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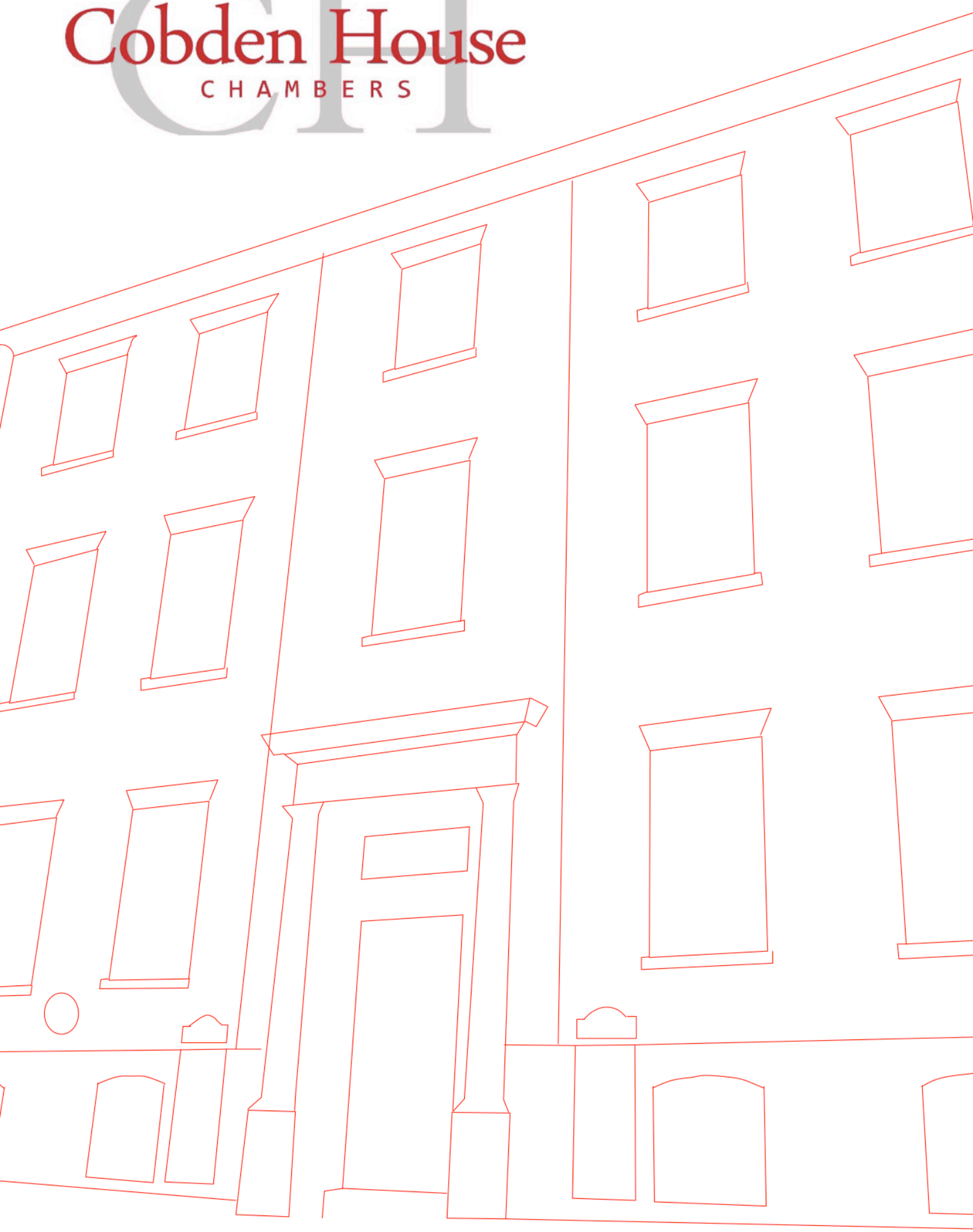

Cobden House

CHANCERY AND COMMERCIAL

The Department

The Chancery and Commercial Department at Cobden House provides expertise in every area of Chancery and Commercial law, including company law, construction, contract, insolvency, landlord and tenant, private client, taxation, probate and family provision, property, partnerships, professional negligence and trusts.

The Department prides itself on delivering accurate legal analysis, practical advice and a high standard of advocacy. Members can also deliver CPD accredited seminars at solicitors' offices on request.

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Robert Sterling

Inheritance Act

Garside v Garside (2017) EWHC 3019 (Ch)

The recently reported case of *Garside v Garside* (2017) EWHC 3019 (Ch), in which the writer appeared for the successful claimant, Gillian Garside, is a good example of how the Supreme Court's decision in *Ilott v Mitson* [2017] UK SC 17 can be applied.

In *Garside*, at the time of the trial before Barling J, the claimant was aged 58 and the defendant, Vanessa Garside, was aged 42. The claimant was the former wife of Martyn Garside, who died on 6th April 2014, aged 56. They had been married 26 years by the time of their separation in 2009. They had two children, a daughter aged 30 and a son aged 23, at the date of the trial. About 12 months after the separation, Mr Garside began a relationship with the defendant. They married on 24th June 2012.

On the divorce, the claimant received Mr Garside's half share in property bought some years earlier as the intended matrimonial home. The property was worth £600,000/£800,000 but subject to a mortgage of £308,000. A periodical payments order of £36,000pa was also made until death, re-marriage or further order. The reason why there was no clean break with a final cash payment to the claimant was that most of Mr Garside's capital was tied up in his substantial interest in the long-established family funeral directors' business, John Garside & Sons, of which he was 50% partner, and which he wanted to preserve.

Mr Garside died suddenly and prematurely. The periodical payments order, therefore, came to an end. By then, the claimant had already sold the property from the divorce and bought a 4 bedroomed house for nearly £380,000, leaving her with capital, after payment of liabilities, of about £150,000. By the time of the trial, little of the capital was left.

The effect of Mr Garside's death was to force a sale of the business. This achieved about £1,600,000 net.

By Mr Garside's will, the defendant inherited the whole of his estate subject to a legacy of £100,000 in favour of his son. In total, £1,527,000 reached the defendant through the sale and Mr Garside's death, approximately half in property and the other half in cash.

As at the date of the trial, the claimant was not working and the Judge found that her earning capacity could almost completely be discounted. It was also relevant that she had made a substantial contribution to the marriage and had worked in the business, without remuneration, all the hours that were required.

In 2015, the defendant re-married. She also had a 12 year old child. With part of the inheritance, she had purchased a property for £440,000, where she was now living with her new husband and the child. Her total income as at the trial was £49,000, £41,000 being derived from the inherited property.

The Judge applied the statutory regards under the Inheritance (Provision for Family and Dependants) Act 1975 and took specific account of *Ilott*, in particular at paragraphs 13, 14, 15, 19 and 22 of Lord Hughes' speech.

Although the claimant was the former wife and although the periodical payments order expressly provided that it was to cease on Mr Garside's death, the Judge had little difficulty in being satisfied that the will and the effect of Mr Garside's death were such as not to make reasonable financial provision for the claimant. More difficult was the quantification of the reasonable financial provision.

On the one hand, the claimant's award was to be limited to maintenance and the award was to be based upon a need for maintenance. On the other hand, the death had unlocked substantial capital, which otherwise was not freely available on the divorce, and the level of maintenance, albeit in the context of Mr Garside being alive and involved in the family business, had already been fixed at an annual level of £36,000.

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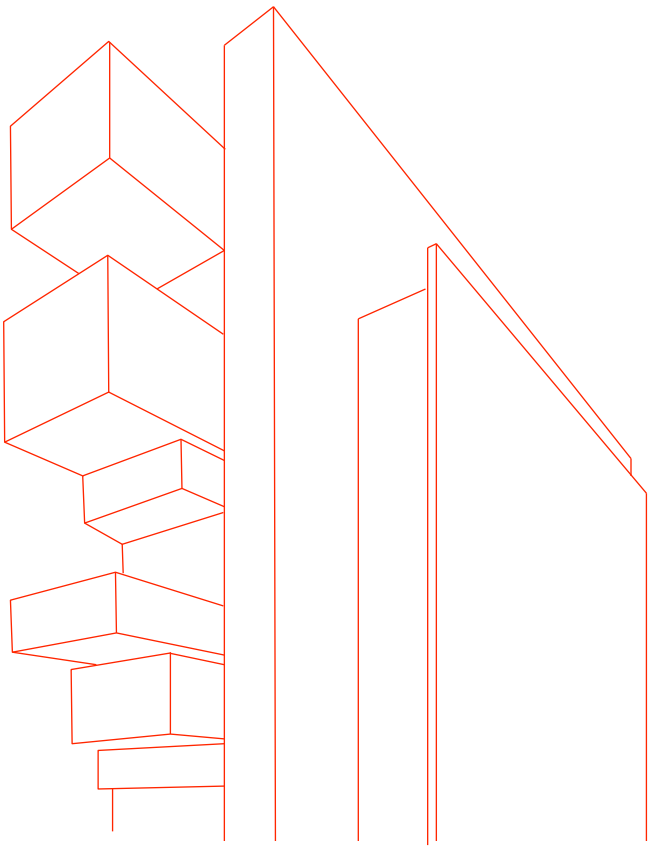
The Judge determined that the claimant's financial income needs were £24,000pa with no income, whereas the defendant's financial needs were £25,000pa against an annual income of £49,000.

The primary factors in the Judge's determination of an award of £475,000 capital in favour of the claimant were the agreed periodical payments, that they had not been paid for 3 ½ years by the time of trial, and the curtailment of the payments, when the claimant might reasonably have expected payments to continue for up to 30 years if Mr Garside had lived out his own life expectancy. As checks, the Judge calculated that the defendant would still be left with two thirds of the estate and that the award was within the calculation of capital, if Duxbury Tables were used.

The case illustrates that maintenance can be substantial, when financial arrangements on a divorce are not concluded once and for all and where a testator must have appreciated that his former wife would need financial support for many years to come.



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Gary Lewis

Landlord and Tenant

Liverpool Mutual Homes v Mensah

(Unreported, Liverpool County Court, 31 August 2018)

On 31st August 2017, His Honour Judge Gregory handed down judgment following a two-day trial in Liverpool County Court concerning a landlord's right to access a property to carry out repair works which were the subject of disputed housing disrepair proceedings.

Ms Mensah was an assured tenant and her tenancy was therefore subject to the usual repairing obligations pursuant to Section 11 of the Landlord and Tenant Act 1985. It was also subject to the usual express and implied access obligations in favour of Liverpool Mutual Homes by the terms of the tenancy agreement and by Section 16 of the Housing Act 1988 respectively.

By a letter of claim dated the 20th October 2016, the tenant alleged that her landlord was in breach of its repairing obligations due to a number of alleged defects at the property. Both parties subsequently appointed surveyors but they were unable to agree the scope of works to be carried out. In spite of the dispute, the landlord sought access to carry out certain repair works at the property. It did so by way of written correspondence attaching a schedule of proposed works but to no avail; the tenant repeatedly refused access on the advice of her solicitors because the works were not agreed.

The landlord therefore issued proceedings for an access injunction to carry out such works alleging that the tenant was in breach of the terms of her tenancy agreement. The tenant defended the same on the basis that, pursuant to the terms of the Pre-Action Protocol for Housing Disrepair Claims (which, the tenant maintained, took precedence), a tenant was not required to grant access in circumstances where the works were in dispute.

In giving judgment, HHJ Gregory found the tenant to be in breach of her obligation to grant access to her landlord to carry out repair works notwithstanding the dispute between the parties as to the scope of such works. In doing so, the Court found that the Protocol clearly contemplated the situation which had arisen and the existence of a dispute by the tenant as to the works did not entitle her, contrary to the provisions of the tenancy agreement, to refuse access. An access injunction was therefore granted together with costs against the tenant.

By way of brief comment, while the judgment is no more than a persuasive County Court decision, it serves as a useful tool for landlords who, in the current climate of increased CFA-funded disrepair claims, are being faced with the all too common problem of tenant-solicitors (erroneously) advising tenants to refuse access on the basis that the intended repair works are not agreed. To do so is a breach of the tenant's obligations to grant reasonable access to the landlord and the tenant cannot rely upon the terms of the Protocol to excuse any such breach.

A copy of the transcript of judgment is available via Westlaw.

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Arron Walthall

Litigants in person

EDF Energy Customers Ltd v Re-Energized Ltd

[2018] EWHC 652 (Ch)

In the case of *EDF Energy v Re-Energized*, HHJ Paul Matthews gave useful guidance on how much leeway the Court should afford litigants in person.

The decision arose out of insolvency proceedings regarding an alleged contractual debt of around £190,000. The defendant company had unsuccessfully applied to restrain advertising of the winding-up petition before being wound up at a subsequent hearing. On appeal, the company argued that the relevant procedural and substantive rules should have been applied differently because it had only been represented by a director and had therefore been a litigant in person.

When considering the question of how to treat a litigant in person, and this defendant in particular, the Court acknowledged that the director was intelligent and articulate but that he was not a trained lawyer. The Judge also noted that there are certain rules within the CPR that specifically cater for litigants in person. Rule 3.1A, for example, obliges the Court to have regard to the presence of an unrepresented party when making case management decisions and hearing evidence. After summarising the relevant authorities, HHJ Matthews set out the following guiding principles at paragraph 37:

1. There is a general duty on tribunals to assist litigants, depending on the circumstances, but it is for the tribunal to decide what this duty requires in any particular case and how best to fulfil it, whilst remaining impartial.

2. The fact that a litigant is acting in person is not in itself a reason to disapply procedural rules or orders or directions, or excuse non-compliance with them.

3. The granting of a special indulgence to a litigant in person may be justified where a rule is hard to find or it is difficult to understand, or it is ambiguous.

4. There may be some leeway given to a litigant in person at the margins when the Court is considering relief from sanctions or promptness in applying to set aside an order.

When deciding not to grant the company special treatment in this case, the Court took into account the following facts. Firstly, the company had not sought an adjournment to obtain legal representation or advice at any stage [38]. Secondly, the director had been able to draft a sensible skeleton argument and written submissions and to provide bundles for the hearings [39]. Thirdly, the relevant rules were not hard to find or particularly difficult to understand. Fourthly, *"every indulgence given to a litigant in person casts an extra burden on the represented party and on the court system. This extra burden is usually marginal, but it mounts up over time"*[40].

The case is a useful reminder of the fact that the Court should not ordinarily grant special indulgence to litigants in person, particularly as so doing can have a detrimental effect on the other party, court resources and other court users.

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Arron Walthall

Inheritance Act

Nahajec v Fowle [2017] W.T.L.R. 1071

The recent case of *Nahajec v Fowle* [2017] W.T.L.R. 1071 provides some indication of how the Court might approach an Inheritance Act claim brought by adult children following *Ilott v Mitson*.

In *Nahajec v Fowle*, a 31-year old claimant brought a claim against her father's estate, which was valued at around £265,000 [2]. Her father's will had given the entire amount to a friend, Mr Fowle, with a note explaining that he had not seen his daughter for 18-years, that he did not believe that she had any interest in him or his welfare, and that he believed that she was independent and had independent means [4].

As for the claimant, she lived in rented accommodation and worked both as a retail assistant on a zero hours contract and at a veterinary surgery. She had brought the claim because she aspired to be a veterinary nurse and intended to use any award to fund a veterinary university course [29, 38]. The claimant's income was consistent but sufficiently modest that she qualified for working tax credits. She had around £6,600 debts (as she had taken time off work during treatment for cervical cancer) [32] and she suffered from occasional bouts of depression (although this did not affect her work) [34]. According to the Judge, she lived *"a rather frugal existence with only occasional and modest expenditure on "fun" items"* [35]. Nevertheless, *"she accepted that even on her current income she could support herself if it were not for her debts"* [64]. The Judge found that it was the deceased's choice not to have a relationship with the claimant, as the claimant had sided with her mother upon their divorce [12-13].

Mr Fowle, on the other hand, earned around £2,000 per month [44] but had suffered financial difficulties in the past [45]. He was living in a static caravan on a plot of land that he hoped to develop, having sold his house to buy the land [48]. The £88,000 he had received from the proceeds of sale after purchase of the land had been spent [48] and Mr Fowle had used some of the estate funds to pay for his wedding and to buy Rolex watches [47].

When reaching his decision, the Judge noted that, *"It does not necessarily follow that there is an obligation or responsibility to support a child who, like the claimant is of full age and is working"* [52]. However, he concluded that the will had failed to make reasonable provision in light of the following factors:

a. The deceased was at fault for his poor relationship with the claimant. She was someone who *"very much regretted the absence of a relationship with her father and who, despite the fact that that absence* [of] *a relationship was one for which she was not at fault, has consistently tried to rekindle it"* [67]. Moreover, he was *"satisfied that this claim is based on something more than simply the qualifying relationship to which Lord Hughes refers in paragraph 20 of Ilott. There was no relationship between father and claimant but … that was not for want of trying on the part of the claimant. She appeared to have had a father who was stubborn and intransigent. That was not her fault."* [86]

b. The claimant was not profligate [87].

c. The claimant had shown a genuine aspiration to better herself by becoming a veterinary nurse and had shown real commitment to it [88].

d. The size of the estate would still provide Mr Fowle with a sizeable amount [89].

e. There was criticism of Mr Fowle's spending [91].

f. The deceased's note carried little weight, as the claimant did not have *"independent*

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means" and was only just making ends meet. Moreover, there was some confusion therein as to precisely how long it had been since the deceased had seen his daughter [65-66].

The Judge found that the claim for £60,000 - £70,000 to cover her debts, course fees, transportation, and living expenses was too high but rejected the submission that the award should be limited to paying off her debts [94 – 100].

Instead, he awarded £30,000 on the grounds that it would help to maintain her whilst studying to be a nurse, taking into account the fact that she might not need a vehicle to do so [104] and reduced to reflect the risk that she might never go on the course, despite her intentions [104]. The Judge also commented that it was a factually similar case to *Ilott v Mitson* [69] and that the award was roughly comparable at 11.3% of the estate [107].

If you have any questions about this newsletter or wish to discover ways in which Cobden House can assist you or your firm, please contact our Director of Clerking, Martin Leech, on 0161 833 6880 or 07791 519 124 or by email at: Martin.Leech@cobden.co.uk