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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.

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How Queen's Speech will impact on businesses

The Queen's Speech outlined several Bills that could have a significant impact on businesses. The government says the main theme behind most of its proposals is to strengthen the UK's competitiveness and to create conditions that will enable companies to create more jobs.

These are some of the main proposals:

Enterprise Bill

This aims to save businesses at least £10 billion over the life of this Parliament by cutting red tape. This will be achieved by deregulation and by obliging regulators to design and deliver services that best suit the needs of business.

The Bill will also create a Small Business Conciliation Service to help firms resolve disputes, particularly complaints about late payments, without the need for court action.

Trade Unions Bill

This will introduce a 50% minimum voting threshold for the turnout in union strike ballots and retain the requirement for there to be a simple majority of votes in favour of the action being decided.

National Insurance Contributions/Finance Bill



This will ensure that there are no rises in income tax rates, VAT rates or National Insurance Contribution rates for employees or employers for the next five years.

Immigration Bill

The Bill will introduce an offence of illegal working. It will provide a legal framework for the wages of illegal workers to be seized as proceeds of crime. The government will carry out a consultation on the possibility of introducing a skills levy. This would seek to



fund apprenticeship schemes by imposing a new visa levy on businesses that use foreign labour. It will be illegal for employment agencies to recruit solely from abroad without advertising those jobs in Britain and in English.

The Bill will also make it easier to evict illegal tenants.

EU Referendum Bill

This would "enable a referendum to allow the electorate to have an in-out vote on the UK's membership of the European Union before the end of 2017".

The government faces extensive negotiations with our European partners before any referendum takes place but if the UK does eventually leave the EU, it will have huge implications for businesses across a number of areas including regulation and employment law.

Speaking about all the measures in the Queen's Speech, Prime Minister David Cameron, pictured left, said: "We have a mandate from the British people, a clear manifesto and the instruction to deliver. And we will not waste a single moment in getting on with the task."

Please contact us for more information about the issues raised in this article or legal matters relating to running your business.

Company awarded damages against former director

A steel production company has won a damages claim against a former director and members of his family after they formed a rival business.

The director, his son and daughter-in-law all worked for the production company at the same time. The son and daughter-in-law left to set up their own business in the same sector making steel products.

The director also resigned but while working his six months' notice,

he started to divert some of the company's orders to the new start-up.

He provided it with steel and various off-cuts, and hired it to provide cutting services on a sub-contract basis. The company took legal action as soon as it discovered what had happened.

The court held that the director had breached his fiduciary duty to his company by getting involved with the start-up business. He had wanted to

secure a future for his son and this led him to do things he should not have done. The court also found that the son and daughter-in-law had been in breach of their employment contracts by starting a rival business while they were still employed by the company.

All three were held to be liable to pay damages.

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Fall in negligence claims against property agents

The number of professional negligence claims against estate agents and surveyors fell by 65% last year.

Figures published by the Solicitors Journal showed that more than 8 out of 10 claims were made by the big mortgage lenders, particularly Barclays, Santander and RBS.

Property experts say that there was a steep rise in claims during the recession when property prices fell dramatically.

Lenders were keen to recoup some of their losses, which they attributed to properties being overvalued by

professional agents prior to mortgages being granted.

The fall in claims suggests that most of the cases dating back to the height of the recession have now been settled, although new actions are still coming before the courts.

The law requires that people providing professional services should exercise reasonable skill and care when carrying out their work.

If you suffer financial loss because a professional makes a mistake that a qualified person in a similar position



would not be expected to make then you may be entitled to claim damages.

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Assessing damages when suppliers fail to deliver

It is not uncommon for a company's business to be disrupted because a supplier fails to deliver materials on the agreed date.

In such cases, how do you assess the extent of the damage caused and whether it may be possible to claim compensation? A recent case involving an airline company gives a useful insight into how the courts approach the question of awarding damages.

The company had three contracts with a supplier for the delivery of aircraft seats. Some of the seats were delivered late and some were not delivered at all. It meant that the company was prevented from using five aircraft for 18 months until seats were obtained from another supplier.

The supplier admitted liability and the only question was how to assess damages.

The airline company claimed \$162m to cover the cost of leasing aircraft from another company for three years. It also claimed a further \$21m for buying and installing replacement seats for some of its aircraft.



The supplier claimed that the damages should be reduced because the company had gained certain benefits by

having to find alternative suppliers. For example, its decision to enter into a three-year lease with another company turned out to be very cost-efficient and eliminated any losses the company might have suffered.

The supplier also argued that the replacement seats were lighter than the seats it would have supplied and so had generated fuel savings to the benefit of the company.

The court found that the supplier was wrong to state that the leased aircraft had completely mitigated the company's losses. However, the court also pointed out that the company could reasonably have expected to find replacement seats and bring its aircraft back into service within two years. In spite of this, it entered into a three-year lease with another supplier.

The company agreed to a third year for commercial reasons and so this could not be included in its claim. The court therefore limited the damages relating to the leases to \$107m.

In relation to the lighter seats argument, the court found that some of the seats were more efficient and brought benefits but others did not. The damages were then calculated giving the supplier some credit for the number of lighter seats but making it liable for those seats which did not provide added benefit.

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Developer wins appeal over permission for houses

A developer has won an appeal against a decision to refuse permission to build 100 houses on farmland following objections from protesters and the local authority.

The authority had initially refused permission. The developer appealed and an inspector was appointed who decided to deal with the issues by way of an informal hearing. Due to an error, no notice of the hearing was given to the public.

Once the error was discovered, the inspector called a second meeting,



which took place with local objectors in attendance. The inspector then granted planning permission.

The authority and the objectors appealed. The judge ruled in their favour after deciding that there had been an appearance of unfairness in the way

the inspector's second hearing had progressed. The case then went to the Court of Appeal, which ruled in favour of the developer.

It agreed that the public hearing had lacked the usual formality.

However, the issue was whether the procedure had been unfair to the objectors. The evidence suggested it had not.

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To buy or to lease as the economy recovers?

During the recession, many firms shelved plans to move to better and larger premises. Indeed, some businesses looked to downsize rather than expand.

However, as the economy gradually recovers and confidence slowly returns, some firms may be considering whether the time has now come to make a long-delayed move.

The demand for property has recovered over the last few years and although the rock bottom prices being offered during the recession may no longer be available, there are still good deals to be had.

One of the first things for businesses to consider is whether it would be better for them to buy or to lease.

The great advantage of leasehold is the flexibility it offers. A firm that sees itself expanding will not want to buy a property that it's likely to outgrow within a few years. By leasing instead it can leave itself free to up sticks and move a few years down the line, or simply expand within the landlord's existing

premises by taking on new units if they are available.

You can negotiate a short lease of say, three to five years, if you think you are likely to want to move to somewhere larger in future. Or if you want longer term stability but are unsure how well your business might perform then you could take out a longer lease with a three-year break clause.

This would enable you to walk away if things don't work out as you hope. That might prove an attractive option in these uncertain times.

There are potential pitfalls, however. If you don't exercise the break clause then you will be tied in for the remainder of the lease.

Leaseholders may also be able to negotiate a rent free period to help cover the cost of fitting out the premises. The landlord may also be prepared to



contribute to the cost, especially on a longer term lease.

The advantages of buying are in part the opposite of leasing and will often be the better option for more settled businesses where future growth and development are more predictable.

If you feel you are likely to want to remain in a property on a long term basis then buying may well work out to be more cost effective. Most landlords work on the general rule of charging an annual rent that is 10% of the value of the property.

If you think you are likely to stay in your premises then buying might be a better option because the amount you pay on a lease could be enough to buy the property outright within ten years.

The problem may be finance because although banks have money to lend, they are still very careful about where they place it.

Buyers still come under great scrutiny by lenders who don't want to risk their money with someone who might soon go out of business. Your existing bank with whom you already have a rapport might be the most likely to help. Other lenders may even be suspicious of someone who hasn't gone with their existing bank and wonder whether there is a problem with your ability to service the loan.

Given the uncertainties in the market, it's likely that we may see more leasing but for those who feel they would be better off buying, there are good deals to be had if you can raise the finance.

Landlord not liable for council tax on flat left empty by the tenant

A landlord was not responsible for council tax on a flat which the tenant had left empty because it needed major repairs.

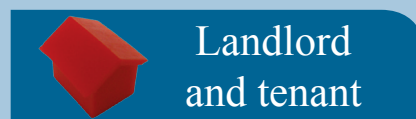
That was the ruling of the High Court in the case of a tenant who argued that she should not have to pay because the place was uninhabitable.

The court heard that the tenant had a 99-year lease on the flat but had not lived there for several years because it had twice been flooded and suffered from damp.

The tenant asked for it to be removed from council tax list but the valuation office refused. It concluded that since the rest of the building was structurally sound and inhabited, there were no structural problems with the flat.

The tenant appealed to the valuation tribunal but it ruled against her. She then took the case to the High Court, claiming that the hearing was unfair and the outcome was a breach of her human rights.

However, the court held that the tribunal had applied the correct legal



Landlord and tenant

tests. The evidence showed that the flat could be made fit to live in if a reasonable amount of repair work was done.

On that basis the tenant, not the landlord, was responsible for paying the council tax.

The law stated that if no one was living in a dwelling, and it was subject to a lease for a term of more than six months, the lessee was liable for council tax. The tenant felt strongly that the legislative scheme was wrong and irrational.

However, the decision about who should be liable for council tax on an unoccupied dwelling that was subject to a lease had been made by Parliament. A court had no power to change that.

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Many SMEs unsure about shared parental leave

Many small businesses are unsure about how to deal with shared parental leave (SPL) according to a survey reported in The Times newspaper.

Half of the 400 firms polled said they didn't understand the legislation and how it would work.

A further 17% said they were worried about the effect the new rights would have on their business.

The new system of SPL came into effect on 5 April and allows parents to share 52 weeks' leave. It also applies to couples who adopt a child.

Mothers are still required to take two weeks' compulsory leave immediately after the birth, but the other 50 weeks can be shared between both parents. They can choose whether to take their leave simultaneously or take turns, or a mixture of the two, but the leave must be taken in complete weeks.

Parents can take their leave in a continuous period but would



have to negotiate with their employer if they wish to take leave in discontinuous periods. The employer doesn't have to agree to a discontinuous leave period.

To qualify for SPL, a parent must have worked for their employer for at least 26 weeks at the end of the 15th week before the Expected Week of Childbirth (EWC). They must also give sufficient notice to their employer.

The other parent must have worked for 26 of the 66 weeks prior to EWC and earned a minimum of £30 in at least 13 of those weeks.

An estimated 285,000 couples a year are expected to benefit from the new system so the impact on businesses is likely to be substantial. Employers may wish to review their employment policies to ensure they don't breach the new regulations.

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Directors fail to make company liable for their failings

The Supreme Court has rejected the idea that directors can avoid responsibility for offences like fraud by trying to make their company responsible for their wrongdoing.

The case, involving Bilta UK Ltd and Swiss company Jetivia SA, helps to clear up some uncertainty over the extent to which directors, as opposed to the company itself, should be held accountable for wrongdoing.

The court heard that two directors at Bilta took part in a VAT fraud which they knew would be damaging to the company. They were helped by Jetivia. Bilta then went into liquidation and the liquidators took legal action seeking

payments from the two directors and from Jetivia. The case centred on whether the directors were directly responsible for their actions or whether liability rested solely with the company.

Giving judgment, Lord Mance said: "It is certainly unjust and absurd to suggest that the answer to a claim for breach of a director's (or any employee's) duty could lie in attributing to the company the very misconduct by which the director or employee has damaged it.

"A company has its own separate legal personality and interests. Duties are owed to it by those officers who constitute its directing mind and will."



Company Law

The Supreme Court ruled that the directors were liable and the liquidators were entitled to seek payments from them.

The court also ruled that the Insolvency Act could apply extra-territorially and so the liquidators could pursue payments from Jetivia, even though it was based in Switzerland.

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