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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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Insolvency rules relaxed during Covid crisis

The government is amending insolvency rules to protect companies and their directors during the Covid-19 crisis.

The current lockdown has meant a sudden drop in revenue for thousands of firms that are otherwise solvent and profitable, putting them at risk of going out of business.

Existing insolvency rules stipulate that directors of limited liability companies can become personally liable for business debts if they continue to trade when uncertain about whether their businesses can continue to meet their debts.

The government is relaxing these wrongful trading rules to reassure directors that the difficult decisions they have to make about their business "will not have to be unduly influenced by the exceptional circumstances which are entirely beyond their control".

Under the plans, the UK's Insolvency Framework will add new restructuring tools including a moratorium for companies giving them breathing space from creditors enforcing their debts for a period while they seek a rescue or restructure.

There will also be protection of their supplies to enable them to continue trading during the moratorium.

The government is also looking at restructuring plans for struggling businesses, which would be binding on creditors.

Business Secretary Alok Sharma said: "The government will temporarily suspend the wrongful trading provisions to give company directors greater confidence to use their best endeavours to continue to trade during this pandemic emergency, without the threat of personal liability should the company ultimately fall into insolvency.

"This will also include enabling companies to continue buying much-needed supplies, such as energy, raw materials or broadband, while attempting a rescue, and temporarily suspending wrongful trading provisions retrospectively from 1 March 2020 for three months for company directors so they can keep their businesses going without the threat of personal liability.

"The proposals will include key safeguards for creditors and suppliers to ensure they are paid while a solution is sought. Existing laws for fraudulent trading and the threat of director disqualification will continue to act as an effective deterrent against director misconduct."

Legislation to introduce these changes will be introduced in Parliament at the earliest opportunity.

Please contact us if you would like more information about insolvency issues or any aspect of company law.

Contractor wins claim for immediate payment of £85,000

A contractor has won its claim for immediate payment of £85,000 that was awarded following a dispute over work it had carried out for a developer.

The case involved Granada Architectural Glazing Ltd and RGB P&C Ltd (2019).

RGB had appointed Granada to carry out the design, supply and installation of curtain walling, windows and doors for a hotel project.

RGB complained about Granada's performance and gave notice to terminate the contract on the basis that it had failed to remedy its breaches. Granada referred the dispute to an adjudicator, who decided that it was entitled to £85,089 plus interest.

Granada then issued proceedings to enforce the adjudicator's decision immediately without the need for further proceedings.

RGB sought a declaration that it had lawfully terminated the contract. It asked for a stay of execution to delay payment in case Granada was unable to repay the £85,000 if RGB was successful in the legal action it was planning.

The court ruled in favour of Granada. There was no evidence that it would not be able to repay the money if future legal action went against it.

The purpose of adjudication was to mitigate cash flow difficulties by making payments promptly. There should be no stay of execution.

Please contact us for more information about the issues raised in this article or any aspect of contract law.

Whistle blower at Ernst & Young awarded $10.8m

A whistle blower at the global accountancy company Ernst and Young has been awarded $10.8 million in damages after revealing unethical auditing practices.

The case involved Amjad Rihan and four UK-based companies that were part of the Ernst & Young network. The company is now known as EY.

In 2013, Rihan was a partner in EY's Middle East and North Africa (MENA) office.

He conducted an assurance audit of a Dubai-based client Kaloti Jewellery International.

He claimed to have discovered that Kaloti was participating in irregular activities which suggested that it was involved in money laundering; that the local regulator (the DMCC) pressured him to cover up his findings; and that the DMCC and Kaloti required him to conduct the audit unethically and in a way that amounted to professional misconduct.

He sought damages for loss of earnings, asserting that the company colluded with the DMCC, which led to his resigning, publicly disclosing the wrongdoing, and fleeing Dubai out of fear for his safety.

The High Court found in his favour. The company's conduct was to be measured against the code of ethics published by the International Federation of Accountants (the IFAC Code) and, by that measure, it was unethical, improper and unprofessional.

Moreover, they had put improper pressure on Rihan to acquiesce or take part in it.

Had Rihan been supported by the company he would have continued his career with EY up to retirement, and his losses amounted to some $10.8 million.

Please contact us for more information about the issues raised in this article or any aspect of employment law.

Pub director ousted after breaching his legal duties

A director of a company that owned and ran a public house breached his legal duties when he acquired an interest in a nearby rival pub.

The High Court ruled that the breach was serious enough to justify his removal as a director.

The case involved Edward Charles Allnutt, who together with four other directors ran the Nag's Head Reading Ltd.

The company's articles contained a proviso that directors had to disclose the nature and extent of any material interest they had in another business.

In 2013, he entered into an arrangement with third parties to purchase a rival pub.

In August 2014, a meeting of Nag's Head shareholders' was held at which Allnutt answered questions from the other directors about how he intended to run the new pub.

The other directors were not satisfied and voted to remove him as a director of the Nag's Head.

Allnutt submitted that his involvement in the rival pub could not reasonably be regarded as giving rise to a conflict of interest. Or if it did, then any breach had been disclosed and approved at the August 2014 meeting.

The court ruled against him. It held that any disclosure he had made was a long way short of what was necessary.

Allnutt had not disclosed the name or terms of the new partnership he had entered, any equity interest he held in it, his role in that business, or the planned business model of the rival pub.

Please contact us for more information about the issues raised in this article or any aspect of company law.

Supplier must abide by contract despite not being paid

A company has been told it cannot unilaterally change the terms of a contract and so must continue supplying a customer despite not being paid.

The case involved Medina Dairy Ltd and Nampak Plastics Europe Ltd (2020).

Medina supplied fresh milk to supermarkets. Nampak produced plastic bottles and supplied them to Medina under a contract. The contract entitled Nampak to suspend its supply if, two weeks after notifying Medina of an overdue invoice, Medina failed to pay. It also entitled either party to terminate the contract on written notice if debts owing were not paid.

Medina owed a substantial amount to Nampak for past supplies.

Nampak stated that if Medina did not adhere to new terms, including payment before delivery and a pricing increase, then Nampak would cease the supply.

It then emailed Medina to say that all deliveries would now require payment in advance and payment of the outstanding debt.

Medina applied for a court injunction requiring Nampak to supply bottles in accordance with the contract terms.

The judge held that Nampak was acting in breach of contract by refusing to supply goods unless Medina agreed to new terms.

The court therefore granted the injunction that Nampak must continue to supply Medina as before until the issue could be decided at a full trial.

Please contact us if you would like more information about injunctions and contract law.

Changes to right to rent checks during Covid crisis

The right to rent checks that landlords must carry out on prospective tenants have been temporarily adjusted due to the Covid-19 crisis.

It remains an offence to knowingly lease premises to a person who is not lawfully in the UK but the government recognises the difficulties and has offered guidance on conducting a right to rent check during the current crisis.

It acknowledges that because of Covid-19, some individuals will be unable to provide evidence in person of their right to rent.

It's therefore now acceptable to ask the tenant to submit a scanned copy or a photo of their original documents via email or using a mobile app.

You can also arrange a video call with the tenant and ask them to hold up the original documents to the camera and check them against the digital copy of the documents.

You should record the date you made the check and mark it as “an adjusted check has been undertaken on [insert date] due to Covid-19”.

If the tenant does not have the right documents you must contact the Landlord’s Checking Service as soon as possible. You will get an answer within 2 working days.

You must keep their response to protect against a civil penalty.

The government will announce in advance when these measures will end.

After that date you must revert to the checking process set out in the *code of practice on illegal immigrants and private rented accommodation and right to rent document checks: a user guide*. You should carry out retrospective checks on tenants who started their tenancy during this period or required a follow-up check.

You should mark the retrospective check: “the individual’s tenancy agreement commenced on [insert date]. The prescribed right to rent check was undertaken on [insert date] due to Covid-19.”

The retrospective check must be carried out within 8 weeks of the Covid-19 measures ending. Both checks should be kept for your records.

The Home Office will not take any enforcement action against you if you carried out the adjusted check set out in this guidance, or a check via the Home Office, and follow this up with the retrospective check.

If, at the point of carrying out the retrospective check, you find your tenant, who started their tenancy during this period, did not have a right to rent you must take steps to end the tenancy as soon as possible.

If you find a tenant who required a follow-up check during this period no longer has a right to rent, you must report this to the Home Office as soon as you have carried out the check.

If the check you have undertaken during this period was done with original documentation, you do not need to undertake a retrospective check.

We shall keep clients informed of developments,

Please contact us for more information about the issues raised in this article or any aspect of commercial property law.

Two firms win claims for unpaid fees worth £445,000

Two firms involved in getting planning permission for a large development project have won their case to recover a total of £445,000 in unpaid fees.

The two firms had worked for Investin Quay House Ltd (2019) to help it obtain planning permission for a property it had bought for £13 million. The process of applying for permission was well advanced, but the application had not been formally made when Investin sold the property for a significant profit.

Both firms brought claims for unpaid fees, and the High Court found in their favour.

The court noted that the first firm’s contract was short and informal, but it expressly provided that if the property was sold more than 12 months from the contract date then the firm was entitled to a payment of £150,000.

That was exactly what had happened, so an uncontestable £150,000 fee was payable, plus VAT.

The second firm’s contract contained a clause allowing Investin to terminate with 10 days' notice. The fee payable under that termination clause depended on when the contract was terminated. It was intended to provide a fixed amount of compensation in circumstances where the firm was not able to earn other fees as the contract had terminated before the grant of planning permission.

After a period of silence from Investin, the firm took the view that the contract was at an end and sent an invoice for £295,000, as if the contract had been formally terminated.

The court held that there was a clear commercial basis for such an implied term, namely that the firm should be rewarded for its work. It went much further than something nice or reasonable: it was necessary. Therefore, there was a breach of that implied term.

The sum of £295,000 plus VAT arose as a matter of debt and was therefore payable.

Please contact us for advice on contract disputes, credit control and debt recovery.

NDAs ‘can’t be used to stop harassment claims’

The workplace advisory service Acas has issued new guidelines for employers making it clear that they cannot use non-disclosure agreements (NDAs) to silence employees who want to make claims of sexual harassment or discrimination.

Acas Chief Executive Susan Clews said: “The news has reported on victims coming forward that have alleged appalling abuse by high-profile figures who have then tried to use NDAs to silence whistleblowers.

“NDAs can be used legitimately in some situations but they should not be used routinely or to prevent someone from reporting sexual harassment, discrimination or whistleblowing at work.”

NDAs are sometimes used to restrict workers from disclosing sensitive commercial information or trade secrets to people outside their place of work. But employers should consider whether one is needed in the first place as their misuse can be very damaging to their organisation.

If an employer still wishes to use an NDA, then the advice is that they should always give a clear explanation of why one is being proposed and what it's intending to achieve.

They should also ensure that a worker is given reasonable time to carefully consider it as they may wish to seek trade union or legal advice on its implications.

NDAs should not be used routinely and employers should think about whether it's better to address an issue head on rather than try to cover it up. Businesses should have a clear and consistent

policy around NDAs that is regularly reviewed and reported on.

A worker should be able to ask questions and seek advice before agreeing to an NDA. They can also seek legal advice if they have concerns over an NDA they have already signed.

Please contact us if you would like advice about employment law and how to use NDAs.

Firms that fail to pay rent due to Covid-19 won’t be evicted

Commercial tenants who cannot pay their rent because of coronavirus will be protected from eviction under new legislation.

Many landlords and tenants are already having conversations and reaching voluntary arrangements about rental payments but the government says it recognises that businesses struggling with their cashflow due to coronavirus remain worried.

The emergency Coronavirus Act provides that no business will be forced out of their premises if they miss payments up to the end of June.

As commercial tenants will still be

liable for the rent after this period, the government is also actively monitoring the impact on commercial landlords’ cash flow and continues to speak with them.

The Communities Secretary, Robert Jenrick, said: “These new measures will provide reassurance to businesses struggling with cashflows and ensure no commercial tenant is evicted if they cannot pay their rent because of coronavirus.”

The Coronavirus Act measures on commercial leases apply to all commercial tenants in England, Wales and Northern Ireland.

They are effective until 30 June, with an option for the government to extend if needed.

Please contact us more information about the issues raised in this article or any aspect of commercial property law.

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