Commercial Client ~ August 2023

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**General**

Did European Works Councils Survive Brexit? 'Yes' Rules the Court of Appeal

**Property**

Renewal of Commercial Leases – It Can All Come Down to Judicial Discretion

**Tax**

Does Aesthetic Treatment of Physical Appearance Amount to 'Medical Care'?

**Company**

Commercial Landlords Hit Hard in Gym Clubs' COVID-19 Restructuring

**Contract**

Authorised Push Payment Frauds – Bank Succeeds in Supreme Court Test

**Data Protection**

High Court Aids Professional Firm Targeted in Ransomware Cyberattack

**Em****ployment**

Retail Worker Sacked for Smoking at Work Succeeds in Unfair Dismissal Claim

**Health & Safety**

Theme Park Operator Succeeds in Roller Coaster Personal Injury Appeal

General

**Did European Works Councils Survive Brexit? 'Yes' Rules the Court of Appeal**

Under European law, substantial undertakings operating within the EU are required to set up European Works Councils (EWCs) to facilitate employee consultation – but did EWCs previously established by UK companies survive Brexit? In an important ruling, the Court of Appeal has answered that question with a resounding 'yes'.

EWCs are the means by which substantial European employers provide information to, and consult with, their employees on transnational issues. The obligation to set them up arose from EU directives that were transposed into English law by the Transnational Information and Consultation of Employees Regulations 1999 (TICER). TICER was, however, significantly amended on the UK's exit from the EU.

At the height of the COVID-19 pandemic, an airline which operates across Europe announced plans to reduce its staff numbers by up to 30 per cent. In that context, the airline's EWC lodged a complaint with the Central Arbitration Committee (CAC). The airline asserted that the EWC ceased to exist on 31 December 2020, the date on which the UK's departure from the EU was completed, and that the CAC thus had no jurisdiction to consider the matter. That argument, however, persuaded neither the CAC nor the Employment Appeal Tribunal (EAT).

Ruling on the airline's challenge to the EAT's ruling, the Court noted that the critical amendment to TICER on which the case hinged was poorly drafted and capable of more than one interpretation. It was undisputed that the creation of any new EWCs was precluded after Brexit day. The sole issue, therefore, was whether previously established EWCs continued to exist after that date.

In dismissing the appeal, the Court found that they did. Whilst acknowledging that its reading of the amendment would create practical difficulties – amongst other things, the airline would be obliged to establish two EWCs, one in Europe and the other in the UK – they were far from insuperable. Ruling that the CAC had jurisdiction to hear the EWC's complaint, the Court found that such an outcome did not conflict with the will of Parliament and had the advantage that the airline's UK employees would continue to be protected via the existing EWC.

**Partner Note**

*Easyjet PLC v Easyjet European Works Council [2023] EWCA Civ 756*

Property

**Renewal of Commercial Leases – It Can All Come Down to Judicial Discretion**

A commercial landlord may, for any number of reasons, be keen to see the back of a tenant. However, as one case showed, the question of whether a business tenancy should be renewed can in the end come down to an exercise of judicial discretion.

A company's tenancies of two sets of retail premises were protected under Part II of the Landlord and Tenant Act 1954. When the company sought new leases under Section 26 of the Act, the landlord issued counter-notices objecting to renewal. Following a hearing, however, a judge directed the landlord to grant the company fresh tenancies on terms to be decided by the court, if not agreed.

The judge found that, owing to the company's breach of its repairing obligations under the leases, the premises were in a substantial state of disrepair when the counter-notices were served. He also found that the company had persistently delayed in paying rent. He nevertheless went on to exercise his discretion in the company's favour.

He noted that the couple who were the guiding minds behind the company derived their livelihoods from the business, which served the local community. They had inherited the premises in poor condition and, albeit belatedly, they had personally borrowed a substantial sum and spent it on repairing them. He was confident that they would not permit the company to breach its leasehold obligations again.

In rejecting the landlord's challenge to that outcome, the High Court noted that the judge had criticised aspects of the couple's behaviour as unsatisfactory or wrong. He did not, however, find that they had been dishonest, nor was he obliged to do so on the evidence. In a careful and detailed ruling, the judge was entitled to exercise his discretion in the way he did. The landlord's challenge to an order requiring it to pay 75 per cent of the company's legal costs was also dismissed.

We can advise you on any matters relating to commercial property and landlord and tenant disputes. Contact **<<CONTACT DETAILS>>** for guidance.

**Partner Note**

*Gill v Lees News Ltd [2023] EWHC 403 (Ch)*

Tax

**Does Aesthetic Treatment of Physical Appearance Amount to 'Medical Care'?**

Aesthetic treatments can transform clients' psychological wellbeing, boosting their self-esteem and confidence in their appearance – but do they amount to 'medical care' for VAT purposes? The First-tier Tribunal (FTT) addressed that issue in a guideline case.

The case concerned a private clinic offering a wide range of aesthetic, skincare and wellness treatments. It contended that many of its services consisted of the provision of medical care by a registered medical practitioner and thus qualified for exemption from VAT. HM Revenue and Customs, however, took a contrary view.

Ruling on the matter, the FTT noted that the clinic's sole director is a highly qualified, skilled and ethical medical professional, registered with the General Medical Council. Its clients include vulnerable people who have suffered disfiguring physical consequences of medical conditions, including cancer. Many are depressed or anxious about their physical appearance.

In a VAT context, however, the FTT noted that medical care is defined as diagnosing, treating and, in so far as possible, curing diseases or health disorders. In dismissing the clinic's appeal, it had no hesitation in finding that its relevant services did not fall within that definition and were thus subject to VAT at the standard rate.

The relevant services, whilst delivered with care and professionalism, were distinct from those provided by a GP or other health professional. Their general purpose was to help people feel better about their appearance. Whilst assisting clients to achieve such goals may well improve their confidence and self-esteem, that did not amount to treating their mental health status. It was, the FTT found, a misuse of language to describe the relevant services as healthcare falling within the VAT exemption.

The FTT acknowledged that clients who are discontented with some aspect of their appearance may leave the clinic in a happier state of mind. That, however, did not mean that their treatment was medical or had a therapeutic aim. Clients went to the clinic intending to have a cosmetic procedure and had no expectation that they would be seen by a psychiatrist, counsellor or therapist.

Our specialist team can assist you with all types of business tax issues. Contact **<<CONTACT DETAILS>>** for advice.

**Partner Note**

*Illuminate Skin Clinics Ltd v The Commissioners for Her Majesty's Revenue and Customs [2023] UKFTT 547 (TC)*

Company

**Commercial Landlords Hit Hard in Gym Clubs' COVID-19 Restructuring**

The COVID-19 pandemic has prompted the restructuring of numerous businesses and that can mean commercial landlords having to take severe financial haircuts. That was certainly so in the case of a once successful chain of gyms whose business was devastated by the onset of the virus.

The chain, which relied heavily on office workers to generate membership fees, had contracted dramatically in the face of the pandemic and the changes in lifestyle that it engendered. It had been kept afloat by substantial loans from its main shareholder, who was its only secured creditor. She was not, however, prepared to continue funding the business in the absence of a court-sanctioned restructuring plan.

The plan put forward by the company was a complex one. However, if it were put into effect, the majority of commercial landlords from whom the company rented premises would be forced to accept a reduced rent for a three-year period or, in some cases, no rent at all.

Under judicial supervision, nine meetings of various classes of creditors were held with a view to obtaining approval for the plan. Four of the classes of creditors voted in favour of the proposal, but five – entirely made up of landlords – voted against it by substantial margins.

The company nevertheless asked the High Court to sanction the plan under Section 901F of the Companies Act 2006. Subject to certain conditions, Section 901G of the Act – the so-called 'cram down' provision – enables judges to sanction a restructuring plan even where one or more classes of creditors have not voted in favour of it by the 75 per cent majority usually required. The company's application was, however, opposed by five dissenting landlords.

Ruling on the matter, the Court expressed the view that the company should have made more effort to engage with the landlords. It noted that, when businesses encounter financial difficulties, it is far more beneficial to seek to cooperate and negotiate with creditors rather than to assume that there will be hostility and opposition.

In nevertheless exercising its discretion to sanction the plan, the Court found that the most likely alternative would be to place the company in administration with a view to a swift pre-pack sale of part of its business and assets. If that course were taken, the dissenting landlords' estimated recoveries would be substantially smaller than those they would receive if the plan were put into effect.

Given that four of the meetings had approved the plan by the requisite 75 per cent majority, and that the dissenting landlords would be no worse off if it were given effect, the conditions attached to Section 901G were satisfied.

For advice on any aspect of company law, contact us.

**Partner Note**

*In the Matter of Fitness First Clubs Ltd [2023] EWHC 1699 (Ch)*

Contract

**Authorised Push Payment Frauds – Bank Succeeds in Supreme Court Test**

Banks are contractually bound to follow their clients' instructions and are not obliged to concern themselves with the wisdom or risk of their payment decisions. The point was made in a Supreme Court decision of great importance to the financial services industry.

A woman and her husband fell victim to a so-called 'authorised push payment' fraud. They were deceived by criminals into instructing their bank to transfer £700,000 in two payments from the woman's account to accounts in the United Arab Emirates. The bank carried out their instructions and the money was lost.

The woman subsequently sued the bank, asserting that it was responsible for her loss. Seeking reimbursement of the money, she contended that the bank had reasonable grounds for believing that she was being defrauded and therefore owed her a duty not to carry out her payment instructions.

Her claim was initially struck out by a judge on the basis that it had no real prospect of success. However, the Court of Appeal subsequently reinstated it after accepting that, in principle, a bank owes a duty to its clients of the kind that she alleged. The bank challenged the latter decision before the Supreme Court.

The standard terms of business on which the bank provides services to its clients did not contain any express term to the effect that it would decline their payment instructions if it had reasonable grounds for believing that they had been tricked into authorising a payment. However, the woman argued that, as a matter of principle, such a term should be implied into her contract with the bank.

Dismissing her appeal, however, the Court rejected that argument as inconsistent with the ordinary obligations owed by a bank to its clients. Banks act as agents for their clients when making authorised payments. Provided that a client's account is in credit, banks owe a strict contractual duty, unless otherwise agreed, promptly to execute the client's instructions. They are under no obligation to inquire as to the wisdom of, or risks involved in, the client's payment decisions.

The Court noted that each of the two payments was made after the couple visited a branch of the bank and gave instructions to transfer the money in person. It was conceded that, on the first occasion, the husband told a cashier, falsely, that he had had previous dealings with the company to whom the money was being sent. On each occasion, a representative of the bank telephoned the woman seeking confirmation of the transfer request and that she wished to proceed with it.

She each time provided such confirmation and it was thus beyond dispute that she unequivocally authorised the payments and instructed the bank to make them. In those circumstances it was impossible to say that the bank owed her a duty not to comply with her instructions.

The Court noted that the Financial Services and Markets Act 2023 has, since the woman sustained her loss, provided for a mandatory reimbursement scheme in respect of certain types of bank fraud. It does not, however, extend to international payments and thus would not have assisted her. However, the Court left it open to her to pursue a claim that the bank breached its duty in not acting promptly to try to recall the payments after being notified of the fraud.

Our expert lawyers can advise you on any contractual matter. Please contact **<<CONTACT DETAILS>>**.

**Partner Note**

*Philipp v Barclays Bank UK PLC [2023] UKSC 25*

Data Protection

**High Court Aids Professional Firm Targeted in Ransomware Cyberattack**

For businesses dealing with confidential client data, malware attacks by those intent on blackmail can represent an existential disaster. However, as a High Court ruling showed, there is a great deal that the law can do to help them.

A firm providing accounting, tax and financial advice to its clients was the subject of a ransomware cyberattack. Hackers compromised its IT system and obtained a large volume of its confidential electronic documents. They threatened to disclose or sell the information, including on the dark web, unless a ransom was paid.

After the firm launched proceedings, an interim injunction was swiftly granted. The hackers – who had hidden their identities – were restrained from using or disclosing the information. They were ordered to delete or deliver up hacked documents to the firm, together with a signed witness statement. At a later hearing, the firm sought default judgment against the hackers and to make the injunction permanent.

Granting the orders sought, the Court found that the firm had taken all reasonable steps to bring the interim injunction to the hackers’ attention. However, the hackers had entirely failed to engage in the proceedings. They had put in no defence to the firm’s breach of confidence claim and were already in breach of the interim order, having done nothing to comply with its requirements.

The most likely reason for their failure to respond to the proceedings was that they had no intention of identifying themselves. The Court was satisfied that there was a high risk that they would persist in their course of conduct unless restrained by a permanent injunction, breach of which would be a contempt of court punishable by up to two years’ imprisonment or an unlimited fine. Although it remained open to the hackers to apply to discharge or vary the injunction, they were ordered to pay the legal costs of the proceedings.

**Partner Note**

*Armstrong Watson LLP v Person(s) Unknown [2023] EWHC 1761 (KB)*

Employment

**Retail Worker Sacked for Smoking at Work Succeeds in Unfair Dismissal Claim**

Even where employees have committed gross misconduct, dismissing them may be unreasonable. An Employment Tribunal (ET) made that point in the case of a store supervisor who was sacked for smoking on company premises.

The woman worked for a national retail chain which took a zero-tolerance approach to staff use of tobacco products on any part of its property. There was a clear policy in place that categorised such use, whether inside or outside stores, as gross misconduct.

Following a disciplinary process, she was dismissed for the principal reason that she had routinely taken smoking breaks in the 'goods inwards' yard of the store where she worked. She subsequently launched ET proceedings, alleging that her dismissal was unfair.

Ruling on the matter, the ET found that her misconduct was indeed gross. The chain was entitled to take a tough approach to smoking on its premises and, even if she was unaware of the policy's full rigour, she ought to have known better. Neither the investigation nor the disciplinary process leading up to her dismissal could be characterised as unreasonable.

In nevertheless upholding her complaint, the ET noted that she had worked for the chain for over 16 years and had an otherwise unblemished disciplinary record. The evidence suggested that there was at the very least a culture of smoking in the yard to which the store's manager and assistant manager had turned a blind eye.

The ET noted that it could be said that, as a veteran employee in a supervisory role, she should have been fully aware of the strict no smoking policy and complied with it. Given the absence of any blot on her long service with the chain, however, she might reasonably have expected to be given some benefit of the doubt.

Overall, the ET concluded that her dismissal fell outside the range of reasonable responses open to a reasonable employer. The amount of her compensation would, if not agreed, be assessed at a further hearing. The ET acknowledged that she had contributed to her dismissal by her own conduct and ruled that her award should be reduced by 50 per cent.

Contact **<<CONTACT DETAILS>>** for advice on any employment law matter, including unfair dismissal.

**Partner Note**

*Williams v Wilko Ltd [2023] UKET 1600899/2022*

Health & Safety

**Theme Park Operator Succeeds in Roller Coaster Personal Injury Appeal**

For businesses found liable in personal injury proceedings, the reputational damage can be every bit as serious as the financial consequences. As a case concerning a theme park operator showed, however, they are entitled to have their arguments carefully considered and to a clear judicial explanation as to why they have lost.

After a woman went to the theme park with her young son, they embarked on a roller coaster ride which was not for the faint-hearted. She said that their carriage reached excessive speed, travelling out of control and throwing her from side to side before coming to a sudden halt. She and her son were trapped at the top of the ride for an extended period, on a very hot day, before they were rescued.

In seeking compensation from the operator, she alleged that the incident occurred due to a fault in the ride which had caused her serious physical and psychological injuries. In its defence to the claim, the operator asserted that the ride was safe to use and that it had done all that was reasonably practicable to ensure that its guests came to no harm. Following a one-and-a-half-day trial, however, a judge found the operator liable and ordered it to pay the woman substantial damages.

Upholding the operator's challenge to that outcome, the High Court noted that the judge gave her decision orally just after each side had made their final arguments. That was a common occurrence. However, given the numerous issues raised during the case, some of them technical, her decision to give an immediate ruling, without taking any time for reflection, was challenging and ambitious. When transcribed, her judgment ran to just over three pages.

The case was not straightforward and it was apparent that the judge was not well prepared to deliver her decision. She failed to engage adequately with the operator's arguments and it was not possible to discern from her ruling the basis on which she rejected key aspects of its case. Overall, her judgment was not coherent and did not adequately explain why the operator's defence failed and the woman's claim succeeded. The Court directed a retrial of the claim.

**Partner Note**

*Merlin Entertainments PLC. v Idziak [2023] EWHC 1597 (KB)*

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