



### EMPLOYMENT

## DRUGS ALCOHOL & MEDICAL TESTING AT WORK

**Do drugs and alcohol misuse amongst employees cause problems for your business? The statistics are shocking.**

Up to 14 million working days are lost each year in the UK as a result of alcohol-related problems. The cost to industry has been estimated at about £3 billion a year. Drug addiction has risen fourfold in the past 10 years. Around 25% of those seeking help for drugs are in employment and approximately 18% of large companies reported illegal drug use amongst their employees between 2000 - 2001. The cost to industry of drug use has been estimated at about £800 million a year. A survey as at March 2002 demonstrated that an estimated 4 million people take illicit drugs in the UK each year. Approximately 3 million people in Britain smoke cannabis regularly and a further 1.5 million use cannabis recreationally. 'Clubbers' take around 2 million ecstasy pills every week. Cocaine deaths rocketed from 12 in 1993 to 90 in 2000, and ecstasy deaths rose from 8 to 36. In addition, the proportion of accidents in which motorists died after taking drugs rose from 3% in the mid 1980s to 18% in the late 1990s.

As drug use continues to increase, are employers equipped to deal with incidents at work involving drug-taking employees?

It saves money to have managers trained to recognise early the warning signs that an employee has a drug or alcohol related problem.

#### *Managers should be aware of ;*

- **Impaired job performance;**
- **Poor time keeping;**
- **Increased periods of sick leave;**
- **Deterioration in relationships with clients and colleagues;**
- **Out of character behaviour such as irritability and aggression;**
- **Sudden mood swings;**
- **Loss of appetite;**
- **Poor attention span and memory loss**

Despite evidence that all drugs impair mental or physical ability to some extent, there are signs of a relaxation in the official view. The proposed reclassification of cannabis as a class C drug may well mean dismissals for cannabis-related workplace incidents may soon be viewed by Employment Tribunals as 'disproportionate' or excessive. Much will depend on the nature of work carried out by the employee, the level of impairment, and the risk posed to other employees and the business.

*How should the employer ascertain that the employee is taking drugs or working under the influence of drugs, and once this has been ascertained, how should the employer deal with the situation?*

**Firstly**, it would be wise to issue a clear statement in the contract of employment that either regular or random medical testing will take place including drug and alcohol testing. The employee's consent is required in order for such medical testing to take place. The objection of intrusion into privacy (contrary to the Human Rights Act 1998) may be countered by the employer's stated intention to comply with legislation relating to health and safety and unfair dismissal.

**Secondly**, an employer should introduce a formal written anti-drugs and alcohol abuse policy, as an employer's case is much stronger if clear rules exist that set out the stance of the employer and any penalties that can flow from such misconduct. The policy should make the abuse of alcohol and / or drugs a disciplinary matter and give the employer the right to summarily dismiss for gross misconduct.

Although dependency on alcohol or drugs is specifically excluded from the list of disabilities covered by the Disability Discrimination Act 1995, Employment Tribunals classify addiction as an illness. Therefore before dismissing an employee found drunk or under the influence

of drugs at work, it would be prudent to find out if the employee in question is simply guilty of an isolated incident of misconduct through drug or alcohol abuse, or whether s / he is suffering from an addiction. In the light of the Home Secretary's proposals, a zero tolerance policy on all drugs and alcohol may not be considered reasonable, so it will be important for the employer to assess the drug or alcohol related incident properly by considering the nature of the employee's work, the risk posed to safety, and the reason why the drug or alcohol has been taken, before deciding to dismiss.

*What about drugs or alcohol taken out of working hours?*

Human Rights legislation requires that an employer does not infringe on employees' privacy by preventing alcohol or drugs use in the employee's own time.

If the result of a medical test to which the employee has consented is positive due to drugs or alcohol that the employee has taken in his / her own recreational time, but which has remained in the bloodstream for 24 hours or more, the position on whether the dismissal would be fair is unclear. Again, the employer would need to consider the risk that the employee in question posed to public safety by virtue of his / her job, as well as any breach of the employee's human rights before deciding to dismiss.

#### *Conclusion*

If in doubt about any circumstances with employees involving the above issues, employers should take advice immediately, as going wrong procedurally can result in serious, time-consuming, and expensive claims.

Contact **Farha Leadbetter** of our Employment team on [farhaleadbetter@cep-law.co.uk](mailto:farhaleadbetter@cep-law.co.uk)  
A fuller version of this article appears on our website.

A number of excellent articles have been submitted for this edition, but space does not permit us to print them in full. In every case the complete text can be found on our website ([www.cep-law.co.uk](http://www.cep-law.co.uk)), or please telephone or e-mail us for a copy of the article.

Hazel Wright of our Family law team has written on the capitalisation of income

payments after divorce, where circumstances point towards termination of periodical payments.

**Dele Obilade** from the Company Commercial department defines the concept of tradeable sporting rights, and discusses the issues involved in their marketing. Another member of the Company Commercial team, **Edward Limbrey**, highlights the problems that are now likely to arise as a result of a

European regulation which allows e-business consumers to bring actions in the courts of their home country, wherever the website is based.

You will find enclosed a set of Budget Edition tax fact cards, which we hope are useful. For further copies, or advice on matters arising out of the Budget, please contact **Nicola Waldman** of our Private Client department on [nicolawaldman@cep-law.co.uk](mailto:nicolawaldman@cep-law.co.uk)

## LITIGATION

# THE COLOUR OF MONEY



**Money Laundering is a global problem. Many professions, solicitors among them, who regularly deal with client's property and money are now being relied upon as "gatekeepers" to prevent this "dirty money" entering the system and, through new legislation, their responsibilities are about to increase.**

So what is money laundering? Quite simply, legitimisation of the proceeds of crime. The true ownership of the proceeds of criminal conduct are changed so that they appear to emanate from a legitimate source. A basic example might be of a large retainer paid to a solicitors firm on the basis of consideration for a transaction such as, for instance, a property purchase. The purchase unexpectedly falls through when the client "changes his mind" and requests the return of his retainer funds less solicitors costs already incurred. More complex "scams" are also used, including apparently unfairly dismissed employees who seek legal advice and make a claim against their employers. Proceedings are issued whilst settlement negotiations are ongoing when suddenly, out of the blue, the employer offers a strangely more-than-generous settlement package and proceedings are withdrawn. In both instances, the money having been through the solicitors accounts system, hey presto! clean cash.

The law relating to money laundering is contained in several pieces of voluminous legislation, but the offences of which solicitors are now particularly aware fall into three categories.

### 1 Assistance

Knowledge or suspicion that funds are "unclean" and continued assistance to the launderer to retain those funds - *maximum 14 years imprisonment or a fine or both.*

### 2 Failure to report

Knowledge or suspicion of money laundering must be reported as soon as reasonably practicable. Currently this only relates to drug trafficking or terrorist activities. Failure to do so - *maximum 5 years imprisonment or a fine or both.*

### 3 Tipping off

Informing the suspected launderer, or any third party, that disclosure has been made to relevant internal or external authorities - *maximum 5 years imprisonment or a fine or both.*

The Money Laundering Regulations 1993 place additional requirements on solicitors who conduct relevant regulated financial business within what is now the Financial Services and Marketing Act 2000, and if so, certain procedures must be maintained. Briefly, these include: identification enquiries (except in certain specified instances) where a one-off transaction payment to or from a client is for

more than 15,000 euros; adequate internal reporting procedures including the nomination of a firm officer (an MLRO); and finally, staff training on the law relating to money laundering and the internal reporting procedures. On the face of it, solicitors who report a launderer are breaching confidentiality; however, in the case of laundering or fraud, they have an immediate defence. Legal professional privilege does not cover the client-solicitor relationship where the solicitor is being used by the client to further a criminal purpose.

A new European Directive is expected later this year that will extend the Regulations to all solicitors, whether they are engaging in regulated activities or not. The Proceeds of Crime Bill currently before Parliament intends to make the Failure to Report offence an objectively-based ("negligence") test (rather than subjectively-based as it is at the moment) and also widen the scope of the offence to include suspicion or knowledge of proceeds of any crime, not just drug trafficking or terrorism. These changes will have a wide-ranging effect and the Law Society has made it known that the law will be applied rigorously. CEP is preparing for the imminent legislation, as it is well known that prevention is better than cure. Our clients can rest assured that CEP are fully aware of the colour of money.

**Andrea London** is a member of the Litigation Department on [andrealondon@cep-law.co.uk](mailto:andrealondon@cep-law.co.uk)

## PROPERTY LITIGATION

There is an interesting article on our website about the effect on renewal of business leases of late payment of rent under the old lease. **Chan d'Souza** discusses the recent case of Hazel v-Akhtar where Mr Hazel eventually succeeded in

the Court of Appeal in his argument that late payment without complaint by the landlord was not sufficient to deprive him of his right to renew his tenancy. The moral for the landlord is that a notice should be served on the tenant

early on, to make it quite clear that no delay will be tolerated.

For the full text of the article, visit our website or contact **Chan** on [chandsouza@cep-law.co.uk](mailto:chandsouza@cep-law.co.uk)

# DANGER HIDDEN BEHIND TELECOMMUNICATIONS MASTS

**The Telecommunications Code (found in the Telecommunications Act 1984) gives unprecedented protection to telecommunications operators to install and maintain their equipment on your land. This article examines the impact of the Code on landlords and occupiers of land and briefly considers how to avoid its pitfalls, or at least to mitigate their effects.**

For a landowner it is the perfect solution. You are offered relatively large sums of money in order to allow a mobile telephone company to erect telecommunications masts on a small piece of your land. This can be a tidy earner for you from an otherwise fairly useless section of your land. The time comes for you to reclaim the land in order to redevelop it with the rest of your land or to use it in some other way. It is then that you discover that you are not able to. Being an astute commercial landlord you excluded the relevant sections of the Landlord & Tenant Act 1954 but you are faced with a far more difficult hurdle to overcome.

The Telecommunications Code imposes a regime parallel to, but quite different from, that of the 1954 Act. It deals specifically with agreements between occupiers of land and telecommunications operators which allow the operators to install their equipment on the land.

For the Code to take effect there simply needs to be a written agreement allowing a licensed telecommunications operator access to the land to install its apparatus. Operators commonly ask the occupier to enter into an agreement

giving them early access to commence installation while the terms of the lease are being negotiated. However, be warned, this qualifies as a written agreement for the purposes of the Code. In fact a written agreement could even be inadvertently reached in an exchange of letters or emails. Once there is such agreement the Code bites giving the operator rights protecting its apparatus from removal and so the operator is not obliged to enter into any lease that was under negotiation at the time.

The Code binds not only the occupier who grants the right, but also anyone who consents to it and indeed anyone with an interest in the land, whether they have consented or not. Hence a tenant could bind a landlord without obtaining that landlord's consent.

The Code entitles operators: to carry out any works necessary in relation to their apparatus; to keep their apparatus installed; and to enter the land to inspect their apparatus. The second of these is particularly serious. Even after the agreement between the occupier and the operator expires, the occupier cannot insist

upon removal of the apparatus. If the operator objects to its removal the owner will have to apply to the court, where the cards are stacked in favour of the operator (the principle is that nobody should be denied the right of access to a telecommunications system).

Add all this to the concerns over health (the jury is still out on this one) and you may wonder why anyone agrees to allow telecommunications apparatus on their land.

Nevertheless, a telecommunications mast lease can be a very good way of obtaining value from a piece of land or part of a property, such as a rooftop, which would otherwise be unused. With good advice, correct preparation and an informed approach to negotiation, while not being able to prevent the Telecommunications Code from biting, you can prevent it from leaving any lasting marks.

*For further advice including a detailed consideration of any potential telecommunications mast lease please contact **Rod Forsyth** on [rodforsyth@cep-law.co.uk](mailto:rodforsyth@cep-law.co.uk)*

## MORTGAGES AND WIVES

Frequently one party to a marriage (assumed to be a husband for the purposes of this article) needs to borrow to finance a business, and offers the matrimonial home as security. His wife is joined in by the lender. If subsequently the business fails the lender may want the house sold to meet the indebtedness. Although the borrower husband doubtless recognised this as a possibility, his wife may not have done so, and that has been the focal point of numerous cases.

The lender will have insisted that both husband and wife are advised of the nature of the loan agreement. Sometimes a wife claims that she had not appreciated what she was signing, or that she was under duress and had to sign. Can she stay in the house and thwart its sale by the lender? If so, is the lender then able to sue the solicitor for having failed to advise thoroughly? The answer in both instances can be "yes", although all cases turn on their individual facts.

Until October 2001 the law placed so great an onus on solicitors that many felt they should

always decline to advise a wife in such cases. This is hardly conducive to the smooth running of small businesses, which might thus be unable to borrow. A recent House of Lords decision has changed the law. The case report is long, with five different judgements differently expressed. It is therefore difficult to summarise, but its guidance is important to borrowers and to lenders and to their respective professional advisers. The decision indicates that a wife's adviser should:

- **explain the nature of the documents and their practical consequences;**
- **explain the risks, the terms of the loan and the extent of the potential liabilities;**
- **emphasise that there is no obligation to proceed;**
- **check there is the intention to proceed; the solicitor might also**

**....OR ALTERNATIVELY MORTGAGES AND HUSBANDS.**

**offer to negotiate with the lender (although usually the position is "take it or leave it")**

The result might be that a wife refuses to sign, and that there is no loan, with possibly disastrous consequences for her husband's business. Where the same solicitor is acting for the husband and wife this naturally can cause difficulties for the solicitor and his clients, which all parties have to understand.

*Timothy Bartlett, or his colleagues in the Property Department, will be pleased to discuss any property matters further.*



## Welcome and Farewell

We have a number of welcomes to report in this edition. **Chan D'Souza and Farha Leadbetter** joined us in January. Chan is an associate with the Property Litigation team. She has had considerable experience in this field, both in the City and elsewhere in London. Chan enjoys food and wine and is an adventurous cook. She enjoys walking, having caught the bug when she walked in the Lower Atlas Mountains in Morocco.

Farha is an assistant solicitor in the Employment team. She has had wide legal experience both in criminal law in Northern Ireland, and in Wales where she worked on the North Wales Child Abuse Inquiry, before moving into the employment field. Farha enjoys frequent trips home to Ireland, and is a skier and golfer.

We are also pleased to welcome **Anna Hill**, who has taken over secretarial duties for the Company Commercial department, and **Natalie Wheeler**, who joined Paul in General Office at the beginning of February.

We are sorry to say goodbye to Gary Bunce and Anna Berry from the Property Department, and also Brian Crane, who decided that it was high time for him to retire (we could never believe his age, but apparently it was true). We wish all of them well.

## Skating

The deep dark days of January were enlivened by a visit to the skating rink at Somerset House. Although we chose one of the wettest evenings in a wet winter, and skated on a rink the surface of which resembled Slush Puppies, much enjoyment - and amusement - was had by all concerned. Adam Edwards and one or two other younger members of the firm showed off by skating round the rink at high speed and frightening everybody; the rest of the party demonstrated varying degrees of skill, and one or two preferred not to leave the comfort of the perimeter rail at all. The picture (below) proves that at least some of us were able to stand upright. We dried out and warmed up with some delicious glühwein at the bar afterwards.



## Events

Also in January we hosted the pre-marathon reception for the runners for the Brain & Spine Foundation, one of the charities for whom we act. These athletes hope to exceed the £100,000 raised for the charity last year: as before words of encouragement came from their team captain Des Lynam, and this year we were also joined by the champion jockey, Richard Dunwoody. Many thanks to Lynne Shaw Wheeler for all her hard work as organiser and hostess at this end.

Future events include a trip to South Pacific at the National Theatre in April, and the City of London Road Race in May, when we hope to field a team of at least six.

## Wheeler-Dealers

In case it is thought that our extra-mural activities are entirely athletic, the CEP Allstars (namely James Lamont, Andrea London, Raj Koria, Edward Limbrey and William Hammon) moved effortlessly into the second round of the Business Investment Management Game after winning their group

with a couple of million pounds profit to spare. This competition pits teams from different professions across the country against each other by placing them in the shoes of the directors of a manufacturing business where decisions on pricing, marketing, production costs and other such business

variables may result in healthy profit or at worst insolvency. Congratulations to the group on their undoubted financial acumen, although they will no doubt have noted the cautionary tale recently reported in the papers, when a five year old out-performed City analysts (all right - different sort of game. Ed)

**The views and recommendations in this publication are those of Cumberland Ellis Peirs and have been obtained from a variety of sources. While we believe that our sources are reliable, we cannot guarantee that the information in this publication is accurate and it may be condensed or incomplete. No responsibility can be accepted for the accuracy of the information in this newsletter and no action should be taken in reliance on it without advice.**

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