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Firm News

Wall James Chappell has joined forces with Midlands Air Ambulance to help raise awareness of the charity and support its fundraising initiatives.

The charity provides a vital emergency service all over the region and is funded by charitable donations to contribute to its £6m annual running costs.

Also in support of its local community,

the firm has chosen **Mary Stevens Hospice** as its chosen local charity. The firm will be running a number of charitable events throughout the year.

The firm is also the main first team sponsor for **Dudley Kingswinford Rugby Club**. The launch of the new first team kit was celebrated with an impressive 36 v 12 win over Lichfield.

Franchising: duty of care

A High Court decision warns franchisors to ensure that when they provide advice to prospective franchisees, they do so with due skill and care.

The court held that the franchisor owed a duty of care to its franchisee and had breached that duty by giving negligent advice to the franchisee. The franchisor was also in breach of contract by failing to provide the level and quality of marketing advice and support agreed by the parties.

It is always advisable for the franchisor and franchisee to negotiate and agree a franchise agreement before entering into such arrangements. The franchisor is the business or individual that sells the right to use its products or services to another business or individual.

The franchisor allows the franchisee to use a name which is associated with the franchisor; Exercises continuing control over the franchisee.; Provides assistance to the franchisee.

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The franchisee is the business or individual that purchases the rights to use the franchisor's products or services. The franchisee will periodically have to make payments to the franchisor.

What are the advantages of franchising for the franchisor?

Franchising provides a business with the opportunity to secure distribution for products or services more quickly than if it had to train up its own employees and develop its own internal marketing, sales and distribution organisation.

“Using a franchisee’s capital will enable a business to expand more quickly than if it had to find the funds itself.”

Franchising a business may provide the franchisor with increased purchasing power and possibly reduced overheads, therefore increasing its profitability.

What are the disadvantages of franchising for the franchisor?

Loss of control. While a franchise agreement will impose substantial restrictions on the franchisees, it is important to remember that there will be independent third parties who will be seeking to maximise their own profits, sometimes at the expense of the franchisor.

Part of the franchisor's profits will be used to support the franchisee's business. By involving a third party, the franchisor will have to divulge substantial know-how and information concerning its business. Although a franchise agreement will contain restrictions on the franchisees' ability to make use of this information for their own purposes, these types of provisions are often difficult to monitor and enforce.

The business skills required to control franchisees and provide back-up are different from those involved in operating a business with its own employees and as the recent High Court has recently held, a franchisor may owe a duty of care to its franchisees and prospective franchisees.



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Property: Ensure you are insured!

When taking on a Lease it is important to ensure that adequate insurance is in place. Ruth Latham highlights the pitfalls of not “ensuring insurance”.

Most Leases provide that the landlord will insure the premises and request reimbursement of the cost from the tenant. Usually this covers the premium for insuring the premises against various risks defined in the Lease, for example, fire and flood and may also include the cost for periodic valuations of the premises and loss of rent, commonly for three years.

“A tenant should read carefully through the policy” to check it covers the risks required. Often, terrorism is not included as a standard risk and depending on the locality maybe required. If you are taking a Lease of retail premises it is important to remember that usually plate glass insurance is the tenant's responsibility to arrange.

It is advisable to ask for details of any insurer's requirements, for example, in respect of storage of chemicals so as to ensure nothing is done which may invalidate the policy. It is also important to remember that if any improvements or additions are undertaken they are notified to the insurers so as to be certain they are covered. If you are looking to leave the premises unattended for

any length of time this again needs to be notified to the insurers.

The Lease should provide that any monies claimed through the landlord's insurance policy is used to reinstate the premises unless the policy is invalidated because of some act or omission of the tenant.

It is desirable for a clause to be inserted in the Lease from a tenant's point of view to provide that any shortfall in the cost of reinstatement is made up by the landlord out of its own funds.

Most Leases contain a rent suspension clause under which if the premises are damaged and cannot be occupied because of an insured risk no rent is payable during that period. However, this is often limited to the period for which the loss of rent is insured, for example, three years. From a tenant's point of view there should be a provision by which both the landlord or the tenant can terminate the Lease if reinstatement is not completed within that period.



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Property: Are you sure your lease has really ended?

You might be forgiven for thinking that a Lease ends when it says it does ("the Expiry Date"). However, there are numerous ways in which a Lease can end. And one covered by the Landlord and Tenant Act, 1954 ("a Protected Tenancy") is treated differently from another which is not ("an Excluded Tenancy").

If a Tenant stays in occupation after the Expiry Date, and the Landlord accepts rent, the original Lease is replaced by a Periodic Tenancy. Each period of a Periodic Tenancy is treated as a new Lease (though they are linked together for the calculation of Stamp Duty Land Tax liability) with a new expiry date. The "period" length depends on when rent is paid. This replacement Lease is a Protected Periodic Tenancy or an Excluded Periodic Tenancy, and the Tenant is described as "holding over".

"A lawful Lease of Business Premises for more than six months is a Protected Tenancy", unless it has been previously agreed that it will not be protected and prescribed forms have been signed to that effect. Such Excluded Tenancies end when they say they do, so no rent or service charge is payable under the original Lease for any days after the Expiry Date.

An Excluded or Protected Tenancy will end other than on the Expiry Date if

- (a) a break clause in the Lease is validly exercised; or
- (b) the Landlord accepts a Surrender of the Lease by deed; or
- (c) the Lease is forfeited by the Landlord due to default of the Tenant and no court application for Relief against forfeiture is made within six months; or
- (d) the Landlord is a Tenant and a superior Lease is for-

feited without Relief; or

(e) a new Lease is agreed between the Landlord and the Tenant either for the property, or for the property with other land; or

(f) (after occupying for at least a month) the Tenant gives Notice (of more than the length of the period) to Quit a Periodic Tenancy

(g) the premises are destroyed and cannot be rebuilt

In the absence of these, a Protected Tenancy ends only if

(a) a prescribed Notice is served

(i) by the Landlord six to twelve months before a date when the Lease would have ended, or

(ii) (if the Lease was for over one year or is a yearly Periodic Tenancy) by the Tenant to request a new tenancy starting in six to twelve months,

and the Lease then ends if no new Lease is granted in the time allowed; or

(b) the Tenant gives written Notice to discontinue at least three months before the Expiry Date.

If the Landlord opposes a new Lease (either by his Notice or in response in the prescribed form to the Tenant's Notice) then he can do so only on certain grounds under the Act. It may be necessary for a Court to decide whether or not a new Lease is granted. There are time limits for an application to Court (whether by the Landlord or Tenant).



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Property: The importance of reviewing rent

When negotiating terms for a new Lease it is not only important to agree the rent but also the frequency and nature of rent reviews.

Most Leases for a term exceeding three years have three or five yearly rent reviews. Traditionally, these have been on an upwards only basis so that rent is increased to the greater of the rent payable at the time of the rent review and market rent, if that has increased.

In recent years many tenants' groups have been calling for a move away from the traditional upwards only rent review. **"In today's market there is increased pressure on landlords to agree alternative rent review provisions"**, for ex-

ample, by reference to the market rent which can go up or down or by reference to an increase linked to the Retail Price Index.

The Code for Leasing Business Premises in England and Wales, published in March 2007 as a result of discussions between landlords' and tenants' representatives and the government promotes efficiency and fairness in landlord and tenant relationships. The code provides that rent reviews should be clear and that on request landlords should offer alternatives to the proposed option for rent review on a risk adjusted basis, for example, an alternative to upward only rent review being an up/down review to market rent with a minimum of the initial rent.

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Alternatively, a tenant may consider asking for a break clause exercisable at the time of the rent review if they are not happy with the proposals.

It is usual for a rent review clause to provide that certain matters shall be disregarded when determining the market rent, for example, improvements to the premises carried out by the tenant with the landlord’s consent and any goodwill relating to the premises by reason of the tenant’s occupation.

The rent review clause usually sets out the mechanism for review including dispute resolution. Usually, if agreement cannot be reached between the landlord and the tenant it is referred to either an arbitrator or independent expert for determination.

For further information contact

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More than just a commercial litigator!

Jane Beale, a member of our commercial dispute resolution team, is adding a further string to her bow by studying to become a specialist in contentious probate and trusts. Jane explains below the added value of this service to clients.

As people have become wealthier, disputes about wills and trusts have become increasingly common. I was involved in my first contentious probate case over 15 years ago and it is a specialism that I have continued to develop.

The College of Law, in association with the “Association of Contentious Trust & Probate Specialists (ACTAPS)” offers a training course for those specialising in contentious probate and trusts who wish to become members of this specialist association. This training course aims to develop expertise in this area and provide a recognised professional qualification to those already working in the field.

I have recently successfully completed the first year of the course and aim to complete what is usually a three year course over the next 12 months. So far it has been very useful. Contentious probate has many strands to it; emotions are often running high and the legal issues are often very complex.

When clients instruct a solicitor at what is, by its nature, a distressing time, they need to know that their solicitor has the necessary expertise and skills to deal with their problem. Whilst many solicitors may say they have the necessary experience, if they have the ACTAPS qualification then the client can rest assured that in fact they do.



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This update is intended only to provide a summary of the law and is not a comprehensive guide. It is not intended to provide legal advice for specific cases. If you would like specific advice please contact a member of the team.