

## Non-Competition Clause Reasonable

A company director who lured customers away from his former employer after he had resigned from his post has been ordered to pay £50,000 in damages for breach of a non-solicitation clause in his employment contract.

The defendant was employed as business development director of Safetynet Security Ltd. (Safetynet), a medium-sized company providing security guards and door supervisors to pubs and clubs, until his resignation in April 2012. The day after he resigned by email, a rival security company – Freedom Security Solutions Ltd. (Freedom) – was incorporated. Within 12 days of the defendant's departure, five of Safetynet's customers had terminated their relationships with the company.

The High Court ruled that a non-solicitation clause in the defendant's employment contract – which restrained him from approaching Safetynet's customers for six months following the termination of his employment – was 'reasonable and wholly enforceable'.

Finding the defendant in breach of the non-solicitation clause, the judge ruled that he was 'the controlling mind/de facto director' of Freedom.



He rejected the defendant's plea that Safetynet had been in repudiatory breach of his employment contract prior to his resignation.

The defendant and Freedom were ruled jointly liable to pay Safetynet £50,000 in damages as compensation for the loss of revenue the company suffered due to the solicitation of its customers.

**If a former employee of your business is approaching your customers in breach of his or her contract, or you wish to ensure such a situation does not occur, contact us.**

## Supreme Court Rules in Equal Pay Case

The Supreme Court has ruled, by a majority of three judges to two, that 174 former employees of Birmingham City Council who left their jobs between 2004 and 2008 do have the right to pursue their equal pay claims in the civil courts as breach of contract cases.

The women – many of whom worked as cooks, cleaners and care assistants – argued that they had been denied payments and benefits given to men doing equivalent work, in breach of equal pay legislation. They were prevented from taking their cases to the Employment Tribunal (ET) as the six-month time limit that applies to such cases had expired. Instead, they launched High Court proceedings, which benefit from a six-year limitation period.

Birmingham City Council had attempted to strike out the women's claims on the ground that resolution of equal pay disputes fell within the exclusive jurisdiction of the ET. The High Court and the Court of Appeal rejected this argument and the Supreme Court has now dismissed the Council's appeal.

The judgment effectively extends the time limit for equal pay claims from six months to six years, which is the biggest change to equal pay legislation since it was first introduced in 1970. It means that employers are open to the threat of claims long after the employment relationship has come to an end and face the prospect of an award for costs being made against them should they lose the case.

**Contact us for advice on all employment law issues.**

## Insurers Fail in Attempt to Limit Theft Claim

Employee theft is often an exclusion in commercial insurance policies.

When fashion retailer Ted Baker found that it had suffered a major loss due to employee theft of stock, AXA, the company's insurer, declined to meet the claim on the ground that Ted Baker had not taken out the cover offered for employee theft.

The total losses to Ted Baker were approximately £4 million – £1 million for the loss of the stock and £3 million for the consequential loss to the business.

The policy taken out had not specifically excluded losses due to employee theft, however. The High Court ruled that the fact that such an exclusion was 'market practice' was not sufficient to mean that the policy excluded employee theft. Furthermore, Ted Baker had deleted the specific exclusion for consequential losses arising from theft or attempted theft.

The result was that Justice Elder ruled that the loss was covered by the policy. It remains to be seen if AXA will appeal the decision.

Nonetheless, it underlines the wisdom of making sure that insurance policies

are fully understood and do address the risks for which cover is sought.



**If you are concerned about the meaning of clauses in your insurance policies, contact us for advice.**

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## Surrender Relieves Obligation to Reinstate

The post-Christmas period is traditionally a tough one for retailers, and commercial landlords are well aware of the likelihood that tenants will have difficulty in the winter months. Where these problems result in the insolvency of a corporate tenant, it is common for the liquidator to surrender the lease of the commercial premises involved.

Recently, a case was heard relating to just such circumstances, the argument being over the 'reinstatement' clauses in the lease. The landlord argued that the tenant (now in liquidation) was still liable to reinstate the premises according to the termination provisions of the lease. The liquidators of the

tenant argued that there was no such liability.

The tenant had significantly altered the premises and the cost of reinstatement was estimated to be in excess of £1 million. There was also a substantial claim for failing to keep the premises in good repair.

Under the lease and the licences granted to alter the premises, the reinstatement obligation was, in effect, deemed to arise at the end of the term of the lease, which was the end of the original lease term, not the end of the lease brought about by the early surrender. The High Court ruled that

both parties to the lease were therefore relieved of such of their obligations under it that post-dated the surrender. Accordingly, the tenant was relieved from the liability for reinstatement because that obligation was a future obligation at the date of the surrender.

**Landlords faced with insolvent tenants should take advice as soon as possible to ensure that any agreements made with tenants' liquidators or receivers protect their rights as far as possible. Contact us for assistance.**

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## Patent Protection Basics

Some people may think that once you have obtained patent protection for your product, you need do nothing further to protect your rights against infringement or to claim damages from an infringer.

However, in many jurisdictions, merely being the owner of a patent is not sufficient to justify a claim for damages, because an 'innocent infringer' (someone who violates a patent because they are unaware that the patent exists) can rely on their lack of knowledge of the patent as a defence.

Making the existence of your patent common knowledge is therefore important. Indeed, in some countries, it is obligatory

to identify patented products as such and to show the patent number. Failure to do so can mean that damages from infringers cannot be claimed.

It is also unlawful in some jurisdictions to mark a product as patented if, in fact, it is not.

Patent law varies throughout the world, and the steps that have to be taken to safeguard patent rights vary also.

**Contact us for advice appropriate to your circumstances.**

## Changes to the Money Laundering Regulations

Readers are reminded that on 1 October 2012, changes to the Money Laundering Regulations came into force that will affect many businesses, particularly those that engage in high-value transactions or that offer services involving the exchange of money.

Broadly, the changes are designed to move from a 'tick-box' system of compliance to one based on an assessment of the risks involved.

For more details, see [www.hmrc.gov.uk/MLR/getstarted/intro.htm](http://www.hmrc.gov.uk/MLR/getstarted/intro.htm).

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## Who Owns the Email?

If a member of staff uses your computer system to exchange emails, does the content of the email become the property of your business?

This question was addressed recently in a court case concerning a dispute that arose between a shipping company and its former chief executive. The company had gone to court to obtain an order to prevent the executive from deleting emails he had received, which it wished to access in order to investigate alleged accounting irregularities and in order to look into a dispute over a contract. The chief executive was technically employed by a service company and the company he had run had automatically deleted from its own servers emails which it had forwarded to him.

The High Court concluded that unless the business has a contractual right to the contents of the email or it contains confidential information relating to the business or the business can claim copyright over content within the email, it does not have a legal right to the content of the email.

Accordingly, the company had no right to claim ownership over the content of the emails in question or to access them.

'Third party employment' agreements are common with both senior executive and specialist staff. This case illustrates

an important planning point: it is sensible to ensure that if employment arrangements involving external companies are involved, a contractual right to retain all emails passed through your company's servers or relating to the company's business is obtained.

**To ensure that your business is appropriately protected in circumstances similar to this, contact us for advice.**



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## Tyre Fire Case May Reflect Liability Law Change

A tyre trader has been cleared of liability for a fire that caused £250,000 of damage after the Court of Appeal considered legal issues arising from as far back as the Great Fire of London in 1666 in a bid to determine the ambit of the concept of what lawyers call 'private law nuisance'.

In a ruling which will be pored over by law students for years to come, the Court ruled that Mark Stannard, who trades as Wyvern Tyres, was wrongly held liable for the blaze that spread from his workshop on the Holmer Trading Estate in Hereford, gutting his own and neighbouring businesses in February 2008.

The fire, which required 10 fire engines and more than 50 firemen to fight it, started in electrical wiring. Mr Stannard had already been cleared of negligence after a County Court judge found that he properly maintained the wiring and there had been nothing to indicate that it was dangerous.

However, despite the absence of any fault on his part, Mr Stannard was found 'strictly liable' to compensate the

owner of a neighbouring business after the judge ruled that the thousands of tyres stored at Mr Stannard's premises had accelerated the blaze and amounted to a private law nuisance.

In allowing Mr Stannard's appeal, the Court of Appeal referred to the consequences of the Great Fire of London and to legal precedents dating back even further than that.

The Court ruled that the legal principle which imposes strict, no fault liability where a 'non-natural' use of land leads to something 'escaping' from one piece of land to another and thereby causing damage has been whittled away by the courts over the centuries and may now be of very limited application.

Observing that it was not the tyres, but the fire, which 'escaped' from Mr Stannard's land, Lord Justice Ward ruled that the storage of tyres on the premises was not 'exceptionally dangerous or mischievous' or an 'extraordinary or unusual use of land'.

## Contract Cancellation Fails

Just because a term in a contract is breached does not necessarily mean that the contract can be rescinded, as was demonstrated by a dispute between a company that owned land and a wind farm company.

The company that owned the land entered into an agreement with the other company that the latter would develop a wind farm on its land. The agreement stipulated that the firm wishing to construct the wind farm had to provide the landowner with a copy of any application for planning permission, so that it could comment on it before it was submitted to the local planning authority.

The wind farm company submitted an application for planning permission without first sending it to the company that owned the land. The agreement between the two companies stipulated that if the wind farm company committed a material breach of the agreement, the company that owned the land was entitled to terminate the agreement provided that the breach could not be rectified or was capable of being so but this had not been done within a reasonable time after receipt of a written notice that the breach had to be rectified.

A notice was served on the wind farm company, which duly supplied the landowner with a copy of the application for planning permission. However, the company that owned the land still issued a notice to terminate the contract. The dispute ended up in court.



The court ruled that although the failure to submit a copy of the planning application was a material breach of contract, it was capable of being remedied and was in fact remedied by the issuing of a copy of the application. Indeed, the letter from the landowner requesting a copy of the planning application had to be interpreted as indicating that the breach of contract was capable of being remedied by supplying the requested information.

**Although this case was heard in Scotland, it is to be expected that an English court would take a similar view. If a contract you have entered into looks as though it will lead to a dispute, contact us for advice.**



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