

Inform

INSIDE



**When mediation
beats litigation**



**Where there's no
will can there still
be a way?**



**Landlords dodge
deposit penalties**

New bribery rules – don't get caught by the Act

Suzanne Eva considers the new Bribery Act and the potential risks businesses face

The long awaited revised guidance on the Bribery Act 2010 was published by the Ministry of Justice on 30 March 2011 (the "Guidance"). The Act itself came into force on 1 July 2011.

In addition to creating offences of offering and receiving bribes and of bribing a foreign public official, the Bribery Act creates a totally new offence which can be committed by commercial organisations which fail to prevent persons "associated" with them from bribing another person on their behalf. An organisation that can prove it has adequate procedures in place to prevent bribery by persons associated with it may well have a defence to a prosecution on these grounds. Commercial organisations must, therefore, now have in place "adequate procedures" to ensure that all persons "associated" with them are aware of the requirements under the Act and what constitutes bribery.

It is worth noting that the Bribery Act applies not only to UK commercial organisations but also to entities carrying on business within the UK, whether through a branch, a subsidiary or even directly. An organisation which carries on business in the UK will also be liable for the acts of anyone "associated" with it who bribes another person intending to obtain or retain business or a business advantage for that organisation, wherever in the world that person is and wherever the bribery takes place. A person will be "associated" with an organisation if

he/she/it performs services for it and it does not matter whether that person is an employee, agent, consultant or even a subsidiary.

The Guidance refers to six founding principles. These are: proportionality, top level commitment, risk assessment, due diligence, communication (including training), monitoring and review. A small organisation which only does business in the UK is likely to need far less rigorous procedures than a multinational operating throughout the world. Similarly, a business employing two or three people may well not need written procedures at all, although it will need to be able to prove that all its staff members and associates have been made aware of the Act and its implications and received firm guidance on the unacceptability of giving or taking bribes in any context. A larger organisation should have written guidance for employees and other associated people and there should be a strong lead from the top level of management about the eradication of bribery within the organisation.

The first step for each commercial organisation will be a proportionate risk assessment that should identify and prioritise the risks the organisation faces, as regards bribery in the markets in which it operates and amongst the customers and suppliers with whom it does business.

Continued on page 2



When mediation beats litigation

In the case of separating couples and in workplace disputes, mediation often offers the best resolution. Cumberland Ellis have a specialist team to help.



Following the recommendation of the Family Justice Review, new rules for England and Wales came into force on 6 April 2011, meaning that most separating couples who cannot reach agreement about their finances will be referred to mediation before they are allowed to pursue a claim in court. At the time the changes were announced, the Justice Minister Jonathan Djanogly stated:

"Our proposals aim to radically reform the system and encourage people to take advantage of the most appropriate sources of help, advice or routes to resolution... Now everyone will have the opportunity to see if... [mediation] could be a better solution than going straight to court."

Inevitably this will mean that mediation, which is already a common form of resolution for commercial

disputes, becomes a much more familiar form of dispute resolution for family law in the future.

In essence, mediation is a process to bring parties to a mutually acceptable settlement with the assistance of a suitably trained but entirely independent mediator. It has many advantages: the process is flexible and can be tailored to specific requirements of the dispute, participants are in control of the agenda (including the timing of meetings etc.), the broader picture can be addressed (mediation can bring in issues that a judge would not be able to consider) and generally result in a quicker and sometimes cheaper conclusion than would be the case if the matter went to trial at court.

With the likelihood of more and more disputes being resolved by

mediation in the future, Cumberland Ellis have in place a team of specialist mediators. All of the Cumberland Ellis mediators are partners who are accredited with specialist training bodies, take direct referrals and offer a partnership in mediation – a genuine willingness to see matters through to a satisfactory outcome.

Hazel Wright and **Conrad Adam** are trained and accredited mediators in the areas of divorce, family and cohabitation mediation. The Cumberland Ellis Family department has been offering mediation for over 15 years and also offers collaborative practice, which is similar to mediation, in that it is private.

Mark Shulman specialises in workplace and employment mediation, where he uses his many years of experience of employment situations to mediate a solution that saves time and money, and means that relationships at work suffer as little as possible.

Roger Curtis joined Cumberland Ellis in 2009 and has been a mediator for many years. Though his background expertise is in planning law, Roger has successfully acted as mediator in a wide range of commercial disputes.

These mediator services complement Cumberland Ellis's substantial expertise in dispute

Continued from page 1

Facilitation payments are likely to be treated as bribery under the Act. This has caused some heartache for British businesses because facilitation payments are a normal and acceptable part of doing business in many parts of the world. Even the US Corrupt Practices Act 1997 excludes certain types of facilitation payments from its ambit.

Happily, the Guidance is more proportionate and pragmatic than originally feared and it is now clear that bona fide hospitality, promotional and other business expenditure of a like nature, which is reasonable and proportionate, is unlikely to fall foul of the Bribery Act.

For more information about the Bribery Act contact suzanneeva@cumberlandellis.com

resolution services across a wide spectrum of commercial and property law and private client issues.

For more information about our mediator services, please contact hazelwright@cumberlandellis.com, conradadam@cumberlandellis.com, markshulman@cumberlandellis.com or rogercurtis@cumberlandellis.com who will be happy to discuss how they can help, without charging for the first contact.

Where there's no will can there still be a way?

To avoid future disputes, it's essential to record any changes to a will and lodge them safely



What happens where a beneficiary believes they know what was contained in a will but cannot find the document itself? The High Court considered this question in the recent, rather remarkable, case of *Ferneley v Napier*.

In 2008, some three years after he first met Rowena Ferneley, Charles Napier bought a cottage on the Isle of Wight where he planned to live with Rowena once it was refurbished. However, Charles died in November 2008 before they were able to move into the cottage. Rowena's case was that on two occasions before he died Charles had indicated to her that his will had been changed so that everything would go to her. Her case mainly depended on the remarkable evidence of an electrician who, a few days after Charles's death, was working in the cottage at the time that Charles's brother (Derrick), his son (Stephen), Stephen's wife and Derrick's girlfriend went to the cottage to search for Charles's will.

The electrician claimed to have heard one of the search party on the upper floor of the cottage announce out loud that he had "found it". He then heard them discuss the

details of the will: Rowena was given the bulk of the estate, Charles's wishes for the scattering of his ashes were specified and the names and addresses of the witnesses to Charles's signature were given.

Stephen and Derrick disputed the electrician's account claiming that, though they had found a will and part of it was read out at the cottage, the document they found was an unsigned will from 2002 in favour of a former partner of Charles and not Rowena.

The judge commented that it would only be in the clearest of cases that the court (applying the policy of the Wills Act 1837) would grant probate when there was no physical evidence of the will. He described the electrician's evidence as "striking" as he clearly heard words being read out on the floor above and recollected precise details so that he could write them down a month and

a half later. Despite being impressed by the electrician's evidence and indicating it was possible that another valid will existed, the judge ultimately dismissed Rowena's claim as she failed to make out her conspiracy explanation to the required standard of proof.

This singular case highlights how important it is after having made or updated a will to keep it stored somewhere safe and to notify relevant people of its existence and location. As well as providing advice regarding will drafting and estate management, Cumberland Ellis offer a wills storage service. You can contact Ann Stanyer, the head of the Private Client department, or Elizabeth English, to discuss the will services provided by Cumberland Ellis at annstanyer@cumberlandellis.com or elizabethenglish@cumberlandellis.com

Landlords dodge deposit penalties

Landlords given leeway regarding compliance with tenancy deposit regulations



When, on 6 April 2007, a new regime requiring landlords to protect tenancy deposits by registering them with approved deposit schemes was brought into force, it was widely believed that landlords would be automatically penalised if they failed to comply with the new statutory requirements and deadlines. Landlords of all shorthold tenancies who receive deposits from their tenants must pay the deposit into a recognised scheme within 14 days of the tenancy beginning and serve a Deposit Information Certificate and prescribed written

information about the scheme in accordance with the requirements of the particular scheme. A sanction of three times the deposit sum is payable by any landlord who fails to comply with these requirements.

To the surprise of many observers, three decisions of the court over the last eight months have dramatically changed the understanding of when the three times deposit sanction will be ordered against a landlord..

In *Tiensia v Vision Enterprises Limited*, the first of the three defeats for tenants, the Court of Appeal held that the landlord would not have to pay any sanction if he complied with the deposit requirements at any time up to the day on which the trial took place.

The landlord in the next case, *Potts v Densley & Another*, did not protect the deposit until after the tenancy had ended. The High Court took the *Tiensia* decision one step further and decided that it was still possible for the landlord to avoid paying damages if he protected the deposit after the tenancy had ended.

In the third case, *Gladehurst v Hashemi*, the Court of Appeal

decided that where a landlord did not protect a deposit and the tenancy ended before the claim for damages was begun then the tenant's damages claim could not succeed.

It may be that Parliament will in the future act to give new teeth to the tenancy deposits' legislative regime but the position as things now stand is that a landlord who has failed to protect a tenancy deposit or provide the required information ought to be able to avoid any damages award (though he may be ordered to pay costs) if he protects the deposit at any time before the trial. Tenants retain one basic protection, though, as a landlord may not serve a notice (under section 21 of the Housing Act 1988) to bring a possession claim until he has complied with the requirements.

If landlords or tenants require advice regarding tenancy deposits and/or possession claims, they can contact susanfritsche@cumberlandellis.com or vanessafreeman@cumberlandellis.com

Why forming an LLP needs more than just a gentleman's agreement

LLPs can be advantageous but a formal, written agreement is essential

Limited Liability Partnerships ("LLPs") were brought into existence by the Limited Liability Partnerships Act 2000 and have a legal status that is something like a hybrid of a company and a partnership. The recent case of *Eaton v Caulfield & Others* [2011] EWHC 173 provides an example of the difficulties that can be experienced and the monies wasted if no express agreement is drawn up by an LLP.

The parties carried on a legal recruitment business as an LLP but had no formal, written LLP agreement. They had discussed some issues that would have been relevant for an LLP agreement – the removal of members was raised during an alcohol-fuelled train journey and some agreement in respect of profit sharing was reached during email correspondence. There was no evidence, though, of precise terms having been agreed and/or recorded regarding the expulsion of members. Mr Caulfield later on purported to

expel Mr Eaton from membership of the LLP. Mr Eaton did not accept that there was a power to expel him and brought an action for unfair prejudice under Section 994 of the Companies Act 2006 together with a petition for a just and equitable winding up of the LLP, pursuant to Section 122(1)(e) of the Insolvency Act 1986.

The Court ruled that as there was no express agreement permitting expulsion from the LLP, the default governance rules (as set out in the Limited Liability Partnerships Regulations 2001) applied. These default rules provided that a member of an LLP cannot be expelled unless there is a power to expel conferred on members of the LLP by express agreement. The Court, therefore, found that Mr Eaton had not been expelled from the LLP and that he had been unfairly prejudiced by Mr Caulfield. The purported expulsion prevented Mr Eaton from contributing to the profits

of the LLP and from participating in the continuing prosperity of the business and this had a direct impact on Mr Eaton's interests.

The golden rule for anyone thinking of entering into or setting up an LLP is to properly record the terms and basis upon which it will operate to prevent disaster in the future. Even if it is already up and running it is not too late. By way of illustration, members of an LLP can also agree, unanimously, in writing, to exclude a member's right to petition the Court for unfair prejudice, as provided in the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009. This additional power would certainly have helped Mr Caulfield. Anyone interested in finding out more about Unfair Prejudice disputes relating to LLPs can contact jeremylederman@cumberlandellis.com and tammyevans@cumberlandellis.com

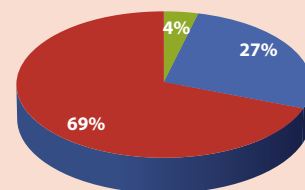
In brief

A fate worse than debt?

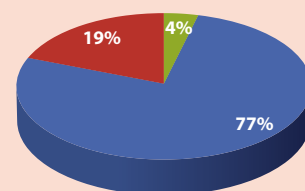
Cumberland Ellis carries out a large amount of debt recovery work across many sectors and recently surveyed 60 businesses within the central London area regarding the issues they consider when deciding how to pursue their unpaid invoices.

Surprisingly, given current economic conditions, 69% of the sample surveyed said their business had not experienced an increase in late or non-payment of their firm's invoices during 2010/2011. The survey revealed that before deciding what action to take, 77% would first consider how engaging debt recovery services might impact on their business's reputation and 90% said that there may be a time when they would choose to accept late or non-payment of an invoice in order to maintain relations with clients/customers.

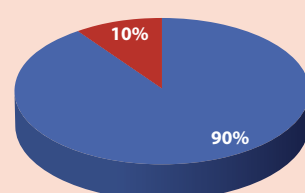
1. Has your business experienced an increase in the late or non-payment of its invoices in 2010/11?



2. Do you consider the impact on your business's reputation when deciding how to pursue unpaid invoices?



3. Is there ever a time when you would choose to accept late or non-payment of an invoice in order to maintain a relationship with a client/customer?

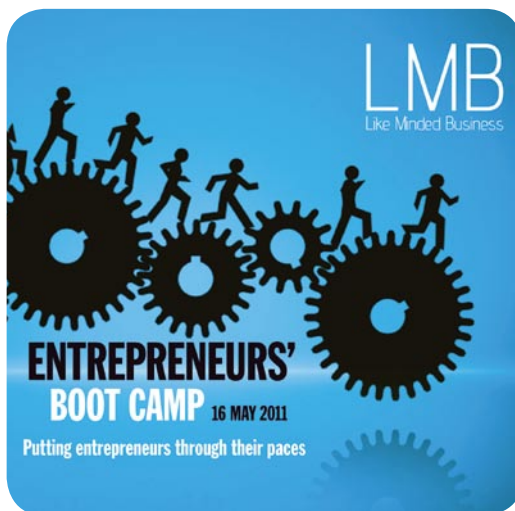


■ Yes ■ No ■ Don't know

For further information about Cumberland Ellis's debt recovery service please contact jeremylederman@cumberlandellis.com

Entrepreneurs get fit for business

On 16 May 2011 Cumberland Ellis's business network, Like Minded Business (LMB), co-hosted a "boot camp" for entrepreneurs with Barclays Bank, Arram Berlyn Gardener accountants, Pace Equity and Birkbeck University of London. The day focused on everything a successful entrepreneur needs to know about making a success of a business, including tax-saving tips and financing options for short-term and long-term growth, marketing strategy and planning and cashflow management. As well as a series of seminars the attendees had the opportunity to take part in one-to-one clinics with the event sponsors. Helen Robinson, the head of the Company/Commercial department at Cumberland Ellis, commented, "LMB was delighted to host its first boot camp for entrepreneurs. Our aim was to provide business owners with valuable and practical advice which will help equip them for the challenges ahead." To find out more about joining the LMB network contact helenrobinson@cumberlandellis.com



Office news

Staff appointments

Cumberland Ellis is pleased to announce that Adam Edwards has been appointed by the management board as managing partner taking over some of the managerial duties of Neil Turner who remains as senior partner. The new separate roles reflect the expansion of administrative and managerial work at Cumberland Ellis as the firm increases in size.

Following Adam Edwards's appointment, the firm is happy to announce that Helen Robinson is taking over from Adam as the head of the Company/Commercial department.

Congratulations also go to Graeme Fraser and Richard Adams in the Family department and Elizabeth English in the Private Client department. Graeme has been made a partner and Richard and Elizabeth have been promoted to become associates.

The Private Client department is delighted to announce the appointment of Jaspal Rai as a paralegal.



Expert advice at Resolution's National Conference

Graeme Fraser, a partner in the Family department, gave an address to an audience of over 100 family lawyers at Resolution's National Conference in Cardiff on 1 April 2011 on the developing law relating to unmarried couples' interests in property following separation. The conference also provided the venue for the launch of *Cohabitation Claims*; Resolution's latest guide for family law practitioners as co-authored by Graeme. The guide draws together the relevant information from different areas of law as it relates to cohabitation and sets out stage-by-stage illustrations of cohabitee claims.

Private client litigation team

A new cross-departmental team has been created to co-ordinate expertise in all aspects of private client litigation work. The new team is made up of Adam Colenso (partner and head of the team) and associates Richard Collier-Wright and Tammy Evans. All private client disputes

and trusts and probate litigation work will be conducted by this team and full details about the expertise and services provided (together with relevant news and articles) can be found in the appropriate part of the Cumberland Ellis website.

LexisNexis webinar

On 15 February 2011 Conrad Adam, partner in the Family Law department, co-presented a webinar for LexisNexis addressing the topic of *Marital Agreements – An Update*.

ISO accreditation

After satisfying a demanding and thorough audit, Cumberland Ellis became ISO 9001:2008 accredited in January 2011. This quality standard recognises the high standard of service quality and procedures at the firm and is a badge of excellence now being displayed with pride on all letters and emails.



Cumberland Ellis

Atrium Court, 15 Jockey's Fields, London WC1R 4QR England
Telephone +44 (0)20 7242 0422 Facsimile +44 (0)20 7831 9081
contact@cumberlandellis.com DX: 250 Chancery Lane

www.cumberlandellis.com



Contacts:

Charities: **Simon Howell** Commercial Dispute Resolution: **Jeremy Lederman** Commercial Property: **Michael Sinha** Company/Commercial: **Helen Robinson** Employment: **Mark Shulman** Family: **Hazel Wright** Private Client, Personal Taxation, Trusts and Estate Planning: **Ann Stanyer** Property Litigation: **Chan D'Souza** Residential Property: **Angela Lucy**
Our house style for email address is first name and surname run together e.g. adamcolenso@cumberlandellis.com