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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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Duty on employers to prevent sexual harassment

The Government has announced it will introduce a duty on employers to prevent sexual harassment and consider extending the time limit for claims under the Equality Act 2010 from three to six months.

There will also be explicit protections from third-party harassment.

The measures are in response to the consultation on sexual harassment in the workplace, which ran from July to October 2019.

A government statement says that consultees highlighted the complexity of introducing protections from third-party harassment without the need for an incident to have occurred but were generally supportive of employers being able to use the defence of having taken all 'reasonable steps', which already exists in the Act.

On extending the protections under the Act to volunteers and interns, ministers believe that many of the latter group would already be protected, and that extending protections to the former could have undesirable consequences.

The statement says: "We recognise the impact that extending time limits could have for those bringing sexual harassment cases and that 3 months can be a short timeframe.

"Therefore, we will look closely at extending the time limit for

bringing Equality Act 2010 based cases to the employment tribunal from 3 months to 6 months.

"Those which require legislative changes will be introduced as soon as parliamentary time allows.

"This package of measures will not only strengthen protections for those affected by harassment at work but will also motivate employers to make improvements to workplace practices and culture, which will benefit all employees."

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

Company loses $3m due to conflicting contract terms

A company has lost $3m dollars because it had agreed to contradictory contract terms when entering into a purchase agreement.

The case involved Septo Trading Inc, which contracted to import fuel oil supplied by Tintrade Ltd.

The terms were recorded in an email confirmation (the Recap).

A clause in the Recap stated that a quality certificate issued by an independent inspector at the load port was binding, but it also provided for the BP 2007 General Terms and Conditions for FOB Sales to apply "where not in conflict with the above".

The BP terms stated that the quality certificate was conclusive and binding "for invoicing purposes" but without prejudice

to Septo's right to bring a quality claim if it wished to do so.

The quality certificate issued by the inspector certified that the fuel oil met the contractual specification at the load port, but a subsequent analysis showed that it did not.

Septo claimed $3m damages on the basis that the product was not in accordance with the contractual specification and, in accordance with the BP terms, the certificate was only binding for invoicing purposes and did not preclude it from bringing a claim for damages based on the quality of the product.

The judge found in favour of Septo on the basis that the BP terms qualified the Recap term which, if it had stood alone, would have excluded Septo's quality claim, but that there was no conflict between the terms which could be read together to give effect to both.

The Court of Appeal has overturned that decision.

It held that the two provisions could not fairly and sensibly be read together.

The contract, on its true construction, provided that the quality certificate issued at the load port would be binding, with the consequence that Septo was precluded from bringing its $3m claim.

Please contact us if you would like more information about the issues raised in this article or any aspect of contract law.

Directors breached their duties over pensions

The High Court has ruled that two directors breached their legal duties when they used company property to fund their pensions.

The case involved a company that had been incorporated in 1998 to take over a volunteer-run project that renovated and resold donated furniture.

In 2001 the company bought a property as its premises. Some of its profits came from renting out meeting rooms in the property.

In 2009 the two directors, the only ones remaining in the company, received financial advice from accountants indicating that their salaries were small compared to similar positions elsewhere.

They then arranged self-invested personal pensions (SIPPs) for themselves, funded in part by a transfer of the freehold of the property to a SIPP provider.

The company was to continue to occupy the property for £60,000 rent per annum; the lease prevented the sub-letting of meeting rooms.

The directors subsequently resigned.

The company brought proceedings to hold the directors liable for its loss of the property, alleging that the transfer amounted to a breach of their duties.

The High Court found in its favour.

It noted that before the transfer, the company had been making modest profits and the property was its main asset; after the transfer it lost that asset, became liable for rent and could not sub-let.

In establishing the pension schemes, the directors did not act in the company's interest.

They failed to exercise due diligence and put themselves into conflict with the company. They were in breach of their fiduciary duties.

Please contact us if you would like more information about the issues raised in this article or any aspect of company law.

Are external doors in leasehold flats landlords' fixtures?

The Court of Appeal has clarified whether external doors are landlords' fixtures and so subject to landlord control.

The case involved a tenant who was the registered proprietor of two long-leasehold flats. The leases included a covenant by the tenant at cl.3(4) not to "remove any of the landlord's fixtures" without the landlord's consent.

In 2014 the tenant replaced the entrance doors to both of his flats. He did not seek the landlord's consent to do so.

The First-tier Tribunal held that the doors were "landlord's fixtures" and that the tenant had acted in breach of the covenant by replacing them. However,

the Upper Tribunal reversed that decision, concluding that the doors were part of the land demised to the tenant.

The case went all the way to the Court of Appeal, which upheld the Upper Tribunal's decision.

It held that the entrance doors were part of the original structure of the flats.

The relevant part of cl.3(4) was the promise not "to remove any of the landlord's fixtures". Its purpose was limited to preventing the removal of landlord's fixtures without the landlord's consent.

While the landlord might wish to have control over the replacement of external doors, that part of cl.3(4) was not apt for that purpose once it was concluded that an external door was part of the demised property, and not a fixture.

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

Two businessmen ordered to repay £600k to company

Two businessmen who breached their legal duties as company directors have been ordered to repay £600,000, even though the court accepted that one of them probably hadn't realised that anything unlawful was happening.

The case involved TMG Brokers Ltd, which had gone into liquidation.

The liquidator applied for declarations under the Insolvency Act 1986 in relation to certain payments out of the company's bank account involving two directors, referred to as D1 and D2.

The payments totalled more than £600,000. The liquidator claimed that they were disguised distributions of capital and that the directors were in breach of their fiduciary duties under the Companies Act 2006.

One payment was a debt owed to the company which the director had requested be paid to a connected business that the directors also controlled. D1 maintained that he had received a single payment, thought to be salary, and repaid it when he realised it had not been properly accounted for in the company's accounts.

He explained that D2 had ultimate control of the company and that any other payments had been without his consent. D2 denied wrongly receiving payments from the company.

The High Court ruled in favour of the liquidator.

It held that the payments made by D2 were disguised distributions of capital.

D1 admitted to ignorance of his duties as a director and to signing accounts showing the company to be dormant when it was not.

Please contact us for more information about directors' duties or any aspect of company law.

Age discrimination claims rose by 74% in 2020

Age discrimination claims surged by 74% last year following the outbreak of the Covid-19 pandemic. It's thought the figure is likely to keep rising.

The research was carried out by Rest Less, the digital community for the over-50s.

Rest Less analysed data from the Ministry of Justice and found that the number of age discrimination claims in employment tribunals reached 3,668 in 2020, up from 2,112 in 2019, an increase of 74%.

Unemployment levels amongst the over-50s reached 426,000 in the final three months of 2020, up 48% year on year.

There were 284,685 redundancies amongst the over 50s during the same period, up 79% year on year.

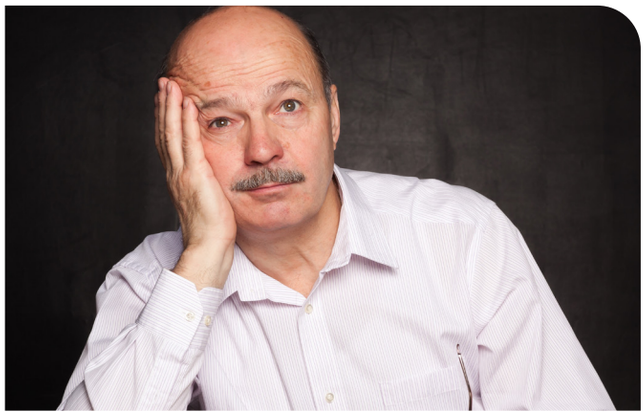
Rest Less predicts that the number of age discrimination complaints will soar in the coming months.

Stuart Lewis, Founder of Rest Less, said: "With more than 1 million workers over the age of 50 having been on furlough, and concerns around the potential for new virus variants to affect business, we fear a new wave of redundancies may be on the horizon.

"We know that the pandemic has exacerbated age discrimination in both the workplace and the recruitment process.

"These factors, combined with the need for many to keep working until they are 66 to access the safety net of the state pension, are leading to an increase in the number of employment tribunal cases based on age discrimination – and it's likely to get worse.

"Age is a legally protected characteristic, just like gender, ethnicity, religion and disability yet age discrimination is still



widely seen as a socially acceptable form of prejudice." Patrick Thomson, Senior Programme Manager, Centre for Ageing Better, said: "Employment tribunals are often the last course of action for people facing discrimination or unfair treatment in the workplace.

"It is worrying to see so many older workers needing to pursue them.

"Our recent research with employers finds that while many said diversity and inclusion were important to them, few had strategies or approaches to make their workplaces age-inclusive. We know a third of people in their 50s and 60s feel their age disadvantages them in applying for jobs.

"It has never been more important for employers to make sure they are de-biasing the recruitment process, creating an age-inclusive culture, and supporting flexible working are all crucial to doing so."

Please contact us if you would like more information about the issues raised in this article or any aspect of employment law.

Landlord wins right to challenge Nero coffee chain CVA

A landlord has won the legal right to challenge a company voluntary arrangement (CVA) proposed by the Nero coffee shop group.

Nero was severely affected by the Covid-19 pandemic and had fallen into rent arrears at its shops. Mr Young was the landlord of one of the shops, the rent from which was a main source of his income.

In November 2020, Nero proposed a CVA that would compromise the terms of the shop leases. It stated that the alternative would be insolvent administration under which the landlords would receive next to nothing.

Under the CVA, the rent arrears due to Young would be reduced to 30% of the outstanding total, meaning he would receive £11,360 of £37,867, and the future rent would be reduced by being based on a percentage of the shop's turnover.

The creditors' deadline for voting on the CVA was 30 November. Young was not

particularly happy with the terms but voted in support around 26 November.

On 29 November, a third party offered to buy out the Nero group, refinance its debt and repay in full all the company's rent arrears. It requested that the vote be postponed to allow the creditors to consider the offer.

Nero refused the offer and declined to postpone the vote. The CVA was approved, and Young began challenge proceedings.

He asserted that the CVA was unfairly prejudicial to the landlords and that the approval decision should be revoked or suspended, or a revised CVA should be considered.

The third party entered into an agreement with Young to fund his challenge and pay him £100,000 in return for him undertaking not to accept any settlement offer from Nero or withdraw the challenge without the third party's consent.

Nero applied to have the challenge dismissed on the grounds that it was being pursued for a collateral and illegitimate purpose in that the third party was controlling Young to help its takeover bid.

The court refused Nero's application. It held that it was not appropriate to strike out Young's challenge or grant summary judgment in favour of Nero based on the collateral purpose argument. The court had to accept that there were substantive grounds for Young's challenge and that his reasons for pursuing it were truthful.

Please contact us if you would like advice about debt collection or company voluntary arrangements.

Irrational clause caused huge rent increases

The Court of Appeal has ruled that an 'irrational' clause in a lease that led to exponential growth in rent increases was an error and should be corrected.

The case involved Monsolar IQ Ltd and Woden Park Ltd.

Monsolar agreed a 25.5-year lease to create a solar farm on land owned by Woden.

The lease laid out that the rent should be calculated by reference to the Retail Prices Index (RPI) in such a way that the annual increase in rent was the aggregated increase over all previous years of the term.

This would lead to exponential increases, rather than the increase

being relative to the previous year only. Monsolar took legal action to correct what it described as an obvious error. The High Court agreed and ruled that the lease should be amended.

The Court of Appeal has upheld that decision. It said it was clear that the lease was as plain a case of drafting error as one could find.

The formula's effect, literally construed, was that the rent was increased each year by an amount that reflected not the change in RPI for the previous year but the cumulative change in RPI since the start of the term, all of which, apart from that attributable to the latest 12 months, had already been taken into account.

The results of applying the formula in the lease literally could aptly be described as arbitrary and irrational, equally as commercially nonsensical.

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

Interior designers win dispute over hotel 'five-star finish'

A firm of interior designers have won a contract dispute over unpaid invoices for their work refurbishing a hotel requiring a "luxurious 5-star feel".

The case involved Phoenix Interior Design Ltd v Henley Homes plc.

Henley engaged Phoenix to provide interior design services, furniture and fittings for a new apartment hotel in Scotland.

The brief stated that the hotel was intended to be "high end", with furnishings that were "hard-wearing and contract quality which is easy to clean, maintain and replace BUT with a luxurious 5-star feel".

Phoenix presented its design concept to Henley, and hard copies of its terms and conditions were made available at the presentation.

Phoenix provided samples before commencing work, and prepared a sample room in the hotel, which was inspected and approved by Henley.

A dispute arose concerning the quality and suitability of the products and design, snagging works, and whether the works had been "signed off" so that completion occurred.

However, Henley continued to use the furniture and furnishings for over three years and did not replace them.

Phoenix asserted that a five-star specification was not part of the contract. Henley submitted that performance had been so defective that completion never occurred, and the balance was therefore not due.

The High Court found in favour of Phoenix. It held that the absence of a specific reference in the contract to a five-star product was significant.

Such a requirement was not supported by the documents, and Phoenix's evidence was preferred. In any event, there was no star categorisation for furniture or furnishings. In addition, Henley had inspected samples and approved the sample room at the hotel.

It was telling that Henley had used the furniture and fittings for several years.

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