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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.

Got something on your mind? ... give us a call or email us.

For more than 125 years we have been providing clients with expert and professional legal advice. We understand the value of a personal and friendly service.

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

Landlords must join new tenant redress scheme

Landlords will be obliged to join an ombudsman redress scheme as part of government efforts to give tenants greater protection.

The new measures were unveiled by the Communities Secretary Sajid Javid.

He said the government will also oblige letting agents to be registered so they are subjected to proper professional oversight.

The new system will make it easier for tenants to challenge excessive fees and unfair treatment.

In a separate move, landlords will be offered incentives to provide longer tenancies to give renters greater security.

Mr Javid said: "For too long, tenants have felt unable to resolve the issues they've faced, be it insecure tenure, unfair letting agents' fees or poor treatment by their landlord with little to no means of redress. We're going to change that.

"We will insist that all landlords are part of a redress scheme and we will regulate letting agents who want to operate.

"Everyone has a right to feel safe and secure in their own homes and we will make sure they do."

Meanwhile, Parliament has begun work on the Draft Tenant Fees Bill that will make it illegal for agents to charge tenants letting fees.

Ministers say the level of fees charged are often not clearly or consistently explained, leaving many tenants unaware of

the true costs of renting a property. This latest action will help improve transparency, affordability and competition in the private rental market. It will also prevent agents from double charging both tenants and landlords for the same services.

As part of wider plans to improve the rental market, the government has already introduced measures that crack down on the small minority of rogue landlords who shirk their responsibilities.

Earlier this year, the law was changed to allow councils to impose fines of up to £30,000 as an alternative to prosecution for a range of housing offences.

We shall keep clients informed of developments.

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

Damages of £3.6m awarded against 'negligent' architects

Professional Negligence

A developer has been awarded £3.6m damages from a firm of architects in a professional negligence case.

The developer had engaged the architects on a major hotel project. No budget was specified in the contract, but the developer claimed to have told the firm that it was £70m.

However, the architects produced a scheme costed at £195m. The developer said he then increased the budget to £100m after the architects assured him that the scheme could be "value engineered" down to that figure.

That proved to be impossible and the developer was unable to obtain funding for the scheme. He sought repayment of £4m expended in professional fees.

The High Court found in his favour. It said the architects had embarked upon the design project with no consideration for the budget and had therefore failed to perform the contract, which amounted to a breach of duty.

They had then advised that value engineering could reduce the cost of the scheme to £100m. On the expert evidence, that advice was clearly negligent.

As they had specifically advised the developer that value engineering would result in a reduction in the cost of the scheme, it was entirely reasonable for him to have continued to incur professional fees in reliance on that advice.

Those fees of £3,604,694 were therefore recoverable as damages for breach of contract.

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

Don't risk a family split over business succession

If you've worked hard to build up a successful business it's only natural that you wish to hand it on to your sons or daughters.

However, there are several risks involved.

In some ways, succession plans involving family members are more likely to cause problems than handovers involving complete strangers. With strangers, people tend to be cautious and get legal advice; with family they often rely on goodwill and a muddle through attitude.

For example, it is not unusual for business owners to hand over their firm to the children with hardly any thought as to how they should share control and make decisions about future policy, or how they should resolve disagreements.

The result if often bitter family feuds further down the line as siblings vie for control.

The way to avoid succession problems is to prepare properly and draw up a legally binding agreement.

One key requirement is a strategy for resolving disputes. This could be done by nominating an independent third party as an arbitrator. This should be someone who understands the business and is trusted by both sides. It could, of course be the person handing over the business, but an outsider might be a better choice as it avoids the problem of parents having to arbitrate between their children with all the resentment that can cause.

The first task of the independent arbitrator would be to try to help the two sides reach agreement. If that proves impossible, the arbitrator could then

make a decision on principles set down by the parent and the successors when the handover agreement was drawn up.

However, if disputes are impossible to resolve, it may be necessary for siblings to end their business relationship.

This could be done in several ways. For example, the business could be sold to a third party, in which case the handover agreement would need to state how the proceeds should be divided.

Alternatively, one sibling might buy the other's shares. In that case, it would be sensible to set out in advance how the shares should be valued. The valuation could be based on the company's assets, its profits or by some other method.

Throughout succession planning it's important to get advice from your accountant, lawyer and possibly your bank manager.

Professional advice is important in all succession planning but particularly if you are passing the business on to family members because emotions can easily get in the way.

Sons and daughters may feel guilty that they are demanding too good a deal from their parents, while parents may feel they are taking too much out of the business making it difficult for their children to succeed in the future. Independent opinions from lawyers and accountants can help guide and reassure both sides.

It may seem counter intuitive but the closer the family relationship, the greater the need for a formal agreement. After all, if siblings fall out in future they may not only destroy a business, they may also destroy family relationships.

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

Franchisee wins dispute over setting up rival company

An international company has failed to get a court order to prevent one of its franchisees setting up a rival business.

The case involved an Australian gym and fitness firm that opened centres in the UK on a franchise basis. It entered into an agreement with a franchisee on its standard terms and conditions.

The franchisee had a licence to operate in a territory covering a five-mile radius in London. Customer details were stored on the franchise company's software system and were described in the agreement as "confidential information".

The agreement also had a clause relating to non-competition.

The franchisee later sent out a document to customers stating that he would be setting up a new gym. The franchisor sought a court injunction to stop him, claiming he had set up his gym on its site using customer information from its system.

The court ruled in favour of the franchisee. It held that there was nothing in the agreement that gave the company the ownership of customers' names and addresses and nothing to the effect that the data belonged to it exclusively.

It had suggested that irreparable damage would be caused to its business. That argument was rejected as that part of London was already filled with gyms.

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

Early signs your customer can't settle your invoice

Good cash flow is the life blood of any business so it's essential to monitor overdue invoices and act quickly to ensure payment.

Failure to act promptly could mean your firm incurs damaging losses if a defaulting customer becomes insolvent and can't afford to pay you.

There are several early signs that a customer may be struggling financially.

Late payment of invoices is an obvious indicator but so is erratic or partial payments. For example, when a firm gets into difficulties it may settle only part of an invoice with a promise to pay the balance the following week or month.

If a firm has several invoices from a supplier, it may pay the smaller bills before the larger ones even if the larger ones are the most overdue.

Delaying tactics also come into play. A firm in difficulty may try to buy time by disputing an invoice and asking for more details about what was supplied.

Sometimes they will claim they never received the invoice and ask for a copy to be sent. They may then treat it as a new invoice that doesn't have to be paid for another 30 days or whatever your standard terms may be.

The government says that delaying tactics like this mean that SMEs are owed £26 billion in overdue invoices.

According to a survey carried out by the Forum of Private Businesses, late

payments are more of a problem than poor sales, restricted bank lending or complying with business regulations.

Many firms are reluctant to take action to enforce payment because they fear offending the customer and losing repeat business.

There may be genuine reasons for non-payment, of course, and firms may have to be given a little leeway.

However, some firms exploit the fact that you don't want to jeopardise your relationship with them and they ignore your polite requests for payment. It is only when you take legal action that they finally take you seriously.

A simple letter written in legal terms outlining the consequences of not settling is usually enough to secure payment.

The realisation that you now mean business means most firms will settle very quickly.

For those who still refuse to budge there are several other options available to get them to pay. In fact, firms can turn credit control into a profit-making operation by recovering unpaid money in a way that earns more than enough to cover the cost of pursuing bad payers.

This is possible because businesses are entitled to levy a statutory late payment fee of between £40 and £100 depending on the size of the debt and also charge punitive interest at 8% above the base rate.

If this doesn't make the debtor pay, it may be necessary to issue a 'court order for questioning' against the company secretary.

This is usually enough to prompt even the most stubborn late payers into action but for those who still refuse to pay, there are other legal avenues available.

Firms shouldn't be afraid to explore these options. While it may be important to maintain a good relationship with customers, there's no point in doing business with them if they don't pay their bills.

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

Director recovers money after colleague diverted funds

A director has succeeded in recovering money from the estate of a colleague who breached his legal duty by diverting funds and business opportunities to a rival company.

The case involved two directors, Nigel Clegg and Andrew Pache, who were joint shareholders in a company trading steel.

Clegg alleged that from 2004 until shortly before his death in 2010, Pache had carried on a steel trading business for his own benefit through a second company.

Clegg took legal action against Pache's estate to recover the money and be compensated for the lost business opportunities. He also brought a claim based on unjust enrichment against Pache's wife in respect of payments she received from her husband's alternative company.

The judge accepted that Pache had breached his fiduciary duty, however, he was not satisfied that all the second company's profits were attributable to that breach.

He directed that there be an account for profits by reference to a list of specific transactions identified by Clegg.

He also limited Clegg's recovery to 50% to reflect that from that time he was also in breach of fiduciary duty for failing to prevent Pache's misconduct.

Finally, he found there was no basis for any claim of unjust enrichment.

The Court of Appeal has overturned those decisions.

It held that all the second company's profits should be accountable, subject to the exclusion of such transactions that could be shown to have been independently earned.

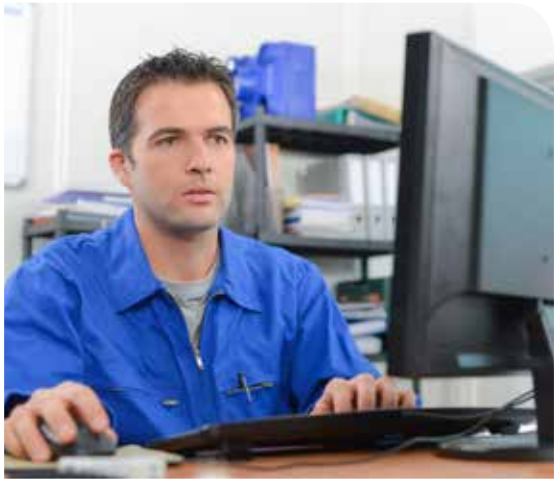
There was no basis for apportioning any blame to Clegg for failing to prevent Pache's misconduct and so the recovery of missing money should not be limited to 50%.

The court also ruled that the claim against the wife for unjust enrichment should not have been rejected.

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

Businesses urged to prepare for data regulations

The Information Commissioner's Office (ICO), which oversees data protection in the UK, has urged businesses to prepare for major regulation changes coming into force next year.



The General Data Protection Regulation (GDPR) is an EU initiative to harmonise data protection across the European Union and it will apply in the UK from 25 May 2018. The government has confirmed that the UK's decision to leave the EU will not affect that commencement date.

The GDPR will contain provisions similar to the existing UK Data Protection Act (DPA) but will be broader in scope.

It will apply to both the 'controllers' and 'processors' of personal data. The definitions are broadly the same as under the DPA – ie the controller says how and why the data is processed and the processor acts on the controller's behalf. If you are currently subject to the DPA, it is likely that you will also be subject to the GDPR. If you are a processor, the GDPR places specific legal obligations on you; for example, you are required to maintain records of personal data and processing activities. You will have significantly more legal liability if you are responsible for a breach.

However, if you are a controller, you are not relieved of your obligations where a processor is involved – the GDPR places further obligations on you to ensure your contracts with processors comply with the GDPR.

The ICO has urged business to make sure they're fully prepared for the changes. In a statement, it said: "Any contracts in place on 25 May 2018 will need to meet the new GDPR requirements.

"You should therefore check your existing contracts to make sure they contain all the required elements."

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

'Substitution' means Deliveroo cyclists are self-employed

Deliveroo has won a dispute over whether its cyclists should be classed as workers or self-employed after inserting a 'substitution' clause into their contracts.

The issue arose after the Independent Workers' Union of Great Britain (IWGB) claimed union recognition for Deliveroo cyclists in Camden in London. For the claim to succeed, the union had to show that cyclists constituted a bargaining unit of "workers".

The case was heard by the Central Arbitration Committee (CAC), which adjudicates in union recognition cases. Shortly before the hearing, Deliveroo sent its cyclists a letter telling them it had inserted a substitution clause into their contracts.

This gave them "the ability to appoint another person to work on your behalf with Deliveroo at any time".

The letter also told them they could work for other firms, including competitors, while still working for Deliveroo.

The substitution clause was enough to make the CAC rule in favour of Deliveroo. The decision means the cyclists do not have to be classed as workers and so do not qualify for the rights that go with being a 'worker,' such as holiday pay or union representation.

Giving its ruling, the CAC said: "In light of our central finding on substitution, it cannot be said that the riders undertake to do personally any work or services for another party. It is fatal to the union's claim."

For more details contact
Paul Stevens - 020 8290 7422
pstevens@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