

Newsletter

Keeping our clients up-to-date



Shareholders disputes and resolution



Putting your house on the market



Family and carers face costly problems with Court of Protection

Break clauses: implications for landlords

Break provisions allow tenants and landlords the right to terminate their lease before the expiry of a fixed term.

A break clause is usually exercised on a fixed date during the lease term although rolling breaks, which are exercisable at any time during the term, can also be agreed.

Break clauses are generally regarded as disadvantageous to landlords and beneficial to tenants. However in the current financial climate, landlords are more inclined to agree to break provisions in order to attract and secure tenants.

The risks for a landlord of allowing a break provision are an increased possibility of empty premises and the associated cost of business rates, losses through lower or no income and the danger that premises are returned in a worse condition than at the start of the lease.

To protect themselves landlords should seek to attach a number of pre-conditions to the exercise of a tenant's break right.

These will usually include:

- an obligation on the tenant to have paid the rents due, to avoid dealing with arrears
- compliance with the tenant covenants in the lease, so that the premises are returned in the condition required by the lease
- vacant possession of the premises before the break right can be successfully exercised.

If any of the conditions have not been fulfilled, unless otherwise agreed with the landlord, the break right will be fettered.

However, there is a lot of case law surrounding the interpretation and compliance of break clauses. As tenants



have become alert to the problems of strict compliance, the pre-conditions are being watered down by phrases such as 'material compliance' and 'substantial compliance'.

Recent case law suggests that there is an onus on the landlord to co-operate with the tenant and that landlords will need to be more aware of their conduct in dealing with tenants where a tenant has made all reasonable efforts with the landlord to establish what is required in order to exercise their break right.

A landlord may protect themselves further, by only agreeing to a break right on

the basis that it is personal to the current tenant. If the tenant then assigns the lease, the break right will fall away and the new tenants will not benefit from it.

Break provisions are the source of many disputes between landlords and tenants, both in negotiating the terms, in exercising the break right and in complying with the conditions.

You need to be extremely careful in dealing with any aspects of a break clause. Contact our commercial property team at the earliest opportunity to seek legal advice and avoid lengthy disputes.

New offices in Chesterfield

Elliot Mather has opened a new office in Chesterfield at:

**12 Soresby Street
Chesterfield, S40 1JN**

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The new office is home to the following teams:

- Company & commercial
- Residential property
- Wills & probate

Shareholder disputes and resolution

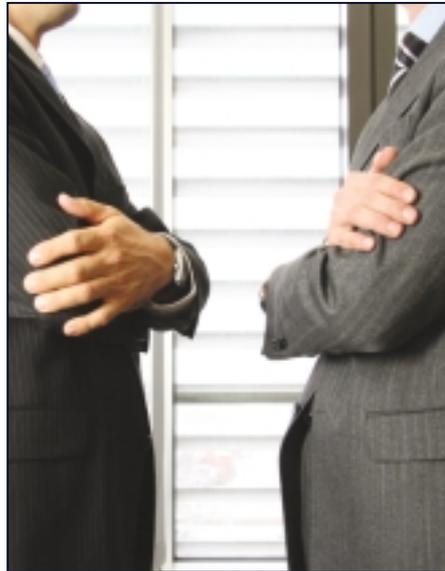
Shareholder relationships have been likened to a commercial marriage with similar personal and financial stress resulting from a relationship breakdown. To prevent serious damage to the management and long term success of the company, shareholder disputes need to be addressed immediately.

Common causes of shareholder disputes include:

- disagreements over the direction and strategy of the business
- conflicts of interest, especially if directors have other business interests beyond the company
- remuneration of directors and terms of service
- decisions to retain money in the company and not pay the dividends some shareholders believe ought to be paid.

Ideally shareholders should anticipate what to do in the event of a dispute by placing suitable provisions in the company's Articles of Association or a shareholder agreement. We can advise you if you do not have a shareholder agreement in place.

If a dispute does arise and cannot be resolved informally, you need to be aware that company law can have serious implications on your company's arrangements. This makes it imperative that you take legal advice as soon as possible as knowing your legal position will almost always improve your ability to negotiate an acceptable settlement.



You will need to establish the following to determine the strength of your position:

- Do you have control of the board?
- Are you in control at shareholder meetings? Different majorities are required for different decisions.

- Have the company's affairs been conducted in a way that is unfairly prejudicial to any shareholder's interests? This could give rise to a court action by the aggrieved shareholder.
- Have you acted properly as a director? Failing to do so could render you personally liable to the company.

Be aware that an aggrieved shareholder can also bring an action to wind-up the company where it would be 'just and equitable' to do so. The courts are keen to encourage settlement of disputes and, if you have made a reasonable offer to buy out the shares of the aggrieved party, it will not be just and equitable to wind up the company. The courts have issued guidelines on such offers and we will be able to advise you further.

There are alternatives to going to court. Alternative dispute resolution, most often by mediation, is a more cost and energy efficient method of resolving many disputes than litigation.

Our dispute resolution team will advise you on the most appropriate course of action for your particular circumstances.

Obtaining a medical report and the new "fit note"

On occasion you might need to obtain a medical report on an employee, to consider whether someone who has taken a substantial number of short-term intermittent absences is suffering from any underlying medical condition or to obtain a prognosis concerning the likely timescale within which an employee who is on long-term sickness absence is likely to return to work.

You are only permitted to apply for a medical report if you have notified the individual concerned in writing that you intend to do so, and the individual has

provided explicit consent to the application being made. A copy of the employee's consent should be supplied to the medical practitioner when requesting a report.

The Department of Work and Pensions is expected to introduce the new "fit note" in April 2010, to replace the existing MED3 sick note. The aim is to focus on what the employee can do, rather than what they cannot do. It will also give GPs the option to indicate that an employee may benefit from such changes as a phased return to work, altered hours, amended duties or workplace adaptations.

Although GPs will have to give reasons for their proposals, they will not be expected to provide any more than generic reasons. So while the new system should help employers assess an employee's medical condition,

you will not be bound by the GP's recommendations and will remain responsible for ensuring that your employee is fit to return to work under the terms of his or her contract.

Employers should therefore not follow a GP's suggestions in isolation but should also bear in mind their responsibilities and possible exposure under the disability discrimination and various health and safety laws.

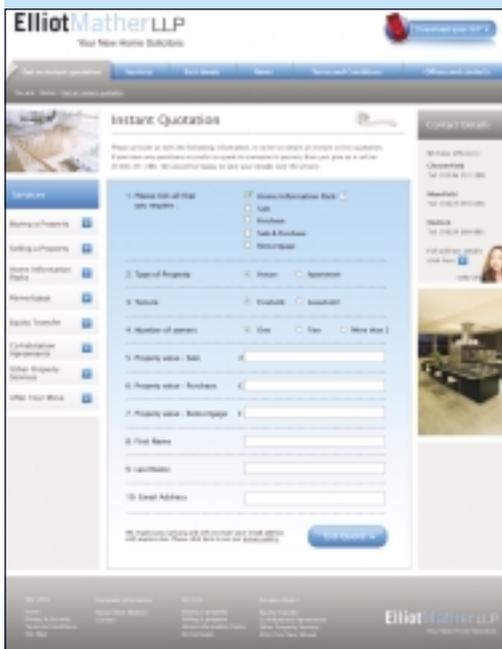


For advice on employment matters contact Stacey Spooner.

STACEY SPOONER

Putting your house on the market

Traditionally anyone wishing to sell their property would speak to an estate agent initially. Since April 2009, you will need a home information pack (HIP) before you can start to market your house or apartment, so speak to us first.



We can prepare this for you and as our home information pack will be independent, you will not be bound to one estate agent with possible problems if you wish to change agents in the future.

Last year, an investigation by Channel 4 News claimed that up to £100 in commission was being added to the cost of home information packs by estate agents. One HIP provider told Channel 4 that estate agents were being paid anything from £50 plus M&S vouchers to £200.

Not only are our HIPs and conveyancing services competitively priced, you will receive a highly personal service from professionals who know the local market and have your best interests at heart.

To obtain an instant quote for a home information pack and conveyancing services, visit our dedicated web site: www.newhome-solicitor.com

Keeping you on the road

Losing your driving licence could have a substantial negative impact on both your employment and your social life. So, to stand the best chance of keeping your licence and remaining in the driving seat, it makes sense to obtain legal advice and support from experienced solicitors, such as Elliot Mather.

Whatever the circumstances, if you receive a Notice of Intended Prosecution, a summons or are arrested by the police, it is vital that you have suitable legal representation as soon as possible - do not be tempted to leave it until it is too late!

Call us as soon as possible if you are accused of any motoring offence, including the following:

- **Driving under the influence of drink or drugs** - usually carries a penalty of disqualification for at least 12 months. The court will also impose a fine or worse. In certain circumstances it may be possible to reduce the length of the ban, or even avoid it altogether, by putting forward 'special reasons'. We can advise you on this.
- **Dangerous or careless driving** - cover a wide range of poor driving, from clipping a car or pulling out without checking through to excessive speed or a police chase, with an equally broad spectrum of penalties. If you are found guilty of dangerous driving the sentence can include imprisonment and you will be banned for at least a year and have to take an extended retest.
- **Speeding offences** - if you have not been stopped by the police, for example if you are caught by a speed camera, you will receive a Notice of Intended Prosecution and it is at this stage that you should call us. For company cars, the court will expect the business owner to have a system for recording who is driving a vehicle at a

particular time. Failure to respond to the request to name the driver of the vehicle could result in points on your licence, or even a ban.

- **Failure to stop and report an accident** - if you have an accident, however minor, and cause damage to someone's property, you are legally required to stop and exchange contact details with the other person. If you cannot, for example if you cannot locate the owner of the other vehicle you must report the accident to the police as soon as reasonably practicable (always within 24 hours). Failure to do so is a serious offence and can even result in a sentence of imprisonment. At least 5 points would have to be put on your driving licence.
- **Totting up penalty points** - accumulating a total of 12 penalty points in any 3 year period usually means a disqualification of at least 6 months. However, it is possible to reduce the length of any ban, or even avoid one altogether, in a number of circumstances, for example, to prevent you losing your job as a result of a ban. We can advise and assist you with this.

The Police and Criminal Evidence Act provides for free and independent advice for anyone detained in police custody. You are entitled to your choice of solicitor, so you can ask the police to contact Elliot Mather on your behalf. We operate a 24 hour call out system which means that representation from our expert team can be requested at anytime of the day or night. Please don't be afraid to call us!



Families and carers face costly problems with Court of Protection

We insure our life, our home, our cars, our holidays and even our pets against misfortune. So why do so many people fail to guard against costly problems for our loved ones that could arise from serious illness or death?

Only a minority of the population have a valid will. An even smaller number, just 60,000 people in the UK, have taken steps to create a lasting power of attorney - leaving their relatives to face a nightmare of bureaucracy and expense if you lose mental capacity due to old age, a serious accident or illness such as Alzheimers.

Too often, people put off preparing a power of attorney as they assume that it will only be a problem in old age and their partner will take care of them. Unfortunately, accidents happen to the young and old and when one person becomes ill or dies, the remaining partner frequently still does not get around to taking precautions. Time and time again we see problems occurring, which could have been prevented with forward planning.

A report in the Mail on Sunday last year brought to light the large number of families who were having problems due to the lack of a lasting power of attorney, when over 350 people left comments and horror stories about their experiences with the Court of Protection.

The Court of Protection was set up under the Mental Capacity Act 2005, to ensure that "No one person has the right to take the property of another person who lacks capacity unless either this person has authorised this in advance (through a lasting power of attorney) or the Court of Protection has given that authority."

Your next-of-kin may not necessarily be appropriate to manage your affairs and you probably have strong views about who you

would or would not trust to look after your finances and personal welfare. However, unless you formalise this in a lasting power of attorney, the Office of the Public Guardian will look into the background of your carer or next of kin to decide if they are fit to look after your affairs.

If the judge decides that they are not fit, then the court can appoint someone else to do so, such as the local authority. This can cause a delay and create problems for family members trying to manage affairs and there will then be an annual charge of up to £800 per year to cover the costs of supervision. Over several years this will run into thousands of pounds.

The Court of Protection has powers to take control of assets and currently controls over £3.2 billion. Your money, which could include the proceeds of your home if you have to sell this to go into a care home, will be kept in the Court of Protection account with the Bank of England, which currently pays a rate of just 0.5%. This means that you lose out financially as your financial reserves will fail to grow as much as they would in a commercial bank or building society account.

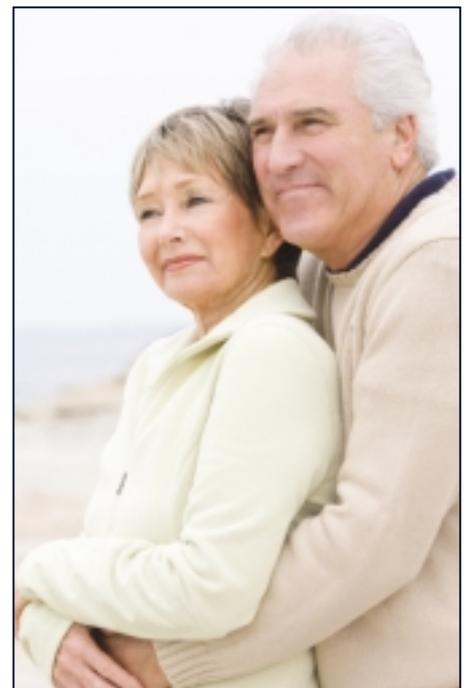
Your relative or carer will need to apply to the court to pay any expenses such as household bills, rent or care fees.

Most of us do not get on with making our will or a lasting power of attorney as we simply do not like to think about our own death or serious illness and believe that it can be put off for another day. But by doing so we are creating a costly and stressful problem for our families and carers if we lose mental capacity and we are putting our finances and healthcare into the hands of the government.

A lasting power of attorney can be likened to a 'one-off' insurance policy to protect ourselves and our families in the unfortunate event that we are unable to communicate our own wishes in the future. Like any insurance policy, the hope is that it will not be required, but you can rest assured that you have taken appropriate precautions to protect yourself and your family in the event that it is needed.

Choosing not to create a lasting power of attorney is the equivalent of choosing the Court of Protection to take charge of your assets and decide who will look after your affairs. Is this really what you want?

To make an appointment to arrange your lasting power of attorney, please contact our wills and probate team.



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