Family Law Information Pack

January 2016

Contents

Introduction

asb law's family team consists of five expert lawyers advising exclusively on a wide range of family issues in a constructive and cost efficient way.

Every member of our team is a registered member of **Resolution**, an organisation committed to the constructive resolution of family disputes. Members promote a non-confrontational approach to family problems and encourage solutions that consider the needs of the whole family – and in particular the best interests of children.

Our experience speaks for itself: in the most difficult of circumstances, we have the experts who can help.

Our team has access to other specialist services both within our firm and through external connections with barristers, accountants, financial advisors and other professionals.

Our team advises on

Divorce proceedings

- Financial issues
- Property
- Pensions
- Preserving assets

Issues relating to children

- Children's care arrangements, where they should live, who they shall spend time with etc.
- Domestic and international relocation disputes
- Child abduction
- Special guardianship applications
- Parental responsibility matters

resolution
first for family law

Cohabitation issues

- Living together agreements
- Trust of Land applications

Civil partnerships

- Financial issues
- Dissolution of civil partnership

Injunctive relief

- Applications for non-molestation and occupation orders
- Injunctions under the Protection for Harassment Act

Asset preservation

- Pre- and post-nuptial agreements
- Pre- and post-civil partnership contracts

Inheritance Act claims

- Applications on behalf of minors, spouses and former spouses for financial provision against the estate of the deceased
- Acting for beneficiaries in preserving their interests against possible claims against the estate

"…asb law is 'exceptional in every respect', and has a wide-ranging practice…"

Legal 500 2013
on our family team

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The family law team

Mark Rennie

Partner, Head of Family

Mark's main areas of expertise are in divorce and financial proceedings, and resolving disputes involving children and property between separating couples. He has particular expertise negotiating complex pre and post-nuptial agreements to protect his clients' interests in the event of marital breakdown.

Mark also has a particular interest in Inheritance Act disputes and issues involving contested wills.

mark.rennie@asb-law.com

"I wish to say how delighted I am with the services of asb law, and in particular Mr. Rennie. I have substantial assets and, thankfully, after two divorces still have my assets thanks to the careful advice and planning of asb law. I would highly recommend them to anyone thinking of living with or marrying a partner who either has assets, or is an entrepreneur who may have assets in the future."

Divorce and asset protection client testimonial

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Jackie Judd

Associate

With more than 25 years experience to call on, Jackie's work includes advising in all areas of divorce (including complex financial cases), preparing cohabitation, pre-nuptial and separation agreements. She also regularly acts for clients in private Children Act matters both in this country and also where an international element is involved (including child abduction).

jackie.judd@asb-law.com

Gail Brooks

Associate

Gail has extensive experience in all areas of family law, advising clients in divorce, civil partnership or judicial separation proceedings. Gail has also advised on a number of complex high net worth financial disputes; asset protection prior to marriage/cohabitation, and all manner of children-related matters including international relocation cases.

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Anna Scales

Solicitor

Anna completed her Legal Practice Course at the College of Law and achieved a Distinction. Anna joined asb law in September 2013 as a Trainee at the firm and qualified into our Family team in September 2015. Anna's main areas of expertise are in divorce and financial proceedings, resolving disputes involving children and property between separating couples.

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Natalie Suret

Solicitor

Prior to joining the team, Natalie worked as a Family Solicitor in a high street practice advising on divorce, finances and children. Natalie's areas of expertise are divorce, financial negotiations and proceedings, separation agreements and difficulties surrounding children on separation.

natalie.suret@asb-law.com

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Client care

We are regulated by the **Solicitors Regulation Authority** and are dedicated to providing the best possible service to all our clients. We will:

- Put your interest first when representing you
- Be polite and considerate in our dealings with you
- Find out from the start what you are hoping to achieve and aim to make sure that your expectations are realistic
- Make every effort to explain things clearly and in terms you can understand, keeping jargon to a minimum
- Agree with you the type of service you can expect to receive
- Tell you who will be handling your work
- Explain what the costs are likely to be
- Keep you informed of costs throughout so that you can work out if a particular course of action is worth following financially
- Respond to your letters and phone calls without delay
- Tell you about any developments and update you on progress as work proceeds
- Give you a clear bill which shows the work done and the amount charged
- Treat all clients fairly and not discriminate against anyone because of his of her race, sex, sexual orientation or disability
- Keep what you tell us confidential and refuse to act for anyone else if doing so could compromise that confidentiality

We take client care very seriously and welcome feedback. Many of our clients are very satisfied and come back to us if new problems arise. We see every new client as a potential client for life. We hope that this ensures our clients remain satisfied with our service.

Fees & Funding

Whilst we provide skilled and cost efficient advice, we are conscious that paying legal fees can be a concern for individuals. We are, therefore, transparent about costs and provide regular cost estimates and updates to help you budget throughout your case.

Our costs commitment to clients provides that there is:

- A transparent fee structure, agreed in advance
- Regular, fully itemised, billing
- Value for money
- No hidden extras

In most cases we charge on a time spent basis and quote hourly charge out rates. In some circumstances we are able to offer fixed fee options and initial appointments at a reduced rate.

We do not offer publicly funded services (Legal Aid), however we are happy to discuss any of the following funding options before, or during, the handling of your case:

- Loans or specifically arranged finance deals from banks
- Use of credit cards
- Loans from family members or friends
- In certain circumstances, ‘Sears Tooth’ Agreements (where you assign in a deed the full settlement to your solicitor so that at the end of the case the costs can be paid first)
- An application for Maintenance Pending Suit or a Legal Services Order in Financial Proceedings (for an order that the other party in the proceedings pays a contribution to your legal costs)

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Divorce procedure timetable

After one year of marriage

Either spouse may start the divorce. He or she is referred to as the 'Petitioner'. The **Petition** is completed and sent to the Designated Divorce Centre (DDC), together with the marriage certificate. A fee (currently £410) is payable on lodging the Petition.

Within a few days of sending the Petition to the court

The DDC sends a copy of the **Petition** to the other spouse, referred to as the 'Respondent'. A copy of the **Petition** can also (though very rarely recommended) be sent to anyone named in an adultery Petition, who may be referred to as a 'Co-Respondent'. If the Respondent (or Co-Respondent) has instructed solicitors, the **Petition** may be sent to them.

From the date the documents are received the Respondent has strict time limits to observe

- Within seven working days he/she should send an '**Acknowledgement of Service**' form (which accompanies the **Petition**) to the court. The form asks whether the Respondent intends to defend the **Petition** and whether any claims for costs are disputed.
- Within 21 days of receipt (longer if documents have to be sent abroad), if the Respondent intends to defend the **Petition** he/she must file a defence, or 'Answer'. The **Petition** then becomes defended and the procedure outlined below does not apply. Defended divorce proceedings resulting in fully contested hearings are very rare.

Within a few days of receiving the Acknowledgement of Service from the Respondent (and Co-Respondent)

The court sends a copy of the **Acknowledgement of Service** to the Petitioner's solicitor.

If the Petition is not being defended, the Petitioner can apply for the Decree Nisi to be pronounced

The Petitioner's solicitor prepares a statement confirming that the contents of the **Petition** are true. It will also state whether any circumstances have changed since the **Petition** was filed. The Petitioner will sign the statement; it will then be sent to the DDC, requesting a date for the first decree of divorce ("**Decree Nisi**") to be pronounced.

If the Acknowledgement of Service is not returned to the court

Proof that the Respondent (and any named Co-Respondent) has received the **Petition** will have to be obtained before the Petitioner can take the next step. This may involve arranging for the **Petition** to be personally delivered to the Respondent (and any named Co-Respondent) or, exceptionally, obtaining a Court Order which provides that proof does not need to be given that the Respondent (and Co-Respondent) has received the **Petition**. This is called "dispensing with service".

On receipt of the Application for a date for pronouncement of the Decree Nisi

The District Judge ("DJ") looks through the papers and, if they seem in order, grants a certificate for the **Decree Nisi** to be pronounced. Both the Petitioner and Respondent (through their solicitors) are then advised of the date fixed for the pronouncement, which is likely to be a few weeks after the Application is lodged. The parties do not have to attend court, unless there is an issue as to costs, in which case the court can ask them to attend to put forward their positions.

On pronouncement of Decree Nisi

- 6 weeks and 1 day after the date of **Decree Nisi** the Petitioner may apply for the final Decree ("**Decree Absolute**") by sending the appropriate form to the DDC. This step is not automatic. The application will be processed as a matter of priority and the Decree may be available as quickly as the same day.
- 3 months after the Petitioner could first have applied for the **Decree Absolute**, the Respondent may apply for the **Decree Absolute** if the Petitioner has not done so.

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Civil Partnership

Since 5 December 2005, same sex couples have had the choice to register their relationship as civil partners.

Once registered, the civil partnership can only be brought to an end by the death of one partner, annulment of the partnership, or the dissolution of the partnership.

Dissolution of a civil partnership can take place one year after its registration. The ground for dissolution is irretrievable breakdown and the breakdown has to be shown by one of the following facts:-

- Behaviour
- Two years separation with consent
- Five years separation
- Desertion

On the dissolution of a civil partnership the Court has the jurisdiction to consider financial provision. The factors considered in relation to financial matters correspond with those considered by the Court on divorce.

Civil partners who register their relationship are also afforded more protection in respect of Children Act matters, in particular, they can:

- Enter into a Parental Responsibility Agreement
- Adopt jointly

Financial disputes on divorce

When the Court is faced with determining how matrimonial assets should be divided upon divorce, there are a number of factors they must consider before any Orders are made. The Court is required to consider **all the circumstances** of the case in question. First regard is given to the **welfare of any children** (under 18) and thereafter each of the following factors, (otherwise known as the **s.25 checklist**), should be considered:

- The income and earning capacity of each party, the property they own and other financial resources they each have;
- Each party's financial needs, obligations and liabilities.
- The standard of living enjoyed during the marriage;
- The length of the marriage and the ages of the parties;
- Any physical or mental disability either party suffers from;
- Contributions made by each of the parties to the marriage both financially and otherwise;
- Any behaviour by either of the parties that is so serious that it cannot be ignored by the Judge; and
- The value of any benefit which either of the parties will lose the opportunity of acquiring as a result of divorce, such as pension and insurance benefits.

The Court has a wide discretion as to which of the items it will give most priority. **The aim is to achieve a fair division of the assets and income.** To that end, the Court will require both parties to make **full and frank disclosure** to each other of their financial circumstances.

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Commencing financial proceedings

When the Family Procedure Rules 2010 came into effect in April 2011, one of the most significant changes introduced was the requirement for all parties to consider **alternative dispute resolution (ADR)** before applying for an order within relevant family proceedings.

This means that before issuing an application for the Court to make orders dealing with financial issues arising from a divorce or the dissolution of a civil partnership, we will ensure you have been fully informed of all other options including, for example, **mediation**.

In the event matters are resolved with mediation, we will then draft the agreement into a **Financial Remedy Order** to be sealed at court so that you benefit from a legally binding and enforceable Court Order.

In the event that matters remain unresolved or are simply not suitable for resolution via these methods of **ADR**, then a Court application can still be made, in which case the following procedure will be followed:

Upon receipt of an Application for a Financial Order, the Court will set a timetable by which information must be provided and for a series of hearings to decide initially how the matter is to proceed and ultimately what orders should be made. Parties are required to attend all hearings.

The first hearing is known as the **First Appointment** and usually takes place approximately three months after the application is issued. By the time it takes place, both parties must provide a detailed financial statement (Form E) at the same time as each other. They must also then produce a Questionnaire setting out details of any additional information they want the other party to provide.

In addition, a Statement must be produced by both parties setting out details of what they regard as being the main issues in dispute.

At the **First Appointment**, the Judge will encourage the parties to consider whether an agreement can be reached to settle matters. If that is not possible, the Judge will give directions about what additional steps should be taken and what extra information should be provided, and will fix a date for the next hearing.

This is known as the **Financial Dispute Resolution Appointment (FDR)** and usually will take place about six weeks after the First Appointment, depending on the Court's timetable.

By the **FDR hearing**, replies to the Questionnaire must have been provided. Parties are also expected to have made offers to settle the proceedings. There may be cost penalties if this does not happen.

At the **FDR**, parties are expected to make every effort to negotiate sensibly to reach an agreement to resolve the dispute and the Judge can be asked to play an active role in this. As a consequence, and to encourage free discussions, the Judge would not be entitled to have any later involvement in the proceedings and nothing which is discussed as part of the **FDR** can be brought to the attention of the Judge in any later hearings.

If no final agreement can be reached, the Judge will fix a date for the **Final Hearing**. At that hearing the Judge will hear the evidence and decide what Orders should be made. Again parties are expected to make offers to settle beforehand.

Offers to settle are important: although the general rule in financial remedy proceedings is that the Court will not make an order requiring one party to pay the costs of the other party (unless in exceptional circumstances), the Court must have regard to any open offer to settle made by a party when considering whether to make any order for costs.

If an agreement is reached at any stage, we will incorporate this into an application for a **Financial Remedy Order by Consent**, which the Court would then be asked to approve to conclude proceedings.

We will of course advise you at all stages as to the right applications to make, the correct procedure to follow, and tactics to adopt.

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Wealth protection measures and pre-nuptial agreements

Dividing assets upon divorce

We spend our lives putting specific measures into place to protect our assets in our lifetime and upon our death, not only for ourselves but also for our loved ones. It should therefore follow that we ensure that such measures are applied upon entering into marriage too.

Under English law, upon marriage a spouse will then be entitled to a share in the assets should the marriage breakdown in later years. The starting point which must be applied by the Courts when faced with an application for matrimonial assets to be divided upon divorce is that of equality. The Court will focus on the guiding principles of 'equal sharing', 'the 'needs' of the respective spouses (and dependants if there are any), and 'compensation'.

Before considering how assets should be divided, both spouses are required to provide full and frank financial disclosure of all of their assets, this includes any assets acquired prior to the marriage and/or inherited. The notion that assets one spouse may have acquired and/or inherited prior to the marriage could be lost in a divorce is an unwelcome thought amongst many, particularly if the assets have arisen as a result of family inheritances and/or there are children from previous relationships whom one spouse may want to provide for in years to come.

Pre-nuptial agreements to protect assets

In recent years, in particular since the "landmark" case of ***Radmacher v Granatino [2010] UKSC 42*** and the subsequent Law Commission Report on 'the future of financial orders on divorce' released in February 2014, there has been an increase in demand from couples considering marriage wanting **pre-nuptial agreements**.

A **pre-nuptial agreement** is a legal agreement made between two individuals before their marriage has taken place. The purpose of a **pre-nuptial agreement** is to allow a couple to set out how they would wish their assets to be dealt with and divided between them in the event they later separate or divorce.

The existence of a **pre-nuptial agreement** enables each individual to clearly identify within the agreement **'matrimonial'** and **'non-matrimonial property'** or, as they are sometimes referred to as, **'joint property'** and **'separate property'**. Once the assets are identified in this way, each individual can then also clarify within the agreement exactly how the 'joint' and 'separate' property should be dealt with and also how each of them will conduct their financial affairs both during the marriage and in the event the marriage breaks down.

By entering into a **pre-nuptial agreement**, both individuals will benefit from clarification as to how financial affairs will be conducted, together with a level of certainty arising from the ability to protect assets which they may deem to be 'separate property', (such as inheritances and/or pre-marital property), from being made subject to a later financial claim.

It is widely accepted now that there are real benefits to **pre-nuptial agreements**, particularly for individuals wishing to protect their assets. Whilst it does need to be recognised that the existence of a **pre-nuptial agreement** cannot override the jurisdiction of the Court and it's discretion to apply the law relating to the division of assets upon divorce, (namely section 25 of the Matrimonial Causes Act 1973), since ***Radmacher*** and the subsequent Law Commission report, it is now generally understood that a **pre-nuptial agreement** should be given **decisive weight** if:

- the agreement is freely entered into by each individual;
- each individual can be shown to have had a full appreciation and understanding of the implications of the pre-nuptial agreement and;
- the terms contained therein are deemed to be fair in the circumstances; and
- various safeguards, (as set out by the Law Commission), are fully adhered to.

Of course, the issue of fairness is always going to be a subjective one and as such, it is imperative that individuals obtain **appropriate independent specialist advice** regarding a **pre-nuptial agreement** so as to ensure that this test is satisfied. Here at **asb law LLP** our **family team** have the specialist knowledge to advise on, and indeed draft, pre-nuptial agreements so that in the event they are ever relied upon in subsequent divorce proceedings, they will be afforded the decisive weight of the Court as intended by the couple entering into the agreement.

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Children

When determining any question with regard to children, the **child's welfare** is of **paramount** consideration. The Court will also have regard to a number of factors set out in Section 1(3) of the Children Act 1989 as follows:

- The ascertainable **wishes and feelings** of the child concerned (considered in the light of his/her age and understanding);
- His/her physical, emotional and educational **needs**;
- The **likely effect** on him/her of any **change** in his/her circumstances;
- His/her age, sex, background and any **characteristics** of his/hers which the Court considers relevant;
- Any **harm** which he/she has suffered or is at risk of suffering;
- **The capability of each of the parents** and any other person in relation to whom the Court considers the question to be relevant, is of meeting his/her needs; and
- The **range of powers available to the Court** under the Children Act in the proceedings in question.

No one factor is given any more weight than any other; every child's case is different and will be dealt with by the Court on an individual basis having regard to the statutory check list above.

Whilst the Court is considering whether or not to make any Orders in respect of a child, no Order will be made unless the Court considers that an Order would be better for the child than making no Order at all.

The Court will also have regard to the general principle that any delay in determining any question with respect to a child's upbringing is likely to prejudice the welfare of that child.

If an application is made to the Court, the Court will try to ensure that the First Appointment involves both parents meeting with **Children and Family Court Advisory and Support Service** (**CAFCASS)**, with the express purpose of encouraging the parents to discuss matters and to try and reach an agreement without the need for further Court intervention.

If no agreement can be reached, it is usual practice for **CAFCASS** to be directed to prepare a report.

There are a variety of Orders that the Court can make in respect of children and their welfare. Some of the most common are as follows:

Living with Order

An Order settling the arrangements to be made as to the person with whom a child is to live.

Child Arrangements Order

An Order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the Order.

Specific Issue Order

This is an Order that determines a specific question which has arisen, or may arise, in connection with any aspect of a child's upbringing. There are an infinite number of possibilities, for example: returning a child to the parent with whom the child normally lives with in events where the other parent may have refused to return the child; changing a child's surname; authorising removal of a child from this jurisdiction, etc.

Prohibited Steps Order

This is an Order that no step can be taken by a parent of the kind specified in the Order without the Court's consent. Again, there are numerous examples, such as: preventing a parent from changing a child's surname; removing that child from this jurisdiction; preventing a child from coming into contact with certain named persons, etc.

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Parental Responsibility Order

'**Parental Responsibility'** means all the rights, duties, powers, responsibilities and authority that by law a parent of a child has in relation to a child and his/her property. This means that as well as having the right to bring up a child on a day to day basis, the person with parental responsibility has the right to make important decisions in a child's life, for example: regarding their change of name, education, religion and consenting on a child's behalf to medical treatment etc.

All mothers automatically have parental responsibility for their children, as do married fathers for their own children.

Unmarried fathers of children born prior to 1 December 2003 do not automatically have parental responsibility for their children. This is frequently a problem when a relationship between unmarried partners breaks down, as it is often only then that an unmarried father becomes aware he has no rights in respect of his children.

Pre-01 December 2003

An unmarried father can obtain parental responsibility for his child/children in one of three ways:

- By subsequently marrying the child's mother;
- By entering into a **Parental Responsibility Agreement** with the mother; or
- By applying to the Court for a **Parental Responsibility Order.**

If an unmarried father has shown commitment to his child/children and there is ongoing contact between them, it is likely that an Application for **Parental Responsibility** will succeed. This will give the father the same legal status regarding the child as the child's mother.

If there is a subsequent dispute between parents as to how **parental responsibility** should be exercised, for example, if one parent does not agree to a particular type of medical treatment being given to the child, or there is a dispute regarding schooling, or where the child is to live; either parent can apply to the Court in order for the Judge to decide.

Applications can be made to the Court at any time up until the child reaches the age of 16.

Post-01 December 2003

The Adoption and Children Act 2002 makes changes to the Children Act 1989. This provides that **an unmarried father will automatically acquire parental responsibility for his child if he is registered on the child's birth certificate as the father.** It is important to note that these provisions only came into effect on 1 December 2003 and only apply to children born on or after that date.

If a father is not registered on the birth certificate of a child born after 1 December 2003, he can subsequently be registered as the father with the consent of the mother. Alternatively he can seek the mother's agreement to entering into a **Parental Responsibility Agreement**. If the mother does not agree, then **parental responsibility** can be acquired by making an application to the Court.

The Court's willingness to grant **parental responsibility** may depend upon receiving satisfactory explanations as to why the father was not able or willing to participate in joint registration after the child's birth, as well as considering the father's attachment / commitment to the child.

Whilst the Courts encourage parents to try and agree issues regarding their children between them and to only use the Court as a last resort, if any issues regarding a child's welfare or upbringing do become a dispute, the Court is available and there are very few Orders regarding children that a Court will not make.

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Inheritance Acts claims

We are often asked if there is anything that can be done if a Will (or if there is no Will - the intestacy rules) fail to make adequate financial provision for a member of the Deceased's family or anyone who was dependant on the Deceased. The answer we usually give involves the Inheritance (Provision for Family and Dependants) Act 1975, also known as **The Inheritance Act.**

The Inheritance Act is available to help spouses, children, civil partners, co-habitees and other surviving dependants who have been left to cope without sufficient money from the Deceased to enable them to get by.

We advise both individuals wishing to make a claim for financial provision and also beneficiaries who want to defend the provision they have been left.

Factors that will need to be taken into account include:

- the **size and nature** of the Deceased's **estate**;
- the **needs and resources** of the person making the claim and of any existing beneficiaries of the estate;
- any **obligations or responsibilities** the Deceased had towards the person making the claim or towards any existing beneficiaries of the estate;
- any physical or mental **disability** of the person making the claim or any existing beneficiary of the estate; and
- **any other matter**, including the conduct of the person making the claim or any other person, which in the circumstances of the case may be **relevant**.

If the claim is made by the Deceased's spouse or civil partner, the Court will also take a number of other factors into consideration such as:

- the **age** of the person making the claim;
- the **duration of the marriage** / civil partnership;
- the **contribution** to the welfare of the family that has been made by the person bringing the claim; and
- the **provision** that the person bringing the claim might **reasonably** have expected to receive if the marriage / civil partnership had been terminated by divorce / dissolution.

If you are considering a claim under **The Inheritance Act,** it is essential that you seek advice at the earliest opportunity. **Inheritance Act claims must be brought within six months of the grant of representation to the estate.** If this period has expired we may still be able to help, as long as you act quickly.

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Access by the media to family proceedings

The rules governing access by the media to family court proceedings changed in April 2009 with the aim of improving public confidence in the operation of the family justice system, and to improve transparency in the family courts.

The current situation is as follows:

- Members of the press can attend (nearly all) hearings in family proceedings whether they relate to financial aspects or issues affecting children;
- Members of the press are not permitted to publish documents, reveal the identity of children involved in proceedings, or publish detailed or specific information relating to the proceedings. They may only report in general terms on the processes involved and the principles by which decisions are made;
- Any breach of these restrictions will constitute contempt of Court, with very serious consequences; and
- The Court has the power to exclude members of the press from family hearings but only in limited circumstances where it can be shown that it is necessary in order to: protect the interests of a child; to ensure the safety of a witness or party to the proceedings; or if justice would be prejudiced if a hearing proceeded without members of the Press being excluded.

In summary, what we suggest our clients need to be aware of is as follows:

- If we have to attend Court on your behalf, members of the press may be present at the hearing;
- No documents referred to at the hearing can be published and no information other than general coverage of the processes involved and the principles by which decisions were made can be published;
- Any breach of these rules will still constitute contempt of Court; and
- In advance of any hearing, we will consider whether there is any likelihood that any sensitive information could become available and, if necessary, whether there is any realistic prospect of the Court exercising its very limited powers to exclude members of the press from that hearing.

Of course, if our clients have any queries or concerns about the impact of these rules, we are more than happy to discuss these with them.

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