

# Update

Family, Employment, Commercial

## Welcome to Anthony Gold

In this issue we look at the problems which arise for a Partnership facing bankruptcy, the importance of forum shopping in divorce cases and future developments in employment law.

We hope you find the articles informative. Please contact us if any of these matters affect you directly and you would like further advice. We are happy to have a preliminary discussion without charge.

### Partnerships and Bankruptcy

Fahri Ecvet  
Commercial team



that bankruptcy will at least mean that the bankrupt partner ceases to have any right to the future profits (or losses) of the partnership after bankruptcy. But the Act generally contains provisions you will want to change rather than adopt.

Perhaps the biggest single problem with the Act is that it states that if any one of the partners becomes bankrupt, the whole partnership automatically dissolves. The bankrupt's trustee in bankruptcy will take control of the bankrupt's share of the business, and the partnership has to cease trading. Assets and liabilities must be ascertained and realised. The remaining partners can form a new partnership and take control of what's left, and will have to try and find some way to pay the bankrupt's share in any profits and capital, and then find some way to revive the business.

This may not seem like an insurmountable problem, but it won't always be as easy as it sounds. The trustee in bankruptcy is unlikely to be concerned with or accommodate any effort to save the business. Their primary concern is to maximise assets for the bankrupt's creditors. If the partnership has been successful and increased in value, the partners could find themselves with a capital gains tax liability payable on the dissolution of the partnership. The unexpected tax bill will inevitably come at the most inconvenient time.

#### How a Partnership Agreement can help

If a majority of other partners want to remove a partner from the partnership, they cannot do so at all under the provisions of the Act. A simple provision in a Partnership Agreement, automatically removing a partner from a partnership if they are bankrupt, will allow the business to continue without dissolving the partnership, avoiding some of the problems this may otherwise cause. It is normal to have an Agreement which specifies that this can be done for other reasons, as well as bankruptcy. Removal of a bankrupt partner rather than dissolution does not solve all the issues the partnership will face. The partnership may still have to deal with the bankrupt's trustee, but a written Agreement can include clear provisions outlining how to deal with the financial consequences of a partner's bankruptcy. The Agreement can explain how and when a bankrupt's trustee will be able to deal with undrawn profits, and residual capital.

#### What if you are a partner in a partnership that becomes insolvent?

There are ways to try and trade through it – for example, a Partnership Voluntary Arrangement can be considered, and specialist assistance should be sought with this.

But assuming that the business must be wound up, the basic rule remains that, as well as benefiting from profits, partners will be liable for the partnership debts and losses. They can be expected to pay for these from their own pockets, and potentially far beyond what they might have contributed to the partnership initially. This is the obvious reason

When people enter into business partnerships, they do so with ambition, drive and a single minded focus on success. They rarely conceive of the possibility of business failure or bankruptcy. But it often happens, particularly in the current economic climate. A little foresight and planning, usually in the form of a written partnership agreement, can go a long way to making things much less painful than they might otherwise be when bankruptcy looms for a partner or partnership.

#### How well do you know your potential partner?

When considering partnership, partners should think carefully about the solvency of their partners, before they start trading, and ask some pertinent questions. They should not be afraid to ask their potential business partners for evidence of their solvency and assets, even if this may appear improper or impolite. Partners owe each other a duty of utmost trust and good faith so it is wise to get used to an increased degree of personal association. But even if it is genuinely difficult to broach the subject, there are ways to conduct your own checks.

#### The Partnership Act 1890

Even after careful enquiry, bankruptcy can be unforeseen and can happen suddenly. Without clear agreement about the terms of a partnership, it will be governed by the vagaries of a piece of legislation written 129 years ago – The Partnership Act 1890 (“the Act”). One good thing about the Act is



## Cont/ Partnerships and Bankruptcy

people choose to set up limited companies – i.e. to avoid personal liability for the debts of the business.

If the Partnership Act is left to apply without alteration, partners will share these liabilities equally. This is rarely what partners intend and so it is almost always normal to agree the extent to which partners will share in profits and losses as whatever proportion they may choose to agree between themselves. This is best done in a written agreement.

When someone takes a 10% share in the business and profits, and signs a document to this effect with their partners, they may be forgiven for thinking that their potential liability ends with 10% of the debts on business failure. But in fact their potential liability for the losses may be much greater than this. This is because partners cannot limit the extent of their liability for the commercial debts of the partnership and the acts of other partners to the outside world.

If a partnership fails leaving debts or claims, a creditor can, and usually will, pursue all of the partners as individuals for the entire amount of the debt. If the creditor gets a court judgement against all of the individuals, they can be quite selective about whom they actually choose to enforce it against. They will obviously look to pursue the partners they believe it will be easiest to recover the debt from – that is the partners who appear to have the biggest, mortgage free, house that they can attach a charge to and apply to court for the power to sell. So the partner who agreed a 10% share of profits (and grudgingly expects to be liable for 10% of the losses, should that happen) will in theory face potential personal liability for 100% of the business losses.

Partners often fail to realise the potential extent of their liability. A written Partnership Agreement cannot override or change this potential liability to creditors, but it can be worded in a way which helps to lower the chances

of a partner actually having to pay for the whole of a debt. The partners can at least agree that some of their number will provide an indemnity to others if they are pursued for the whole of a debt beyond agreed shares.

Expert advice is essential when considering an indemnity. An indemnity is only as good as good as the person giving it. A paper indemnity from partners who have flown to Venezuela on a one way ticket shortly after withdrawing the entire partnership bank account is not going to give you much comfort.

The agreement can also be invaluable in dealing with perhaps more mundane matters – who can sign cheques, and for how much, how many partners need to approve and bank borrowing? What is or isn't an allowable expense? If you have clarity on these things from an early stage, the partnership will run much more smoothly and is much more likely to be successful.

### Conclusion

Bankruptcy will always be messy and unpleasant, not just for the bankrupt but for those caught up in the fall that follows. But you can go a long way to protecting yourself if you are willing to apply a little thought and consideration to the possibility of future bankruptcy and the steps that can be taken to minimise your liability as a partner.



## New Family Partner for Anthony Gold

Anthony Gold is pleased to announce that Margaret Hatwood has become a Partner in the firm.

Margaret joins the family team, specialising in high value financial cases involving married and unmarried couples. Much of her work often involves complex international, business or tax elements.

Margaret acts for high-profile clients including Company Directors, senior members of the legal and medical professions and the City, including

Investment Bankers and Fund Managers. She joined Anthony Gold in September 2009.

Margaret is a regular broadcaster and contributor to legal journals and the national and international press. She is a Collaborative Lawyer and a member of Resolution, holding the advanced accreditation in high-value cases.

Her new appointment adds further strength to Anthony Gold's highly regarded family practice.

**Margaret can be contacted on 020 7940 4000**

## David Marshall speaks about rise in stress at work claims

The Health and Safety Executive has revealed that there were around 96,800 cases of anxiety or depression-related illness in London last year, with stress now second only to fast replacing backache as the number one cause of sick leave.

Over 16% of workers complain that their job is "extremely stressful" and the number of workers pursuing stress related compensation claims is on the rise. To help combat this, the National Institute for Health and Clinical Excellence (NICE) has suggested firms undertake annual "wellbeing" audits of staff.

Quoted by the Evening Standard, Anthony Gold's Managing Partner, David Marshall, emphasised the importance of employers confronting potential problems early to reduce absenteeism and costly litigation. He stated that, "Judges are cautious about opening the floodgates but are getting more with the times. It's much less defensible for a boss to say this behaviour is part of office culture".

David specialises in personal injury and employment law, and is an expert in this highly specialist field of stress at work, securing compensation payments that can run into millions. He is the author of Compensation for Stress at Work published in March 2009.

**David can be contacted at  
david.marshall@anthonygold.co.uk  
or on 020 7940 4000**

## Notary Services at Anthony Gold

Anthony Gold has recently appointed Philip Wallace as a consultant. Philip can provide a full range of Notary services. The role of a Notary is to authenticate legal documents which will be used abroad. In addition to the Notary's authentication, many foreign jurisdictions require documents to be legalised. Legalisation is the process whereby a Notary's signature and seal is certified to be genuine by the UK and foreign government.

For further information please contact Philip on 0207 940 4000

**Philip.Wallace@anthonygold.co.uk**

If you require notary services for businesses please contact David Wedgwood on 0207 940 4000,  
**David.Wedgwood@anthonygold.co.uk**

## Managing partner David Marshall is appointed as a Member of the Law Society's Civil Justice Committee

This is one of the Law Society's prestigious specialist committees and is responsible for advising the Society on policy in respect to the civil justice system.

In September 2009 David was also appointed as a member of the Civil Justice Council's new Costs & Funding sub-committee. The Civil Justice Council is 'an Advisory Public Body established under the Civil Procedure Act 1997 with responsibility for overseeing and co-ordinating the modernisation of the civil justice system'. It is intended to assist with implementation of reforms to be proposed by Lord Justice Jackson in his report this year.

# Divorce – forum shopping

**Kim Beatson** Partner and Head of Family team  
& **Camilla Fusco** Partner and Family Specialist

## Relocation

Everyone who works with international clients knows that relocating abroad can be a very unsettling experience. The family faces a big task of finding a new home, getting it furnished, settling the children in a new school, coping with a new culture and adjusting to new jobs. To make it more difficult, all of these tasks must be accomplished without the usual support of family and close friends.

Sadly, all of these factors can take a toll on marriage. But what happens if a foreign national wishes to divorce an English husband/wife?

The first question to consider is which country will have jurisdiction over the court hearing. This issue is critical as divorce settlements vary enormously from one country to another and often, as we shall see, there is a definite “first mover” advantage in applying for jurisdiction in the most favourable location.

England is often called the divorce capital of the world as the English courts tend to be far more generous to wives than elsewhere. Many foreign nationals will be surprised at how easy it is to establish English jurisdiction.

The asset or income rich spouse can save thousands, if not millions, of pounds by shopping around for the most advantageous legal jurisdiction in which to divorce. Conversely, the wife who manages to achieve English jurisdiction for her divorce can achieve substantial financial advantage.

## Who is eligible to divorce under English Law?

The rules are complex but the general principle is that jurisdiction can be granted if certain conditions as to domicile or habitual residence are met. These conditions can be extremely generous – for example, a non-domiciled petitioner may still be able to claim English jurisdiction simply based on habitual residence (which can be based on periods of residence as short as six months)

The main questions to be answered here relate to domicile and habitual residence. Domicile is a legal point which takes into account where you were born, as well as where you are living and where you intend to live ultimately. A specialist lawyer will be able to advise whether you are eligible for a divorce on this basis. Habitual residence is more straightforward as this simply refers to where you are living now. The general point to note however is that many foreign nationals who are working in the UK may be at potential risk of a more expensive divorce settlement than would have been the case back home.

## EU Regulations

Under an EC Regulation (known as “Brussels II”) the rules for jurisdiction in all EU member countries (except Denmark) regarding Divorce have been harmonised. This means that in a situation where more than one EU member country could deal with the Divorce (for example where a French couple live in England) the country where the proceedings are filed first has exclusive jurisdiction. In other words whoever is “first past the post” in filing the Divorce proceedings will secure the jurisdiction of that country as it will take precedence over any other European country even if the other spouse subsequently files Divorce proceedings elsewhere. As a result it is extremely important to take specialist Family Law advice in different countries (if there is more than one potential jurisdiction applicable to a situation) and for very prompt action to be taken in order that the husband or wife can secure the “best” jurisdiction for him or her.

Indeed in extreme cases it may even be worth while making a “pre-emptive strike” in an overseas location rather than waiting for proceedings to be lodged in the English courts.

## Born in the USA?

The situation in the US is different and varies from state to state. The US tends to be more favourable to wives than in many European locations although not quite so favourable as in England. Many states operate a community of property system and have prescribed “scales” of child support and alimony. The US courts tend to recognise pre-nuptial agreements far more readily than in other locations. However, US courts can be less ready to recognise overseas divorce settlements and, in

some cases, custody and contact orders, so the greatest of care will be needed when considering such matters.

Official Government statistics show that over 40% of first marriages break down (this data relates to the UK but the US is not dissimilar). Couples with different nationalities suffer particular pressures and it would not be surprising if the percentage divorce rate was slightly higher for this community. As can be seen above, anyone originally from England and Wales can use the English Courts on the basis of domicile or “legal connection”.

## Forum Shopping

The contrast between England and Scotland is stark. In England, joint lives maintenance obligations which terminate when (typically) a wife remarries or dies is relatively common place. In Scotland, spousal maintenance will usually last for three years only. In France, wives are expected to go back to work which explains why France has one of the highest rates of working women.

Forum shopping – choosing the best legal jurisdiction to your circumstances – is becoming more popular now because more people are moving from one country to another to live and work and marrying people from other EU Member States.

The cost of divorce papers being filed in an unfavourable jurisdiction can be staggering.

For example, an expatriate wife who has been living in Singapore for three years or longer (the minimum period of residence required to give Singapore jurisdiction to deal with the Divorce) may find herself facing Divorce proceedings in a country where her maintenance and capital claims will be treated much less advantageously than in England.

In some countries, such as Denmark, the Law restricts the period of time for which a wife can be awarded maintenance to relatively brief periods (perhaps one or two years) and as an absolute maximum to the length of the marriage. Often the amount of child maintenance and spousal maintenance is fixed according to prescribed rates or percentages applicable in that country, sometimes on a sliding scale, according to the payer’s level of income.

Most EU countries, with the exception of the UK and the Netherlands, exclude inherited wealth and pre-marital assets from the divorce settlement. Even more differences arise when it comes to the treatment of prenuptial agreements.

## Pre Nups

Prenuptial agreements are not strictly enforceable in the UK although the terms of such an agreement may be upheld by a Court when there has been full financial disclosure, where both parties have taken separate legal advice and there are no unforeseen circumstances such as children and a relatively short marriage.

In other jurisdictions, prenuptial agreements are generally binding.

## Child Abduction

Great care should also be taken when one parent is considering a move from one country to another where children are concerned. Most EU countries together with the USA, Canada, New Zealand, Israel and Australia (amongst many others) are signatories of an international treaty concerning child kidnapping (“the Hague Convention on International Child Abduction”). Under this treaty if a child is removed or retrieved (without the other parent’s knowledge or consent) the parent who has removed them will be guilty of child abduction. (a criminal offence in England) and may well be compelled to return them to their usual country of residence by legal proceedings.

This could easily apply, for example, to an American mother who has been living with her husband and children in England and who decides at the end of a Christmas vacation at home in the US to remain with the children (without her husband’s consent) due to difficulties in her marriage.

## First come, first served

We hope the above alerts you to the importance of choosing a jurisdiction and doing so quickly. It may be necessary to consult a solicitor in both potential jurisdictions in order to check which jurisdiction best suits. It is then a case of winging it to the appropriate Divorce Court before the other party gets wind of what is happening. Under European legislation, the jurisdiction for a divorce takes place on a first come, first served basis. He or she who issues proceedings first gets to choose the jurisdiction.

## Free Morning Seminars

The commercial team, having completed a successful set of morning seminars about matters of commercial interest, will be running a further set this year.

Please email:

**Philippa.Savage@anthonygold.co.uk**  
if you would like to be placed on the mailing list.

### London Bridge

The Counting House  
53 Tooley Street  
London Bridge City  
London  
SE1 2QN

tel: 020 7940 4000  
fax: 020 7378 8025

### Streatham

Lloyds Bank Chambers  
186 Streatham High Road  
London  
SW16 1BG

tel: 020 7940 4000  
fax: 020 8664 6484

### Walworth

169 Walworth Road  
London  
SE17 1RW

tel: 020 7940 4000  
fax: 020 7708 3133

# Update on Developments in Employment Law

## Mark Cornish

Partner and  
Employment Specialist



- On 1 October 2009, a weeks pay for the purposes of calculating redundancy was raised from £350 per week to £380.
- From 1 October 2009, employees' tips and gratuities are excluded from any calculations of the minimum wage.
- The adult rate of the National Minimum Wage (NMW) was raised to £5.80 (£5.73) an hour in October 2009. This is payable to those age 22 and over. The hourly youth development rate will increase to £4.83 (£4.77) and for 16 and 17 year olds to £3.57 (£3.53) an hour.
- If you weren't aware already by now from 1 April 2009, the ill fated statutory grievance and disciplinary procedures were repealed. A revised ACAS code of practice replaces them and failure to comply with it will be indicative of an unfair dismissal, if not conclusive.
- The Equality Bill 2009 was presented to Parliament in April 2009 and is currently making its way through Parliament. See further below.

The contents of the Equality Bill 2009 are intended to be law in Spring 2010, although some provisions may not end up in force until significantly later than this. The Bill is likely to have a profound effect on discrimination legislation.

In its current form the Bill proposes to repeal almost all existing discrimination law and replace it with one centralised Act. This may be an ambitious aim, given that discrimination legislation is contained in more than 9 key Acts of Parliament and more than 100 statutory instruments. The commitment to "Plain English" drafting will almost certainly lead to a slue of cases requiring clarification of the new Act's provisions and the intention of Parliament.

But the Bill also contains wider and additional laws intended to promote equality in the workplace. For example, one small but significant change to the law will be that any attempt by employers to restrict employees from discussing their salaries, by contractual terms or otherwise, will be prohibited. This does not mean that people will be compelled to disclose details of their pay with anyone, nor will employers be compelled to tell employees what other employees are paid. But employees will be able to compare pay if they want to.

If the Bill passes in its current format, it will also introduce an element of positive discrimination. It will be potentially lawful for employers to select a candidate who comes from an underrepresented group of people in that employer's organisation, provided that the candidates to choose from are equal in all other respects. However, the practical difficulties involved in establishing that candidates were indeed equal in all other respects, is likely to make these provisions difficult for employees to rely on. Most commentators think it unlikely that employers will change their employment and recruitment practices significantly in response to this change. There will be a duty imposed on public sector employers (not as yet in the private sector) to consider reducing "socio economic inequalities" in their workforce, in their "strategic decision making". This may have far reaching consequences in the longer term - a form of anti "class" discrimination in its infancy.

Doubtless, this Bill will hit the headlines at regular intervals in the coming months as it makes its way through Parliament, and public awareness of its provisions increases. And of course there may well be an Election before this Bill may be enacted.



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