product or the item doesn't meet those specifications, that is a different matter.

Do not forget the trader's rights

Consumers have the right to cancel the distance contract without incurring any liabilities and, if the statutory cancellation rights are exercised, the trader must reimburse the consumer all payments received from the consumer including any sums charged for delivery (if applicable).

However, some liabilities may need to be considered by the consumer before making a decision to cancel. For example, if the consumer upon checkout requests enhanced delivery, the trader may, upon cancellation, retain the amount by which enhanced delivery exceeds the costs of standard delivery.

Although the consumer is permitted to handle the goods to establish their nature, characteristics and functioning, the trader may also be entitled to make deductions for use of goods from any refund due to the consumer if the handling necessary for establishing the nature of the goods is proven to be excessive. For example, if goods involve clothes which are evidently worn for prolonged amount of time (more than what is required for trying it on), the trader may be entitled to reduce the refund if it diminishes the value of the goods.

In case of services, those cannot be provided by the trader until the expiry of the of the standard cancellation period, unless the consumer asked the trader to do so. In such situation, the trader may be entitled to require the consumer to pay for the services used prior to cancellation. This, however, depends on the type of the service as well as its performance.

Conclusion

As a consumer you will enjoy enhanced statutory protections when it comes to cancelling the contract with the trader. This does not only include the entitlement to enjoy the statutory cancellation period of 14 days if this is required, but also extended cancellations periods if the trader fails to provide the consumer with the information about cancellation rights, whether or not these are reviewed by the consumer.

Regardless of the enhanced protections, the consumers should read the trader's terms and conditions before entering into the contract to establish their cancellation rights. When calculating the cancellation periods, consumers should also bear in mind the type of their contract. Despite the consumers or their receivers having the right to handle the goods to establish their nature and functionality, excessive use should be avoided if possible to eliminate any reductions in refund.

If, after taking all the precautions, you still find yourself fighting with a trader over contract cancellation in respect of purchases of a significant value, our Litigation Team will be more than happy to assist you.

Lastly, we at our Litigation Team wish you Merry Christmas and a Happy New Year which, hopefully, will not involve any contractual disputes!





BANK OF MUM AND DAD - FINANCIAL SUPPORT FROM THIRD PARTIES AND DIVORCE



WRITTEN BY

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The First Stage - Disclosure

When dealing with financial matters ancillary to divorce proceedings, both parties to the divorce have a duty to provide full and frank financial disclosure to their spouse. This is so that effectively both parties enter into financial negotiations with their eyes wide open and have a clear understanding of what the 'matrimonial assets' are in order so that they can then be fairly divided.

Matrimonial assets are any assets that the parties acquired during the course of their marriage. They can

also be assets acquired during the time the parties lived together before they got married.

It's not uncommon that one or both parties to the marriage receive some form of financial assistance from third parties (in the vast majority of cases from one or both parties' parents) during the marriage. Details of which will often need to be disclosed during the financial disclosure process.

I have previously represented clients who have received significant financial support from their parents. For example, I have represented clients where their parents have paid the full purchase price for the family home, they've assisted with the deposit for the purchase of the family home, or they've provided financial assistance for a business venture for one or both of the parties. More often than not, this financial assistance comes from parents who want to set their child up with a financially secure future. The support is provided with good intentions and the best interests of their child in mind.

All is well until the recipient parties separate, and the third party then comes to the stark realisation that their son-in-law/daughter-in-law could walk away and benefit significantly from their generosity. This is a particularly

bitter pill to swallow when the separation is acrimonious between the parties.

Is it a gift or loan?

The first question we're faced with is whether the financial assistance was intended as a gift or a loan. Sometimes the parties will disagree on this with one party claiming that the third party wants the money back and therefore needs to be repaid using matrimonial assets and the other party claiming it was a gift to both parties and therefore now forms part of the matrimonial assets that should be divided between the parties in order to achieve a fair outcome.

What happens if the divorcing couple can't agree whether the funds were a gift or a loan?

If the parties simply cannot agree whether the monies provided by a family member was a gift or a loan, the client could seek the Court's permission to file with the Court a statement from the family member involved, explaining the reason for the loan and what they expect in terms of repayment. If the family member is willing to provide a statement, they will also need to be made aware that they may be required to attend Court to formally give evidence and they may be cross-examined on the content of their statement by the opponent's representatives. The party seeking to persuade the Court that the money was intended to be a loan will need to provide evidence that the money was given to them as a loan rather than a gift.

Alternatively, the Court may join the family member to the proceedings so as to determine the issue and thereafter also determine the extent of the parties' resources in order so that they can be distributed fairly. Any family member that is being invited to join financial remedy proceedings on divorce should consult a Solicitor at an early stage as it's important they fully understand what this will entail before progressing matters. Accepting or rejecting an invitation to join proceedings can directly



impact the final financial settlement and therefore it's important legal advice is sought promptly.

How does the Court treat unsecured loans from family members?

If it is apparent or accepted that the financial assistance was a loan and not a gift, the terms of the loan will then need to be ascertained.

If the loan has not been protected or secured in any way and it is made from a family member on lenient terms (for example, the loan being interest free or there being no strict deadline for the loan to be repaid), the Court will be unlikely to order the repayment of this loan, unless it can be evidenced that there was a legal intention for the funds to be repaid. These types of unsecured and unprotected loans are referred to as 'soft loans' by the Court.

Whether the money is a gift, loan or soft loan, the Court will always turn on the facts of the case. Sometimes the intentions can be evidenced by paperwork documenting the loan or exchange of letters/emails that will help clarify the position and intention at the time the financial assistance is provided.



What if it was intended to be a gift but only to the family member and not to their spouse?

Even when it is accepted by all parties that the funds provided by the family member were intended to be a gift, further issues can then arise as to who the gift was intended to be for.

This is because gifts by third parties are not considered to be 'matrimonial property,' and therefore anything you receive as a gift from a third party, does not necessarily need to be shared with your spouse, although each case will turn on its own facts in this regard.

One area that can cause difficulties is in determining who the gift was given to. Was it just to the family member or was it intended to be a joint gift to their spouse as well? Consideration will then need to be had as to what the purpose of the gift was, e.g., was it for a special occasion and whether anything was recorded in writing at the time.

If there is any doubt as to who the intended recipient of the gift was, the Court will look at all of the circumstances surrounding the making of the gift. That is why, as with

most things, it is imperative to make sure these matters are clear (and, if possible, in writing) at the time the gift is made.

What can make it even more complex, is when the gift was initially given to one party directly and was intended for their sole benefit but then this party decided to invest the funds into what is considered to be matrimonial property, for example, the family home. As the gift has been mingled into what is now a family/matrimonial asset, the starting point is that the other spouse is entitled to a share of this asset on divorce. The person who received the gift is then left with the challenge of persuading the Court that it would be unfair to split it equally as the source of funds were non-matrimonial and therefore this is something the Court must give due consideration to when considering whether any financial settlement is fair in all circumstances.

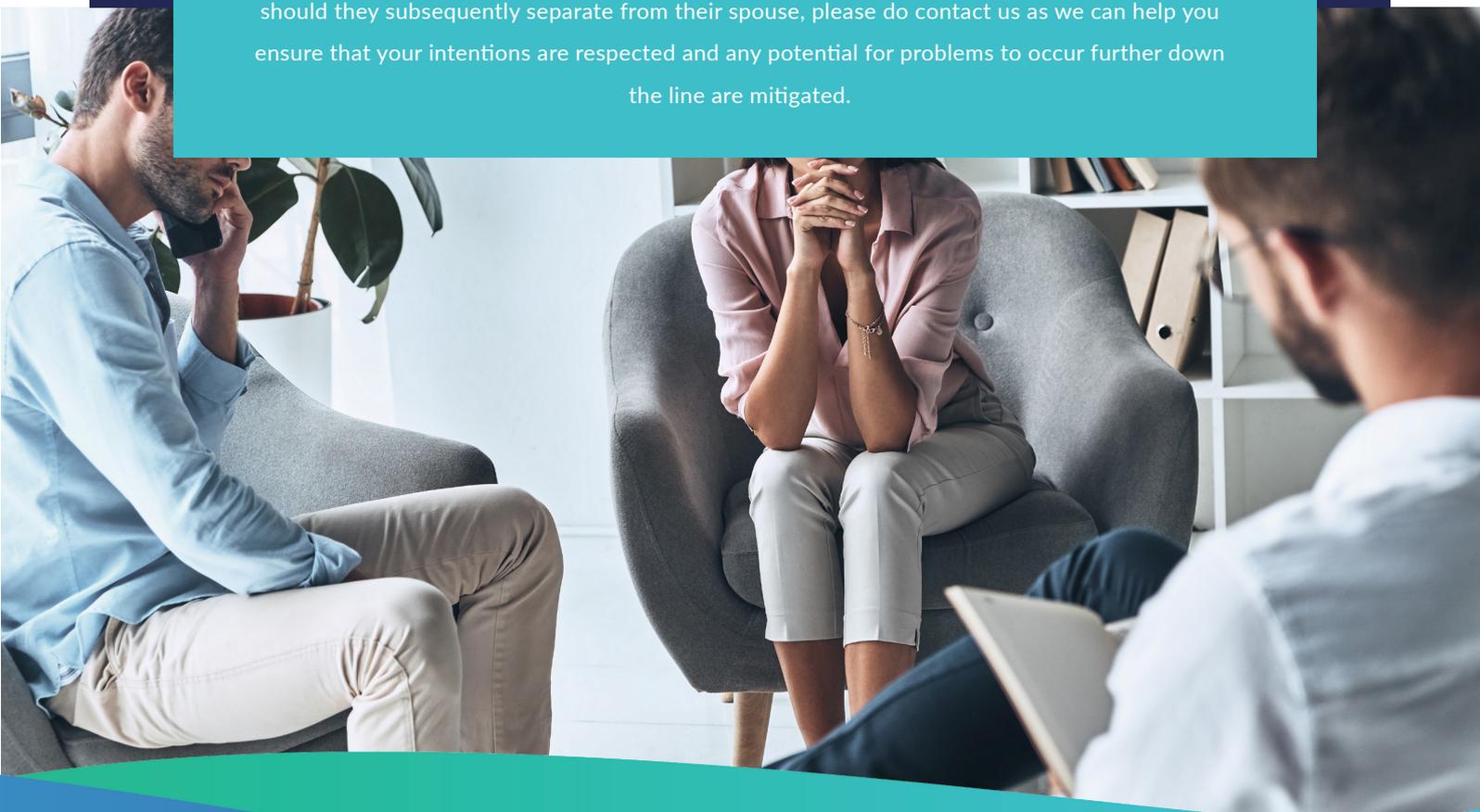
I have successfully argued this case in Court before, however, it can often be a tricky point to persuade the Judge on, particularly where there are only very modest assets and all available financial resources have to be utilised (whether matrimonial or non-matrimonial) in order to meet both parties financial needs.

How can these problems be prevented?

The following steps can be taken to limit disputes in respect of these matters and the involvement of third parties in dealing with financial matters arising from divorce:

1. Ensure that any interest of friends or relatives is recorded in a declaration of trust or loan agreement
2. Register a restriction at the Land Registry so that the party with an interest is notified before the asset is sold
3. Register a formal charge at Land Registry so that you are effectively in the same position as a mortgage lender and your loan will require repayment upon the sale of the property
4. Keep a contemporaneous record of any financial contributions made and the intention of the person providing the loan/gift at the time.
5. If you're the spouse in receipt of a gift from your parents, consider whether a prenuptial agreement/postnuptial agreement should be entered into with your spouse in order so that you can record your agreement that you expect these funds will not be called upon by your spouse in the event you should divorce in the future.

If your family member is calling on you for financial support, or you're considering offering your family member financial support, and you're concerned as to what the implications will be should they subsequently separate from their spouse, please do contact us as we can help you ensure that your intentions are respected and any potential for problems to occur further down the line are mitigated.





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