

# News and Views



Matthew (right) with skydive instructor

## Matthew and Richard leap for Orpheus

A mid-May weekend saw Matthew Truelove and Richard Bullen flown to 10,000ft before leaping out of a plane above Surrey in a skydive for local charity Orpheus. In excess of £1,800 was raised by the pair for the charity that provides opportunities for disabled young adults in the county. The photograph only begins to show the exhilaration of the experience which, if the opportunity arose, both said they would repeat.

## Leatherhead Rotary 10km run

TWM staff were out in force for the sixth running of this 10km race across Bluebell-covered Headley Heath, near Leatherhead. The weather was kind, and the race raised over £6,000 for MacMillan Cancer Support. The event was a lovely way of keeping our dear former colleague, Carmel Meaney, in our thoughts.

## TWM retains excellence standard



Lexcel is the Law Society standard for practice management, awarded to those solicitors' practices that meet the highest standards for management

and customer care. The accreditation is re-appraised every three years, and we can report that we passed, accompanied by some particularly pleasing words of congratulation from the assessor.

## Marathon achievement for Janet

Congratulations to Janet Cummings, a senior legal secretary in the Reigate private client team, who successfully completed April's London Marathon. Janet was running for a cancer charity in memory of her parents and raised over £1,300. Here she is pictured at 17 miles, with a mere 9 to go!



## Dispute Resolution **Enforcement - Taking Control of Goods**

In the current economic climate it is not enough simply to obtain a judgment, arguably the real skill and benefit to a client lies in the enforcement process. April 2014 has seen significant overhaul in the Law of Execution.

When a Judgment Debtor fails to make payment in line with a Judgment or Order there are a number of enforcement methods which may be used to seek recovery.

The most common enforcement method known as Execution Against Goods, allows the Judgment Creditor to enforce the judgment by seizing the goods (now referred to as Taking Control of Goods) of the Judgment Debtor which can ultimately be sold to pay the debt.

With the introduction of the Taking Control of Goods Regulations on 6 April 2014, there have been changes to which items may or may not be taken into control during enforcement. Certain items remain exempt from seizure, for example bedding, clothing, furniture and provisions that the debtor and their family need for a basic level of domestic life.

The Taking Control of Goods Regulations now specify that any items reasonably required for the care of a person under 18, a disabled person or an older person (over 65) are exempt, as are assistance dogs, sheep dogs, guard dogs and domestic pets.

The Regulations also specify exempt vehicles, including vehicles with a valid disabled person's badge or vehicles used

for police, fire or ambulance purposes or use for other health emergency purposes.

Previously, most Tools of the Trade (defined as those items needed by the Debtor to do their job or run their business, for example tools, books, vehicles etc) were exempt from seizure; however, since the introduction of the Regulations, the position has changed. Under the new Regulations, Tools of the Trade are only exempt to a value of £1,350. Goods to that value can be claimed by the Judgment Debtor and anything above that may be taken into control by the Enforcement Officer.

The Enforcement Officer can take into control a wide range of goods within the Judgment Debtor's premises or on the highway, including vehicles, boats and aeroplanes, household furniture, jewellery and artwork, money, bank notes, cheques and goods on finance (provided the sale is agreed by the finance company), jointly owned property as well as livestock and animals. These will either be removed for sale or left at the Judgment Debtor's premises under a Controlled Goods Agreement until the debt and costs are fully paid.

Certain time limits apply for taking enforcement steps. If you have a Judgment or Order for money which has not yet been enforced we would be happy to discuss with you the various enforcements options available.

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## Private Client **Your children's future**

We all want the best for our families, but what steps should be taken now to protect your children's future? Life does throw up unexpected turns of events, and it is sensible to have a safety net for those who depend on you. Elements include:

### **The security of a Will**

Over half of people die intestate (without a Will). The rules of intestacy mean that your estate may not pass as you had intended or assumed. Intestacy rules make no provision for cohabittees who are therefore particularly vulnerable. A Will enables:

- your assets to pass to those who you would want to benefit;
- you to choose the legal guardians of any infant children and

to appoint people to manage any children's inheritance via a trust fund; and

- provision for vulnerable beneficiaries without compromising their right to state support.

### **Investing for the future**

Investing money or setting up a regular savings scheme at an early age is always a wise decision when considering your children's future. Junior Investment Savings Accounts and NS&I Children's Bonds provide efficient investment options. It is even possible to set up and contribute to a junior self-invested personal pension for children up to 18.

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## Private Client **Health and Welfare LPAs vs. Advance Decisions**

Since October 2007, and the introduction of Lasting Powers of Attorney (LPAs), individuals can appoint trusted family members or friends to make decisions about health and welfare issues on their behalf, if they lose the mental capacity to make such decisions themselves.

A key feature of the Health and Welfare LPA is that you can grant a specific power to your attorneys so they can make decisions about life-sustaining treatment for you. This is any treatment that is considered by a doctor to be necessary to keep you alive and can mean a major surgical procedure such as an organ transplant, or more day-to-day treatment such as a course of antibiotics, artificial nutrition or hydration.

Before the introduction of the Health and Welfare LPA, you could make an advance decision (more commonly known as a living will) to refuse life-sustaining treatment in a future situation where such treatment is to be given and you no longer have the capacity to refuse it. Advance decisions were given statutory footing in October 2007 by the Mental Capacity Act 2005, the same Act that brought in LPAs.

An advance decision may have been created long before there is a situation where it applies. It can be difficult to prepare a

document that will cover all the possible treatments that may be available and all the relevant circumstances that may arise in the future. But attorneys with the power to make decisions about life-sustaining treatment can apply their knowledge of your values and beliefs to respond to the particular circumstances and make decisions reflecting what you would have chosen if you had been capable.

The Health and Welfare LPA allows you to put these decisions into the hands of those who know you well. Without it, these decisions will be made by healthcare professionals instead. However, for those who are uncomfortable with putting their family and friends in a position to make such difficult decisions, the advance decision remains a valuable alternative. Even if the advance decision does not cover the specific situation, as an expression of your views it can provide helpful guidance to the healthcare professionals of the treatments you would have chosen if you were capable.

For those with strong views about being kept alive artificially, these documents are essential so your voice can be heard if you no longer have the capacity to express yourself.

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## Family **Private children law**

April's Children and Families Act introduced reforms to private children law, so that where it is safe to do so, a child should benefit from the involvement of both parents in its life.

There will now be three types of orders available for the courts to make:

- child arrangements orders which replace contact and residence orders;
- prohibited steps orders; and
- specific issue orders.

The court can still hear an application to vary or discharge any of these types of the existing orders. Under Section 1 of the Act, when considering making any order under the Act with respect to a child, a Judge in the Family Court shall not do so unless it considers that making an order would be better for the child than making no order at all. This is often referred to as the "no order principle".

It is usual to expect the Family Court to encourage agreement

between the parties and for a schedule setting out terms of agreement rather than a formal order being made. In certain circumstances the court will decide that it is in the best interest of the child for it to make an order.

The new *child arrangements* deals with whom a child is to live, spend time or otherwise have contact with. An application will no longer be made for a residence order or a contact order, separately or together. These are dealt with under the new "child arrangements".

The *prohibited steps order* ensures no step which could be taken by a parent in meeting his/her parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court, e.g. preventing the removal of a child from the jurisdiction for a holiday.

The *specific issue order* gives directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child, for example attendance at a particular school or a requirement for medical treatment.

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## Employment **Are covert recordings admissible in Employment Tribunal proceedings?**

Following the recent case of Punjab National Bank and Others v. Ms S Gosain UKEAT/003/14/SM it appears that covert recordings will normally be admissible as evidence unless there is a good public policy reason not to.

The case concerned an employee, Ms Gosain, who was employed by the bank. Ms Gosain attended both a grievance hearing and a disciplinary hearing with the bank. As is usual in meetings of this nature, parts of the meeting involved all of the parties (including Ms Gosain) discussing matters. There were also periods where Ms Gosain was asked to leave the room and private discussions between managers took place. Ms Gosain made covert recordings for the entirety of the meeting (including the private discussions of managers whilst she was not in the room).

Ms Gosain brought claims against the bank for sexual harassment, sex discrimination and constructive unfair dismissal and disclosed the covert recordings as part of those proceedings. The bank objected to the admissibility of the private contents of the recordings. The recordings included a senior manager giving a direction to dismiss Ms Gosain, acknowledgment by the manager hearing Ms Gosain's grievance that he was deliberately skipping the key aspects of her grievance and the manager hearing the disciplinary making vulgar statements of a sexual nature about Ms Gosain.

The Employment Tribunal permitted the entirety of the recordings to be admitted (both public and private) on the basis that "they were not part of the deliberations in relation to the matters under consideration".

As demonstrated by this case, the Employment Tribunal has a wide discretion to determine admissibility of evidence. In practice, an Employment Tribunal will generally decide that evidence is admissible if it is relevant to an issue between the parties.

### **Practical tips for employers**

- An employer should ensure that its disciplinary and grievance procedures explicitly prohibit covert recordings in disciplinary and grievance meetings. In addition, employers may wish to consider asking employees

to switch off mobile phones and electronic devices at the start of meetings. It should be noted however, that this will not assist an employer in preventing the admissibility of such evidence. Whether conversations that are covertly recorded are admissible in evidence at any subsequent Tribunal hearing will always be at the discretion of the Tribunal.

- Be aware that there is always a possibility that a meeting may be recorded regardless of policy documentation. We would strongly advise that any discussions between managers during breaks in proceedings are conducted in a separate room. Care should also be taken to ensure that discussions at, and relating to, such hearings are appropriate.
- Keep notes as backup evidence. When deliberating in private, those making decisions may wish to consider keeping a confidential note of their reasoning. Whilst this would not be provided to employees, it could be produced to defend any allegations if the matter proceeds to litigation.
- Managers who are carrying out meetings of this nature should be trained in how such meetings should be conducted and the potential risks associated with the meetings and the processes themselves. This should assist managers to present themselves in the best possible way.

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## Commercial Property **Non-domestic management of asbestos**

The Control of Asbestos Regulations 2012 (CAR 2012) record the obligations in relation to asbestos and non-domestic premises. The obligations are wide ranging but fundamentally include a duty to manage asbestos and is increasingly something that commercial property solicitors are becoming involved with.

If you are assigning, granting or taking a commercial lease or buying or selling commercial premises, asbestos is likely to be raised early on. If acting for a landlord or seller we would ask for a copy of the asbestos survey for the property to issue with the draft documentation. If acting for a buyer or tenant entering in to a lease or taking an assignment of a lease we would ask the seller or the landlord to supply an asbestos survey.

Your role in relation to asbestos will depend on who is identified as the “duty holder” for the premises; *“The duty holder is required to determine whether asbestos is present, assess the*

*risk and have an action plan and system in place for managing the risk”*. This extends to making the relevant people (including employees) aware of the location of any asbestos and its condition. If you are having works carried out to your premises you would also need to make the contractors aware.

Failure to comply with the requirements of CAR 2012 is a criminal offence. At present in the magistrate’s court the penalty for each offence is imprisonment for up to twelve months and a fine not exceeding £20,000. If convicted in the Crown Court, the penalty for each offence is imprisonment for up to two years and an unlimited fine. The harsh penalties recognise the dangers of asbestos to humans and emphasise the importance of commercial property owners and occupiers to take responsibility for the risks and to have the correct safety measures in place.

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## Business Law **Trade Marks – likelihood of confusion**

Trade marks are one of the measures a company can take in order to protect the value of its brand. Once a trade mark is registered with the Trade Marks Registry, it prevents others from doing the same and gives the proprietor a cause of action should it be infringed.

However, registration of a trade mark can be refused on several grounds. One of these is where the proposed trade mark is similar to an earlier trade mark and is to be used in relation to similar or identical goods, there would be a likelihood of confusion amongst the public between the two marks.

What amounts to a “likelihood of confusion” is a matter of interpretation for the courts. There have been a number of recent cases at European level on what will cause likelihood of confusion and here are three examples from the past month.

**Existing mark: PEDRO**

**Proposed mark: Pedro del Hierro**

Although there was a low degree of similarity between the marks both phonetically and visually, the earlier trade mark “PEDRO” was highly distinctive in Spain for clothing. There was therefore a likelihood of confusion and the mark “Pedro del Hierro” could not be registered.

**Existing mark: BEYOND VINTAGE**

**Proposed mark: BEYOND RETRO**

The court held that there was a likelihood of confusion between these trade marks as consumers are more likely to pay attention to words at the beginning, which were identical in these marks. The words “vintage” and “retro” were conceptually similar to both the English and non-English speaking public in Europe as they were both commonly used in the clothing industry and brought to mind the past for the majority of people.

**Existing mark: ASSOS**

**Proposed mark: ASOS**

These trade marks had no conceptual meaning as the majority of the European public would not associate ASOS with the acronym “As Seen On Screen”. Therefore, a likelihood of confusion existed in relation to clothing, footwear, headgear etc. which had a fundamentally aesthetic function. However, the court held that some of the ASOS goods with a fundamentally utilitarian function such as sports bags, briefcases and wallets were not similar goods, so this ground of refusal could not be relied on by the owners of the ASSOS mark.

Should you require any assistance with trade mark registration or opposition, please contact us.

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## Awards Success

### Contentious Probate Firm of the Year

We were delighted to receive the news that the Firm has won UK Contentious Probate Firm of the Year, from publisher Acquisition International. Following strong peer reviews and in-house research, Guy Perkins' team came out ahead of other shortlisted candidates.



and matrimonial law. In addition, this year, Lindsey is included in a new category called Power Women, recognising successful women in the private wealth sector.

In the peer recommendation section Lindsey is described as follows. *“She continues to be an extremely pragmatic and constructive family lawyer even when the wheels are potentially going to come off a pre-nuptial agreement. She has extensive experience of all areas of family law including financial claims, children disputes and property claims between unmarried couples”.*

## UK Information Technology Law Firm of the Year

The same publisher has also released its 2014 Mergers & Acquisitions Winners List. TWM won the UK award for Information Technology Law Firm of the Year, testament to the work undertaken by the team, that includes Jamie Berry and Peter Stevens.

## Citywealth accolades for Lindsey

Lindsey Alexander, a family partner in the Epsom office, has been included in a new listing of advisers in the private wealth sector. Citywealth has published the 9th edition of its leaders list, bringing together leading lawyers, trustees, bankers, investment managers and accountants who advise the country's ultra high net worth individuals (UHNWs). As in 2013, Lindsey is listed as a prominent figure in family

News and Views is TWM Solicitors' quarterly newsletter for clients and contacts. The articles included in this publication are necessarily brief and because the law may change subsequently, it is essential that legal advice is obtained prior to proceeding.

TWM Solicitors is a full service law firm. Our seven office network covers Surrey, SW and Central London. Our approach centres on achieving success for our clients.

If we can help with a legal issue, please do not hesitate to contact one of our team:

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