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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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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.

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Creditors of Café Nero granted fast track trial

Creditors of the Café Nero chain have been granted the right to an expedited trial to enable them to recover full compensation for unpaid rents.

The case involved several commercial landlords who were challenging the validity of the way Nero had entered into a Company Voluntary Arrangement (CVA) after being adversely affected by the Covid-19 pandemic.

Under the CVA drawn up in October 2020, landlords would receive 30p for every £1 of rent they were owed.

A potential buyer made an offer for Nero's shares on a debt-free basis. Under the offer, the landlords would have been paid in full for unpaid rents amassed during the pandemic.

In November 2020, Nero rejected the buyer's offer and modified the proposed CVA to say that it would use its best endeavours to ensure that creditors would have their arrears paid in full if a sale to the potential buyer did occur within the next six months.

In December 2020, the landlords issued proceedings seeking to challenge the CVA under the Insolvency Act 1986 on the basis that it was unfairly prejudicial to their interests, and that Nero's directors had acted in breach of duty by refusing to accept the buyer's offer.

The claim was at an early stage and was expected to be heard between December 2021 and March 2022.

The landlords submitted that an expedited trial was necessary to resolve the ongoing commercial uncertainty. Nero was content to support an expedited timetable whilst maintaining that the challenge to the CVA was without merit.

The court granted the application. It held that until the validity of the CVA was resolved, the landlords were exposed to the risk of the buyer walking away from a sale, resulting in them being unable to recover satisfactory compensation.

Please contact us if you would like advice about company litigation and recovering debt.

Supreme Court rules that Uber drivers are 'workers'

The Supreme Court has ruled that Uber drivers should be classed as workers rather than as self-employed.

The distinction is crucial as it means drivers gain significant employment rights such as entitlement to the minimum wage and holiday pay.

The court's decision marks the end of a four-year legal battle between Uber and two of its former drivers, James Farrar and Yaseen Aslam.

They began their fight to be classed as workers in the Employment Tribunal in 2017. It ruled in their favour, after hearing that Uber paid drivers weekly, based on the fares charged for trips undertaken, less a service fee for the use of its booking app.

Uber argued that it was merely acting as an agent and that drivers entered into binding agreements with passengers to provide them with transportation services.

The tribunal concluded that any driver who had the app switched on and was within the territory in which he was authorised to work, and was willing to accept assignments, was working for Uber under a "worker" contract.

It held that any supposed contract between driver and passenger was a pure fiction, bearing no relation to the real dealings and relationships between the parties.

The Supreme Court upheld the tribunal's decision.

In giving the ruling, Lord Leggatt said that the court unanimously dismissed Uber's appeal that it was merely an intermediary party and stated that drivers should be considered to be working not only when driving a passenger, but whenever logged in to the app.

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

Tenancy agreement eases restrictions on pets

The government has introduced its new Model Tenancy Agreement making it easier for tenants with well-behaved pets to secure leases.

It means that landlords will no longer be able to issue blanket bans on pets.

Instead, consent will be the default position, and landlords will have to object in writing within 28 days of a written pet request from a tenant and provide a good reason.

Currently, just 7% of private landlords advertise pet friendly properties, meaning many people struggle to find suitable homes. In some cases, this has meant people have had to give up their pets all together.

The Model Tenancy Agreement is the government's recommended contract for landlords. Figures show that more than half of adults in the United Kingdom own a pet, with many having welcomed pets into their lives during the pandemic. Ministers say this means it's important that landlords should cater for responsible pet owners.

Under the new agreement, rejections should only be made where there is good reason, such as in smaller properties or flats where owning a pet could be impractical. To ensure landlords are protected, tenants will continue to have a legal duty to repair or cover the cost of any damage to the property.

Housing Minister Christopher Pincher said: "It can't be right that only a tiny fraction of landlords advertise pet friendly properties and in some cases people have had to give up their beloved pets in order to find somewhere to live.

"We are bringing an end to the unfair blanket ban on pets introduced by some landlords. This strikes the right balance between helping more people find a home that's right for them and their pet while ensuring landlords' properties are safeguarded against inappropriate or badly behaved pets."

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

Sotheby's in $10m dispute over 'counterfeit' painting

Contract Law

Sotheby's auction house has won a $10m contract dispute over the sale of a painting because experts could not agree if it was genuine.

The case involved a painting believed to be the work of Frans Hals, the Dutch Golden Age painter.

The owners arranged for it to be sold through Sotheby's to a private foreign buyer. They entered into a contract in which Sotheby's agreed to give an authenticity guarantee to the buyer.

The contract also provided that if Sotheby's determined that the painting was counterfeit, the sellers agreed to rescind the sale and return to the buyer the purchase price and the buyer would return the painting.

Sotheby's sold the painting for $10.75 million. Several years later, Sotheby's discovered facts which cast doubt on the painting's authenticity and commissioned an expert to examine it. He concluded that the painting was counterfeit.

The purchaser rescinded the purchase and returned the painting, and Sotheby's refunded the $10.75 million. Sotheby's then brought proceedings to recover that sum from the sellers.

The three leading scholars on the work on Frans Hals disagreed as to the authenticity of the painting: one believed that it was fake, one believed that it was genuine and the third that it could be genuine.

The judge concluded that as there was no clear view among the experts, Sotheby's had been entitled to determine that the painting was counterfeit and was therefore entitled to reimbursement.

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

Investor granted freezing orders in Ponzi scheme case

An investor has been granted freezing orders against a father and son who ran a company that was allegedly operating a Ponzi scheme.

The investor said that he had provided £700,000 to the company after being promised returns of 3% and guaranteed access to his capital on 28 days' notice. He maintained that he had received back only £438,256 despite requests for the full amount.

He alleged that the investment scheme was in fact a Ponzi scheme and that he had been induced to invest by the father and son's fraudulent misrepresentations. Following information that the son was selling his home, an interim freezing order was granted against him and the company.

The father denied any involvement with the investment.

The investor applied for a continuation of the freezing order and sought to add a claim relating to a cheque provided by the son's wife which had not been honoured.

The wife had received a large sum from the proceeds of sale of the home, yet the son submitted that he had no funds. The court held that the investor's evidence led to a good arguable case of deceit.

There was evidence that it was a Ponzi scheme and an ongoing risk of wrongful dissipation of assets and concealment by both father and son. A freezing order was granted against them and their company.

The dispute regarding the cheque from the son's wife was added to the claim.

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

1 in 10 workers ‘told to re-apply for their jobs’

The Covid-19 pandemic has led to nearly 1 in 10 workers being told to re-apply for their jobs on worse terms and conditions or face the sack, according to research by the TUC.

Employment experts say companies planning such moves should ensure they get detailed legal advice first to prevent unfair dismissal claims.

The TUC commissioned an online survey of 2,231 workers in England and Wales between 19 and 29 November last year. All respondents were either in work, on furlough, or recently made redundant.

Almost a quarter said their working terms, such as pay or hours, have been downgraded since the first lockdown in March. The survey found that nearly a fifth of (18%) of 18 to 24-year-olds say their employer has tried to re-hire them on inferior terms during

the pandemic. It showed that ‘working-class’ people (12%) are nearly twice as likely than those from higher socio-economic groups (7%) to have been told to re-apply for their jobs under worse terms and conditions, and BAME workers (15%) have been faced with “fire and rehire” at nearly twice the rate of white workers (8%).

The polling also reveals that nearly a quarter (24%) of workers in Britain have experienced a downgrading of their terms during the crisis – including through reduced pay or changes to their hours.

Ben Willmott, head of public policy at the Chartered Institute of Personnel and Development, warned that forcing a change to an employment contract by dismissing someone and rehiring on different terms should be a last resort.

He added: “Employers must consider all alternatives and do everything possible to try and reach a voluntary agreement.”

Any employer considering making changes of this kind should seek legal advice because it is a difficult process and if it isn’t carried out correctly, employees may be able to claim unfair dismissal.

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

Compare the Market fined

The insurance comparison website Compare the Market has been fined £17.9m for breaching competition law.

An investigation by the Competition and Markets Authority (CMA) found that between December 2015 and December 2017, the company breached competition law by imposing ‘most favoured nation’ clauses on providers of home insurance selling through its platform.

These clauses prohibited the home insurers from offering lower prices on other comparison websites and protected Compare the Market from being undercut elsewhere. They also made it harder for its rivals to challenge the company’s already strong market position.

Please contact us if you would like more information about competition and company law.

Network Rail in £13m dispute over the word ‘default’

Network Rail has won a £13m contract dispute that centred on the meaning of the word “default”.

The issue arose after Network Rail engaged ABC Electrification Ltd to carry out some major works.

Under the contract, ABC was entitled to payment based on the total cos which was defined to exclude “disallowed cost”.

ABC had not completed the contract works in accordance with the contractual timetable, and Network Rail sought to deduct £13.43 million as disallowed costs.

The relevant clause in the contract said that disallowed cost included “any cost due to negligence or default on the part of the Contractor in his compliance with any of his obligations”.

ABC argued that the word “default” meant fault in the sense of blame or

culpable behaviour on the part of the contractor.

The case went all the way to the Court of Appeal, which ruled in favour of Network Rail.

It held that the natural and ordinary meaning of "default" as used in the contract meant just what it said, namely a failure to fulfil an obligation, in this case, a failure on the part of ABC to comply with any of its obligations under the contract. There was no basis for introducing any qualification such as personal blame or culpability on the part of the contractor.

Any contractual clause, however clear, was not to be read in a vacuum.

Its meaning should be assessed in the light of any other relevant provisions of the contract; the overall purpose of the clause and the contract; the facts and circumstances known or assumed by the parties at the time it was executed; and commercial common sense.

There was nothing arising out of the wording of other provisions of the contract, the overall context of the contract or the commercial background that suggested any interpretation of default other than the natural and ordinary meaning.

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

Surge in insolvencies with many more to come

There has been a sudden surge in corporate insolvencies, due mainly to the effects of the Covid pandemic.

Figures released by the Insolvency Service show there were 1,228 business failures in December 2020 compared with 891 in November. That's a rise of 37.8%.

The Insolvency Service says that overall, the numbers of company and individual insolvencies have remained low since the start of the first UK lockdown in March 2020, when compared with the same period in 2019.

This was likely to be at least partly driven by government measures put in place in response to the pandemic, including temporary restrictions on the use of statutory demands and certain winding-up petitions, together with enhanced government financial support for companies and individuals.

The fear is that insolvencies may increase significantly once these protections are removed.

Colin Haig, President of insolvency and restructuring trade body R3, said: "It's a question of when, not if, insolvency numbers further increase this year - especially as the Government's support packages, which have provided a critical

safety net for businesses and individuals, are due to start running out at the end of the first quarter. Even if the Chancellor decides to extend them again, at some point they will have to come to an end. As soon as signs of financial trouble surface, it's time to seek advice from a qualified and reputable source. Doing so will allow more options to resolve your situation, and more time to take a considered decision about solutions."

Please contact us if you would like advice about debt collection and credit control.

Landlord can add ground repairs to service charges

The terms of a tenancy agreement entitled a landlord to add grounds maintenance to the services for which it could charge.

That was the decision of the Court of Appeal in a case involving Curo Places Ltd and Anthony Pimlett.

Curo Places was a registered provider of social housing.

It had entered into a tenancy agreement with Mr Pimlett in 2008 concerning a one-bedroomed bungalow in a sheltered housing scheme of 32 units set in communal grounds, which were maintained without charge. In 2017, after carrying out a proper consultation, Curo Places gave written notice to Pimlett seeking to add grounds maintenance to the services for which it could charge under the tenancy agreement.

Pimlett objected, arguing that the landlord had no power under the agreement to take such action.

The issue arose in 3,400 other tenancy agreements of which Curo Places was landlord and the possible financial impact to it by the end of March 2021 was estimated at around £1.16 million.

The First-tier Tribunal ruled in favour of Pimlett, and the landlord's appeal to the Upper Tribunal was dismissed.

The Court of Appeal overturned those decisions. It said the tenancy agreement stated that any services provided by the landlord with a specific charge would be listed in the particulars of tenancy and would have to be paid for by the tenant.

The effect of this was that changes in service charges could be made without the tenant's agreement.

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