



Defigo

'Focus'

Commercial Newsletter Autumn 2011 Edition

Editor's foreword

We have had one of the mildest autumns on record but remember the warning in the old saying:

"When berries are many in October, beware a hard winter".

Over the last number of weeks the economic storm clouds have continued to gather over Europe, with Greece calling a referendum in respect of further austerity measures, Italy on the verge of requiring an EU bailout and the financial markets reflecting a feeling of uncertainty and instability. It could well be a long hard winter for everyone associated with the Eurozone.

There were however brighter sporting moments in the last three months: an exciting Rugby World Cup with New Zealand at last fulfilling their potential (just), amid the hue and cry from Wales in respect of Mr. Rolland's controversial use of the red card; the recent successes of Swansea City in the Premiership and Cardiff City in the Championship, and perhaps the highlight, Wales' Dai Greene, client of Dolmans, captaining Team GB at the Athletic World Championships, winning gold in the 400hurdles and now being amongst the nominees for BBC Sports Personality of the Year 2011 – roll on London 2012.

In this edition a new member to the team, Rhian Rees, gives a word of warning in relation to protecting your digital inheritance; Alison Henders-Green advises on the legal implications of and how to deal with "stopped" cheques; and Ryan David explains the benefits of bespoke valuations when purchasing property.

In addition we have our usual "snapshots" and news and events sections.

Should you require more information about this edition's content, please do not hesitate to contact me or the various contributors directly. Likewise, I invite our readers to advise of any particular topic which they would like covered in future editions.

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In this edition:-

- **Protecting our digital inheritance**

In light of our increasing use of the internet, Rhian Rees considers the importance of considering access to online information in the event of death.

- **Stop that cheque**

Alison Henders-Green considers what action you can take if a supplier makes payment by cheque and then has a change of heart.

- **Buy to let valuation pitfalls**

Having previously considered the importance of a surveyor's report in respect of a landlord's repairing obligations, Ryan David now considers the issue of valuation reports for buy to let purchasers.

- **First prosecution under the Bribery Act**

Following her recent article on the introduction of the Bribery Act, Jennifer Cottle comments on its impact in practice.

- **Snapshots**

Our usual round-up of other interesting developments.

Protecting our digital Inheritance

Facebook, Twitter, Flickr, You Tube; these names, as much as we may try to resist them, are definitely here to stay. We have all found that these social media platforms have become commonplace in many people's everyday lives and now dictate our choice of communication and interaction with our family, friends and colleagues. As our lives move into the digital community we must ask ourselves, what happens to our digital legacy after we die? Rhian Rees considers what steps individuals should take.

Organising our personal affairs in the anticipation of one's own mortality is a morbid concept for many, however, as our time online increases, together with the number of users, it is vital that we preserve and pass on our digital legacy.

A recent survey carried out by cloud computing company Rackspace found that, out of 2,000 adults, almost a third of people have assets online which they will include in their will, and 11% have already done so.

1 in 4 people already have more than £200 of digital assets protected by passwords. A quarter said they had "special photos" stored online, one in 10 had treasured videos and the same number kept sentimental emails from loved ones.

As a nation, Britons already have a £2.3bn 'digital inheritance' lined up and this is set to increase considerably. This could include bank accounts, music services, videos, electronic subscriptions, PayPal accounts, photos and more.

Most people owning more traditional assets such as bank accounts, investments or property will know that they should make a will to deal with these effectively on death, or should appoint an attorney to give instructions during their lifetime. However, despite this two thirds of the population do not have a valid will in place.

It is therefore of utmost importance that internet users, who want to ensure that e-mail and other online accounts are accessible on their death, recognise the importance of drafting an appropriate will to deal not only with their more traditional assets, but also to incorporate the necessary wording to ensure that their executors can deal with their digital assets as part of the estate planning process.

So how should people deal with their online passwords in their wills?

Our advice is that the passwords should not be included in the will itself but in a separate confidential letter that is placed alongside your will, often called a letter or memorandum of wishes. The reason for this is that during the course of the administration of your estate your will must be sent to the Probate Registry in order that a Grant of Probate can be issued. The physical Grant of Probate will have a copy of your will attached to it. Once the Grant of Probate is issued it then becomes a publicly available document. The risk therefore is that if your online accounts are still active at that time, they could, in theory, be accessed by someone unknown to your personal representatives and without their consent.

Another aspect to consider is how many of us use internet banking in our everyday life? What would happen if we were to become physically or mentally incapable of managing those accounts? Who has the account numbers, passwords and the necessary memorable information? Our advice would be to prepare a Lasting Power of Attorney giving your attorney the right to access and manage your online digital information.

In conclusion, it is necessary to ensure that you seek advice as to the importance of not only drafting an appropriate will to ensure that your more traditional assets are dealt with on death but also your 'virtual' assets.



Rhian Rees can advise on all aspects of wills and probate.

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Stop that cheque

Whilst many of us now have smart phones, i-pads and other tablet computers which mean that internet banking is appealing, a cheque is a legal form of tender which is still used to pay for goods and services. Alison Henders-Green looks at what are the legal consequences of stopping a cheque once it has been tendered...

It is not without precedent for a customer to pay a supplier by cheque for goods/services supplied and then have a "change of heart" and instruct the bank to stop/countermand the cheque. This most often occurs when the customer decides they are dissatisfied with the goods/services provided or potentially when there are concerns regarding a supplier's financial position.

What the customer forgets when taking this action is that a cheque is the equivalent of cash. Therefore, there are two separate contracts:

- The contract for the supply of the goods or services.
- An unconditional promise to pay the recipient (by providing the cheque).

If the cheque is stopped, the supplier has a choice whether to sue on the original supply contract (allowing the customer to raise arguments about the quality of the goods or services) or, more simply, to sue on the cheque. As a cheque is the equivalent of cash, a party who sues on a cheque that has been stopped or countermanded is normally entitled to summary judgment against the party who wrote the cheque. Only very limited defences are available to avoid summary judgment.

There are certain absolute defences which relate primarily to the formation of the bill of exchange or cheque as a bill. The principal examples are:

- Forged or unauthorised signature.
- Complete incapacity.

These are unlikely to apply in a supplier/customer situation.

Other defences are:

- Fraud or duress.
- Misrepresentation.
- Illegality.
- Failure of Consideration.

Again, in the majority of cases, these are unlikely to apply in a supplier/customer situation. However, it is worth briefly considering these defences, as in certain circumstances they may provide a defence.

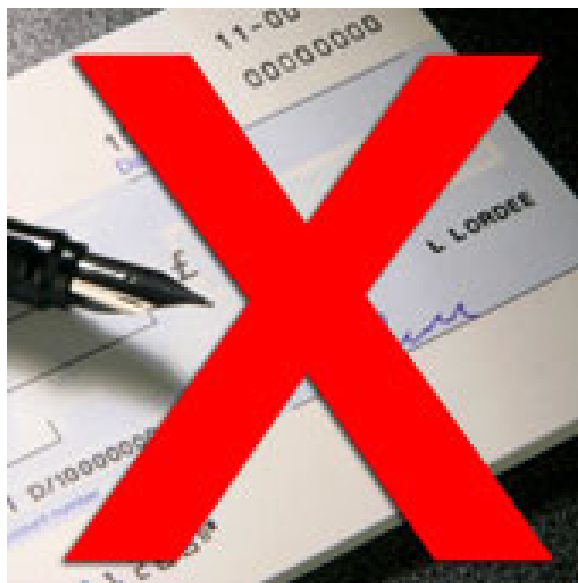
Fraud or duress

The fraud defence relies on the application of the maxim "fraud unravels everything". To succeed, the evidence of the fraud must be clear and preferably documented. A "mere" assertion or allegation is not sufficient.

The defence of duress derives from the English legal principle that a contract which has been obtained by illegitimate forms of pressure or intimidation is voidable on the ground of duress. Duress here is generally considered to mean actual or threatened violence and unlawful imprisonment (common law duress); other forms of pressure or coercion (equitable duress) including economic duress; and also undue influence.

Misrepresentation

Often a defence of misrepresentation is really a disguised complaint about the quality of goods ("you told me that the goods would be better"). Without fraud, this is not a defence to a claim on a cheque. (If a misrepresentation is fraudulent, however, then the defence of fraud may apply.)



Illegality

The "illegality defence" is founded on public policy and arises when the defendant argues that the claimant should not be entitled to their normal rights or remedies because they have been involved in illegal conduct that is linked to the claim.

Failure of consideration

The source of this defence is the premise that a cheque is a contract and without consideration it will not be enforced.

This defence succeeded in *AEG v Lewis (1992)*. The facts were that Mr Cash had some repairs carried out to his central heating system. The work was done by an engineer employed by a firm of heating engineers. Mr Cash was not at home when the work was finished and his daughter (the defendant) paid for the repairs by drawing a cheque on her bank account, which she gave to the engineer. When Mr Cash returned, he discovered that the heating was not working properly and his daughter stopped the cheque.

The Court of Appeal was divided on this issue but ultimately held (2:1) that the engineer had no authority to accept a cheque to discharge Mr Cash's liability and therefore give consideration for the cheque. The daughter was therefore entitled to stop the cheque. A total failure of consideration may occur where a buyer lawfully rejects the goods sold, entitling the buyer to recover the cost of the goods from the seller, or where the goods agreed to be sold are never delivered. In these circumstances, the paying party has received no part of the benefit for which he bargained and which led to him writing a cheque, and such total failure of consideration will be enough to resist summary judgment. In addition, it is possible for a partial failure of consideration to provide a defence to part of the claim on a cheque, but only if it is for an ascertained and liquidated sum. So, for example, if a cheque is given for 1000 items and only 500 are delivered, there will be a defence to a claim on a cheque for the missing 500.

Counterclaim

Good news for those seeking to sue on a stopped/countermanded cheque, the Court has held judgment on a cheque should not be held up by a counterclaim (or claim to set-off) for damages for breach of some other contract or the commission of a tort. This is the case, whether the counterclaim arises out of, is connected with, or is independent of the contract for which the stopped cheque was given.

Therefore, the message is if you are a supplier and a cheque has been stopped/cancelled you will in the majority of cases be able to take prompt action to recover the amount due under the cheque.



Alison Henders-Green can advise on all elements of commercial disputes including taking action in respect of a countermanded/stopped cheque.

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First Conviction under the Bribery Act 2010

Following Jennifer Cottle's recent article on the introduction of the Bribery Act, she now comments on the Act in action.....

Munir Patel, a former magistrates' court clerk, has admitted taking a £500 bribe to "get rid" of a speeding charge for someone. He pleaded guilty on 14 October 2011 to a charge under section 2 of the Bribery Act 2010 and to misconduct in public office for other similar offences.



The Act came into force on 1 July 2011 with the intention of modernising and simplifying the law on bribery. An individual convicted under the Bribery Act 2010 could be liable for a prison sentence of up to a maximum of 10 years, a fine, or both. Munir Patel was sentenced on 11 November 2011 at Southwark Crown Court to six years' imprisonment.

The Serious Fraud Office has said that a high priority for the Office will be to find a foreign corporation with a UK business presence that has become involved in corruption in another country and has undermined a good ethical UK corporation.

However, it is now clear that the Bribery Act 2010 is aimed at everyone and not only at corporate organisations with an international reach. This first conviction sends a clear message: bribery and corruption will not be tolerated in any shape or form.

All organisations, regardless of their size, should now be taking steps to prevent bribery and corruption by providing staff training and ensuring their internal procedures and policies are adequate. If you would like any guidance on this, the Dolmans Employment Team would be happy to help.

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Buy to let valuation pitfalls

Ryan David considers whether a buyer can rely on a bank valuation in a buy to let purchase and in what circumstances a buyer should be considering obtaining his own valuation report...

In previous editions of Defigo we have looked at the position of tenants and their repair liability when entering into commercial leases. We now turn our attention to the purchase of a house or buy to let house or flat. There are usually two issues which require input from a surveyor. One is to survey the building and check that its condition is sound and free of defects, and the other is to value the property to ensure that the price you are paying is reasonable in the current market. All very sensible, and when you are a cash buyer, you are well advised to procure an appropriate report from a surveyor of your choice. However, where you are buying with a mortgage, the mortgage company will also want to carry out a valuation report. Buying a property can be an expensive business, so it is tempting to rely on the valuation report provided for the bank. Is this something you can safely do from a valuation perspective? The question is dictated by whether the surveyor who prepared the report owes a duty of care to the buyer for whom the bank is providing the funding. The answer to the question depends on whether the subject property is an owner occupied or a buy to let.

Case of Owner Occupied

In the case of an owner occupied property the courts have taken a somewhat protective and paternal view of buyers. They assume that they are not sophisticated or familiar with the conveyancing process. They also take into account evidence that the vast majority of buyers actually rely solely on the mortgage company's valuation report, backing up this assumption. Accordingly, they have held that a valuer preparing a report in this instance does owe a duty of care to both the mortgage company and the buyer. From a buyer's perspective, should you simply rely on such reports because the courts say you can? The simple answer is "no". The level of detail in these valuation reports is low and they provide a very limited opinion on the condition of the property. Valuers in this instance will not be held responsible for defects in the condition of the house where such matters have been expressly excluded from their report. They will only hold a duty on the valuation aspect. A home buyer's report is a recommended on all purchases.

Buy to lets

The courts have taken a different approach with buy to lets where they have stated that no duty exists. The rationale behind this is that the court views the buyers of buy to lets as more sophisticated and generally wealthier than typical house buyers. The purchase is viewed as essentially a commercial transaction and accordingly the court's view is that a reasonably prudent commercial buyer in their position should obtain their own report specifically to ensure that the rental income will be sufficient to pay the mortgage and that the condition of the property is good.



Better safe than sorry

From a buyer's perspective, we would always recommend that you procure your own valuation/survey in either case to ensure that any problems with the property are identified before you commit to what could be a very expensive mistake. Dolmans can advise on all aspects of commercial and residential conveyancing.

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Snapshots

A brief round-up of some other interesting developments...

Changes to unfair dismissal rules

On 3 October 2011 George Osborne announced that radical changes would be made to the rules on bringing a claim for unfair dismissal and Employment Tribunal fees. The current position is that employees are eligible to bring a claim against their employer for unfair dismissal after one year's continuous service. On 6 April 2012 this will rise to two years. This is the latest development in the government's workplace reforms which aim to instil greater confidence in businesses and encourage employers to take on new employees. No further detail has been given, leading to speculation as to whether or not transitional provisions will be put in place to protect those employees who may have already achieved one year's continuous service by next April. The government has estimated that this change could save businesses nearly £6million per year and will result in 2,000 fewer claims per year. Apart from the Chancellor's brief mention that Employment Tribunal fees will be introduced, there has been no further official announcement as to the detail of these fees. It is hoped that these changes will encourage the early resolution of disputes, whilst also tackling weak and vexatious claims.

The Energy Act 2011

The Energy Act 2011, which received Royal Assent on 18 October 2011, will include key provisions for implementing the Green Deal.

The Green Deal is the coalition government's flagship initiative for improving the energy efficiency of buildings in Great Britain through a "pay as you save" scheme. It will enable occupiers of both domestic and non-domestic premises, and private sector landlords, to receive finance from accredited providers for energy efficiency improvements, which will be paid for by energy bill savings. The aim is to remove the upfront costs of making energy efficiency improvements, which the government believes is the key to driving down carbon dioxide emissions from buildings.

To be eligible for finance under the Green Deal, the expected financial savings resulting from installing measures must be equal to, or greater than, the cost of repayment over the term of the Green Deal plan. This has been dubbed "the Golden Rule".



The Green Deal should be available from autumn 2012 in England and the Department of Energy and Climate Change is currently in talks with the Welsh devolved government with a view to introducing the Green Deal in Wales.

Industry critics have warned that Green Deal financing will have to be made available at very low rates of interest to encourage widespread uptake of efficiency measures, such as cavity wall and loft insulation. Further, they consider that businesses will be unable to move forward with plans for the scheme until details of the financing initiative are fleshed out in a formal consultation that is due to commence at the end of this month.

Check those documents

Since 1st September 2011, Companies House is no longer accepting documents and forms where the name of the particular company concerned contains typographical errors or minor variations. This is mainly to ensure that documents are entered on the correct company record, but also to ensure that fewer documents are rejected, as it is hoped that companies will exercise greater care after reading the new rules.

There are a few exceptions to the rules, which are:

- 'Co' may be used instead of 'Company'.
- '&' may be used instead of 'and'.
- The word 'the' may be omitted, but only at the front of a company name.
- Certain standard abbreviations such as 'ltd' 'plc' and 'LLP' will continue to be accepted.

Our Corporate Team can assist with company secretarial matters.

News & Events

A look at what the members of the Commercial Team have been up to recently and forthcoming events...

Here come the girls

We are pleased to announce the arrival of two new members to the team. Rhian Rees, a specialist probate/private client practitioner, joins us having previously worked in Swansea and Cheltenham.

Bethan Walsh joins us having trained in another large Cardiff commercial practice and will specialise in employment and commercial law.



EMPLOYMENT / COMMERCIAL SEMINAR

Alison Henders-Green and Jen Cottle recently presented a seminar in our offices at One Kingsway on the topics of Debt Recovery and The Agency Regulations 2010. If you could not attend but would like a copy of the seminar notes please contact Alison or Jen.

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It's just not fair

Continuing our support for local charities the Commercial Team and guests had an extremely enjoyable "Monte Carlo Night" in support of Cancer Research Wales at the Cardiff City Hall. The evening included music from the sensational Big Mac's Wholly Soul Band, giant Scalextrics and a casino. Phil Bradley's delight at amassing piles of chips at Blackjack was matched only with his despair when he was told that they weren't real.

We also entered the recent quiz organised by the Wooden Spoon Charity. Appearing under the pseudonym "Rolland's Rats" we were doing particularly well until Ryan David was adjudged to have tipped his pint illegally onto the floor and was given a red card. We played on valiantly but the disadvantage was too great. We are not complaining – best team won – bit harsh though!



"A little bird told me"...you can now follow our Employment and Probate teams on twitter at:

http://twitter.com/#!/Dolmans_Cardiff
<http://twitter.com/#!/DolmansWills>

Get to know Rhian Rees...

What's the best thing about your job?

The clients! I see such a varied mix of clients, who all have the most fantastic tales to tell! With a wide variety of clients you get a very mixed bag of work. For example, I could be dealing with an estate file where we are calculating the Inheritance Tax that has to be paid on an estate which could and has run into hundreds of thousands of pounds. Next, I might be drafting a will where the clients wish to have a 'Beer and Curry' night as the theme to their funeral!

What challenges do you face in your role?

Ensuring that my clients understand and are happy with the drafting of their wills, especially if they involve trusts which can be very difficult to explain in everyday language to clients. Dealing with clients which have recently been bereaved can be difficult, as can ensuring that the client is given the time to be able to form a relationship with you before dealing with the whys and why nots of the practices of administration of estates.

What was your worst experience when you were starting out?

As a Trainee in my Private Client Seat, we had been instructed to act in the administration of an estate, in which the elderly lady who had died had been in hospital for quite some time before her death. Her only beneficiary was her son who was in the Army and stationed in Germany. I therefore had to visit her property to collect paperwork, valuables etc to enable me to deal with her estate. I pulled up outside the house which looked ok from the outside, it was in a nice area of Swansea, I opened the door...to be hit with the most horrendous smell and an army of rats looking at me! The house had not been lived in for more than 6 months and the electricity had been disconnected so the rotting contents of the fridge and other foodstuff had obviously caused quite a delicious odour for the nearby rodent population!

What was your first ever job?

Saturday Sales Assistant in Clarks Shoe Shop in Swansea. I was the one that fitted children's first shoes and then took a picture of them trying to walk! Thankfully my fitting of the shoes was far better than my photography.

What's your favourite restaurant?

I love eating out. For my 30th I was spoilt and was taken to Gordon Ramsey's Maze Restaurant which was 'amazing' (sorry!), but I'd say my favourite restaurant is Patricks in Swansea.

If you were stranded on a desert island, which two luxury items would you want with you?

My iPhone and a pillow (no explanation needed!)

What was the best holiday you've been on?

Last year's jaunt to America. We flew to Houston, Texas, spent a couple of days in Texas, visited the Texan State Fair in Dallas which was...ummm...'interesting' – cowboys, rodeos and fried beer! Then a road trip across Route 66 from Texas to Las Vegas – fabulous!

Which superpower would you most like to possess?

Mind reading, it would help to explain a lot.

Who is your hero and why?

My parents, soppo I know, but they have both worked incredibly hard to get to where they are now (and I still get ridiculously spoilt!) they take everything in their stride and enjoy life to the full.

And finally...what's your specialty in the kitchen?

Lemon Drizzle cake.....and when I get a minute I will test it out on my colleagues!



Rhian can advise on all aspects of wills and probate and can be contacted at rhian@dolmans.co.uk

DEFINITIVE

Dai Greene takes World Championship title in Daegu

The Definitive team has had a busy few months following Dai Greene's sensational victory at the IAAF World Championships in Daegu, South Korea on 1 September. He returned home to Wales to a packed press conference hosted by Definitive at One Kingsway, with all the TV, radio and written press keen to catch up with Wales' new World Champion.

Dai has now been signed up with Searcys, the catering and events management company who are opening a chain of champagne bars at venues across London including the Westfield Stratford City. He attended a launch dinner with Jamie Baulch to mark their new partnership and Searcy's involvement in the London 2012 Olympic Games.

The shortlist for the BBC Sports Personality of the Year top ten has now been unveiled and Dai Greene has been announced as a contender. The ceremony will take place in Manchester this year on 22 December. Dai will then be heading off to South Africa for a period of warm weather training.



Another World Champion represented by Definitive, Nathan Stephens, recently starred in a BT short film broadcast on Channel 4, the official broadcaster for the 2012 Paralympic Games. He will also feature over the coming months in a BT Ident filmed in Cardiff Bay telling the story of his journey to the London 2012 Games.



Non Evans enjoyed a special day at Windsor Castle in early October, when she received her MBE for 'Services to Sport' from Princess Anne. Non has now retired from international rugby and is concentrating on building her speaking and media career, alongside her work for Pfizer as a Medical Sales Representative. She said: "It was an amazing day, being surrounded by so many of the Royal Family to receive my MBE. It was a huge honour and was the perfect setting at Windsor Castle, it was certainly a day I will always remember."

The Definitive team is pleased to confirm the signing of three new clients in recent weeks:

Brett Morse, Welsh and GB international discus thrower who competed at his first World Championships in Daegu.
Anikya Ouora, GB international sprinter based in London.
Jade Jones, Taekwondo who is one of Britain's hottest prospects for Gold in London next year, from Flint, North Wales.

To find out the latest news at Definitive, visit www.definitive-sports.com or follow us on twitter at [definitivesport](https://twitter.com/definitivesport).

If any clients are interested in endorsement opportunities please contact Jamie Baulch at jamieb@definitive-sports.com or phone the office on 02920 727350.



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Dolmans is a fully integrated commercial law firm. To find out more about us go to www.dolmans.co.uk.

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