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Legally Speaking - Judge & Priestley's Quarterly Legal Update for Commercial Clients

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INVESTOR IN PEOPLE

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How the latest Companies Act measures could affect your business

A raft of new measures introduced in the Companies Act 2006 came into effect on 1st October and will impact on directors and the way they run their businesses.

The changes cover a wide range of subjects from directors' addresses to the filing of accounts and notification of changes to your company's articles.

The issue of addresses has received a lot of attention because you must provide Companies House with both your residential address and a service address for each directorship you hold.

These service addresses will be publicly available but the residential addresses will only be available to regulatory authorities and to credit reference agencies. The service address must be a place where documents can be delivered and a receipt obtained. This could be the company's registered office but can not be a PO Box or DX number.

A director can choose to use his residential address if he wishes, in which case it would not be apparent from the public record that the two addresses are the same. However, your residential address will automatically become your service address and become publicly available unless you register a separate service address. You may want to do this if you want to protect your personal privacy.

There are also changes to the arrangements for inspecting company registers. Registers can be held at the company's registered office or you can have a Single Alternative Inspection Location (SAIL). You have to notify Companies House if you want to set up a SAIL or change it at a later date. Directors will need to be aware of changes to the filing of annual returns and accounts. The deadline for filing accounts

**Failure to comply could be
a criminal offence**



has been reduced from ten to nine months after your year end. It means that if you normally have to file by 31st January, you will now have to file by 31st December. It's also important to keep your records up to date and make sure they tally with the official record. Companies House should be informed of changes as they happen rather than leaving it until the annual return.

Any amendments to your company's articles must be notified within 15 days. Failure to do so could result in a £200 fine and could leave you liable to a criminal offence.

The Act also makes it easier to set up a company and introduces new model forms of articles of association. You can continue with your present constitution if you wish, or you may prefer to switch to the new articles and treat it as an opportunity to review the administration of your company. All Companies House forms have been changed to include more information and guidance notes. You will now need to use these new forms, as anything submitted on old forms will be rejected.

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Tower can go ahead despite 'harming' Somerset House

The High Court has ruled that a 43-storey tower can go ahead even though it was generally accepted that it would harm the setting of Somerset House and surrounding conservation areas.

The development includes the provision of a community sports centre and swimming pool. The planning inspector had originally concluded that planning permission should be refused because the detrimental impact would be so great.

The Secretary of State for Communities and Local Government overturned that decision saying that the benefits of the

development would outweigh the harm. Westminster City Council and the Historic Buildings and Monuments Commission then applied to the High Court to quash the Secretary of State's decision to grant permission.

However, the Court held that the Secretary was entitled as a matter of planning judgment to decide that the project should be allowed to continue. When the planning inspector concluded that the development would intrude on Somerset House and have an

adverse impact on the local area, he was making a value judgment.

There was nothing to stop the Secretary of State from disagreeing with that value judgment. She had found that although there would be significant harm, any adverse impact would be outweighed by the benefits. She was

therefore entitled to decide that planning permission could be granted.

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Negligent consultants are liable for damages

A construction company is to receive compensation from a firm of consultant engineers who provided negligent advice on a building project.

The engineers had been asked to advise on the kind of foundations needed to support a proposed water treatment works.

After carrying out tests, they recommended that a conventional approach with some modifications would

be sufficient. The project went ahead on that basis but it then transpired that the recommended foundations would not meet the required standard and a more expensive approach would have to be taken. This led to considerable extra cost and delays.

The construction company sought damages on the basis that the advice given by the consultants had been negligent. The court held that the consultants had been in breach of

their duty to exercise reasonable skill in carrying out their work. They were ordered to pay compensation for the cost of carrying out the remedial work required to get the project back on track.

They were also ordered to pay more than a third of the construction company's legal costs.

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Late payments still a major headache despite some signs of improvement

Late payments are still causing a major headache for many businesses despite new research showing there's been a slight improvement in the time firms take to settle invoices.

Experian's Late Payment Index shows that, on average, UK businesses were paying their bills 21.54 days beyond terms in September compared with 23.6 days in August – an improvement of 2.06 days.

Larger businesses employing more than 501 employees produced the biggest monthly improvement, down 13.5% to 24.63 days beyond terms. This still leaves them a long way behind the September 2008 level of 15.44 days. Businesses employing between 26 and 50 employees also made improvements and are now paying 18.52 days late.

The improvements are certainly welcome but have to be put in the context that we were starting from a very low base and the late payment problem is still far worse than it was only a year ago.

It remains a major issue for many businesses, despite the slight



improvements of a day or two here and there. A recent survey carried out by the Forum of Private Business found that late payments continue to cause small businesses the most headaches, even more so than lack of sales and the decline in bank lending.

Businesses still need to keep a close watch on late payments and take action to protect themselves as quickly as possible. Make sure you get good legal advice first to ensure all the procedures are carried out correctly.

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Agencies fined £39m for boycott and price fixing

Six recruitment agencies have been fined a total of £39.27m for price fixing and for boycotting another company. The fines were imposed by the Office of Fair Trading after it concluded that the firms had engaged in anti-competitive conduct in breach of the Competition Act 1998.

They were found to have boycotted a company called Parc UK which had entered the industry in 2003 with the intention of acting as an intermediary between construction companies and recruitment agencies.

This put pressure on the profit margins of the recruitment firms. Instead of competing with Parc on price and quality of service, they formed a cartel and decided to boycott it by not supplying it with candidates wishing to work in construction.

They also reached an agreement to fix target fees for supplying workers to certain construction companies and intermediaries like Parc.

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Director must pay £17,500 for failing to meet legal duty

A director of an investment services company has been fined £17,500 for failing to meet his legal obligations after discovering that there were concerns about the business ethics of one of his employees.

The director had applied to the Financial Services Authority (FSA) last year for the employee to be confirmed as an approved person to act as a mortgage adviser. The director then became aware that the new adviser had been suspended by his previous employer because of concerns about his business methods. It was suspected that he had

inflated income figures in mortgage applications.

The director raised his concerns with the adviser who admitted that he had lied about his reasons for leaving his previous employment. However, the director failed to disclose this adverse information to the FSA.

The FSA said that this failure to disclose meant that the director had failed to exercise appropriate control over mortgage applications submitted by the adviser. This had created an unacceptable risk to customers because

it could lead to them being accepted for unsuitable mortgages.

The FSA statement said: "When he became aware of the later adverse information relating to the adviser he should have immediately informed the FSA. The fine indicates that the FSA takes a serious view of such failings and serves as a deterrent to directors of regulated firms from acting in a similar way."

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Emails did not add up to a 'binding contract'

The Court of Appeal has ruled that a series of emails between a university and a language school did not add up to a binding contract because they lacked the necessary detail about the services to be provided.

The school had been providing places at the university since 1998 for European students wishing to learn English. The arrangement was based on a series of standard annual contracts containing specific details of the services provided and acknowledging each side's intention to continue the relationship the following year.

However, the 2005 contract did not contain any mention of the 2006 season. During 2005, the university emailed the school to say there would be fewer rooms available in 2006 due to refurbishment.

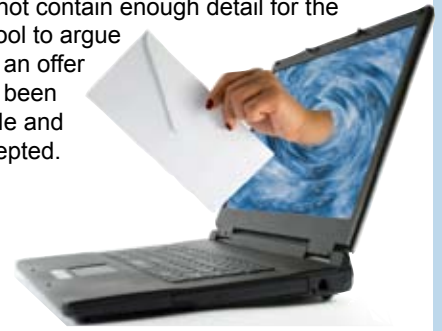
The school responded by saying the reduction was unacceptable and in breach of the contract. The university reiterated that places were limited and the school should make alternative arrangements.

In 2007, the university took action to recover money owed by the school for the 2005 season. The school accepted the money was owed but said it should be offset by the fact that the university had breached its contract in 2006.

The recorder ruled in favour of the school but that has now been overturned by the Court of Appeal. It held that the working relationship between the two sides had always been defined by annual contracts containing specific details.

There was no reference to 2006 in the previous year's contract and the

subsequent emails between the two did not contain enough detail for the school to argue that an offer had been made and accepted.



In addition, any acceptance of a contract offer would have to set out the terms on which the offer was being made. This had not happened in this case and the school had merely relied on what had happened in previous contracts.

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Make sure your lease means what you think it means

The need for landlords and tenants to ensure that leases are properly drawn up and mean what they intend them to mean was illustrated in a recent case before the Lands Tribunal.

It involved a property company and some of its tenants.

The tenants objected to some of the service charges made over a five-year period. One of the issues related to the way the landlord held on to overpayments from one year into the



next. The tenants submitted that unless the landlord operated the reserve fund along very specific lines laid down in the lease, then any overpayment made for

the year ending 31st December should be returned on 30th June the following year.

The company did not seek to justify the retention of the overpayments by reference to the lease but submitted that there was a mismatch between the dates for which service charge payments could be demanded and the date from which the service charge year ran. It meant that if the company "operated in strict accordance with the lease, it could run out of cash in the first quarter of any year".

In giving his decision, His Honour Judge Huskinson said that while the difficulties for the company arising from the poor drafting to the service charge provisions were unfortunate, they did not entitle it to disregard the terms of the lease.

He said: "It is accepted as a matter of fact that for the service charge year ended 31 December 2005 there was a total overpayment by the lessees of £21,019.

"Accordingly they (the tenants) are entitled to set off against the demand of service charge for the calendar year ended 31 December 2006 their respective percentage of this £21,019."

The company was successful on two other appeals relating to service charge payments covering the cost of cleaning carpets, and service charges which were dependant on the issuing of a surveyor's certificate.

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Company wins compensation from employee who set up rival business

A company which organises conferences has been awarded damages after a former employee used its database and confidential information to set up a rival business.

The court also granted an injunction to prevent the employee from passing off his new business as that of his former employers.

The employee had been appointed by the company as a conference organiser. He eventually left and set up a rival business. His former employers took legal action saying that he had misused confidential information.

The court held that there was no restrictive covenant in place so there was nothing to stop the employee creating a rival enterprise. Nor could he be prevented from using information which was not a trade secret and had not been obtained illegally. He was also

entitled to engage speakers who he had previously engaged on behalf of his former employers. However, he was wrong to have given the impression that his conferences were a follow-up to the ones he had previously organised as an employee.

He had tried to destroy his former employer's conferences and it was clear that he had tried to pass off his events as theirs. The court also found that he had taken confidential information including a large number of customer contacts from the database and sales information.

His former employers were therefore entitled to damages and a permanent injunction to prevent further passing off and misuse of confidential information.

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Car valeters set alarm bells ringing for employers

Firms who hire self-employed sub-contractors may need to re-evaluate some of their contracts following a landmark case in the Court of Appeal involving 20 car valeters.

The valeters were taken on as self-employed contractors by a company specialising in car cleaning services.



They had signed contracts which described them as self-employed sub-contractors. Later, after they had been working for the company for several years, they argued that they were effectively employees and so should be given the same rights as other employees, including holiday pay etc.

The company was able to point to its written contract but that wasn't enough to convince the Court of Appeal.

The Appeal Court judges said the issue was whether the written contract represented the true nature of the

working relationship, not only at the time it was drawn up, but later when that relationship may have evolved and changed. In this case it was clear that the valeters were not in business on their own and did not have any customers of their own.

They were expected to turn up for work to meet the requirements of the company's customers and the reality of their situation was that they were employees, despite what a contract drawn up several years ago might say.

The case obviously has serious implications for companies hiring contractors. It is, of course, important to have written contracts but it's also essential to ensure that they reflect the reality of the working relationship. Otherwise, employers may not be able to rely on them in the event of a dispute as they could be ruled invalid.

If that happens then sub-contractors could gain full employment rights including holiday pay, maternity entitlement, unfair dismissal protection

and so on. There may also be tax implications for the employer.

It would be wise for employers to review the contracts periodically, especially those drawn up several years ago, to ensure they reflect the current working practices and can still be relied upon in the event of a dispute.

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Improved rights for agency workers put back until 2011

The Government has announced that new employment rights for agency workers will not come into effect for another two years.

The EU Agency Workers Directive means that temporary employees in the UK become entitled to the same pay, holidays and general conditions as permanent staff after they have been working for a company for 12 weeks.

It was originally thought that the directive might come into force next April but now the date has been put back until 2011.

Director personally responsible for paying company debt

The director of a company in liquidation has been held to be personally responsible for some of its debts. The company had entered into a contract with a supplier to provide it with meat products. At first the supplier addressed its invoices to the company.

Later, however, the supplier suspected that the company was getting into financial difficulties and started addressing invoices personally to one of the directors. The company then went into liquidation and so the supplier took action against the director to recover money owed.

It submitted that it had told the director at the time that it was no longer prepared to invoice the company but would only

supply products on the basis that it invoiced him personally. It said it had confirmed its position both by letter and in a telephone conversation. The director claimed that the supplier had merely changed the name on the invoice to avoid confusion with another of its customers. He said he had never been told that he was being invoiced personally.

The court held that on the basis of the available evidence, the supplier's version of events was more likely to be correct. The director was therefore personally liable to pay the outstanding balance on the invoices.

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