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Legally Speaking - Judge & Priestley's Quarterly Legal Update for Commercial Clients

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Welcome to J & P's latest newsletter, specially designed to keep you up to date with all the latest legal developments affecting you and your business.

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Judge & Priestley LLP
Justin House
6 West Street
Bromley
Kent BR1 1JN

Protect against your staff stealing valuable data

Businesses are facing an increasing threat from staff who steal valuable data to help them set up a rival firm or take to a new job with a competitor, according to recent research.

A survey by the security software company Symantec found that 56% of employees don't think it's a crime to use competitive data taken from a previous employer. More than 50% of those who lose their jobs keep confidential information, and 40% plan to use it in their new job.

A spokesperson for Symantec said: "Companies cannot focus their defences solely on external attackers and malicious insiders who plan to sell stolen IP for monetary gain.

"The everyday employee, who takes confidential corporate data without a second thought because he/she doesn't understand it's wrong, can be just as damaging to an organisation."

Employers will clearly want to implement technical security measures to reduce the risk of data being stolen, but there is also a great deal they can do to protect themselves from a legal standpoint. It's important to ensure that staff contracts include restrictive covenants to prevent the misuse of confidential information during the period of employment, and afterwards when the employee leaves the company.

Employers can reduce risks by reviewing staff contracts and updating where necessary as an employee's status changes. This is important because it is not uncommon for firms to leave staff on basic contracts long after they have moved up the ladder from junior to senior positions. By that time, they may have access to highly valuable data but not be subject to any formal restrictions on how they use it.

Employers should also have procedures in place for dealing with an employee's computer and other data storing devices once they leave the business. This equipment is often wiped so it can be used by another employee, but this runs the risk of deleting evidence that the employee had copied or downloaded valuable material before leaving.

A thorough check should be made before any devices are wiped.

Restrictive covenants can help to reduce the risk of misuse. However, they need to be drawn up properly. If they are not strict enough, they may not be effective, but if they are too strict or impose too long a time frame limiting an employee's actions once they have left the firm, the courts might not uphold them.

For more details contact
Paul Stevens - 020 8290 7422
pstevens@judge-priestley.co.uk

Director disqualified for not treating firm's creditors fairly

Company Law

A director has been disqualified from running a business for six years because he paid large sums of money to his associates instead of creditors after his clothing company got into difficulties.

Ronald Trevor Barnes ran Cleanliness Ltd, a manufacturer of personal care products in Nottingham.

The company went into liquidation on 1 August 2014 owing £1.2m to creditors, of which £510,100 was owed to the landlord, £380,850 to trade and expense creditors, £354,736 to the director and £53,644 to other creditors.

From May 2013 to 15 August 2014, Mr Barnes caused the company to pay large sums of money to connected parties, the majority of which were not for the benefit of the company and to the detriment of creditors.

Sue MacLeod, Chief Investigator of the Insolvency Service, said: "The Insolvency Service will not hesitate to investigate directors who have caused a company to pay monies to connected parties rather than to the benefit of either the company or its creditors and will rigorously seek disqualification in all such cases."

A disqualification order has the effect that without specific permission of a court, a person with a disqualification cannot act as a director of a company or take part, directly or indirectly, in the promotion, formation or management of a company or limited liability partnership.

Anyone subject to a disqualification order is also bound by a range of other restrictions.

For more details contact
Neil Cuffe - 020 8290 7405
ncuffe@judge-priestley.co.uk

Directors - don't let a failing firm drag you under

Persistence is an admirable quality but unfortunately it can sometimes work against directors who take personal risks when trying to save a failing business.

Sometimes the heart can rule the head.

Directors often have an emotional attachment to a firm they have set up themselves and feel a tremendous loyalty to their staff. This can blind them to the fact that their business has no chance of avoiding insolvency.

Or it could just be down to money. For example, they may be trying to avoid having to pay back company loans which they have personally guaranteed.

The trouble is that if they soldier on too long trying to rescue a lost cause, they could be accused of wrongful trading and face financial ruin as they become liable for the debts of their business – even if it is a limited liability company.

Directors' Duties

As soon as a company becomes insolvent, directors have a legal duty to protect the interests of creditors.

When formal insolvency procedures get underway, the behaviour of directors over the previous few years could come under investigation.

They could become liable for wrongful trading if it's found that they continued entering into contracts or accepting credit after they knew or should have known there was no reasonable chance of avoiding insolvent liquidation.

The court could then order them to use their personal assets to help settle the company's debts.

Directors of insolvent companies are also obliged to treat all creditors equally, so they must not give preferential treatment to friends or a company that is threatening to sue them.

Many directors find it difficult to recognise or accept the point at which they become insolvent, so they should seek professional help as soon as problems start to emerge.

People who run their business as a partnership could be even more at risk because they could be personally liable for debts if their firm becomes insolvent. It could mean that they not only lose the business they have spent years building up, but also lose their personal savings and even their homes in some extreme cases.

The answer could be to consider restructuring the business as a Limited Liability Partnership (LLP). There are several advantages to becoming an LLP – including possible tax benefits - but the main one in the current economic climate is that it helps to ensure that liability lies with the business itself rather than with the individual partners.

The personal assets of each partner should be protected in most circumstances if the business fails, although they would still have to meet their other legal responsibilities as we have seen, or they might still be liable.

Directors also have a legal responsibility to take action if they discover that other directors are acting fraudulently or dealing inappropriately with company funds – an issue that could easily emerge as a business starts to struggle.

Failure to do so could render them liable for subsequent losses.

For more details contact
Neil Cuffe - 020 8290 7405
ncuffe@judge-priestley.co.uk

Architects win dispute after developer ends contract

A firm of architects have won their dispute with a developer over the payment of an invoice.

The issue arose after the developer accepted the architects' fee proposal in relation to a housing project.

After a few months, the developer emailed the architects, indicating that it intended to use another firm to prepare the planning application and develop the layout of the project, but would still work with them in relation to house styles. The architects replied that their understanding had been that they would be designing the layout and that they had submitted a fee proposal for a full service.

They stopped work on the project and submitted an invoice for work up to that point.

The developer failed to pay so the architects obtained an adjudication award.

The developer took further legal action and the court ruled in its favour. It said the developer's decision to use another firm was a repudiation of the contract, which the architects had accepted. The contract had therefore been discharged.

The Court of Appeal has overturned that decision.

It held that the architects had not accepted the developer's decision as a breach of contract; they had treated it as a termination of the contract without the appropriate notice.

For more details contact
Mark Oakley - 020 8290 7337
moakley@judge-priestley.co.uk

Measures to raise standards in private rental sector

The government has announced a series of new measures to crack down on bad practices, stamp out overcrowding and improve standards for those renting in the private sector.

One of the main changes is that landlords renting properties in England occupied by “5 or more people from 2 or more separate households” will need to be licensed. This proposal will need to get parliamentary clearance.

If it gets the go-ahead, it will affect about 160,000 houses and will mean councils can take further action to crack down on unscrupulous landlords renting sub-standard and overcrowded homes.

The government has also set out details of criminal offences that will automatically ban someone from being a landlord.

From April, a person convicted of offences such as burglary and stalking can be added to the database of rogue landlords and be barred from renting properties.

These latest measures build on government action already in place to drive up safety and standards in the private rented sector. This includes bringing in fines of up to £30,000 for landlords who fail to comply, protections for tenants from revenge evictions and £12m funding for councils to take enforcement action in hotspot areas.

Housing and Planning Minister Alok Sharma said: “Every tenant has a right to a safe, secure and decent home. But far too many are being exploited by unscrupulous landlords who profit from providing overcrowded, squalid and sometimes dangerous homes.

“Through a raft of new powers, we are giving councils the further tools they need to crack down on these rogue landlords and kick them out of the business for good.”

New rules will also come into force setting minimum size requirements for bedrooms in houses of multiple occupation to prevent overcrowding. As

part of the licencing requirements, local councils will be able to make sure only rooms meeting the standard are used for sleeping.

We shall keep clients informed of developments.

For more details contact
Nitika Singh - 020 8290 7347
nsingh@judge-priestley.co.uk

Poundland employee ‘unfairly dismissed’ over giveaways

An employment tribunal has ruled that a Poundland employee was unfairly dismissed after giving away over £300 worth of products to customers.

The employee, Mr Zia, joined the company in June 2013 and worked his way up to assistant manager of the Southall store.

As a senior member of the shop team, Mr Zia had the authority to give away

free items to smooth over complaints and to encourage customers to spend more money. Mr Zia gave away more than £300 worth of products over a five-month period. His manager gave away only one pound’s worth of stock, and most colleagues averaged around £70.

An investigation was carried out but an official report was not written. Instead the case was escalated to a disciplinary hearing.

Poundland claimed the button to give away items had been discontinued. Mr Zia said this policy change had not been communicated to him.

The investigating officer made the decision to sack Mr Zia, who then brought claims of unfair dismissal, victimisation, race discrimination and harassment.

The tribunal discounted all the claims except unfair dismissal, for which it ruled in Mr Zia’s favour.

In his summary Judge Manley said: “Poundland has no one to blame but itself for the very poor methods of communication. Poundland needed to be clear about what the misconduct was. The evidence on how or when the free item button was stopped is opaque and inconsistent.”

The amount of compensation will be set at a separate hearing.

For more details contact
Nitika Singh - 020 8290 7347
nsingh@judge-priestley.co.uk

Southern Gas wins Thames dispute

The Court of Appeal has ruled that Southern Gas can recover compensation payments made to its customers following damage caused by Thames Water.

The issue arose after Thames were notified of a burst water main but took no action. Water from the leak damaged a gas pipe and entered the network.

This meant Southern Gas had to compensate customers who had their supply interrupted.

It tried to recover the compensation payments from Thames Water but a judge ruled that they were not recoverable as they did not constitute "expenses reasonably incurred in making good damage" under the New Roads and Street Works Act 1991 (the Act).

The judge also dismissed a negligence claim, which would have allowed Southern to recover payments under common law.

Southern took the case to the Court of Appeal, which ruled in its favour.

It held that while the judge was right to conclude that the company couldn’t claim compensation under the Act, he was wrong on the other issue because it was possible to pursue the negligence claim under common law.

For more details contact
Mark Oakley - 020 8290 7337
moakley@judge-priestley.co.uk

UK firms 'still gripped by poor payments crisis'

The amount of money owed to small businesses has halved in the last five years, according to government ministers – but business leaders say the UK is still gripped by a poor payments crisis.

The figures were released as the government appointed Paul Uppal to the newly created position of Small Business Commissioner. His role will be to "drive a culture change in payment practises to ensure small businesses are treated fairly". He will help SMEs to resolve payment disputes and to tackle the unfair practices of larger businesses.

Margot James, Small Business Minister, said: "Over the last 5 years the amount owed to smaller businesses has more than halved from £30 billion to £14 billion.

"The Small Business Commissioner service will empower small businesses to take action if they are paid late, potentially delivering a £2.5 billion annual boost to the economy."

Mike Cherry, National Chairman of the Federation of Small Businesses, said: "The UK is gripped by a poor payments crisis, over 30% of payments to small businesses are late and the average value of each payment is £6,142."

The appointment of a Small Business Commissioner is the latest move in a long-term campaign to improve payment practices.

This includes the introduction of the Prompt Payment Code in which large companies commit to paying small businesses on time.

The government measures are welcome, but many small businesses still struggle with the ongoing problem of credit control. This can cause cash flow problems that prevent small firms functioning effectively, and even put some of them out of business.

Firms need to ensure they monitor overdue invoices and take early action to ensure prompt payment. A letter from a solicitor is often enough to secure payment, as your customer then realises that you really mean business. If that doesn't work, there are several more steps that can be taken up to and including court proceedings.

Failure to take early action could lead to cash flow problems and severe financial difficulties.

For more details contact
Rachel Addai - 020 8290 7356 raddai@judge-priestley.co.uk

Landlord wins appeal over repossession of her property

A landlord has won her appeal that she was not affected by recent changes in the law and so her notice to repossess her property was valid.

The case involved a landlord who rented out her house in 2007 on an oral monthly tenancy. She sought repossession in 2016 but the tenants objected, claiming that she had not complied with changes brought about by the Deregulation Act 2015.

Among other things, the Act amended previous legislation so that landlords had to obtain a gas-safety certificate and an energy-performance certificate before serving a notice for repossession.

Landlords were also obliged to provide information about the rights and responsibilities of the landlord and tenant under an assured shorthold tenancy.

The deputy district judge held that the landlord was subject to the changes brought about by the 2015 Act and so the possession notice was invalid.

The County Court has overturned that decision. It held that the periodic tenancy had been granted in 2007.

The tenancy ran from that time and was not re-granted each month.

As the tenancy ran from 2007, it was not subject to the changes introduced in 2015 and so the possession notice was valid.

For more details contact
Nitika Singh - 0208 290 7347
nsingh@judge-priestley.co.uk

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Meet the team


Mark Oakley


Pam Bachu


Rachel Addai


Lucy Rudd


Neil Cuffe


Steve Taylor


Paul Stevens


Nitika Singh

For further information **T.** 020 8290 0333 **F.** 020 8464 3332 E. info@judge-priestley.co.uk
Justin House, 6 West Street, Bromley, Kent BR1 1JN www.judge-priestley.co.uk