



THE REPORT

CITY OF WESTMINSTER AND HOLBORN LAW SOCIETY NEWS

NO.32 DECEMBER 2004

THE PRESIDENT'S COLUMN



JEFFREY FORREST

It is a truth universally acknowledged that a writer in want of an opening sentence will shamelessly plagiarise Jane Austen, a 19th Century writer who is as much read today as in her own time. The same cannot be said for Mrs Humphry Ward, whose novels were very popular in Victorian times but are almost forgotten today. But she was a great philanthropist and her memory lives on in her own name, Mary, because it was she who established what is now known as the Mary Ward Settlement. She believed fervently in education for all and that the poor should be able to enjoy the pleasures enjoyed by the wealthy. One element of her Settlement is the Mary Ward Legal Centre, which continues to do the same essential work it has done since the 1890s.

Each year, this Society organises an Annual Lecture to raise funds for, and to publicise the work of, the Mary Ward Legal Centre. This year's lecture was given by Robin Cook on 17 November. When he was persuaded to give the talk, in early summer, he confidently chose a mid-November date, knowing that the House of Commons would be in its quiet days, just before the end of the parliamentary term, prior to the State Opening of the new term. But the last days of the last parliament were eventful beyond imagination, and I received a call from Robin Cook's office on the morning of the lecture to say that on his return to London from his Edinburgh constituency, he was under orders to remain within the Palace of Westminster and would not, therefore, be able to come to Lovells' offices, where the talk had been scheduled to take place.

The lecture was switched to one of the Committee Rooms in the Houses of Parliament and most people managed to get there, where it was standing room only. The event was judged a success and sincere thanks are due to Robin Cook for giving his time, as well as to Lovells for their generosity even though, on the day, they

did not have a chance to demonstrate their hospitality. A record amount was raised for the Mary Ward Legal Centre. Elsewhere in the Report is a summary of the lecture, prepared by John Maycock and Arthur Weir.

On the weekend of 20 - 21 November, a group of CWLS members attended the events organised by the Berlin Bar to celebrate its 125th anniversary. On the Saturday afternoon, the joint session on money laundering regulations was an eye opener for both sides. The Berliners were clearly astonished at the draconian extent of regulation that has already been imposed on us by the UK government; equally we were surprised at the lack of obligation imposed on our German colleagues. Supposedly both countries' regulations give effect to the same European directives but the differences are striking. Although, as lawyers, we both start from the same fundamental principles of client confidentiality and privilege, the UK has moved a long way from that starting point.

Our current regime was lucidly explained by Louise Delahunty and the Germans' position was laid out by Herr Frank Johnigk, who is the Chief Executive of the National Bar (Bundesrechtsanwaltschaft). It is to his organisation that reports are sent by lawyers, as we send ours to NCIS. But, under German rules, mere suspicion is not enough: there must be concrete evidence. And this must be limited to present and future money laundering activity, not to past activity. Thus, Herr Johnigk told us that in the last five years, there had been only seven referrals by lawyers! That compares with the tens, if not hundreds of thousands, of reports by UK lawyers to NCIS. Even given that our reporting obligations are on an "all crimes" basis by reason of the Proceeds of Crime Act 2002, that is a remarkable contrast.

As Louise Delahunty remarked, we really need a proper cost benefit exercise to determine whether (or to what extent) the obligations that have been placed on UK professions are having positive effects.

2004 draws to its close. By the time these words appear, Sir David Clementi may already have arrived, with his sackful of surprises for us all, whether we've been good or bad. If not yet, he'll be coming down Chancery Lane's chimney before the year is out. We don't always get what we want and if you hung up a B Plus stocking, you may find that it is still empty in the morning.

I send you the best wishes of the season, with the hope that the law we all serve may be an instrument of peace in the coming year.

DIARY 2004/05

DECEMBER

9 Lecture: Planning Law Update

2005

JANUARY

12 Lecture: Inquests by Coroners
19 Committee meeting

FEBRUARY

16 Lecture: Recent developments
in matrimonial law
21 Committee meeting

MARCH

1 ANNUAL DINNER
16 Lecture: Attracting and Keeping
profitable clients
23 Committee meeting

APRIL

13 Lecture: Employment Law
Update
27 Committee meeting

CONTENTS

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PRESIDENT'S COLUMN	1
MARY WARD LECTURE	3
THE SOLE PRACTITIONER SYNDROME	4
LAW SOCIETY CONSULTATION	4
FLEXIBILITY AND EXCELLENCE	5
REVENUE COMMITTEE	6
REVENUE LETTER	7
LECTURES	8
CHRISTMAS QUIZ	8

The deadline for all copy for the
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MARY WARD LECTURE

THE ATTACK ON THE RULE OF LAW

There is a sustained attack on the rule of law, said Robin Cook. Speaking in a packed Committee Room 10 at the House of Commons, the former Labour Foreign Secretary deplored trends in international relations. In the title to his lecture on 17 November he described international law as the first victim of the War on Terror.

Not himself a lawyer, Robin Cook had spent 10 years working in the field of international affairs, as Opposition spokesman and later as Foreign Secretary. The only way to have any control over world affairs was by international agreement. Thus, world temperature was rising now more than in the preceding ten million years. Only by international agreement could one try to prevent the extinction of many species.

SABOTAGE

In humanitarian law, he said, progress was slower. He was proud of his part in the creation of the International Criminal Court, with jurisdiction over state and non-state entities alike. One might have thought that the United States would be in favour of the ICC but it was not. Though every state had the right to refuse to ratify, the USA was actually trying to sabotage its activities. It had withdrawn aid from countries supporting the ICC, including Uganda where the Lord's Resistance Army was committing the greatest of atrocities. With the President's appointment of Condoleezza Rice as the new Secretary of State a change in policy was unlikely.

THREE-LINE WHIP

The Mary Ward annual lecture, inaugurated many years ago by Holborn Law Society, this year raised £3,400 for the funds of the law centre. Billed to be hosted by Lovells, it had been switched at

the last moment to the Palace of Westminster, when a three-line whip had prevented Robin Cook from leaving the precincts. During the afternoon ticket-holders received urgent e-mails, and those who arrived at Holborn Viaduct were promptly redirected to the House of Commons.

Robin Cook had resigned because in the period before the Iraq War the United Nations had not been involved. By going to war without a second UN resolution, expressly authorising war, the United Kingdom was breaking the very international law which Labour had helped to create in 1948. Then the vision had been that wars of aggression were beyond acceptable norms. The exceptions were self-defence (justifiably invoked in the case of Afghanistan) or authorisation by the Security Council. Iraq did not fit either exception. It was impossible to reconcile the war in Iraq with the embryonic rule of law. The Attorney General had originally been of the view that a second resolution of the Security Council was required but somehow appeared to have changed his mind.

A GIFT TO BIN LADEN

'War on Terror' was a term he deplored. Terrorism needed to be controlled. But wars and bombs would create support for it, not defeat it. A military solution was a delusion. The USA had used the 'War on Terror' as the basis for the suspension of international norms and even to sanction the use of torture. The situation in the prisons of Abu Graibh in Iraq and Bagram in Afghanistan was a gift to Osama Bin Laden. He could not have faked the photographs even if he had tried.

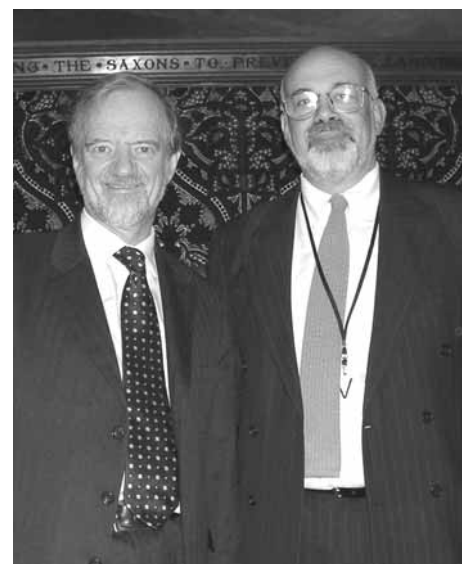
We in the UK should reflect on our reaction to terrorism. Since 9/11 raids under our terrorist legislation had numbered 30,000. The number of convictions was about 17, mostly for immigration offences, not terrorism. The result - the alienation of ethnic minority groups from whom we needed support.

TORTURE

The previous week the Foreign Office had published its annual Human Rights Report (he had started this Report when in office). There was a robust four pages on torture in Uzbekistan. However, it was said that our own security forces and police were using information obtained in such ways. In the UK we had banned torture in Jacobean times. Torture produced not truth but what the torturers wanted to hear. We should refuse to use information obtained in this way.

DOES IT MATTER?

We cannot expect others to obey the rule of law if we do not ourselves. Would not the USA be most worried if, for example, China were to invade Burma on the grounds that it invoked for Iraq? Did it matter? Yes, profoundly, he said.



THE SOLE PRACTITIONER SYNDROME

Solicitors who work on their own take a particular risk of acquiring tunnel vision and failing to see that standards in law and practice have changed in the world around them. The self-aware sole practitioner will spend a high proportion of his or her time and resources going on courses and to groups such as local Law Societies to remain in touch with colleagues and to keep up to date with changes.

However, it would be wrong to assume that only sole practitioners have the problem of becoming isolated in their practice; the sole practitioner syndrome commonly occurs within larger firms. It arises from numerous causes. The obvious one is where a solicitor acquires a specialist area of expertise which does not bring in enough fees to justify the taking on of additional staff, so effectively that practice is the sole responsibility of one lawyer. It can develop where a lawyer has become senior in the department and feels uncomfortable in consulting junior colleagues. This may well be combined with having little time for CPD. A further difficulty can be an excessively territorial attitude to clients and an unwillingness to share work with colleagues, even where others are more suitably qualified to carry it out.

Mergers, and the taking on of new solicitors with an existing client following, can be points of weakness, where poor existing

practices can be perpetuated, unseen by the rest of the firm, creating sole practices within a bigger organisation.

Unfortunately, the first time fellow partners become aware of the problem may well be when the complaint or claim is received. Upon investigation into the files it becomes apparent what the solicitor is involved in and how he/she is working in a manner that is way below the current standard of practice. This often leads to critical legal developments being missed.

HOW CAN FIRMS PROTECT THEMSELVES FROM THE SOLE PRACTITIONER SYNDROME?

Firms should not assume competence in their staff; this needs to be demonstrated and constantly updated.

If there is only one expert in an area of work offered by the firm then the reality is that there will always be a higher risk of claims because there can only be limited engagement on legal issues from colleagues. The firm needs to ensure that the sole expert is gaining every opportunity available from external resources to keep abreast of developments; there can be no skimping on training costs.

Where the problem is that of internal isolation within a work team, team based discussions on topical issues of law and

practice can be a low-key way of involving those operating on the periphery. These can be CPD accredited and may well be more attractive than external courses as they are directed specifically to the practice, and practitioners can discuss real problems thrown up by their cases.

Territorial attitudes to clients are not easily overcome, as they are often ingrained in the style of work that a practitioner has developed over a long period. Managing the risk can involve a number of strategies: peer review of work; a good supervision and delegation policy with an emphasis on the dangers of dabbling in work outside the fee-earner's area of expertise; and implementing standard practices for common operations within work types, so that files can easily be exchanged.

Above all make sure that the risks are understood and that fee-earners take responsibility for consulting others; make sure the "open door" policy is a reality in your firm.

THIS COLUMN WAS PREPARED BY **AFP CONSULTING**, A DIVISION OF **ALEXANDER FORBES RISK SERVICES UK LTD.** A MEMBER OF THE GENERAL INSURANCE STANDARDS COUNCIL.

LAW SOCIETY CONSULTATION

The Professional Matters Committee, with input from the Main Committee, responded to a questionnaire consultation paper of the Law Society "Working Better For You", circulated to Local Law Societies as part of its review of its professional non-regulatory services.

The response, to questions principally based on the position should the Law Society lose its regulatory role, is summarised below. The response was confined to the questions asked although relevant questions were felt to have been omitted!

The Law Society should continue in a representative capacity with the principal roles of

- Advancing solicitors' financial and professional interests

- Improving solicitors' image as a profession
- Advancing the interests of users of legal services and of the public at large

It should continue its involvement in wider public policy issues where legal rights are at stake.

Its representational role should take account of different types of legal practice and to a lesser extent different geographical regions and demographic differences.

Amongst the facilities and services provided by the Law Society, the Gazette and its lobbying and monitoring of legal reform and policy were considered the most important. These as well as Library services, regional offices and pastoral care should be covered by membership fees

while best practice and business development advice and dining etc facilities should be self financing.

Including the regulatory role, the response identified the most valued roles of the Law Society as:

- Regulation of standards and entry to the profession
 - Representation on law reform particularly by sub committees
 - Library services
 - Ethics helpline
- while the first three things the Law Society could do better were:

- Investigation and adjudication of complaints
- Representing solicitors' interests
- Ethics helpline

FLEXIBILITY AND EXCELLENCE?



STRATEGIC
LEGAL SOLUTIONS

These are just two of the key qualities which make a top contract lawyer. They are fundamental to ensuring that clients of Strategic Legal Solutions, whether private practice law firms or in-house legal teams, enjoy the benefits of using high quality lawyers on a contract basis.

When we received a call recently from the human resources team within an existing client, a well respected City law firm, we moved quickly to identify suitable candidates. The client's corporate department had received a large number of instructions and the firm urgently needed a mid-level corporate lawyer, with excellent academic and top level corporate experience, to assist with the overflow of work. 'Intangible' qualities such as a good personality and adaptability were some of the criteria that we used to create a short list. These are particularly important for contract lawyers because they typically do not have the lead-in time often afforded to permanent employees.

By ensuring that candidates' credentials had been verified and references taken up in advance, we were able to move quickly to set up interviews between the relevant individuals within the firm and suitable candidates. The successful candidate commenced work with the firm within a week of the initial client call. Given the high workload of our client at that time, the ability to bring in a good quality lawyer quickly and for a short period enabled the needs of the firm's clients to be properly managed and for work to be completed to a high standard within the timescale.

Importantly, providing lawyers on a contract basis is never a service which ends simply with the placement of an individual in a client organisation. Ongoing liaison by the agency with both client and candidate is essential to ensure that particular needs are continuing to be

properly met. In the case outlined above, extremely positive feedback from the firm was mirrored by job satisfaction for the lawyer concerned. Ultimately, a good and flexible relationship ensured that, at the firm's request and with the lawyer's agreement, the duration of the assignment was extended, further demonstrating the real value derived by both firm and lawyer.

Tim Ryan

Strategic Legal Solutions

(Founded and managed by former City partners and lawyers, Strategic Legal Solutions (www.slslondon.com, 020 7743 7120) brings high quality legal contract working to London. Clients use SLS's people as and when required, to supplement existing resources. SLS candidates apply their skills whilst regaining some control over their lives by flexible working.)

Solicitors Pro Bono Group

Interested in Pro Bono?

If you are a trainee or qualified solicitor in Westminster or Holborn and want to find out about new pro bono projects in your area for 2005, come along to our drinks evening.

Wednesday 8th December

2004

6:30pm

The Pitcher & Piano
40-42 William IV Street, WC2

Free Drinks

If you would like further information on Pro Bono please contact Rebecca Barnes at the SPBG on 020 7090 7355

REVENUE COMMITTEE

WHAT IS THE LAW PENDING AN APPEAL BY THE TAX AUTHORITIES?

JEREMY DE SOUZA



Hitherto it has been Customs' practice, when faced with a decision they are appealing, to permit taxpayers to use the decision of the tribunal or Court in question unless and until overruled, on the basis that interest will be applied if their appeal succeeds. But in the case of their reverse at the hands of Lindsay, J. in the *Debenhams* test case on the attribution of 2.5% of the retail price to card clearance for non-cash sales, they have announced, in *Business Brief 27/04*, that anybody who applies the High Court decision will be assessed to misdeclaration penalties.

While I happen to have considerable sympathy for the declared objective of Customs in this case (to protect small retailers), this reaction does seem to be to be questionable. A High Court judgement is different from the decision of a tribunal in that, until reversed, it constitutes the law. Moreover, in this particular case, the point of disagreement between judge and tribunal was one relating to the general law of contract and leave to appeal was refused by the judge.

TWO-YEAR DISCRETIONARY TRUSTS OF RESIDUE

There has been a recent development of which Probate practitioners need to take account pending republication of the *Advanced Instruction Manual*.

Where the estate includes property subject to agricultural or business property relief, only one appointment out of a residuary "section 144" trust should be made. That should include all the property in residue. If some of the property subject to such relief is to be retained under a discretionary regime, it seems, furthermore, to be necessary for that appointment to make minor changes to the testamentary trusts, in order that the appointment "covers" all the property subject to the section 144 regime.

SIPE

Both Probate practitioners and the CTO had been hoping that it would not be necessary to consider whether the future entitlement to single farm

payments needed to be valued in relation to deaths between 28 October 2003 (the date Council Regulation 1782/2003 took effect under its terms) and 1 January 2005 (the start of the first calendar year for which such payments are to be made).

But the unexpected failure of DEFRA to make any statutory instruments by 1 August 2004 (the date upon which each Member State had to choose between the various options available) appears to have the result that the "entitlement" took effect as IHT "property" and a CGT "asset" on 28 October 2003. The fact that valuation might be difficult, at any rate until Mrs Beckett's Parliamentary Statement of 22 February 2004, would not have prevented this being the case.

This conclusion has, furthermore, been reinforced by, first, DEFRA's apparent reliance on the retrospection (to 1 January 2004) of the administrative provisions in Article 12 of Commission Regulation 795/2004 and, second, the fact that, when promulgated, the appeal regime set up by SI 2004/2689 had nothing but the European legislation to be applied to.

It had been hoped that this issue would be resolved at a meeting between the Revenue and some representative bodies on 9 November, but it was not. This means that the executors of farmers will experience delays in completing the administration of their respective estates.

IHT ON FARMHOUSES

Since the Valuation Office Agency invented the "rule" that 30% of the value of every farmhouse must always be disqualified from agricultural property relief, practitioners have experienced differing treatment on the issue of whether business property relief is available for the whole of it in lieu. Were the latter to be the case, the VOA's "rule" would, of course, be an irrelevance. The CTO have therefore backtracked in at least two cases in which the BPR point had been conceded initially.

In the meantime, the authorities have been seeking to arrange a number of suitable test cases on the APR capping point. But, at the time of writing, they are only holding out in one such case for hearing before the Lands Tribunal, and that is one in which the farm had been sold as a whole. In it, the application of APR can no longer be disputed and lotting the farmhouse separately from the land under the principles applicable for valuation under s.160 does not seem to be a possibility under s.115(3).

On the face of it, such a farm is a single "asset" for which BPR should be available in full under s.112(2)(a). But it is understood that certain officers at the CTO are contending that the s.160 lotting principles relating to "property" should be imported into s.112(2)(a) in order to divide up business assets into new and artificial units for the purposes of a different relief. A great deal could turn on this point and an early resolution may not be in sight.

EU BENEFICIARIES

Probate practitioners need to consider the future administrative (and costs) implications of Savings Income Reporting Guidance Notes V.2, paras 176-180.

ECJ TITBIT

British business has, for decades, been able to benefit from the exceptional treaty negotiating skills of the Inland Revenue's International Division. If the Court adopts the Opinion of Advocate General Colomer in "D", C-376/03, this advantage will be put at risk.

TRUST REVIEW

The Committee's submissions are to be found on p. 7.

SDLT

The President has written to the Revenue and the Chancellor to express our concerns on Stamp Duty Land Tax issues.

CITY OF WESTMINSTER AND HOLBORN LAW SOCIETY
REVENUE COMMITTEE

Inland Revenue Trusts
Room 112
New Wing
Somerset House
Strand
London WC2R 1LB
27 October 2004

Dear Sirs

Modernising the Tax System for Trusts: August 2004 Consultation

As indicated in our response to the previous consultation, the City of Westminster and Holborn Law Society has, amongst its membership, probably the highest concentration of technical expertise relating to private client and trust issues.

In view of the extensive discussion which has taken place, the Society's Revenue Committee has decided only to comment on such of the final proposals as they consider are likely to cause real difficulty in practice. These come down, in effect, to two issues:

A: The machinery for payment of the tax where the liability is imposed on other than the trustees: see paras 1.10-13 and 7.5

What needs to be arranged in both "settlor" and "orphan" cases, is for the trustees to maintain their own ledger with the Commissioners.

The change over to self-assessment with automatic overrun surcharges has made the historic machinery obsolete. In the days when the Inspector issued an Assessment based on his examination of the settlor's return and then issued the settlor with a certificate to enable him to recover the correct amount from the trustees, the surcharge problem did not arise.

In the case of orphans, the reality is that the trustees' money is going to have to be used. If an overpayment is made, it should therefore be returned to them and not paid to the orphan. This is especially important in the case of capital gains tax, where a breach of trust might otherwise be committed.

In the case of settlors, the position is even more difficult because, in very many cases, the settlor will be debarred from benefiting from the trust fund except to the extent to which he is entitled to a statutory recovery. For a system to be set up under which he can retain any over-contribution by the trustees is ludicrous, because it will put trustees in the position of either:

- [a] having to refuse funding until the certificate has been bespoken and passed on;
- or
- [b] committing a breach of trust.

Moreover, where capital transactions are concerned, the settlor would be unlikely to have available funds to defray the tax without resort to the trust fund and a breach of trust would be in prospect in circumstances in which he was entitled to the income.

It is therefore essential that the historic system is changed into one in which:

- [1] the trustees are enabled to deposit funds against their share of the prospective liability;
- [2] on terms that any surplus will remain their money without going through a ledger in the name of the settlor or orphan.

B: The problem of funds within a composite settlement: para 6.3

The real problem is not whether it should be made possible for trustees to elect for funds to be treated as discrete settlements. Modern settlements tend to contain funds set up on either:

- (a) a revocable, or
 - (b) a "Joel" basis,
- both of which roll into newly created ones within the same settlement.

The underlying issues which need to be addressed are:

- [1] changing the rules for identifying sales of securities against purchases, so that pairing takes place only within the fund in question;
- [2] allowing losses to be utilised within the fund where they have been incurred, with rules – similar to those in TCGA 1992, s.90 – for the transmission of both:
 - (a) such losses; and
 - (b) the base values of securities transferredwhen a fund is brought to an end and merged into another one within the settlement; and
- [3] setting out rules for allocating the annual exemption, perhaps rateably to post-loss and taper chargeable gains.

Yours faithfully

W J de Souza
Chairman

CWHLS LECTURES 2004/05

PLANNING LAW UPDATE:	Martin Edwards	9 December
INQUESTS BY CORONERS:	Michael Burgess	12 January
RECENT DEVELOPMENTS IN MATRIMONIAL LAW:	Nicholas Francis, QC	16 February
ATTRACTING AND KEEPING PROFITABLE CLIENTS:	Rod Sloane	16 March
EMPLOYMENT LAW UPDATE:	Andrew Blake	13 April

These lectures will be held at the offices of Lawrence Graham LLP, 190 Strand, WC2. They begin at 6.15 pm with a drink available from 6.00 pm. One hour of CPD is available (ref: JC/CWHLS) – please give your roll number when attending.

TO: Mrs E J Beesley, CWHLS, 25 Rotherwick Road, London NW11 7DG DX 33801 Golders Green
Please send tickets for the following lectures: £20 per ticket for members and £30 per ticket for non members

	Member	Non member
PLANNING LAW UPDATE
INQUESTS BY CORONERS
RECENT DEVELOPMENTS IN MATRIMONIAL LAW
ATTRACTING AND KEEPING PROFITABLE CLIENTS
EMPLOYMENT LAW UPDATE

I enclose a cheque for £ payable to the City of Westminster and Holborn Law Society

Name

Name of Firm

Address

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Signature Date.....

CHRISTMAS QUIZ

The Editor apologises for having overestimated readers' intellectual abilities last year. There were no correct answers to last year's festive crossword, as a result of which the NV champagne prize was unclaimed and can be re-offered this year as vintage. The reader who most correctly or wittily identifies these pictures (all taken within the Society's boundaries) or who correctly identifies most, will win the prize. The prize will be awarded entirely at the Editor's discretion.

Entries to be sent to the Editor no later than 14 January 2005.

