Commercial Client ~ September 2023

**Commercial Client Titles ~ September 2023**

**General**

Business Interruption Insurance and COVID-19 – the Latest Legal Chapter

**Property**

City Council Retains 'Degree of Control' Over Tower Blocks Development

**Commercial Litigation**

High Court Upholds £6.5 Million Housing Maintenance Adjudication Award

**Company**

Oil Major Fends Off Shareholder Bid to Reform its Climate Change Strategy

**Contract**

Lost a Key Employee? This is How to Mount a Damage Limitation Exercise

**Data Protection**

Local Authority Pays the Price for Privacy and Data Protection Breaches

**Insolvency**

Insolvency of Funeral Plans Provider Left Administrators Facing a Conundrum

**Em****ployment**

A Business is Not an Autocracy – ET Fires Warning Shot

General

**Business Interruption Insurance and COVID-19 – the Latest Legal Chapter**

Did business interruption insurance cover financial losses arising from the COVID-19 lockdowns? Few questions have been the subject of more litigation in recent times but, as a High Court ruling showed, there is regrettably no standard answer.

The case concerned a restaurant which, like thousands of others, was required to close its doors during lockdowns. It launched proceedings after its insurer took the view that its losses were not covered by its business interruption policy.

Ruling on the matter, the Court noted that the policy included a term which extended cover to business interruption or interference caused by damage arising from an outbreak of a notifiable contagious human infection or disease manifested by any person on the restaurant's premises or within a 25-mile radius.

Finding in favour of the insurer, the Court noted that the phrase 'caused by damage' was crucial. The ordinary and unambiguous meaning of those words was that no cover was afforded in the absence of 'damage' to the premises. The word, which appeared in bold typeface, was defined in the policy as physical loss, physical damage or physical destruction.

The Court noted that a reasonable owner of a small to medium-sized business would have read the policy and understood the meaning of the word 'damage'. There were at the time significantly more comprehensive insurance products on the market that provided business interruption cover that was not contingent on physical damage.

The Court's reading of the relevant term did not altogether negate the cover it provided, for which no additional premium was paid. The manifestation of a notifiable infectious disease on the premises would clearly be capable of causing physical damage that would interfere with the business.

The restaurant had taken expert advice from an insurance broker and there was no reason to depart from the clear and workable wording of the policy that it obtained. To do so would require the Court to rewrite elements of the policy in a manner contrary to the parties' express agreement and the established approach to construing the meaning of contractual wording.

**Partner Note**

*Bellini (N/E) Limited v Brit UW Ltd [2023] EWHC 1545 (Comm)*

Property

**City Council Retains 'Degree of Control' Over Tower Blocks Development**

To what extent is a local authority entitled to use its powers as a private landlord to promote its strategic objectives as a public planning authority? The Upper Tribunal (UT) pondered that issue in a case concerning the proposed demolition of two warehouses to make way for a major residential development.

The land on which the redundant warehouses stood was owned by a city council and was held by a corporate tenant under a lease that had about 60 years to run. Both landlord and tenant were anxious to see the site redeveloped as part of a wider regeneration project. The council had approved in principle the company's planning application to remove the warehouses and construct in their place two 56-storey tower blocks, comprising over 1,000 flats.

To that end, the council was willing to grant the tenant a fresh, 250-year lease. However, the tenant was dissatisfied with the proposed terms of the new lease, which would, amongst other things, include provisions requiring commencement and completion of the development by specified dates. The tenant therefore wished to press ahead with the development under the terms of its existing lease.

Standing in the tenant's path, however, were numerous restrictive covenants in the lease which prevented the development from proceeding without the consent of the council, as landlord. The tenant applied to the UT under Section 84 of the Law of Property Act 1925 to modify 11 of them. The principal focus of the case, however, was a covenant forbidding use of buildings on the site for anything other than light industrial, warehousing or repository purposes.

Ruling on the matter, the UT found that the proposed development represented a reasonable use of the land. As planning authority, the council had enthusiastically encouraged the project. Given the neighbourhood's ongoing transformation from a light industrial to a residential area, it could readily be concluded that the use of buildings on the site as warehouses had become obsolete.

In rejecting the tenant's application, however, the UT noted that it did not necessarily follow that the covenant was itself obsolete. Its purpose was not to fossilise the land's light industrial use but to give the council a degree of control over any future change in its permitted use. It had indicated its willingness to grant the required consent for residential use, but only on terms that it viewed as necessary to ensure the project's viability and timely delivery.

The council's motives for relying on the covenant were not merely pecuniary or to boost its bargaining position. In the public interest, it was entitled to insist on provisions in any new lease that would ensure that the project was realised promptly and not left incomplete. In maintaining its significant degree of control over development of the site, the covenant continued to provide practical benefits of substantial advantage to the council.

The UT noted that the law should be slow to interfere with the judgment of a local authority which seeks to use its private rights as a landlord to promote its strategic objectives as a public planning authority. To modify the covenant in the manner proposed would inflict injury on the council's interests. The UT had no doubt that development of the site would ultimately prove capable of being achieved through sensible commercial negotiation.

We can advise you on all aspects of planning law. Contact **<<CONTACT DETAILS>>** for advice.

**Partner Note**

*Great Jackson Street Estates Ltd v Manchester City Council [2023] UKUT 189 (LC)*

Commercial Litigation

**High Court Upholds £6.5 Million Housing Maintenance Adjudication Award**

Contract adjudications can involve analysis of vast amounts of detailed evidence, but can an award be challenged on the basis that one side or the other was not afforded enough time to prepare its case? The High Court pondered that question in a guideline ruling.

The case concerned a contract by which a social housing provider engaged a property services company to carry out repair and maintenance work on a large part of its housing stock. The company's work generally consisted of a high volume of small jobs.

After the company purported to terminate the contract, the provider referred the matter to an adjudicator. He found that the termination was invalid and that the company had acted in repudiatory breach of the contract. Following a second adjudication, the company was directed to pay the provider compensation in excess of £6.5 million, plus interest.

In the latter proceedings, the provider presented the adjudicator with voluminous evidence, including a lengthy expert report and hundreds of megabytes of data comprised in thousands of files. The company asserted that it was afforded insufficient time – 13 working days – in which to digest such a vast quantity of evidence and prepare an effective response to the provider's case. That, it contended, amounted to a breach of natural justice that rendered the award unenforceable.

In rejecting the company's challenge to the award, however, the Court noted the general rule that, in the interest of finality, adjudicators' decisions must be enforced, even if they contain errors of procedure, fact or law. Judges are very reticent to do otherwise. Both complexity and restraint of time to respond are inherent in many adjudication processes and are, in themselves, no bar to enforcement.

Despite the sheer volume of evidence placed before the adjudicator, the issues that he had to decide were not unusually complex. He engaged in a legitimate process of sampling and spot checking. The company was able to properly and thoroughly engage in the substance of the matter and in fact enjoyed relatively significant success in undermining aspects of the provider's claim. The Court directed enforcement of the award by way of summary judgment.

Our specialist team can assist you with all aspects of commercial litigation. Contact **<<CONTACT DETAILS>>** for advice.

**Partner Note**

*Home Group Ltd v MPS Housing Ltd [2023] EWHC 1946 (TCC)*

Company

**Oil Major Fends Off Shareholder Bid to Reform its Climate Change Strategy**

So-called 'activist' shareholders have a perfect right to seek to influence the strategy of companies in which they hold a stake. In a guideline ruling, however, the High Court shut the door on an environmental charity's novel attempt to make the board of a multinational oil company reform its approach to climate change risks.

As owner of a small number of shares in the company, the charity made use of its right under the Companies Act 2006 to lodge a derivative claim on behalf of the company against its board. It sought declaratory relief against the directors and a mandatory injunction requiring them to implement a strategy to manage climate change risks in compliance with their statutory obligations.

In refusing permission for the charity to proceed further with its claim, however, the Court found that it had failed to establish a reasonably arguable – or prima facie – case that the directors were in breach of their duties in the respects alleged or that their current approach fell outside the range of reasonable responses to climate change risks and would cause harm to the company's members.

The law respects the autonomy of directors in making commercial decisions and the charity was, the Court found, seeking to impose absolute duties on the board which cut across its general duty to have regard to many competing factors in deciding how best to promote the company's success for the benefit of all its members. The proper balancing of such factors was a classic management decision with which the Court was ill equipped to interfere.

The Court acknowledged that the charity's views in respect of the company's climate change strategy were genuinely held. It espoused a genuine belief that it was acting in the best interests of all the company's members and with the aim of protecting its long-term value. Given its single-minded focus on the imposition of its views as to the right strategy for dealing with climate change risks, however, the Court inferred that it also had a collateral motive in seeking to pursue its case. The Court gave considerable weight to voting statistics which indicated that the charity's case enjoyed only minority shareholder support.

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

**Partner Note**

*ClientEarth v Shell PLC and Others [2023] EWHC 2182 (Ch)*

Contract

**Lost a Key Employee? This is How to Mount a Damage Limitation Exercise**

The shock departure of a key employee is a troubling moment for any business. As a High Court ruling showed, however, effective steps can often be taken to prevent them trailing confidential information and important clients in their wake.

A company that specialised in finding and booking motivational or keynote speakers for corporate events launched proceedings following the resignation of one of its directors. Amongst other things, it alleged that he had, whilst still in its employ, been instrumental in preparing to establish a rival business with a longstanding friend.

The allegations were disputed by the director, his friend and the rival business, but their statement of case was struck out after they failed to comply with a raft of court orders. Judgment having been entered against them on liability issues, the factual basis of the company's claim was taken as having been established.

The Court noted that the director was subject to a panoply of restrictive covenants in his employment contract which were designed, amongst other things, to protect the company's confidential information and to restrain him from soliciting its established clients or involving himself in competing businesses for nine months following his departure.

Ruling on the matter, the Court concluded that the company's loss of one particularly successful speaker was caused by breaches of contract on the part of the director and his friend. Whilst the latter had no written contract with the company, he had worked for it as a sub-agent in circumstances that the company argued gave rise to an expectation of good faith and loyalty. On the basis of the company's pleaded case, breaches of duty on the part of the rival business were also established.

The Court issued an injunction with a view to restraining any further breaches of the company's rights. It further awarded the company £220,453 in damages and interest, including £50,000 in respect of interference with its rights in its confidential database of clients and speakers.

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

**Partner Note**

*Celebrity Speakers Ltd v Daniel and Others [2023] EWHC 2158 (KB)*

Data Protection

**Local Authority Pays the Price for Privacy and Data Protection Breaches**

For good administrative reasons, public authorities hold a mass of personal data concerning almost every UK resident. However, as a High Court ruling showed, judges are always alert to the danger of such data being misused.

In the course of possession proceedings, a local authority accessed and shared data concerning an individual. The information included the account number and sort codes of several of the man's bank accounts and mortgage accounts, and his mortgage balances. It provided a comprehensive snapshot of his financial affairs.

After he launched proceedings, the Court found that the data was private and that he had a reasonable expectation that it would remain so. The council had accessed the information without lawful authority and the scale of its misuse was illustrated by the fact that some of it also related to his son.

The disproportionate access to his private data went well beyond information directly related to his letting of the property, the subject of the possession claim. It had been shared within the council's organisation and with the County Court that heard the claim.

The council admitted that, in delaying its response to a data subject access request lodged by the man, it had breached the General Data Protection Regulation (GDPR). The delay extended to almost four years and the High Court found it likely that some personal data belonging to him which was, or had been, held by the council had not been disclosed to him.

The council's evidence was that his legal file had been destroyed or could not be located. Whilst it remained unclear exactly what had happened to it, the Court found that there was, in breach of the GDPR, a clear failure on the council's part to provide adequate security for his personal data.

In finding that the council's more recent conduct of the matter justified an award of aggravated damages, the Court noted that the case had revealed a lack of respect for legal requirements related to privacy and data protection. The man, who had suffered distress as a result, was awarded £6,000 in damages.

Says **<<CONTACT DETAILS>>**, "This example concerns a local authority, but it could just as easily apply to the commercial sector. To avoid falling foul of data protection laws, contact our specialist lawyers for advice."

**Partner Note**

*Bekoe v The Mayor and Burgesses of the London Borough of Islington [2023] EWHC 1668 (KB)*

Insolvency

**Insolvency of Funeral Plans Provider Left Administrators Facing a Conundrum**

Some corporate insolvencies can have distressing results for ordinary members of the public and require particularly sensitive handling. That was certainly so in the case of a funeral plans provider which had about 46,000 plan holders, many of them elderly or vulnerable, when it fell into administration.

Plan holders purchased their plans, which were meant to pay for their funerals, either by way of lump sums or by deposits and instalments. Their money was held in a trust fund, kept separate from the provider. On their appointment, however, administrators found a significant shortfall in that fund. Current plan holders were expected to receive only 11-15p for every pound they had invested.

At the height of the COVID-19 pandemic, the administrators were faced with a binary conundrum: either to leave plan holders and their loved ones to fend for themselves pending distribution of the fund or to attempt to provide interim assistance. In taking the latter course, they entered into an agreement with a leading funerals company.

After initially providing free funerals for plan holders, the company laid on funerals for a further six months (the interim period) on a non-profit basis. Altogether, it provided over 400 funerals under the agreement. Whether or not it acted entirely altruistically, it stepped in when others in the funeral industry did not, thereby relieving the distress of many families who lost loved ones during the interim period.

The administrators launched proceedings seeking High Court approval of payments due to the company under the agreement. Those payments could only be made at the expense of living plan holders in that their distributions from the fund would be reduced by about £13 each.

The administrators argued that the agreement was entered into for the benefit of all plan holders in that it effectively extended their cover during the interim period. It represented a commercially sensitive and prudent step, driven by the need to continue to hold funerals following the provider's insolvency.

In granting its blessing to the payments, the Court found that the administrators properly exercised their power under the terms of the trust to use money from the fund to pay for funerals, rather than distributing it to plan holders. The agreement relieved the inevitable uncertainty felt by all plan holders and the administrators' reasons for entering into it were overwhelming.

It is vital to seek expert legal advice as early as possible regarding insolvency matters. Contact **<<CONTACT DETAILS>>** for assistance.

**Partner Note**

*Ailyan and Another (In their Capacity as Joint Administrators of Safe Hands Plans Ltd) [2023] EWHC 2025 (Ch)*

Employment

**A Business is Not an Autocracy – ET Fires Warning Shot**

Old-school small business proprietors sadly often place themselves at grave financial and reputational risk by taking an autocratic approach to management. An Employment Tribunal (ET) powerfully made that point in awarding substantial compensation to an unfairly sacked holiday park manager.

The manager had a strong bond with the owner of the park, where he had worked for 26 years. After he suffered a major stroke, the owner – who was himself in very poor health – took steps to cater for his difficulties and generously supported him so that he could work at a reduced pace. However, their relationship later took a dramatic turn for the worse and the owner summarily dismissed him after making numerous allegations of misconduct against him.

Upholding his unfair dismissal claim, the ET noted that some of those involved in the case had referred to the owner as 'old school'. The description of his proprietorial and autocratic approach to the park's management was borne out by the tone of his communications, including the dismissal letter. They conveyed the impression that employee consultation and fair process were, in the context of the case, of no concern to him.

The dismissal took place against the background of a falling out between the owner and his son, whose involvement in the business had acrimoniously ceased. The owner took the view that the manager's loyalties were to his son, rather than to him. On that basis, the ET found that the principal reason for the manager's dismissal was not any misconduct on his part but the owner's desire to make a fresh start in the business.

The ET ruled that the employer's failure to follow the basic requirements of the Acas Code of Practice on disciplinary and grievance procedures justified a 25 per cent uplift in the manager's basic compensatory award. Amongst other things, he was not informed of the disciplinary charges against him prior to his dismissal and was afforded no opportunity to put his case. Even for a small business, the investigation into his alleged wrongdoing was unreasonable.

On the balance of probabilities, the ET found that the manager had disregarded the owner's instruction not to let chalets to a particular tenant. Although he did so in the belief that he was acting in the best interests of the business, he thereby made a 25 per cent contribution to his dismissal. His wrongful dismissal claim was also upheld and he was awarded more than £50,000 in compensation.

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

**Partner Note**

*Tweedale v Tithe Barn Club (Aldwick) Ltd [2023] UKET 1402150/2022*

These articles are provided for general interest and information only. They do not constitute legal advice. Whilst every effort is made to ensure that the content accurately reflects the law in England as at the date of its transmission, no liability is accepted for any loss or damage arising from any act or omission resulting from any information contained herein.