

# THE LEGAL SOLUTION

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## WELCOME TO ISSUE 3 OF THE LEGAL SOLUTION.



Everywhere we turn at the moment there is talk of the Credit Crunch. The team at Clough & Willis speak with many business owners on a daily basis and we

know that many people are feeling the impact, in their business and personal lives.

We are actively involved with many clients who are responding to the changed economic climate. Some are restructuring their businesses by streamlining; others are disposing of departments and refocusing on core business. We advise on the options available and guide them throughout.

Debt recovery is more important than ever to ensure you are paid for what you do – our debt recovery team is busier than ever on your behalf.

On the employment side redundancies are in the air and we are advising employers who are shedding staff - and employees who are facing dismissal.

As business owners are looking to make savings and move their businesses into a position to weather the storm, the best advice at the earliest stage is vital. Snap decisions – especially where employment issues are concerned – can have costly repercussions.

Before taking action please contact us. We have specialist teams in all areas who can help you - and early advice may well open up new ideas which you have not considered. Please visit our website for information on our full range services.

On this note, I wish you well.

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## ENJOY THE SUMMER - PROTECT YOURSELF WITHOUT COMPROMISING ON THE FUN.



Bouncy castles are a real favourite at childrens' parties, galas and summer fairs and will be seen across the country this summer. Thousands of children will enjoy playing on them. But, as a recent case shows, they can be very dangerous and potentially very costly!

A teenager was left brain damaged, and needing constant care, when another child on a bouncy castle at a birthday party did a somersault and kicked him on his head. The parents who hired the bouncy castle were held liable in the High Court for the accident because they had not provided enough supervision.

On appeal the Court of Appeal overturned the decision saying that it is quite impractical for parents to keep children under constant surveillance or even supervision and it would not be in the public interest for the law to impose a duty upon them to do so.



The amount of compensation claimed was in the region one million pounds and an appeal to the House of Lords is not therefore impossible.

This case highlights the dangers involved for those using and those hiring bouncy

castles - and this includes those who organise summer fairs, galas etc as well as parents who hire a bouncy castle for their child's birthday party.

What this case highlights is the need for care. The Court held the mother was supervising activities on the bouncy castle and the bungee run in a manner which accorded with the demands of reasonable care for the children using them.

Had the Court of Appeal found an insufficient level of care then the outcome would have been different.

The simple rule is just to BE SENSIBLE. Whilst not exhaustive, the following simple guidance should help:

- Ensure someone is supervising the bouncy castle at all times
- Limit the number of children using the bouncy castle at any time
- Do not allow much older/bigger children to use the bouncy castle at the same time as younger/smaller children
- Never allow adults and children onto the bouncy castle at all the same time
- Stop all over boisterous/dangerous actions of children using the bouncy castle
- Never allow summersaults.

When holding parties and BBQs, it is sensible to check whether your house insurance or some other policy would cover you if there was an accident. If you do not have any insurance in place it should be possible to take out one off insurance cover at notional cost.

So, enjoy the summer - but take care.

For any queries relating to Personal Injury, please contact Chris MacWilliam (Partner), [chris.macwilliam@clough-willis.co.uk](mailto:chris.macwilliam@clough-willis.co.uk)



## USING EQUITY RELEASE OPTIONS TO FUND YOUR LIFESTYLE IN RETIREMENT



By the age of 55 the majority of homeowners have their money tied up in their home. In the present climate it may be an option to use this money to enjoy your retirement

comfortably, or enable you to remain in a much loved home which was the place where you raised your family. If this is the case you may wish to consider the Equity Release Schemes that are available with various lenders.

The most common Equity Release Schemes are lifetime mortgages which offer either an immediate lump sum, a series of smaller lump sums or regular monthly payments which are set against your home. The sum plus the interest which has accrued is repaid either when the property is sold, when you die or if you go into long term care.

Before committing to equity release, you must ensure that you research your options and obtain independent financial advice in relation to the type of scheme. There are various schemes on the market, so you need to ensure you find the right solution to suit your lifestyle.

As well as obtaining appropriate financial advice you will require legal advice on the

implications of the documents that you are signing. Some of the points that you should consider before proceeding are as follows:-

1. You may wish to discuss the matter with your heirs or beneficiaries because repayment of the mortgage will reduce (and possibly extinguish) your estate.
2. The amount of state or other benefits to which you may be entitled either now or in the future maybe reduced as a result of proceeding with an Equity Release Mortgage and therefore you may wish to discuss this further.
3. You will still have obligations in relation to the property including those of ongoing insurance and maintenance. Usually this is a condition of the mortgage offer.
4. You must ensure you are aware of the circumstances in which the Equitable Release Mortgage Offer becomes repayable. These can differ depending on the Lender involved.

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## STAYING IN CONTROL OF YOUR AFFAIRS - IT'S NOT JUST FOR THE OLD!

Becoming physically or mentally incapable of looking after your own affairs is a realistic issue for people of all ages. It is important to make provision so that someone you know and trust can take control or merely assist you with your financial or welfare decisions if you

become physically or mentally incapable of doing so during your lifetime.

### Lasting Powers of Attorney

Lasting Powers of Attorney (LPA) documents replaced Enduring Powers of Attorney in October 2007. By putting an LPA in place, you can choose who you would like to have authority to deal with your affairs (your "Attorney"). You may also restrict their powers so they can only carry out transactions that you are happy for them to deal with.

There are two types of LPA you can put in place. A Property and Affairs LPA gives your Attorney the authority to deal with your finances, pay your bills, decide how your financial affairs are managed and even assist in selling your house if required. A Personal Welfare LPA gives your Attorney the authority to make decisions about your healthcare and welfare. This can include deciding to accept or decline medical treatment on your behalf or decisions about where you should live.

It is vital that you choose people that you trust completely to be your Attorneys as you may become incapable of supervising their actions. It is now compulsory to register LPAs with the Court of Protection before they can be used. It is advisable to do this as soon as the document has been signed as it may be needed at any time and registration can take a number of months.

Anyone over the age of eighteen can put an LPA in place as long as they have



the mental capacity to do so. A medical practitioner or solicitor must provide a Certificate of Capacity as part of the LPA. These documents can also be revoked at any time as long as the donor has the mental capacity to do so.

Discussing this with your solicitor and having the appropriate documents prepared well in advance of any physical or mental problems will save a lot of time and expense in the event that you become incapable in any way.

### **Applying for a Court of Protection for a Deputyship Order**

If someone becomes mentally incapable of managing their own affairs and does not have in place a valid Enduring or Lasting Power of Attorney it may be necessary for a relative, friend or Solicitor to apply to the Court of Protection for a Deputyship Order.

Within the application forms the person applying will have to set out in detail the decision and specific order they wish the Court to make and the reasons why such an order will benefit the person who is alleged to lack capacity. They will also have to provide the Court with full details of the person's financial and personal circumstances. On submitting an application to the Court an Assessment of Capacity Form must be completed by a registered practitioner and enclosed.

The application process can often be complicated and time consuming. We can advise and assist with the Court's requirements for making an application including completion of the required forms, obtaining the necessary medical evidence and lodging the application.

Once the Court appoints a Deputy an order will be received setting out their specific powers in relation to the person who lacks capacity. The Deputy will then be required to liaise with the Court on a regular basis about the management of the affairs of the person who lacks capacity. We can also provide assistance to the Deputy with putting in place the necessary security, implementing any orders made by the Court and the requirements of general Deputyship Management.

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## **ACCIDENTS AT WORK – IT'S NOT WORTH THE RISK!**



Do you and your business take health & safety seriously? Well you should.

Quite apart from the devastating effect accidents can have upon your employees

and their family, the costs to your business can be substantial.

According to the latest figures published by the Health & Safety Executive in 2006/2007:

- 241 workers were killed at work
- almost 142,000 injuries to employees were reported to the Health & Safety Executive
- 274,000 reportable injuries occurred
- 2.2 million people were suffering from an illness they believed was caused or made worse by their work

And significantly for all businesses 36 million working days were lost in 2006/2007 because of either work related ill health or workplace injury! That's a lot of down time for businesses to swallow!

So what practical steps can a business take to reduce the risks of accidents at work? First of all, have a written health & safety policy (indeed this is mandatory if your business has five or more employees). This sets out your general approach and objectives and the arrangements in place for managing health and safety in your business – basically it says who does what, when and how. It shows your staff, and the outside world, your commitment to health and safety, and should be reviewed regularly.

You will also need a risk assessment. The law requires employers to assess and manage the health and safety risks of their business. For most businesses preparing a risk assessment is not difficult to do: it is an examination of what could cause harm to people in your work and shows the steps you have taken to remove or reduce the risk of that harm happening. Your employees must then be

trained to act in accordance with the risk assessment.

If one of your employees is injured at work the first document solicitors, insurance companies and the Health and Safety Executive will look for is your risk assessment. It is a vital document. Not having a risk assessment in place will increase the likelihood of a finding of negligence on your part – with potential serious consequences.

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## **A STATUTORY DEMAND HAS ARRIVED – CAN I JUST IGNORE IT?**



As the credit crunch tightens its grip, more and more Statutory Demands are being received by companies and individuals. They may be accompanied by a Solicitor's letter – or arrive, handwritten

in a plain envelope. Can they be safely ignored, even if they look home made?

The short answer is "no". A Statutory Demand is the first step in the bankruptcy (for individuals) or Winding Up (for companies) procedure. If they are not dealt with serious consequences may well follow.

A statutory demand is not a Court document. It does not need a Court stamp to be "official". It is, simply, a formal demand from a creditor. It can be handwritten and still be effective.

Its importance lies in the fact that if the demand is not complied with (ie payment made or a deal done) it is evidence which the Court will accept that the debtor is insolvent. The creditor can, therefore, issue a Bankruptcy or Winding Up Petition which has potentially very serious consequences for the debtor. At any subsequent insolvency hearing the Court will accept that a debtor which has not paid a Statutory Demand is insolvent – and may make an insolvency order.

What should you do if you receive a Statutory Demand? Firstly, do not delay. Take urgent legal advice. The options open to you depend if you are an

individual or a company. There are strict time limits and costs only increase as deadlines approach.

When an individual receives a Statutory Demand there is a procedure to apply to the debtor's local County Court (the nearest which has bankruptcy jurisdiction – not all do). The debtor asks the Court for the demand to be "set aside". The debtor has to show that the debt is not payable – or at least that there is less than £750 owed to the creditor. There is a preliminary review by the Court of the application and then a hearing. If the debtor succeeds the creditor - who wrongly served the demand – should have to pay the debtor's costs.

For a Company the receipt of a Statutory Demand is an even more serious matter. There is no "set aside" procedure. Unless a deal can be done with the creditor the only option is to make an application to the High Court for an Injunction to prevent the issue of a Winding Up petition. This is an expensive procedure – usually made in a rush and without the presence of the creditor. There will then be another hearing – usually in the next few days – at which the creditor attends and, if need be, a full contested hearing with evidence. Once again the debtor has to show that no debt is owed (above £750) – and be prepared to give undertakings in damages to the Court in favour of the creditor.

Any company director will, of course, want to avoid the issue of a Winding Up Petition at all costs because of the cataclysmic effect on credit ratings, and relationships with suppliers and the bank! So should you be using this wonder weapon to chase all your debts? The answer depends on the nature of the debt concerned. If it is for a determined amount (known as a "liquidated" sum) and the debt cannot be contested then a Statutory Demand may prove the answer.

However, where there is any chance of a dispute, the statutory demand is a very brave option: if you issue one you may find yourself at the wrong end of a costs order!

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## THAT AGE OLD PROBLEM!



Many employers often dismiss employees with less than one year's service without following a procedure or collating evidence to substantiate the reason for dismissal.

Yet another case, this time in the area of age discrimination, has highlighted the potential problems of such an approach.

A teenager was employed to take over the role of office assistant with the Employer company. The teenager was employed for approximately three months before she was dismissed. The company claimed that she was not performing to the standard required in that there were numerous errors in her work and the volume of work she produced was insufficient.

Conversely the teenager claimed that the reason for her dismissal was her age. She alleged that the company made it clear that she was too young for the job.

The Tribunal considered the evidence and found in favour of the teenager. The company having failed to follow a procedure did not have any evidence to demonstrate to the Tribunal how they had reached their decision. The company could not show that the Claimant was not up to the required standard. The Tribunal concluded that the company had made stereotypical assumptions in respect of the relationship between performance and age. It was held that the teenager had been treated less favourably on the grounds of her age.

The Tribunal concluded that if the company had followed a full and proper procedure they would have discovered that the teenager was not under performing and dismissal could have been avoided.

In the absence of having evidence to support their view that the teenager was not performing the Employer could not gainsay the Tribunal's finding

In the event that a member of staff is considered to be under performing, regardless of length of service, it is imperative to undertake some investigation and collect and retain evidence of their poor performance otherwise it leaves you open to claims that can be difficult to rebut.

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Some companies are unnecessarily failing to ensure they follow correct procedures, leaving their businesses exposed, not only to substantial claims, but also bad publicity which impacts on the public's perception of the business. In addition, some employees are not getting a fair deal when procedures are not followed." Clough and Willis are able to tailor employment services to suit companies of all sizes in order to ensure they are compliant and protect themselves from claims.

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