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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.

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J&P Credit Solutions strengthens its team with the appointment of Mark Bailey as Director of Collections

J&P Credit Solutions, the specialist Debt Recovery division of solicitors practice Judge & Priestley LLP, is strengthening its senior management team by appointing Mark Bailey to the newly created role of Director of Collections.

Mark will be responsible for enhancing and growing J&P Credit Solutions' pre-litigation offering. He will also work to integrate pre-legal collections activity with the legal recoveries expertise already available to maximise recoverable amounts for its growing client base.

Mark was previously CEO and owner of Empingham Ltd, an award winning DCA that was acquired in 2014. He has a wealth of industry knowledge and is highly regarded within the DCA market.

Mark Oakley, a Partner at Judge & Priestley LLP, said "We are very pleased to announce that Mark will be joining our management team. His experience will help to further build our successful and respected Collections team and complement the existing legal expertise at J&P Credit Solutions to enhance our overall offering in the marketplace".

Mark Bailey said "I am absolutely delighted to be joining J&P Credit Solutions at this exciting time. I am looking forward to working with the current team to enhance their already excellent reputation among existing clients and utilising my experience and relationships to introduce a range of new customers to J&P Credit Solutions' services. We share a commitment to building long-term working relationships and using the most up-to-date technology to enhance performance

levels at every stage of the collections process either pre or post legal".

Judge and Priestley LLP's specialist Debt Recovery team was recommended in the recently released Legal 500 legal directory for 2016 with individual commendations for Mark Oakley, Rachel Addai and Mark Younger, who are all partners of Judge & Priestley LLP.

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Agent awarded £500,000 in breach of contract case

Contract Law

An agent for a software company has been awarded nearly £500,000 in damages and commission following a breach of contract dispute.

The issue arose after the agent entered into an agreement to promote the company's products. The company became dissatisfied with his work and gave him 90 days' notice of termination in accordance with the agreement.

A few weeks later it terminated the agreement with immediate effect claiming the agent had failed in his duty to provide the required services because he had become involved with another company. The agent claimed breach of contract under the Commercial Agents (Council Directive) Regulations 1993.

The company claimed the regulations did not apply because the sale or supply of software was not the "sale of goods" within the definition of "commercial agent".

It also submitted that even if the regulations did apply, the agent was in repudiatory breach of the agreement so there could be no contractual damages claim and no claim for commission in respect of post-termination. The court found in favour of the agent. It held that for the purposes of the regulations, software amounted to goods. It also held that the agent's activities with the other company did not give rise to a conflict of interest. There had therefore been no lawful basis for the company's termination of the agreement.

The agent was awarded £490,000 damages for loss of future commission and approximately £7,000 for commission he was due immediately after the termination of the contract.

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Landlords getting tougher over break clauses

The standard break clauses to be found in most commercial tenancy agreements often lead to disputes, but it's thought the numbers are now likely to rise dramatically as the country adjusts to the Brexit decision to leave the EU.

Declining orders mean more firms may use the break clause option to downsize or just find a better deal elsewhere.

The landlord is just as likely to be money conscious. Faced with the prospect of empty premises they have very little chance of re-letting, landlords increasingly respond by poring over the small print of the tenancy agreement to make sure everything is in order.

It means there have been several recent cases where landlords have challenged break notices for technical reasons.

One example involved a tenant who tried to exercise the break clause by giving the landlord six months' notice as required by the tenancy agreement. The landlord refused to accept it because the tenant had failed to also give notice to the property's management company – another requirement of the lease.

The case went all the way to the Court of Appeal where the landlord eventually won and prevented the break clause being exercised. In another case, a commercial tenant was prevented from terminating a lease because it gave notice under the name of its new parent company rather than its original name which was still on the tenancy agreement.

This was in spite of the fact that the landlord had been informed of the change of name and rent invoices were sent to the parent company.

Conditions relating to vacant possession, repairs and maintenance can also lead to disputes as landlords take a tougher stance. They need their properties to be in a fit state so they can re-let them as soon as possible.

Both sides are entitled to protect their interests and so now, more than ever, both sides must try to make sure they comply exactly with every detail of the terms and conditions in the lease. Failure to do so could prove very costly.

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Supply company defends itself against former employees

Protect your business

An agricultural supplies company has succeeded in preventing two of its former employees from dealing with its customers for six months after resigning.

The case involved two employees who joined the company as trainees. Their contracts of employment included a six-month notice period. There were also covenants stating that for six months after leaving the company, the employees would not have any contact with customers they had dealt with in the 12 month-period before termination.

Both employees left after six years to work for a rival company. They tried to have the covenants declared unenforceable so they could begin their new employment straightaway.

The court dismissed their application. It held that neither of them had previously objected to the terms, despite the six-month notice period and the covenants.

The company could not risk allowing employees to build relationships and goodwill with customers without the protection afforded by the covenants. It conferred valuable benefits on the employees such as providing them with training that enabled career progression and greater remuneration.

The employees represented the company in its dealings with customers, and any goodwill they generated belonged to the company.

The notice period and the restrictions were no wider than was reasonable.

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Builder to repay £483,000 following breach of contract

A builder has been ordered to pay £483,000 for breach of contract after failing to carry out repair work to the specified standard.

He was also ordered to return £200,000 after fraudulently inducing a customer to enter into a share purchase agreement.

The case involved a wealthy individual customer who engaged the builder to carry out extensive refurbishment on two properties. The customer made regular payments to the builder as the work was carried out. The builder then persuaded the customer to invest £200,000 in his company in return for 37% of the shares. After receiving the money, the builder ceased work on the refurbishment of the two properties.

An independent survey revealed that the work was not up to the standard agreed and had been done at grossly inflated prices. The builder agreed to complete the work to the correct specifications but then refused to continue unless further payments were made.

The customer regarded this as a repudiatory breach of contract. The court found in favour of the customer. It held that the builder was not entitled under the terms of the contract to suspend work in the way he did. He was ordered to pay damages of £483,000 plus £5,000 for the distress and inconvenience caused.

He was also ordered to return the £200,000 share investment because he had deliberately inflated the value of the company by lying about the number of contracts it had in the pipeline.

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EU employment law in force until Brexit complete

The referendum vote to leave the European Union could have a significant effect on UK employment law although there will be no change in the short term while the Brexit process is taking place.

It means EU law relating to matters such as TUPE, Working Time Regulations and Agency Workers will still apply over the next two years and possibly longer. British courts and tribunals will continue to apply these regulations.

EU based laws will also remain in place after Britain's exit until the government amends or replaces them.

How employment law will look after the exit process is complete in two or three years' time is highly speculative at this point and will depend on the government of the day.

If the present government remains in power, then it's likely that some deregulation could take place. This could involve repealing the Agency Workers Regulations, amending TUPE transfer conditions, relaxing Working Time Regulations and placing a cap on the monetary awards made in discrimination claims.

However, a Labour administration is likely to retain most of these regulations and possibly even strengthen them.

Whichever party is in power, it is quite possible that the UK will agree to retain a wide range of EU regulations as a condition of obtaining a new trading deal. We shall keep clients informed of developments.

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Company fined over £800,000 for restricting online prices

A company has been fined a total of £826,000 after admitting that it tried to stop retailers discounting online prices.

Ultra Finishing Ltd supplies bathroom products to a number of online stores. Following an investigation by the Competition and Markets Authority (CMA), it admitted that in the years 2012 to 2014, it engaged in resale price maintenance (RPM) in respect of the internet sales of two of its brands.

RPM is a form of vertical price-fixing where a supplier restricts the ability of a retailer to determine prices. It is illegal because it prevents retailers from offering lower prices.

Ultra issued retailers with so-called 'recommended' retail prices for online sales. Despite being described as recommendations, which are lawful, Ultra threatened retailers with penalties for not pricing at or above the 'recommended' price. Sanctions included charging them higher prices for products, withdrawing their rights to use Ultra's images online, or ceasing supply.

Ann Pope, the CMA's Senior Director responsible for the case, said: "Price competition from online sales is usually intense, given the ease of searching on the internet.

"Ultra's practice of setting minimum online prices stopped retailers from offering discounted prices online, reducing competition across online and 'bricks and mortar' sales, and denying consumers the benefit of lower prices for Ultra's bathroom fittings.

"The CMA takes such vertical price-fixing seriously and is focused on tackling anti-competitive practices that diminish the many benefits of

e-commerce. We expect businesses involved in similar practices to bring them to an end as soon as possible."

The CMA says any business found to have infringed the Competition Act 1998 could be fined up to 10% of its annual worldwide group turnover.

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Director disqualified for transferring assets to himself

A director has been disqualified for five years for transferring money from his insolvent company to himself and his associates.

James Elliott Pemble ran a marquee hire business called All Marquees Ltd at Tonbridge in Kent. He also had at least three other companies in the leisure and entertainment industry.

An investigation by the Insolvency Service (IS) found that he had withdrawn at least £144,427 over a two year period. None of the transfers had any apparent benefit to All Marquees Ltd, at a time when the company was insolvent. Most of the money was used to fund Mr Pemble's other businesses.

Andrew Stanley, Official Receiver Chatham at The Insolvency Service, said: "A director owes a fiduciary duty to a company to act in its best interest, rather than for their own personal benefit.

"Mr Pemble chose to use company funds for his own personal benefit and that of his other business entities at a time that All Marquees Ltd was insolvent. He demonstrated a disregard to All Marquees Ltd's own creditors who have suffered as a result of his actions.

"Directors should note that the Insolvency Service will take appropriate action to remove them from the business community when their conduct falls below the standard expected and results in the company being subject to a compulsory liquidation."

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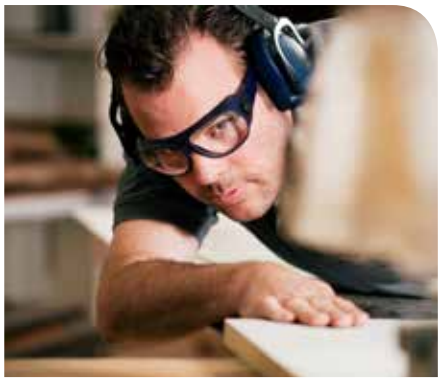
Moratorium for businesses could hit creditors

A government proposal to have a 90-day moratorium for failing businesses could have serious consequences for creditors, according to the Chartered Institute of Credit Management (CICM).

The warning comes from CICM Chief Executive Philip King in response to a review of the corporate insolvency framework being undertaken by the Insolvency Service (IS).

One of the main features of the IS proposals is the creation of a moratorium to allow companies to consider the best approach for rescuing the business while free from enforcement and legal action by creditors.

The proposed moratorium would last for three months, with the possibility of an extension if needed. Mr King said the idea is fraught with danger. "It is 90 days



in which the less scrupulous can fritter away assets whilst being 'untouchable', to the serious detriment of creditors and the stability of the supply chain."

He is also concerned about the proposed extension of firms that can be defined as 'essential' suppliers. "Again, while we understand the logic of preventing 'ransom' payments or changes to terms, the flip side is that a wider number of firms may later be caught out should the business ultimately fail."

A government spokesman said: "Whether it's a kitchen-table start-up or massive multi-national, nobody ever wants to see a company in trouble. But, sometimes, insolvency is unavoidable. And should the worst happen to a business, we have a duty to give it the best possible chance to restructure its debts and return to profitability while protecting its employees and creditors."

The proposals are now subject to public consultation.

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Homeowners win negligence claim against engineer

Professional Negligence

A family have won their professional negligence claim against a structural engineer who failed to alert them that a house they were buying was in a dangerous condition and should be demolished.

The court heard that the house came up for sale in 2011 and the family engaged the engineer to provide a structural report.

He advised that it required remedial work at an estimated cost of £25,000, and the family bought on that basis.

However, contractors brought in later to carry out the renovation said the walls were tilting outwards so badly that there was no alternative but to demolish the property. A second opinion from another firm made the same recommendation.

The measurements of the walls showed that they were tilting to a degree within and beyond the range that industry guidance described as the "ultimate limit".

The family brought a professional negligence claim against the engineer. He said he had considerable experience of houses in the area that tilted and the main concern was whether there was continuing movement in the property, not the degree of tilt.

The court found in favour of the family.

It held that the engineer had not been concerned about tilt in the slightest and his approach was not that of a professional exercising reasonable care and skill. He had fallen below the standard expected of a structural engineer and had been negligent.

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