MOON BEEVER
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NEWSLETTER SPRING 2018

Frances Coulson wins Woman of the Year award

Frances Coulson, Senior Partner and Head of Litigation & Insolvency at Moon Beever solicitors, has been named Woman of the Year at the inaugural Women In Credit Awards 2018. Women in Credit was launched by Credit Strategy to empower, connect, support and uncover achievement among women in the profession.

The awards ceremony, hosted by Olympic hockey star Crista Cullen, was held during the Credit 500 Gala. This was the culmination of Credit Week 2018 which saw credit professionals from many sectors including banking and finance, telecoms, charities, government, as well as professional services firms from across Europe gather in London for conferences and meetings.

The independently judged "Woman of the Year" category had a strong list of finalists. Frances Coulson was particularly praised for her leadership as well as her anti-fraud work.

"I am pleased to have been awarded Woman of the Year in such spectacularly impressive company," said Frances. continuing "Harriet Beecher Stowe said that women were the real architects of society. That is more true now than ever and women can stand shoulder to shoulder with men in leading business and ensuring fair chances for all"

Parents of Sperm Donor Granted Contact with Their Biological Grandchild

Children become more inquisitive as they grow up and it is important that they have a real understanding of both their maternal and paternal lineage. The Court of Appeal made that point in finding that a sperm donor's parents had rightly been granted contact rights in respect of their biological grandson.

The four-year-old boy was born to a female gay couple and there was no dispute that they alone were his legal parents. One of them had got to know the sperm donor at work but, regrettably, no specific agreement was reached prior to the boy's birth as to the part the donor would play in his life.

Whilst relations between the couple and the donor remained amicable, he saw the boy regularly. That changed, however, after the couple split up and embarked on new relationships. They continued to co-parent the boy and began to view the donor's presence in his life as burdensome and troubling.

The donor had no contact with the boy for 18 months and, even when contact resumed, his parents - who had also got to know and love the youngster - were excluded. After the donor launched proceedings, a family judge ordered the couple to let their son see him seven times a year, for two hours at a time. Controversially, his grandparents were also granted the right to have contact with him twice a year.

The judge found that the boy had established a lifelong link with his paternal family and that contact with his natural father and grandparents was crucial to sustaining his sense of identity. The boy would benefit from meeting with biological relatives who wished him well and the judge noted the importance of him having an understanding of the big picture of his birth story.

In dismissing the couple's challenge to that decision, the Court could detect no flaw in the judge's admirable ruling. In expressing the hope that the powerful emotions surrounding the case would subside in time, the Court noted that the boy was much loved by all the adults concerned. They had cooperated during the boy's early life and recapturing something of that spirit would ensure his welfare.

Re G (A Child)

Auto-Enrolment – Increase in Minimum Required Contribution Levels

Employers are reminded that the minimum required contribution levels to auto-enrolment pension schemes or qualifying workplace pension schemes (based on a worker's "qualifying earnings") increase from 6 April 2018.

From that date, the employer minimum contribution rate will be 2 per cent and the staff minimum contribution rate will be 3 per cent.

There will be a further increase from 6 April 2019, when the employer minimum contribution rate will rise to 3 per cent and the staff minimum contribution rate will rise to 5 per cent.

Failure to comply will mean that the pension scheme will no longer be a qualifying scheme for existing members and cannot be used for automatic enrolment.

For further information and detailed guidance, contact our office on 020 400 7770 or info@moonbeever.com.

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Professional Gambling is Not Self-Employment – Guideline Ruling

Professional gambling, no matter how sophisticated, organised or successful, is not by itself an activity amounting to self-employment. The Court of Appeal so ruled in a guideline decision in the context of a child maintenance case.

The matter concerned a father who had, over a 25-year period, made his entire, not inconsiderable, income from gambling. He played cards professionally and bet on boxing and horses with consistent success. The Child Support Agency (CSA) took the view that his winnings were earnings from gainful employment and that they should thus be taken into account when assessing the amount of maintenance that he was required to pay the mother of his child. His challenge to that decision was rejected by both the First-tier and Upper Tribunals.

In allowing his appeal, however, the Court noted that the man carried out no other income-generating activity, linked to his gambling, that could itself be characterised as a trade or other form of self-employment. On the basis of established authority, mere gambling, without more, could never amount to self-employment.

He had not been a self-employed earner at any relevant time and his winnings were thus not earnings from gainful employment, within the meaning of the Child Support (Maintenance and Special Cases) Regulations 1992. The CSA had wrongly taken his winnings into account and the matter was remitted to the Secretary of State for Work and Pensions for the amount of maintenance payable to be reassessed in the light of the Court's decision.

French v The Secretary of State for Work and Pensions & Anr

Woman Ordered to Undergo DNA Test in Inheritance Dispute – Unique Ruling

In an unprecedented decision, a woman has been ordered by a judge to submit to DNA testing in order to prove whether she is the natural daughter of a man who died without making a will.

There was no dispute that the woman's mother was married to the deceased when she was born and that he was named as her father on her birth certificate. Prior to the couple's divorce, they had brought her up as the child of both of them. Following his death, however, the other child of the family claimed that the woman was not his biological offspring and was thus not entitled to inherit any part of his estate.

The woman had refused to undergo DNA testing and argued that performing such a procedure without her consent would amount to an invasion of her bodily integrity and breach her right to respect for her family life and privacy. The test could not in any event provide definitive proof that she and the other child were full sisters.

In ordering her to undergo the test, however, the judge noted evidence that she had told a number of persons during her life that she was not the biological child of the deceased. The proposed saliva test would be quick, painless and risk free and would be much less of a physical invasion than a blood test.

Despite acknowledging that his decision was without precedent, the judge found that the court had inherent jurisdiction to direct that a party to proceedings give a saliva sample by way of mouth swab for the purpose of establishing paternity in a case where paternity is in issue.

The judge noted that the woman might be upset if the test proved that she was not the child of the deceased, but that was outweighed by the benefits of uncovering the truth. If science could be used as a means of resolving the litigation, then it should be. There was no suggestion that the woman would be forced to undergo the test but, if she persisted in her refusal, that would be held against her in the proceedings. She was given 28 days in which to arrange a saliva test by a specialist in forensic genetics.

Nield-Moir v Freeman

Harassment is More than Just Annoyance

Ease of digital communication has led to an increased threat of harassment. As one High Court case shows, however, the human right to freedom of expression is always at the forefront of judges'; minds when dealing with such complaints.

In the midst of a bitter family dispute, a businessman launched proceedings against his brother on the basis that he had sent him and others more than 70 emails that cast aspersions on his honesty and character. It was alleged that the emails amounted to a course of conduct that fitted the definition of harassment.

The brother admitted that some of the emails were somewhat over-zealous and that his behaviour had been less than exemplary. However, it had not been suggested that he did not hold a genuine belief that his allegations against the businessman were true. He argued that the proceedings, whilst dressed up as a harassment claim, were really about protecting the businessman's reputation.

In refusing to grant the businessman a pre-trial injunction, the High Court found that he had not established that he was likely to succeed in proving his brother guilty of harassment. Although the emails were no doubt distressing and annoying, they had not crossed the line from being merely unattractive to being oppressive and unacceptable. The broad wording of the order sought would also represent a very serious interference with the brother's freedom of expression.

Khan v Khan

Owed a Debt for Work Done? Don't Delay Taking Advice

If you are owed a debt for work done; any delay in seeking legal advice could result in you being left empty handed. In one case on point, an architectural practice that claimed to be owed almost £25,000 for its design work on a social housing project left it too late to launch a debt recovery claim.

The practice issued its employer under a contract - a social housing provider - with an invoice for £42,375 plus VAT. The invoice, which was sent in April 2009, was rejected by the employer. The practice was subsequently awarded £24,033 by a contract adjudicator, but launched proceedings in May 2015 to recover the £24,697 balance. Its claim was, however, dismissed by a judge on the basis that it had been issued more than six years after the accrual of the cause of the action and was thus statute barred by virtue of Section 5 of the Limitation Act 1980.

In dismissing the practice's appeal against that ruling, the High Court noted that, in actions for payment in respect of works or services, the default position is that the six-year limitation period begins to run when the relevant work is completed. There was nothing in the wording of the contract to suggest that the parties were intending that the practice's entitlement to payment would not arise until 30 days after the invoice was issued.

ICE Architects Limited v Empowering People Inspiring Communities. Case Number: QB/2017/0261

Can Councils Demand Improvements to Private Rental Properties?

In a decision of huge importance to residential landlords and the public in general, the Court of Appeal has considered the extent to which local authorities can demand improvements, or control the condition and contents, of private rented homes.

A council had, pursuant to Section 80 of the Housing Act 2004, created selective licensing areas in which homes could only be rented out if a licence authorising such occupation had been obtained. In purported exercise of its powers under Section 90 of the Act, it had sought to attach certain conditions to such licenses.

Those conditions required private landlords to install carbon monoxide detectors and to ensure that their premises were covered by valid electrical installation condition reports. One affected landlord launched proceedings on the basis that the council had no power to impose those conditions, breach of which could be visited by criminal sanctions. His arguments were upheld by the First-tier Tribunal (FTT), but that decision was subsequently reversed by the Upper Tribunal.

In ruling on the landlord's challenge to the latter ruling, the Court noted that many other local authorities had adopted similar regimes and that the issues raised were of general public importance. In upholding the appeal, the Court found that the conditions purportedly imposed went beyond regulating the management, use or occupation of the relevant premises. On its true interpretation, Section 90 did not empower the council either to require upgrading of private rented properties or to dictate what facilities and equipment should be available within them.

Brown v Hyndburn Borough Council.

Rehabilitated Offenders in the Professions – High Court Ponders

There is a strong public interest in the rehabilitation of offenders but there are also powerful reasons why those with convictions for dishonesty or violence should be screened out of the medical and other professions. That dichotomy was the focus of a High Court case concerning a pharmacy student who was sent down from university after failing to disclose his criminal past.

The student had been convicted of robbery and assault when he was aged 14, but had since done nothing wrong and had achieved good GCSE and A-level results. Before being accepted onto the pharmacy degree course, he failed to disclose his convictions when filling in a pre-entry form.

When the truth was subsequently uncovered, the student explained that he had filled in the form in a rush and had been told by his probation officer that he was not required to disclose his convictions. He was, however, expelled from the course on the basis that his failure had been dishonest and that his convictions made him unsuitable to work in the pharmacy profession.

In ruling on the student's judicial review challenge to that decision, the Court noted that the university acted as a gatekeeper for the profession. Its accreditation by the General Pharmaceutical Council depended on it having appropriate safeguards in place to ensure that those accepted onto the course could be expected to safely advise patients and handle prescription drugs.

In those circumstances, the university was entitled to ask prospective students to disclose even spent convictions and its policy struck a fair balance between the individual's human right to privacy and the wider interests of the community. In upholding the student's challenge, however, the Court found that the university had entirely ignored the considerable mitigation that was available to him. That was a fundamental failure that vitiated the decision, which was duly quashed.

HA v University of Wolverhampton

Political Party Held Up Defamation Case Settlement Until After Election Day

It is sometimes only right that those who are not parties to litigation - but who stand behind the scenes and provide financial support to one side or the other - have to shoulder at least a proportion of the legal costs incurred. In one such case, a political party that deliberately held up the settlement of a High Court defamation case until after a general election was hit hard in the pocket.

A politician who was a member of the party had been sued for defamation by three MPs following a public speech in which she made a number of serious allegations against them. Following lengthy proceedings, she was ordered to pay each of them £54,000 in damages, plus their six-figure legal costs.

During the proceedings, the party had - in good faith and with a view to achieving a settlement - provided her with £31,000 in litigation funding. The Court accepted that the party had felt some moral responsibility towards her and had sought to play a supportive role. However, as the general election approached, the party changed its position and took a deliberate, informed, and calculated decision, for reasons of party political advantage, to ensure that the case was not settled before polling day.

The Court found that, but for the party's decision, a fairly swift settlement of the proceedings would very probably have been achieved. It was also likely that an expensive hearing at which the MPs' damages were assessed would not have been necessary. In those circumstances, the Court ordered the party to pay that part of the MPs' legal costs that would otherwise have been avoided.

Barron & Ors v Collins

Saving the Environment Matters, But So Do Individual Human Rights

Everyone understands the vital importance of protecting the environment and that the interests of individuals sometimes have to give way to achieving that greater good. An important Supreme Court ruling concerning a salmon fisherman has, however, opened a route to compensation for at least some of those affected.

The fisherman had, for many years, held a lease that entitled him to take salmon from a stretch of the River Severn, using the ancient "putcher rank" technique, which involves trapping adult salmon in conical baskets. He was required to obtain an annual licence from the Environment Agency (EA) in order to carry out his trade.

He had in the past caught hundreds of salmon each year. However, due to concerns about declining salmon stocks in two connected rivers that were classified as Special Areas of Conservation, the EA imposed conditions on his licence that restricted his catch to just 30 fish per year. Further reductions were imposed in subsequent years, but no compensation was paid to him in respect of those restrictions.

The fisherman launched judicial review proceedings on the basis that the restrictions were so onerous as to make his business wholly uneconomic to operate. His lease had been rendered of little or no value. The High Court, and subsequently the Court of Appeal, accepted that the imposition of the restrictions without compensation amounted to a breach of his human right to peaceful possession of his property, enshrined in Article 1 of Protocol 1 of the European Convention on Human Rights.

In ruling on the EA's challenge to the latter decision, the Supreme Court noted the importance of preserving the environment and that Article 1 gives those affected by necessary environmental controls no general expectation of compensation. However, in dismissing the appeal, the Court found that the disproportionately grave impact that the restrictions had on the fisherman made the case exceptional on its facts. The EA had given no consideration to the severe effect the restrictions had on his livelihood.

R on the Application of Mott v Environment Agency

Commonhold – Law Commission Call for Evidence

As part of its 13th Programme of Law Reform, the Law Commission has begun a call for evidence on commonhold law.

Introduced in 2004, commonhold allows a person to own a freehold "unit" (such as a flat in a block of flats) and also be a member of the company that manages the shared areas of a building.

Commonhold has a number of potential advantages over leasehold:

A commonhold involves outright ownership - leases can be expensive to renew when they expire;

Standard rules and regulations apply. This should make conveyancing simpler and reduce the cost;

Owners have a stake in the wider building and manage the shared areas together, rather than having a landlord.

Despite this, there are fewer than 20 commonhold developments, consisting of under 100 freehold units. The call for evidence aims to discover why commonhold is not more widely used. Law Commissioner Professor Nick Hopkins said, "We want to find out what's stopping people, and how the law could be improved to make commonhold more common."

In addition to the legal issues, the Law Commission is keen to hear about other steps that could be taken to make commonhold more attractive, which will be considered separately by the Government. A full consultation will then take place on the legal reforms needed to make commonhold succeed.

The call for evidence closes on 19 April.

Who Bears the Financial Burden of Fencing Boundaries? High Court Guidance

Fencing off land costs money and it is not uncommon for landowners on either side of a boundary to dispute where that responsibility lies. In a case that involved in depth analysis of the law on the issue, the High Court found that a clause in a 46-year-old conveyance validly cast the financial burden on a golf club.

The 1972 conveyance included a covenant which bound the golf club's predecessor to maintain a fence between its leasehold land and adjoining farmland. There was no dispute that the tenant of the farmland enjoyed the benefit of that clause and, after he launched proceedings, a judge found that it created an easement in his favour and that the golf club bore responsibility for fencing the boundary.

In challenging that ruling, the club argued that it was legally impossible for the clause to have created a fencing easement. That was on the basis that easements - which impose obligations on one piece of land for the benefit of another - cannot impose positive duties to do something, such as spend money. It was also submitted that the clause did not bear the meaning contended for by the tenant of the farmland.

The Court acknowledged that fencing easements have an anomalous character. In dismissing the club's appeal, however, it noted that English law has historically recognised that a fencing obligation between neighbours in the nature of an easement can exist and will run with the land, binding successors in title. The clause created a legal obligation that went beyond a purely personal contract between the original parties to the conveyance and had been correctly interpreted by the judge.

Churston Golf Club v Haddock

National Minimum Wage Rates

The draft National Minimum Wage (Amendment) Regulations 2018 were published on 6 February and provide for the following changes to the National Living Wage (NLW) and the National Minimum Wage (NMW) rates with effect from 1 April 2018:

- The NLW, which applies to those aged 25 and over, will increase from £7.50 to £7.83 per hour;
- The NMW for 21- to 24-year-olds will increase from £7.05 to £7.38 per hour;
- The NMW for 18- to 20-year-olds will increase from £5.60 to £5.90 per hour;
- The NMW for 16- and 17-year-olds will increase from £4.05 to £4.20 per hour; and
- The apprentice rate of the NMW, which applies to apprentices aged under 19 or those aged 19 or over and in the first year of their apprenticeship, will increase from £3.50 to £3.70 per hour.
- The accommodation offset will increase from £6.40 to £7.00 per day for each day during the pay period that accommodation is provided.

Disappointed Oxford Graduate Fails in £1 Million 'Negligent Education' Claim

Not every student can achieve the exam results they want and proving that negligent teaching is the cause of perceived failure is notoriously difficult. In one case, an Oxford University graduate who failed to win a first-class degree could not establish that poor tuition was the cause of his disappointment.

The History graduate, who left Oxford with a low 2:1 degree, claimed over £1 million in compensation from the university, principally in respect of lost earnings. That was on the basis that his failure to get a First, or at least a high 2:1, had stymied his chances of forging a career as a commercial lawyer.

The university admitted that it had encountered difficulties in teaching one of the graduate's specialist subjects in his final year, due to the absence of over half of the relevant faculty staff on sabbatical at the same time. The graduate's lawyers claimed that the eminent professor who taught him had thereby been put under intolerable pressure, resulting in a negligent standard of tuition.

In dismissing his claim, however, the High Court found that the professor was an excellent teacher who had put his shoulder to the wheel in making up for the staffing crisis. Also rejected was the graduate's plea that his personal tutor had failed to alert the examination authorities to the fact that he was suffering from insomnia, depression and anxiety when he sat his finals.

The Court found that the graduate had received perfectly adequate tuition and that his disappointing result on one exam paper was more likely to have been caused by his own inadequate preparation, a lack of academic discipline, his general anxiety about taking exams and a severe episode of hayfever.

The Court expressed sympathy for the intermittent bouts of depression that the graduate had endured, but found no evidence that he was suffering from mental health problems when he took the exam. His perceived academic failure was not the root cause of his inability to hold down various jobs since he left Oxford and there was no basis for his entrenched belief that that was the case.

Siddiqui v The Chancellor, Masters & Scholars of the University of Oxford

Powers of Attorney – Why You Should Appoint an Independent Solicitor

A case in which a son abused his power of attorney to squander £230,000 of his frail mother's money underlined the wisdom of employing an experienced lawyer - rather than a loved one - to manage your finances if you lose the ability to do so yourself.

The son used the authority his mother had conferred on him to take control of her finances after she was stricken by dementia. He took the opportunity to sell her home - her biggest asset - and pay the proceeds into his own bank account. By the time she died in a care home some years later, all the money had been spent. Although, by her will, the woman had bequeathed her estate equally to her two children, there was nothing left for her other son to inherit.

After the dishonest son admitted theft, he was jailed for three and a half years. The facts of the case emerged as the Court of Appeal rejected his appeal against that punishment as misconceived. His plea that his mother had approved his expenditure during periods of lucidity was patently untrue and his sentence was impeccable.

R v Westbury

Environmentally Sensitive Planning Decisions – The Need for Transparency

Transparency is a hallmark of the planning system, particularly where developments might cause environmental harm. The Supreme Court made that point in striking down plans for hundreds of new homes in an area of outstanding natural beauty.

The would-be developer's proposals for 521 new homes and a 90-bed retirement village had faced stiff opposition from an environmental pressure group. Planning consent for the development was granted by the local authority but subsequently quashed by the Court of Appeal. That was on the basis that the council had failed to give adequate reasons for its decision, as required by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011.

In ruling on the council's challenge to that decision, the Supreme Court noted that its planning officers had recommended that consent be granted for the project. Although the harm caused to the area of outstanding natural beauty would be significant, the officers reported that the public interest was finely balanced in favour of the development.

In granting the permission, however, the council did not follow the officers' advice that the number of new homes should be reduced to 365. It also failed to enter into a binding agreement that would require the developer to build a hotel and conference centre in order to ensure that economic benefits accrued to the area. Three councillors had also expressed the view that screening measures would minimise the harm to the area of outstanding natural beauty, although that was directly contradicted by the officers' advice that such measures would be largely ineffective.

In unanimously dismissing the appeal, the Court found that the council had failed in its duty to provide a statement of the main reasons and considerations on which its decision was based. The paucity of reasons meant that there was room for genuine doubt as to why the permission had been granted and the officers' advice departed from. A mere declaration that the council had breached its duty was neither appropriate nor sufficient and the planning permission was quashed.

Can Employers Always Recruit the Best Candidate?

At first blush, it might appear obvious that employers are entitled to take on the best candidate for a job. However, as one case concerning a highly qualified medical practice manager showed, immigration law requires that suitable, EU-resident, candidates must be preferred to those from overseas.

The case concerned an Indian national with a first-class degree and an MBA who was recruited as the practice's business development manager. The practice, which praised her excellent presentation, enthusiasm and great ideas, selected her from a list of 40 candidates. However, following an investigation, the UK visas and immigration section of the Home Office was not satisfied that a genuine effort had been made to recruit an EU resident instead of her and the practice was refused a licence to sponsor overseas workers entering the UK.

In ruling on the practice's judicial review challenge to that decision, the High Court identified a number of flaws in the Home Office's approach. The recruitment exercise had not been a charade, the post had been properly advertised, interviews had been carried out and the practice had been entitled to stipulate that the successful candidate should have an MBA qualification.

In rejecting the practice's case, however, the Court noted that the effect of the residential labour market test applied by the Home Office is that a worker who is settled within the EU, and who is suitable for an advertised post, should be recruited in preference to a non-settled worker, even if the latter is considered to be the better candidate.

It appeared that, on receipt of 40 applications, the practice had proceeded to create a shortlist of five. There was nothing in principle objectionable about that but, having found that the overseas worker was the best, indeed the only suitable, candidate amongst the top five, the practice was not entitled to move directly to appoint her without considering the suitability of settled workers who had not been shortlisted. In those circumstances, the Home Office's view that the practice had not made a genuine attempt to recruit from the residential labour market was not irrational.

R on the Application of Khan v The Secretary of State for the Home Department

Duties of Care Imposed on Public Service Providers Must Be Reasonable

Companies that provide services to the public have a duty to look out for the safety of their customers. However, in an important decision concerning a railway accident, the Court of Appeal has emphasised that standards must not be set so high as to render their task unreasonably difficult.

A man who had had a considerable amount to drink fell off a station platform into the gap between two carriages of a stationary train. As the train left the station, it ran over both his feet. He had to undergo a below knee amputation of his left leg and lost all the toes on his right foot. He sued the train's operator for substantial damages on the basis that the onboard guard had been negligent in signalling to the driver that it was safe to pull away from the platform. His claim was, however, dismissed by a judge, who exonerated the guard.

In dismissing the man's challenge to that ruling, the Court noted that the guard had earlier seen him standing up against a wall, but making no apparent movement towards the platform edge. The moving train posed an inevitable hazard and the guard's duty did not extend to guaranteeing the safety of those on the platform against such an obvious risk. In vigilantly surveying the platform before signalling the driver, he had patently acted with all due care. The Court noted that it was important not to impose unrealistic duties of care so as to make it unreasonably difficult for public service providers to perform their functions.

Whiting v First/Keolis Transpennine Limited

The Government Responds to the Taylor Review of Employment Practices

In July 2017, Matthew Taylor, Chief Executive of the Royal Society for the Encouragement of Arts, Manufactures and Commerce and a former policy chief under Tony Blair, issued his report, commissioned by the Government, on how employment practices need to change in order to keep pace with modern business needs.

The Review, entitled **'Good Work',** considered a range of issues, including the implications of new forms of work, the rise of digital platforms and the impact of new working models on employee and worker rights, responsibilities, freedoms and obligations.

The Government has now published its response to the Review, setting out a plan of action for taking forward the recommendations, and launched four consultations on key areas covered. These are:

- **Employment status.** This consultation closes on 1 June 2018;
- **Increasing transparency in the labour market.** This consultation closes on 23 May 2018;
- **Agency workers.** This consultation closes on 9 May 2018; and
- **The enforcement of employment rights.** This consultation closes on 16 May 2018.

Client Confidentiality and Public Interest Journalism Collide

Communications between lawyers and their clients are strictly confidential, but what happens when they fall into the hands of journalists who say that the public interest demands their publication? The High Court is preparing to tackle that issue in a case in which millions of documents were hacked from a law firm's database.

The international firm, which has offices in a number of overseas tax havens, took legal action against the BBC and the Guardian (the publishers) after information drawn from hacked documents formed the basis of a television documentary and a number of newspaper articles concerning the ethics of the offshore finance industry.

The publishers were not alleged to have had any involvement in the hacking incident or even to know the hacker's identity. However, there was no dispute that many of the documents that had been unlawfully removed related to advice in respect of financial and other matters given by the firm to its private and corporate clients and that they were thus covered by legal professional privilege.

On the basis that none of the documents gave grounds for suspicion that the firm or its clients had been engaged in unlawful activity, the firm accused the publishers of breach of confidence and sought damages and injunctive relief. The publishers, however, argued that they had acted in the public interest, in that the documents revealed widespread use by wealthy individuals and businesses of aggressive tax avoidance schemes and, in some instances, potential tax evasion.

The opposing contentions of the parties were revealed during a preliminary hearing at which the publishers argued that the case should be heard by a judge with specialist knowledge of media law. However, the Court found that the firm was entitled to choose to have the case listed before a business judge.

Appleby Global Group LLC v British Broadcasting Corporation & Anr.

Taxation of Crowdfunding Pledges – Moon Mission Company Suffers Blow

In what will be viewed as a serious blow to the crowdfunding community, a tribunal has ruled that a company that obtained venture capital to finance a pioneering trip to the moon was liable to pay VAT immediately on receipt of the six-figure sum raised.

The company's objective was to send an unmanned robotic landing module to the south pole of the moon. Online investors who pledged money via a crowdfunding site were promised various benefits if the project came to fruition. Those included the right to have digital information and strands of hair placed in a time capsule taken to the lunar surface. A total of £672,447 was raised from over 7,000 backers, who were issued with redeemable vouchers and certificates recording their investments.

There was no dispute that there had been a taxable supply in the form of rewards to be provided to backers in the future, and HM Revenue and Customs (HMRC) took the view that VAT was payable on the money raised at the time it was received by the company. On that basis it was submitted that the company ought to have registered for VAT when the project was first advertised on the crowdfunding site. The company, however, argued that the correct tax point was the date on which the vouchers issued to backers were redeemed.

In ruling on the company's challenge to HMRC's stance, the First-tier Tribunal (FTT) accepted that, given the considerable uncertainty as to whether the lunar mission would ever in fact launch, the money raised could not be viewed as pre-payment for services to be provided in the future.

In rejecting the company's appeal, however, the FTT found that the vouchers issued to backers were for a single purpose, within the meaning of Schedule 10A of the Value Added Tax Act 1994. The provision of digital and physical space within the time capsule represented a single type of goods or services. VAT was therefore payable when the vouchers were issued.

Lunar Missions Limited v The Commissioners for Her Majesty's Revenue and Customs

Winning Compensation Is One Thing, Enforcing Payment Is Another

Winning compensation is one thing, but enforcing its payment is another. That point could hardly have been more powerfully made than by a case in which a domestic servant who was awarded almost £270,000 by an Employment Tribunal (ET) ended up without a penny.

In what was believed to be the first successful "caste discrimination" case brought before an ET, the Indian woman successfully complained that the couple for whom she worked had paid her far below the National Minimum Wage. The ET also found that she had been unfairly dismissed and discriminated against on grounds of her religion and race. She was awarded total compensation of £266,536.

A firm of solicitors commendably agreed to act free of charge in pursuing the couple for payment of the award. However, they ultimately only succeeded in recovering £35,702, roughly 13 per cent of the amount due. The Legal Aid Agency (LAA) had funded the woman's case and elected to exercise its statutory charge over the sum recovered. The end result was that the woman received nothing.

In ruling on the woman's judicial review challenge to the LAA's decision, the High Court acknowledged that her position was extremely unfortunate. The findings of the ET were wholly consistent with her claim that she was a victim of trafficking and had been held in servitude by the couple. In dismissing her case, however, the Court rejected arguments that the application of the statutory charge breached her human rights or European rules designed to combat human trafficking.

R on the Application of Tirkey v The Director of Legal Aid Casework & Anr

The Court's Consideration of exceptional circumstances in Bankruptcy Possession Proceedings

If it has been more than a year since the bankrupt's estate has vested in the trustee, s.335A(3) of the Insolvency Act 1986 states that the court will assume that the interests of the bankrupt's creditors outweigh all other considerations unless the circumstances of the case are exceptional.

As there is no clear definition in s.335A (3) of what amounts to exceptional circumstances, it has been a matter for the court to consider the relevant factors before granting a possession order. The court's approach to this area of law has evolved, over time and certain types of hardship have been considered to be exceptional.

The earlier cases show that the courts had limited sympathy for the family victims of bankruptcy. *Salmon's Trustee v Salmon* 1989 SLT (Sh Ct) 49 held that homelessness, family hardship, and detrimental disruption in children's education were considered the inevitable and even natural consequences of bankruptcy. The test in Re Citro (Bankrupts) [1991] Ch. 142, C.A. as reinterpreted in *Barca v Mears [2004] EWHC 2170 (Ch.),* was that exceptional or special circumstances would have to be outside of the usual "melancholy consequences of debt and improvidence" unless those consequences were so severe to necessitate them being taken into account.

In *Claughton v Charalambous* ([1998] BPIR 558), the bankrupt's wife's renal failure, chronic osteoarthritis and immobility, associated special housing and reduced life expectancy did amount to exceptional circumstances. Jonathan Parker J emphasised a need for value judgment and held that in applying s335A (3) the court must look at all the circumstances and conclude whether or not they were exceptional.

In the case of *Re Bremner* ([1999] B.P.I.R. 185) a bankrupt aged 79 with terminal cancer, was being cared for solely by his wife and had a life expectancy of only six months. The court held that the circumstances of the case were exceptional and that the sale of the property should be suspended until three months after the bankrupt's death. The court also took account of the fact there was enough equity in the property to pay creditors in full.

Re Haghighat (A Bankrupt); Britain (Trustee of the Estate in Bankrupt v Haghighat) [2009] was a case in which the bankrupt's eldest child had cerebral palsy with learning disability and epilepsy. A possession order was made but delayed for 3 years or 3 months after the child stopped residing at the property. This case is an example of what is considered as exceptional at the top end.

Lack of equity is not an exceptional circumstance as found in *Harrington v Bennett* [2000] BPIR 630 where it was held that even where there was a risk that the Bankrupt's equity would be eliminated, that did not amount to an exceptional circumstance so as to displace the assumption in favour of the interests of the creditors. Even if the whole of the net proceeds are swallowed up in paying the expenses of the bankruptcy, it is not an exceptional circumstance.

Despite the court's findings of exceptional circumstances over time, the threshold for suspending a possession and sale order is high and often met in cases where there are severe or terminal illnesses, or where specific adaptations that have been made to the property. The presence of an exceptional circumstance, does not however prevent the court from making an order for possession and sale as held by *Dean v Stout* [2005] EWHC 3315. It is more a matter of how long it will be before that order comes in to effect and delivery up of the property is required.

In the case of *Grant v Baker* ([2016] EWHC 1782 (Ch)), it was decided, on appeal, that the sale of the bankrupt's home should only be postponed for 12 months (rather than indefinitely), despite the fact that the bankrupt's daughter (who suffered from global developmental delay, dyspraxia and obsessive-compulsive disorder) lived in the property.

The more recent case of *Pickard v Constable* [2017] EWCH 2475 reiterates that, whilst a finding of exceptionality may delay a possession and sale order, it will not postpone it indefinitely. At first instance the District Judge ordered that the sale of the property be postponed until the death of Mr Constable or earlier permanent vacation of the property, and as a consequence the order for possession was postponed. The trustees appealed and despite Mr Constable's serious health conditions, Warren J made a possession order to be suspended for 12 months. Mr Constable was given permission to apply for the order to be postponed further in the event that there was evidence that he was unlikely to be re-housed, but he would be required to produce far more cogent evidence from medical experts about his condition, the potential effects of it on him and evidence of the non-availability of accommodation.

The decision in *Constable* is a further demonstration that even in situations where there are exceptional circumstances, the courts will still give considerable weight to the interests of the creditors.

How does the European Convention on Human Rights and the Human Rights Act 1998 apply to s.335A?

Article 8 (the right to respect for private and family life and the home) is frequently raised as a defence to bankruptcy possession proceedings, but not successfully. The courts have found that s.335A provides "a necessary balance as between the rights of creditors and the respect for privacy and the home of the debtor" and as such "the requirements of this section satisfy the test of being necessary in a democratic society and are thus proportionate" Smith J in *Ford & Ford v John Alexander (trustee in Bankruptcy)* [2012] EWHC 266 (Ch).

Article 8 arguments cannot succeed and simply cause considerable delay and expense to the bankrupt's estate, without assisting the bankrupt in gaining the desired postponement of sale.

A practical approach

Whilst the case law has proved that the courts are reluctant to order lengthy of indeterminate postponements, in practice applications brought by bankrupts and their families under section 335A(3) often result in multiple adjourned hearings, directions for parties to file detailed evidence and inevitably the delay increases the cost to all parties. Where there is persuasive evidence of circumstances sufficiently serious that they may be deemed exceptional by the courts, it may prove beneficial for parties to attempt to seek an agreement such as a voluntary sale. Trustees must of course remember to protect their interest in the property before it re-vests.

Tanya Barrett, Senior solicitor, Insolvency Department.

Registrars in Bankruptcy renamed Insolvency and Companies Court Judges (ICC Judges)

Chief ICC Judge Briggs and former Chief Registrar debating the finer points of section 284 Insolvency Act at the Moon Beever quarterly insolvency seminar in March.

From 26 February 2018, Registrars in Bankruptcy of the High Court will be renamed Insolvency and Companies Court Judges. The title of Deputy Registrars will also change following the same convention. For more details, see The Alteration of Judicial Titles (Registrar in Bankruptcy of the High Court) Order 2018 (SI 2018/130) and the accompanying Explanatory Memorandum.

Reforms for Estate Agents Announced

Housing secretary Sajid Javid announced this month that agents would no longer be able to practice without a qualification. He also said there would be new rules about disclosing payments earned for referring customers to solicitors, surveyors and mortgage brokers. Homeowners Alliance Chief Executive Paula Higgins said that the industry had been "tarnished by Wild West attitudes" and that reforms would "send the cowboys packing". Javid however did say that there would be an industry consultation on implementing a professional qualification before measures came into effect.

The Late Payment of Commercial Debts (Amendment) Regulations 2018

The Late Payment of Commercial Debts (Amendment) Regulations 2018 came into force on 26th February 2018 in England and Wales and Northern Ireland and implement requirements of Directive 2011/7/EU of the European Parliament and of the Council of 16th February 2011 on combating late payment in commercial transactions. These Regulations substitute a new Regulation 3 of the Late Payment of Commercial Debts Regulations 2002. The new provision clarifies that certain bodies are able to challenge the use of certain grossly unfair terms or practices in or in relation to contracts to which the Late Payment of Commercial Debts (Interest) Act 1998 applies.

New Partner

We are delighted to announce that **Robert Paterson** will join us shortly as a new partner in Restructuring and Insolvency. Robert is a solicitor and Licensed Insolvency Practitioner of 17 years' experience, with clients including lenders and financial institutions, insolvency practitioners, boards of directors (on directors' duties) and creditor and debtor companies. Robert regularly lectures at conferences held by R3, the Insolvency Practitioners' Association, and the Institute of Chartered Accountants in England and Wales. Robert joins from Gowlings WLG, formerly Wragge Lawrence Graham. Robert speaks French & German and has good cross border experience adding to the Firm's breadth of experience.

GDPR- We care about your data!

We know you will have been bombarded by all sorts of organisations to sign new terms but regrettably we must add to that and ask that you do deal with e mails and mailings regarding GDPR and consent. Your data is important and we are ISO 27001 and CyberEssentials certified and all our staff and systems rigorously protect your data. However we need to tell you about how we process your data and we also need to invite your consent to continue providing you with updates and events information. These items are dealt with in separate paperwork and electronic communication which will be sent to you shortly. Thank you for your forbearance.

Frances Coulson, Senior Partner

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