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Legally Speaking - Judge & Priestley's Quarterly Legal Update for Commercial Clients

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Welcome to J & P's latest newsletter, specially designed to keep you up to date with all the latest legal developments affecting you and your business.

Got something on your mind? ... give us a call or email us.

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New Bill to 'help firms to start up and scale up'

A new Bill to help small businesses is being introduced by the government.

The Small Business, Enterprise and Employment Bill contains several measures designed to make it easier for small firms to thrive. They include:

- strengthening the rules on director disqualifications and measures to help creditors recoup losses resulting from director misconduct
- assisting expansion overseas by increasing support from UK Export Finance, making it easier to expand in the international marketplace
- introducing a Pubs Code and Adjudicator to govern the relationship between pub-owning companies and their tied tenants
- cutting red tape by ensuring regulations affecting business are reviewed frequently and remain effective and fair
- improving payment practices so more invoices are paid on time. Also the introduction of 'cheque imaging' means cheques will be cleared by banks faster.



Skills and Enterprise Minister Matthew Hancock, pictured below, said: "Small businesses are the driving force of our economy and this bill is part of the government's commitment to back enterprise and help firms to start up and scale up."

The Bill was put before parliament in June. We shall keep clients informed of developments.

Meanwhile, the administrative burden on small businesses involved in takeovers could be eased by the latest changes to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

TUPE regulations are designed to protect the interests of employees if their company is sold to new owners.

The regulations were amended on 31 July to allow firms employing fewer than 10 people to deal directly with affected employees if there isn't a recognised trade union, and where the firm has not asked employees to elect a representative.



Photo ©ukgov

Director 'unfairly excluded' after an attempted affair

A court has ruled that a director who tried to start an affair with his business partner's wife was unfairly excluded from the management of a company in which he held shares.

The case involved two men who had been close friends and operated their business as a quasi-partnership.

Things turned sour when the director started sending suggestive texts and making phone calls to his partner's wife.

When the partner found out, he called an extraordinary general meeting and appointed his nephew as a director. He then removed the 'offending' director from his position at the company.

The dismissed director claimed that he had been excluded from management without any offer to acquire his shares at a fair value.

He also said that it had been unfair to issue the nephew with shares as

it diluted his stake in the company, which he had helped to set up and run.

The court ruled that the director had been unfairly excluded from the company. It also ruled that the true motivation of the allotment of shares to the nephew had been to dilute the interest of the dismissed director to below 50% and therefore remove his ability to block resolutions.

The court ordered that the partner should acquire his former colleague's shares on the basis that he owned 50% of the company.

The former director wouldn't be compensated for his loss of salary because a working relationship would not have been possible after he had betrayed his business partner.

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It is the latest in a number of changes to the TUPE regulations. An amendment earlier in the year meant that a change in work location following a takeover could be seen as a genuine 'place of work' redundancy, rather than automatically be treated as unfair dismissal.

New employers are now able to change the terms one year after the transfer, providing they are no less favourable overall to the employee.

On 1 May an amendment came into force that increased the timescale for a transferor to provide 'Employee Liability Information' to a transferee from 14 days to 28 days.

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So you want to run a Franchise?

When considering running a franchise it is essential that you carry out the necessary research on the franchise you are interested in joining, their business practices and ultimately whether you can work with the franchisor – starting up any business, franchised or not, is hard work!

Starting up a business by way of a franchise has become more and more popular over recent years. People from all sorts of backgrounds are attracted to it and their circumstances can vary tremendously, as well as their motivation for doing so. So what is the attitude of the banks to this type of venture?

Start ups and franchising

The UK sees the creation of thousands of new business start ups every year and this represents a very important opportunity for the banks. As well as many new start ups each year, there will also be a high number of young businesses that for a variety of reasons will cease to trade.

The advantages of a franchise counter the potential threats a new business would face during its early yet critical trading period, as well as provide a framework for the long term.

So what are the advantages that a bank will see?

For decades now banks have seen that an established and ethically run franchise can deliver results;

- Potential franchisees are screened and in some cases have to undergo very detailed training before finally being accepted.
- The support before and after the start up stage carries on throughout the term of the franchise agreement.
- It is a proven business model - There will be people of all abilities and experience in regards to starting up a business that will and will not succeed, however in comparison with other types of start ups the level of failure is consistently lower.
- The costs involved in starting up will be understood by the bank - the business plan can always be compared to their experience of existing franchisees that bank with them.

- The combined marketing power of a franchised business will help to raise the profile of the brand and service to a level that an independent small business would struggle to achieve

- The systems that the franchisee adopts ultimately include controls and reporting so the bank will be able to get a hold of timely and accurate information on how the franchise is performing.
- Product and service development is carried out, usually independently of the franchisees, so that you can focus on your business in the knowledge that the future direction of the business is being catered for.
- Franchisees themselves will have carried out a good level of research and due diligence in order to establish whether the franchise is the right one for them.

The benefits to you the franchisee

- Banks with a good understanding of franchising will have a dedicated franchise team making the whole process of raising the bank finance required and opening an account that much simpler.
- The amount of finance that the bank may provide could be higher than that offered to a non franchise start up – this is dependent on the track record of the franchise.
- There may be other related banking products which are offered on special terms to franchisees.

Next steps

If you would like any further information about franchising please call Neil Cuffe on 020 8290 7405. We would also be able to put you in touch with RBS with whom we work on funding for franchises and to whom we credit this article.



200,000 homes to be built on brownfield sites by 2020

Up to 200,000 new homes could be built on brownfield sites by 2020 following new measures being introduced by the government.

Ministers plan to provide funds of £400m for 20 zones of brownfield land in London, and £200m for 10 zones outside the capital.



Photo ©ukgov

Councils will be asked to help speed up the house building process by putting local development orders in place which can provide sites with outline planning permission.

Chancellor George Osborne said: "This urban planning revolution will mean that in effect development on these sites will be pre-approved - local authorities will be able to specify the type of housing."

Planners will still need to take into account the needs of the local communities. They will also need to adhere to the same general criteria in order to get planning permission for a project.

Ministers hope that by 2020, planning applications for up to 90% of suitable brownfield land will have been approved.

Communities Secretary Eric Pickles, pictured left, said: "We're determined to make the very best use of derelict land



and former industrial sites to provide the homes this country desperately needs in a way that protects our valued countryside. By ensuring commitments to housing development are in place early and having dedicated housing zones, building becomes quicker and easier for homebuilders, businesses and councils."

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Issues to Consider when entering into a New Lease

As the owner of a business, you will probably enter into a lease of commercial premises during the businesses life span. A business owner will need to consider some core issues that arise at the negotiation stage of a new lease.

A lease will generally specify that premises can only be used for a particular purpose. It is important to ensure that the permitted use stated in the lease is suitable for your business.

You should also consider your potential future use of the premises in case your business changes or expands, in case you need to assign the lease or sublet the premises to a third party.

In addition to the permitted use in the lease, premises will have planning permission for a particular use. A property will be granted planning permission to be used under a particular use class. The use classes are set out in the Town and Country Planning (Use Classes) Order 1987. The use class will determine what the property can be used for. For example, a property with the Use Class B1 (an office) cannot be used as a restaurant (Class A3). It is possible to apply for a change of use of a property but you will have to investigate the likelihood of this occurring prior to entering the lease.

Both the use stipulated in the lease and use class set out for planning purposes must agree, but the use stipulated in the lease may be narrower or wider than the use class given for planning purposes.

Many landlords of commercial properties will require the tenant to pay a rent deposit to be held for the term of the lease. This is used as security for payment of rent and performance of covenants. A tenant who pays a deposit should ensure that he also enters into a Rent Deposit Deed. This protects the tenant's interest in the deposit and will allow



for stricter guidelines as to how the deposit is held and what it can be used for.

The tenant will also have to budget for the rent payments. Rental on the majority of commercial leases still paid quarterly in advance, usually on the "usual quarter days" which are: 25 March, 24 June, 29 September and 25 December.

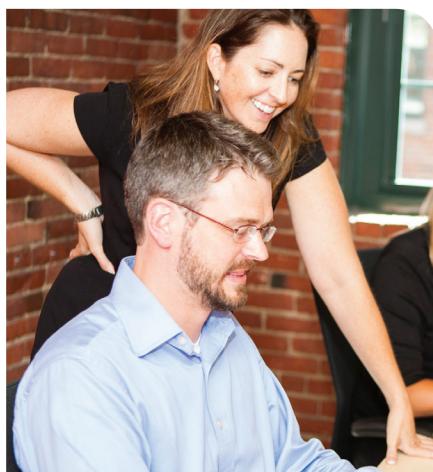
In addition to the rent a contribution to service charges and insurance will also be payable. In budgeting your cash flow, you will need to take all of these costs into account as it can constitute a significant initial outlay. If your cash flow cannot bear that outlay, then you will have to negotiate with the landlord at an early stage to see if alternative arrangements (e.g. a guarantee for rent, or monthly rental payments) can be agreed with the landlord.

If you would like any further information about commercial leases, please call Neil Cuffe on 020 8290 7405.

Legal Costs and Business Start-ups

Cash flow is important to start-up businesses. Capital is needed for the start-up costs of running the business until it starts to generate cash from the sale of goods or services.

Unless the business' backers have deep pockets, you will have to juggle expenditure on various aspects of the business and this will include the budget for legal costs. You will have to decide how you prioritise your legal expenditure. Items which may require legal expenditure include:



1. Shareholders'/Partnership agreement: If you go into business with other individuals, either as a partner or a shareholder, you may wish to regulate your relationship. A shareholders/partnership agreement may include - provisions dealing with voting rights, what decisions need to be taken jointly, how much time each party will be expected to expend on the business, what financial contributions each of the parties will make and what would happen if one or more of the members wish to leave.

2. Terms of Business: You should set out in writing the terms under which you contract your clients. This in particular will deal with what you have to do to keep up your side of the bargain and when you are entitled to receive payment. This will be vital in managing your cash flow.

3. Employment contracts: Your relationship with any employees must

be put in writing, setting out the terms under which they are employed.

4. Commercial property: If you are leasing or buying commercial premises you may require a solicitor to assist you and certainly if you are taking on risk you will require it

5. Funding agreements: If you are raising funds to go into business then you may require a solicitor to review the terms of your borrowing. Further on, if you are offering security to the Lender, such as a charge over your home, it is likely that the bank will require you to obtain independent legal advice in any event.

If you would like any further information please call Neil Cuffe on 020 8290 7405.

We offer a free 40 minute appointment for new start ups which would include a review of your requirements and a recommendation to assist you in prioritising the various items of legal expenditure as well as any other issues may wish to discuss.

SMEs wait an average of 71 days for payment

Figures released by the Asset Based Finance Association (ABFA) have revealed that small businesses are forced to wait longer than large businesses to receive payment.

Businesses with turnovers of less than £1m wait an average of 71 days for payment. That is 23 days more than businesses with turnovers of £500m and above, who wait an average of 48 days.

Many SMEs struggled during the recession as large companies took advantage of their strength by lengthening the amount of time they took to complete payments. The government responded by urging big businesses to sign up to the Prompt Payment Code, in which firms volunteer to pay in accordance with the contract and not attempt to change payment terms retrospectively.

However, SMEs still have to wait a week longer for payment than they did before the recession began. In 2006 they waited an average of 64 days.

Jeff Longhurst, the chief executive of ABFA, said: "These figures highlight the relationship between some big businesses and their smaller suppliers has become even more unbalanced since the credit crunch – and efforts to address this have not had a great deal of impact. It's alarming to see how much longer SMEs are waiting to receive payment



compared to just a few years ago and it's putting some SMEs in financial difficulties.

"It's more important than ever that these businesses are aware of the options they have to get around the roadblock of late payment, and free up the funds they need more quickly."

Firms affected by late payments should seek legal advice as soon as possible. Solicitors can use several measures from formal letters to court action to ensure early settlement of outstanding invoices.

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High value commercial litigation cases jump by 16%

There's been a substantial rise in the number of high value litigation cases between companies in the Commercial Court.

There were 1,353 cases in 2013, a rise of 16% compared with the previous year.

It's thought the increase is due to a build-up of cases arising out of the recession which are only now coming to court.

The reason for the delay could be that the disputes were complex and



so it took a great deal of time for both parties to present their case.

It's also likely that some cases involved businesses doing everything possible to avoid litigation but still being unable to reach a compromise. In such cases, going to court may be the only remaining option following years of negotiation and mediation.

The economic downturn has also made companies more willing to take legal action to protect their interests as they see their revenues squeezed. This is particularly true in disputes involving issues such as professional negligence and property break clauses.

As profit margins become ever tighter, firms are less able to absorb losses and more likely to enforce their legal rights to keep those losses to a minimum.

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