

Updates – March 1st, 2010

1. General

a) VAT rate returned to 17.5% on January 1st, 2010.

b) Stamp Duty Land Tax exemption (section 12.2.2 of the Land Law and Conveyancing book) - between 3 September 2008 and 31 December 2009 the Stamp Duty Land Tax starting threshold for residential property acquisitions was £175,000. The threshold reverted to £125,000 for transactions with an effective date of 1 January 2010 or later.

2. Property

a) Sample Exam and Suggested Answers – Exam 2 – Probate and Taxation – Answers to Question 2

The first two paragraphs of the answer should read as follows:

“Sarah will receive Max’s share of the matrimonial home (valued at £100,000, which will pass to her by the right of survivorship), all of his personal chattels (valued at £80,000), plus a statutory legacy of £250,000, i.e. a total of £430,000.

In addition, she will be entitled to a life interest in half of the residue. The whole of the estate (not including the jointly owned property which passes to Sarah automatically) amounts to £555,000. Therefore, the residue amounts to: £225,000 ($555,000 - [250,000 + 80,000] = 225,000$), a life interest in half of which Sarah will receive: £112,500.”

3. Professional Conduct and Accounts

a) Professional Conduct - Rule 2.05 of the Code of Conduct will be amended on 1 March 2010 and will replace rule 2.08 which will remain in force until 28 February 2010. A new guidance note 49B will also be added on 1 March 2010.

The changes remove the remuneration certificate procedure and clients' statutory rights to information about challenging a bill. The addition means that, as part of the firm's complaints-handling duties, you must inform the client **at the outset and in writing** of the following points: They are entitled to complain about their bill.

- There may also be a right to object to the bill by making a complaint to the Legal Complaints Service, and/or by applying to the court for an assessment under Part III of the Solicitors Act 1974.
- If all or part of the bill remains unpaid, the firm may be entitled to charge interest.

As is currently the case, if a firm can demonstrate that it was inappropriate in the circumstances to meet some or all of these requirements, then they will not breach rule 2.05.

Emergency rule 2.08 (which was effective as from 11 August 2009, and preserved clients' and entitled third parties' former statutory rights to information about assessment by the court for a non-contentious bill and the solicitor's right to charge interest), will remain in force until 1 March 2010. In the mean time, solicitors should remove all reference to remuneration certificates from

- their bills,
- their client care literature, and
- other stationery.

For more information, please visit:

<http://www.sra.org.uk/solicitors/change-tracker/code-of-conduct/rule2.page?20100301#r2-05>

Second part of section 5.4 (Information regarding client care and other matters) as follows:

”Rule 2.05 sets out the solicitor’s obligations relating to **complaints handling**. The firm’s principal must ensure that:

- (a) the firm has an **‘in-house’ written, fair and effective complaints handling procedure**, and ensure that the client is given a copy of this on request;
- (b) the client is informed **at the outset in writing** that, in the event of a problem, **he is entitled to complain**, and the **name of the person to contact** in the event of any problem or complaint; that this complaint could include a complaint about the firm’s bill; that there may also be a **right to object to the bill** by making a complaint to the Legal Complaints Services or the Office of Legal Complaints and/or by applying to the court for a detailed assessment of the bill under Part III of the Solicitors’ Act 1974; and that if all or part of a bill remains unpaid the firm may be entitled to charge **interest**;

- (c) once a complaint is made, the complainant is told in writing **how** the complaint will be handled and within what **timescale** he will be given an initial and/or substantive response.

Guidance Note 49B to rule 2.05 states that in some circumstances it will be appropriate to remind the client at a later stage whom they should approach under the firm's complaints procedure if they wish to complain about the bill – or for the firm to inform the client of this at a later stage if the client has not been told at the outset. This will be appropriate if the client is particularly vulnerable; the client is a private client and the firm is delivering a bill more than 2 years after the original information was given; the firm is taking their costs from money held on client account and have not previously supplied the information; or the firm is suing on the bill and have not previously supplied the information.

The guidance also states that where the solicitor is, in effect, the client – for example, as the executors administering a deceased's estate or as the trustees of a trust – consideration should be given as to whether information on complaining about a bill¹ should be given to any person likely to be affected by the bill.”

First paragraph of section 5.11 (Liens) should read as follows:

“Where, however, the solicitor's costs have not been paid, he will have a lien over the client's property (e.g. deeds, papers and other personal property), provided the solicitor has delivered a proper bill or has given the client sufficient information to calculate the amount owing. If so, the solicitor will be fully entitled to retain (though not to sell or dispose of) the client's property until his costs are paid in full – including the amount of interest to which he may become entitled on his costs, on any paid disbursements and on VAT, from one month after the date of delivery of the bill in the case of non-contentious business. Nonetheless, the court has statutory jurisdiction to order a solicitor to deliver up a client's papers in the solicitor's possession.”

Sections 6.2 and 6.3 are replaced with the following:

6.2 NON-PAYMENT OF BILL BY CLIENTS – SOLICITOR'S RECOVERY OF FEES

A solicitor may sue a client who does not pay his solicitor's bill (e.g. where the client disputes its fairness and reasonableness) provided that the conditions set out below have been complied with:

- (a) A **bill of costs** in the proper form² must have been delivered *to the client (or other entitled person)*, in *non*-contentious cases, such as a residuary beneficiary under a will where a solicitor(s) is the only executor), within a reasonable time of concluding the matter to which the bill relates, signed by the solicitor or the solicitor's firm.
- (b) No bill may be sued upon until the expiration of **one month** from its delivery.

¹ By making a complaint to the Legal Complaints Services or the Office of Legal Complaints and/or by applying to the court for a detailed assessment of the bill under Part III of the Solicitors Act 1974.

² i.e. containing sufficient information to identify the matter to which it relates and the period covered.

- (c) **Interim bills** (being merely demands for payment on account of the final bill) cannot be sued upon by you (and neither can the aggrieved client apply to have them assessed – see paragraph 6.4 below).

In addition:

- In a ***non-contentious matter***, after the passage of one month from delivery of the bill, interest³ can then be claimed on the unpaid amount of the solicitor's costs plus any disbursements already paid by the solicitor and VAT.
- In a ***contentious matter***, too, the client cannot be sued until the expiration of one month from the delivery of the bill. However:
 - no interest can be claimed *before* the issue of proceedings unless this has been ***agreed*** beforehand (either in the original retainer agreement or in a later binding contract to pay interest);
 - while it is good practice⁴ to inform a client of his right to detailed assessment, there is no *obligation* to do so.

6.3 RIGHT TO CHALLENGE BILLS

As a matter of good practice, the aggrieved client should be encouraged to first try and deal with his complaint through the firm's complaints handling procedure. If the complaint is justified, it would then be sensible to reduce the bill to a mutually acceptable figure.

First paragraph in section 6.4.2 (regulations of costs in non-continuous matters) is replaced with the following:

“The Solicitors’ (Non-Contentious Business) Remuneration Order 2009⁵ stipulates those factors which must be taken into account in preparing the bill in non-contentious matters:”

Please add at the end of section 7.6.1 (Conveyancing transactions not at arm's length) the following paragraph:

“However, the Solicitors Disciplinary Tribunal has held that merely because property is being sold at less than the market value and thus apparently indicative of the trust and relationship between the seller and buyer, does *not* bring the sale within the categories set forth in Rule 3.08 above (in the particular case the seller had originally purchased the property from the buyer's parents). Independent advice would therefore be required to both buyer and seller from the outset, the transaction being one “at arm's length.””

³ At the rate payable on judgment debts.

⁴ The Law Society suggests that it might be ‘prudent’ to inform a client in a letter before action.

⁵ See Appendix B to this textbook for the full text of this Order.

Revision Exercises – Chapter 6 (Fees and Costs) - Suggested Solutions - Exercise 1

Question 1 should read as follows:

“Uncontested probate work = non-contentious work. Solicitor’s bill for non-contentious work must accord with the Solicitors’ (Non-Contentious Business) Remuneration Order 2009 (time spent, complexity of the matter, value involved etc).”

The answer to exercise 1 should be the following:

- 1) Uncontested probate work = non-contentious work. Solicitor’s bill for non-contentious work must accord with the Solicitors’ (Non-Contentious Business) Remuneration Order 2009 (time spent, complexity of the matter, value involved etc).

Even though he is not the client, the residuary beneficiary can challenge the bill for non-contentious work, being an ‘entitled third party.’

- 2) The residuary beneficiary can object to the bill by making a complaint to the Legal Complaints Service or the Office of Legal Complaints and/or by applying to have the bill subjected to **detailed assessment** by the High Court. Provided the beneficiary applies for this within one month after being informed by the solicitor of his entitlement, no further action can be taken by the solicitor before the detailed assessment has been completed.

Revision Exercises – Chapter 7 (Conflicts of Interest)

Please add exercise 7:

Question:

We are instructed by X & Co to provide general advice to its human resources department in relation to revising the company’s staff handbook. We have also been asked to act for one of X & Co’s former employees, A, in connection with bringing a claim against the company for unfair dismissal. Will our firm have a conflict of interests in agreeing to act for A?

Answer:

No. The two matters are not directly related (see practice rule 3.01 for the definition of a conflict). If A succeeds in his claim against the company, that will obviously be prejudicial to the company, but not in relation to the particular retainer you have with the company. Similarly, whatever changes are made to the staff handbook will not have any impact on A's claim against the company.

It is a commercial and reputational decision for you as to whether you want to accept instructions to act against the company. You would also have to consider, as a separate issue, whether the firm would be putting confidentiality at risk through acting for both parties (see rule 4.03 for details of the duty not to put confidentiality at risk by acting).

Revision Exercises – Chapter 11 - Relations with Third Parties

Please add exercise 6:

Question:

A large, high street client has asked you to issue proceedings against a “shoplifter” for the costs of the stolen items, together with compensation for the loss and damage caused by the defendant’s actions, often this includes the cost of security staff involved in the incident. Are there any rules of conduct you should be aware of before you commence such an action?

Answer:

Before taking any action for civil recovery of your client's costs you should consider whether the action being proposed is proportionate, having regard to the circumstances of the “offence” and of the proposed defendant. You will have a duty to act in your client's best interests (rule 1.04) but this should be looked at along with your further duties under rule 1.02 to “act with integrity,” 1.06 “not to behave in a way that is likely to diminish the public trust in you or the profession” and rule 10.01 “you must not use your position to take unfair advantage of anyone for your own benefit or for another person’s benefit.” Guidance note 2 to rule 10 states that “particular care should be taken when you are dealing with a person who does not have legal representation.” In the scenario you outline, you need to find a balance between fulfilling your obligations to your client and not taking unfair advantage of another person.

b) Financial Services - section 6.2.5.1 - The Scope Rules - please add the following new sub-section 6.2.5.1(g):

Regulated Sale and Rent Back Agreements: Rule 5(10)

Since July 2009, the FSA has been responsible for protecting the interests of consumers (usually individuals who are in financial difficulties) who sell their homes at a discount, in return for the right to rent them back and this remain in them as a tenant (often under an assured shorthold tenancy, so the individual has limited security of tenure). Under the new arrangements:

(i) Firms may not enter into a regulated sale and rent back agreement as an agreement providers, or administer a regulated sale and rent back agreement, *except* when they are acting as a trustee or PR and where the agreement seller is a beneficiary under the trust, will or intestacy.

(ii) Firms may not recommend that a client enters into a particular agreement, but they *can*: explain the agreement to the client and give advice (provided the advice does not amount to a recommendation to enter into the transaction), advise the client not to enter into the agreement (negative advice), and obtain advice from and/or endorse a recommendation given by an exempt person or by a provider who has been authorised to operate in this market by the FSA.

c) Financial Services - Anti-Money Laundering Update - Shah vs HSBC - Civil Liability in Money Laundering

In *Shah v. HSBC* [2010], Mr. Shah alleged that his bank, HSBC, had breached its duty of care to keep him informed after a suspicious activity report had been submitted by releasing details to him of HSBC's communications with the SOCA, leading to concern by Zimbabwean officials about the bank's decision not to release the funds and seizure by them of over \$330 million of Mr. Shah's assets. The Court of Appeal ruled that once the moratorium period was completed, the risks of tipping off or prejudicing an investigation must diminish and the common law duty of an agent to account to its principal must begin to regain prominence. However, the Court did not explain the exact point at which the client is entitled to more information and whether that would have avoided the loss suffered by Mr. Shah.

For more information, please visit:

<http://www.lawsociety.org.uk/newsandevents/news/view=newsarticle.law?NEWSID=426167>

The provision of legal advice and the conduct of litigation will also not generally be covered by the Money Laundering Regulations 2007 – the rationale for this exclusion being the protection of a person's fundamental human right of access to justice. However, such activities are not necessarily immune to threats posed by criminals; and, indeed, litigation may be an area of growing risk for money laundering and fraud, due in part to the perception that law firms may be taking a more relaxed approach to due diligence and scrutiny of their client's conduct in litigation matters. A solicitor might be approached, for example, to recover what they are told is a legitimate debt; the debtor agrees to make the payment; the funds are passed through the solicitor's account and back to the client. Known warning signs that indicate money laundering may be occurring in this context include: non face-to-face client and/or debtor who may often be quite a distance from the firm; quick settlement of the debt sometimes even before the first letter of demand; overpaid fees; the client requests the funds recovered or the overpaid part of the fees to be paid to a third party etc.

4. Litigation (also relevant to Principles of Common Law)

Historically, the House of Lords held several judicial functions. Most notably, until 2009 the House of Lords served as the court of last resort for most instances of UK law. Since 1 October 2009 this role is now held by the newly created Supreme Court of the United Kingdom.

The final appeal hearings and judgments of the House of Lords took place on 30 July 2009. The judicial role of the House of Lords as the highest appeal court in the UK has ended.

From 1 October 2009, the Supreme Court of the United Kingdom assumes jurisdiction on points of law for all civil law cases in the UK and all criminal cases in England and Wales and Northern Ireland. The Supreme Court is also the highest court of appeal for devolution matters, a role previously held by the Privy Council.

The UK Supreme Court is an independent institution, which is separate from Parliament. The first justices of the 12 member court are the existing law lords but future law lords will be appointed by a newly established and independent Supreme Court Appointments Commission. They are to be known as Justice of the Supreme Court.

The Constitutional Reform Act 2005 made provision for the creation of a new Supreme Court for the United Kingdom. There have, in recent years, been mounting calls for the creation of a new free standing Supreme Court separating the highest appeal court from the second house of Parliament, and removing the Lords of Appeal in Ordinary from the legislature. On 12 June 2003 the Government announced its intention to do so.

At present the most senior judges, the Lords of Appeal in Ordinary, or Law Lords as they are often called, sit in the House of Lords. There are twelve of them. The House is the highest court in the land - the supreme court of appeal. It acts as the final court on points of law for the whole of the United Kingdom in civil cases and for England, Wales and Northern Ireland in criminal cases. Its decisions bind all courts below.

As a result of the change, what was formerly known as the “Supreme Court of England and Wales” (i.e., Crown Court, High Court, and Court of Appeal) will be renamed the “Senior Courts of England and Wales”.

As members of the House of Lords, this means that they not only sit judicially, but are also able to become involved in the debate and subsequent enactment of Government legislation (although, in practice, they rarely do so). Creating a new Supreme Court will mean that the most senior judges will be entirely separate from the Parliamentary process.

It is important to be aware that the new Supreme Court will be a United Kingdom body legally separate from the England and Wales Courts since it will also be the Supreme Court of both Scotland and Northern Ireland. As such it falls outside of the remit of the Lord Chief Justice of England and Wales in his role as head of the judiciary of England and Wales.

5. Principles of Common Law

Section 2.2.3 should read as follows:

“Appeals in both civil and criminal cases are heard by the Court of Appeal.

Civil appeals can be heard from either the High Court (any of the three divisions) or the County Court. Appeals are heard directly by the Court of Appeal in the first instance and ultimately (on points of law) the Supreme Court, which replaced the Appellate Committee of the House of Lords as the highest court for the whole of the United Kingdom in civil cases and for England, Wales and Northern Ireland in criminal cases, in October 2009. There may also be an appeal to the European Court of Justice.

For civil appeals, prior permission to appeal is required from the court of first decision. Where the lower court refuses an application for permission to appeal, a further application may be made to the Court of Appeal. Permission to appeal will only be given where (a) the court considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason why the appeal should be heard (r. 52.3 of the Civil Procedure Rules).

However, where a case involves a point of law of general public importance, the trial judge has granted a certificate of satisfaction and the Supreme Court has given permission to appeal – the Supreme Court can hear a case directly from the High Court (the so-called ‘leapfrogging’ procedure), without first going through the motions of an appeal to the Court of Appeal (with all the attendant delay and expense).”

Section 2.3.2.4 should read as follows:

“Either prosecution or defence may appeal to the Supreme Court from a decision of the Criminal Division of the Court of Appeal, provided (a) the Court of Appeal certifies that the decision involves a point of law of general public importance and (b) either the Court of Appeal or the Supreme Court gives leave to appeal. Application for leave to appeal should be made within 14 days of the court’s decision.

However, there is also a procedure for “leapfrogging” direct from the *High Court* to the Supreme Court. This enables an important case which is obviously going to finish in the House of Lords to go there direct without the intermediate delay and expense of first going through the motions of an appeal to the Court of Appeal, with leave from the Queens Bench Division or the Supreme Court, and a certificate of satisfaction from the QBD that the case involves a point of law of general public importance.”

Section 7.7 should read as follows:

Although harm to someone may be foreseeable, the risk of that harm being inflicted may be so unlikely that the defendant will not be required to take precautions against it happening. Life would be almost intolerable if the ordinarily careful man were to attempt to take precautions against every risk which he can foresee (*Bolton v Stone* [1951]). In that case, the House of Lords held that the cricket club was not liable for injuries sustained by Miss Stone who was hit by a cricket ball while standing on the highway outside a cricket ground owned by the defendant cricket club. Their Lordships struck a balance between the balance of the risk of injury to passers-by and the precautions required to prevent injury.

“More recently, in the wake of concerns about the development of a ‘compensation culture,’ fuelled by the perception that most risks will be covered by insurance, a general increase in compensation payments and ‘no win, no fee’ arrangements for legal services, public authorities have become more fearful and overly cautious due to the financial impact of legal claims. However, in the case of *Tomlinson* (2004), the House of Lords held that it is not reasonable to expect public authorities to prohibit “the harmless recreation of responsible parents and children with buckets and spades on the beaches... in order to comply with what is thought to be a legal duty to safeguard irresponsible visitors against dangers which are perfectly obvious.” This principle was placed on a statutory footing in the Compensation Act of 2006.

In other recent cases, the courts have refused to award compensation for accidents where people should have taken responsibility for their actions, e.g. parents of a 5 year old child who fell off a swing and broke his arm due to no fault of the council (*Simmonds v. Isle of Wight* (2003)) or a person who was paralysed after falling from a climbing wall into absorbent matting, after failing to complete the leap successfully and landing on his head (*Poppleton v. Portsmouth Youth Activities Committee* (2008)). The risk of falling was held by the Court of Appeal to be plainly obvious. The claimant chose to undertake an activity with inherent and obvious risks and the law did not require the defendants to prevent him from undertaking it or require the defendants to train or supervise him.”

At the end of section 8.4.1 add the following:

“More recently, in the case of *Badger v. Ministry of Defence* (2006), the High Court held that continuing to smoke may constitute contributory negligence by a claimant (or his heirs) in a claim relating to his death from lung cancer attributable to another cause (e.g. exposure to asbestos). Although the Ministry of Defence accepted primary liability for Mr Badger’s death, the court accepted that Mr Badger’s failure to give up smoking after receiving specific advice about the effect of smoking on his health amounted to contributory negligence and his damages should therefore be reduced by 20%.”

Section 12.12.1 should read as follows:

“A deed is a formal legal document signed, witnessed and delivered to effect a conveyance or transfer of property or to create a legal obligation or contract. However, it should be noted that a deed need not be written on paper, according to the Law of Property (Miscellaneous Provisions) Act 1989 which provides for the use of electronic communication and electronic storage in place of paper.”

Last two paragraphs on section 13.4.1 should read as follows:

“In the leading case of *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd.* [1953], the Pharmaceutical Society argued that a display of drugs on a shelf in the defendant’s self-service shop constituted an offence, when customers placed their selected drugs into the wire basket, as this act was not supervised by a qualified pharmacist. The Court of Appeal held that the display of the drugs on an open shelf constituted a mere invitation to treat: the customer made the *offer* when he took the bottle down from the shelf and placed it into his basket, and the shop was free to *accept* this offer by the acceptance of the price or, indeed, to *reject* it, which it did at the cash desk (where a registered pharmacist was present).

In *Fisher v Bell* [1961], a display of flick knives in a shop window was similarly held to be an invitation to customers to make an offer to buy, rather than an offer for sale (the Restriction of Offensive Weapons Act 1961 was passed shortly after this case to close this loophole in the law).”

Please add after first paragraph on section 13.4.2:

“Posting an advertisement on a website (e-commerce) similarly amounts to an invitation to treat. The customer selects the products and services – thus making an offer to purchase them. The seller may accept the offer or reject it (e.g. if a computer firm which mistakenly advertises on its website that it is selling PCs for £20, instead of £200, could refuse to sell the goods at the advertised price).”

Section 13.4.4 should read as follows:

“An auctioneer’s call for bids is regarded as an invitation to treat, a mere request for offers – offers which the auctioneer can accept (with the fall of his hammer) or reject as he chooses⁶. Likewise, the bidder is entitled to withdraw his offer at any time before the auctioneer has signified acceptance with the fall of the hammer. In an auction which is advertised as being held ‘without reserve’ there is no contract of sale between the owner of the property (the actual seller) and the highest bidder if the auctioneer refuses to accept the highest bid. However, the auctioneer may be personally liable on a separate, collateral contract between himself and the highest bidder⁷, as the auctioneer has effectively offered that the lot will be sold to the highest bidder, no matter how low the bids might be.”

Section 13.4.5 should read as follows:

“Where goods are advertised for sale by tender, the statement is not an offer to sell to the person making the highest tender, but an invitation to treat, i.e. a request by the owner of the goods for offers to purchase them. For example, where a building contract is put out for tender, this is a request for offers by contractors which can then be accepted or rejected. This said, an invitation to tender can give rise to a binding obligation on the part of the inviter to consider tenders submitted in accordance with the tender conditions. So, where the claimant delivered a tender and placed it in the letterbox of the defendant council, in accordance with the latter’s instructions, one hour before the time limit for submitting the tender, the council had a duty to consider the claimant’s tender and by failing to do so the club was entitled to damages for breach of contract⁸.”

Section 13.4.6 should read as follows:

“The words ‘subject to contract’ are used by parties who are negotiating as to the terms of a contract involving the sale of land to indicate that documents passing from one to the other are not intended to be offers capable of acceptance so as to form a binding contract. No contract will thus come into existence until a formal contract has been drawn up and approved by the parties. This allows either party to withdraw from the agreement at any time and for any reason, even if he has incurred considerable expense in negotiations, without facing an action for breach of contract. While other legal systems impose a duty to negotiate in good faith in order to overcome this loophole, English law

⁶ *Payne v Cave* (1789) and s. 57 Sale of Goods Act 1979.

⁷ *Warlow v Harrison* (1859).

Blackpool and Fylde Aero Club Ltd v. Blackpool BC (1990)..⁸

does not recognise such a duty. Where, however, there is clear evidence of a contrary intention, a court may be prepared to find that a contract has been concluded, despite the use of this formula.”

The title of section 13.5 should read “Cross-Offers Or Counter-Offers”

At the end of section 13.7.2 please add the following:

“It should be noted that the postal rule applies only to communication of an acceptance; offers and revocation of offers must be communicated in order for them to be effective.

Acceptances sent by electronic means will probably be treated in the same way as telephone or telex acceptance. The seller’s acceptance will thus only be effective when actually received by the customer – even if the latter is based in a different country and jurisdiction from those of the seller. To avoid such difficulties, e-traders should confirm customer orders by e-mail and request e-mail confirmation by customers, thus ensuring that the contract is concluded at the seller’s place of business.”

Section 18.4.3.4 should read as follows:

UNDUE INFLUENCE & THIRD PARTIES – GUARANTEES TO SECURE BUSINESS LOANS & INDEPENDENT ADVICE

Undue influence is now regularly invoked by wife-sureties where their relationship with the bank-creditor is manipulated when the debtor-husband acts as intermediary. For example, a husband persuading his wife to guarantee his company’s overdraft with a bank, using the matrimonial home, of which she is joint owner, as security for the debt. In such situations the creditor may be ‘tainted’ by the undue influence of the intermediary. If a bank entrusts certain duties to a debtor-husband who, as intermediary, is capable of exerting some influence over his wife, the position is now summarised by *Royal Bank of Scotland v Etridge* (2001) which states:

- (a) a bank is always put on inquiry where a wife offers to stand surety for her husband’s debts;
- (b) a bank is also put on inquiry where the wife becomes surety for the debts of a company in which she and her husband both hold shares;
- (c) a bank is not put on inquiry where the money is advanced to husband and wife jointly unless “the bank is aware the loan is being made for the husband’s purposes as distinct from their joint purposes.”

In *Barclays v O'Brien*, Lord Browne Wilkinson gave explicit instructions to banks, who were getting very nervous as to the correct actions to take when they were under constructive notice of undue influence. This would avoid them being ‘fixed’ with constructive notice. The bank should: “Insist that the wife attend a private meeting (in the absence of the husband) with a representative of the creditor in which she is told the extent of her liability as surety (guarantor), warned of the risk she is running

and urged to take independent legal advice.” However, in later cases, the private meeting failed to materialise and the requirement changed to merely a need to ensure that the wife had independent advice. Lord Nicholls in *Etridge* accepted that the banks were not arranging private meetings for valid reasons. The emphasis therefore moved to the independent advice wives were receiving. This was not always of high quality so Lord Nicholls gave detailed instructions to *solicitors* as to their obligations and also detailed instruction to banks.

Banks should:

- (a) communicate directly with the wife informing her that for its own protection it would require written confirmation from a solicitor acting for her that the solicitor had fully explained the nature of the documents and their practical implications for her;
- (b) tell her that the reason for this is so that she would not be able to dispute that she is legally bound once she had signed the documents;
- (c) the wife should be told that she may use the same solicitor as her husband but she must be asked if she would prefer a different solicitor;
- (d) the bank must provide the solicitor with all the financial information s/he needs;
- (e) the bank should not proceed with the transaction until it has received an appropriate response directly from the wife.

It follows that significant burdens are now placed on solicitors advising those entering into a security arrangement for the borrowing of another person. If the solicitor does not give the kind of independent advice required of him in *Etridge*, he is liable to find himself being sued in negligence and/or a breach of contract. The business lender is now entitled to assume that the legal adviser has carried out his function and will have an enforceable security and transaction against the wife. Needless to say, the cost of legal advice in security transactions has risen.

Section 19.3.1 should read as follows:

This major exception is the Contracts (Rights of Third Parties) Act 1999, which came into force in May 2000, has the effect of allowing third parties to enforce contracts made for their benefit, even if they are not a party to the contract.

Subsection (1) of the Act sets out a two-limbed test for the circumstances in which a third party may enforce a term of a contract. The first limb is where the contract itself expressly so provides. The second limb is where the term purports to confer a benefit on the third party unless it appears on a true construction of the contract that the contracting parties did not intend him to have the right to enforce it (subsection (2)).

Subsection (3) requires that, for subsection (1) to apply, the third party must be expressly identified in the contract by name, class or description, but establishes that the third party need not be in existence when the contract is made. This allows contracting parties to confer enforceable rights on, for example, an unborn child or a future spouse or a company which, although in the process of formation, has not yet been incorporated.

Potentially this means that where goods and equipment are supplied under a contract, for the intended use or operation by a specific third party, or a class of third party, then that third party or class could enforce the terms intended for his benefit such as standards and performance levels. If the contract is neutral on the issue, then the 1999 Act operates. However, where the contract does not expressly identify third parties, there can be no claim by such parties. Thus, in *Avramides v. Coldwill* (2006), Mr. Coldwill purchased a business from B Trading Ltd. Coldwill had undertaken to complete outstanding customer orders and to pay all liabilities incurred by the company. Avraamides was a dissatisfied customer of the company and brought a claim against Coldwill, arguing that the transfer agreement had conferred an enforceable benefit on Coldwill. The Court of Appeal held that no such identification of the third parties had occurred in this case.

In the above case the action failed but no doubt all parties will have been involved in considerable expense and disruption of business. If a supplier wishes to avoid costly litigation by third parties not known to him he needs to ensure that the 1999 Act is excluded from the supply contract. The supplier should state clearly those persons or organisations who can benefit from the contract under the 1999 Act. If he can he should describe them by name or at least as a class of say first user or such a term. He should then expressly exclude all others not named or defined. Alternatively, and as is common practice in the construction industry he could exclude the 1999 Act altogether.

Subsection (5) of the Act makes it clear that the courts may award all the standard contractual remedies which are available to a person bringing a claim for breach of contract to a third party seeking to enforce his rights under subsection (1). The normal rules of law applicable to those remedies, including the rules relating to causation, remoteness and the duty to mitigate one's loss, apply to the third party's claim.

Subsection (6) makes it clear that the Act is to apply so as to enable a third party to take advantage of an exclusion or limitation clause in the contract, as well as to enforce 'positive' rights. The Act, for example, allows a term of a contract which excludes or limits the promisee's liability to the promisor for the tort of negligence and expressly states that the exclusion or limitation is for the benefit of the promisee's 'agents or servants or subcontractors' to be enforceable by these groups.

So, if Alfie enters into a contract with Bertie, a builder, to build a penthouse for his father, Charlie, and the contract contains an exemption clause which seeks to exclude Bertie's liability for negligent construction work; then, in the event Bertie carries out the work defectively and as a result the roof of the penthouse collapses – if Charlie sues Bertie as a third party to the contract, Bertie will be able to rely on the exemption clause no matter how unreasonable.

The Act thus has the potential to make significant changes in the way in which contracts can be enforced by third parties. It protects third parties in a situation where a contract envisages money being paid to such parties, but this is not honoured by the parties to the contract. It may also cover holiday contracts and the like, where only one person enters into the contract, enabling the other holiday makers travelling with him to pursue a claim for breach of contract. However, the main contracting parties are still in control and can thus agree to exclude the application of the provisions of the new Act.

Example:

If in a building contract an employer and contractor agree that a *subcontractor* will be paid direct by the employer in certain circumstances, without the benefit of the Act the subcontractor could not enforce that right against the employer (unless he had a direct contract). Under the Act, however, it

will be possible to draft the building contract so that the subcontractor can enforce the right against the employer.

Or, if the conditions of engagement of an architect acting for a developer state that he will co-operate in providing information to allow a tenant and his designers to prepare fit-out drawings. Neither the tenant nor designers can enforce that obligation directly against the architect. Under the Act however, it will be possible to draft the conditions of engagement so that the right can be enforced directly.

Since the Act does not enable *burdens* to be imposed unilaterally on third parties, in the first example above the subcontractor could be given the right to be paid direct, but the employer could not impose a warranty regarding his work. (Although what the employer could do is provide that the subcontractor is entitled to be paid direct for work that the contract administrator has agreed has been carried out correctly.)