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

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### Small firms 'expect late payment to get worse'

Nearly a third of small businesses expect the problem of late payment and cash flow to get worse, according to a survey conducted by Lloyds Bank.

The survey reveals that late payment of invoices remains the main cause of cash flow problems facing UK firms. One in five businesses admit it's causing them difficulties, and nearly one in three expect that more customers will request deferred payment terms over the next six months.

Donald Kerr, Managing Director at Lloyds Bank Global Transaction Banking, said: "While the number of businesses suffering cash flow problems has fallen from a peak of 35% in 2013, it remains stubbornly high.

"Cash flow is the lifeblood of any business but for too many businesses, late payments continue to be a significant problem. Where businesses do expect cash flow to be an issue, they need to take action to manage issues like late payment so that it doesn't hamper their opportunities to grow.

"Specialist types of lending such as invoice finance can alleviate these pressures by allowing businesses to borrow against the value of their invoices, helping them to avoid payment delays and improve cash flow.

"Thorough credit checks on customers and setting out clear payment terms at the outset of any relationship will also help."

Late payment is more than just an inconvenience for many



firms. It can threaten their survival. Numerous otherwise viable enterprises have gone out of business because of cash flow problems.

With the stakes so high, it's important that firms monitor their credit control carefully and take early action to recover debts.

A letter from a solicitor is often enough to secure payment of overdue invoices. In more stubborn cases, the law offers several other options, up to and including court action.

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### Firm loses its assets in misunderstanding over contract

A firm that entered into a contract before the final details were agreed has ended up losing all its assets.

The case involved a firm that wanted to buy a property but could not raise the purchase price. It entered into an agreement with a company that would lend it both the deposit and purchase price in full.

The documentation for the deposit loan was drawn up, contracts were exchanged and a completion date set for three weeks later.

As security for the deposit loan, the lender took charges over the firm's assets and a debenture covering its intellectual property rights in a patent.

The firm believed that the documentation securing the deposit



#### Contract Law

loan was intended to be temporary, and would be replaced by a long-term agreement to be negotiated between exchange and completion.

In the event, the two sides were unable to agree terms for a longer-term loan. The lender demanded repayment of the deposit, which the firm could not provide because it had no funds. The lender called in its security and the firm lost everything.

It took legal action claiming that it had been snared into making the deposit loan agreement when the lender had never intended to proceed with a long-term funding arrangement.

The High Court ruled in favour of the lender. The judge said the firm's case was weak from the outset and got weaker during the trial.

On the evidence, there had been no fraudulent misrepresentation. The lenders had put the maximum pressure on the firm, but there was no allegation of undue influence or duress.

They had simply exploited their strong position and the borrower's weakness. That was not, in itself, actionable, and happened every day in the commercial world. The real reason for the breakdown between the parties was a clash of personalities.

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## Travel time classed as ‘work time’ if no fixed base

The European Court of Justice (ECJ) has ruled that if employees don't have a fixed place of work, the time they spend travelling from home to their first job of the day should be classed as work time.

The same principle applies to the time spent travelling back home after the last job of the day.

The issue arose out of a case involving engineers at a security company in Spain called Tyco.

The company closed its regional offices and asked workers to travel from home to their allocated jobs in different locations. It said travel time to the first job of the day and back from last one should be considered as rest time.



The engineers argued that it was work time. The ECJ has ruled in their favour. It said: “The fact that the workers begin and finish the journeys at their homes stems directly from the decision of their employer to abolish the regional offices and not from the desire of the workers themselves.

“Where workers do not have a fixed or habitual place of work, the time spent travelling each day between their homes and the premises of the first and last customers designated by their employer constitutes working time.”

The ruling affects companies in the UK because it is based on the EU Working Time Arrangement. Of course, the ruling does not affect employees who have a fixed workplace.

Employers may wish to review their pay structures to ensure they are not breaching working time regulations.

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## Right to Rent regulations come into force in all of England

On 1 February 2016, the Right to Rent Immigration Checks Scheme came into force in all of England.

Right to Rent was introduced in the Immigration Act 2014 and the Right to Rent provisions are contained in Chapter 1, Part 3 of the Act. It initially came into force on 1 December 2014 when it was tested in the West Midlands on a trial basis. However, from 1 February 2016, the Right to Rent rules will apply to all new private tenancies and various other types of tenancies.

Certain tenancy agreements will be exempt from the Right to Rent rules and a full list can be found at Schedule 3 of the Act. The Act provides that certain classes of people will be disqualified from occupying property under a residential tenancy agreement.

If a Landlord's property falls under the Scheme and the property is being

let to adult occupants, Landlords are responsible for carrying out prescribed checks before allowing an adult to reside in the property. A Landlord must carry out these checks on all adults occupying the property even if they are not named on the tenancy agreement.

The Right to Rent checks will have to be carried out for all agreements entered into on or after 1 February 2016 (if outside the pilot area in the West Midlands). Section 22 of the Act provides that a Landlord must not let an adult occupy premises under a residential agreement if the adult does not have the Right to Rent ie is disqualified due to their immigration status.

It is important to note that, even after prescribed checks have been carried out, a Landlord may be required to carry out follow up checks and checks on new adults. There are specific rules

regarding assigning responsibility to an agent and in a situation where a tenant sublets the property.

Contravention of the Act will result in serious consequences to a Landlord. Although a breach is not a criminal offence, if it transpires that a Landlord has rented to a tenant who does not have the Right to Rent, the Landlord could incur a financial penalty of up to £3000. If there has been a contravention, the burden of proof will be on the Landlord to prove that they have a statutory excuse defence.

Landlords will have to consider the new legislation before renting a property and the experts in our Housing Team can provide guidance to Landlords to ensure full compliance.

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## Landlord wins dispute over VAT charges to tenants

A landlord was entitled to recover from tenants the VAT charges he had to pay his managing agent for caretaking staff.

That was the decision of the Upper Tribunal (Lands) in the case of a landlord who hired a managing agent to fulfil the various obligations set out in his lease agreements. The agent was responsible for employing the staff needed to carry out the work.

The invoices submitted by the agent included VAT on staff salaries, which the landlord passed on to the tenants as part of the service charges.

The tenants objected. The issue before the tribunal was whether the VAT charges fell within the concession set out in VAT Notice 48.

This exempts “all mandatory service charges or similar charges paid by the occupants of residential property towards the upkeep of the dwellings or block of flats in which they reside and towards the provision of a warden, caretakers and people performing a similar function”.

The tribunal ruled in favour of the landlord. It held that the concession did

not apply because the agent's charges were not “mandatory service charges”. Where a landlord employed staff directly and passed the cost on to the tenants through a service charge, no VAT would be payable on the salaries of such staff.

However, where the same staff were employed by an agent who invoiced the landlord for their services, VAT would be payable on the salaries and that could be passed on to the tenants.

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# New regulations affecting landlords and tenants

New regulations governing the use of section 21 eviction notices and specifying the information landlords must provide to tenants came into effect on 1 October.

Landlords must provide tenants with the following information at the start of the tenancy or as soon as possible afterwards:

- a copy of the Energy Performance Certificate for the property
- a copy of the current gas safety certificate
- a copy of the Department for Communities and Local Government's How to Rent: the checklist for renting in England.

This information must be provided before a section 21 no fault possession notice can be used.

The regulations apply to tenancies dating from 1 October 2015 and will apply to all tenancies from October 2018.

The full title of the regulations is: The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 (SI 2015 No. 1646).

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## Law changes in 2016 that employers should know about

Whilst not as dramatic as the last couple of years, there are some changes in the coming year employers should be aware of. Below are the main ones:

### National Living Wage Introduced

On 1 April 2016 the national living wage will be introduced, and for the first time, employers will need to pay staff aged 25 and over the national living wage which will initially be set to £7.20.

Another change concerning minimum pay is the doubling of the penalty for failure to pay staff the national minimum.

### Gender Pay

By 26 March 2016, regulations will be introduced making it compulsory that large employers, with 250 or more employees, will be obliged to publish information about the difference in pay between men and women including information of the gap in bonus payments. Further details will be provided about what the information should include and where it should be published.

### Reforms to Strike Laws

Workers who are trade union representatives. There are proposed



reforms to the power to strike. The vote must have the backing of at least 40% of eligible trade union members, as opposed to just 50% of those who vote.

Employers can cover striking workers by using agency staff.

### Statutory maternity, paternity, adoption and shared parental pay rates frozen

The annual increase in the weekly rate of statutory maternity pay, statutory paternity pay, statutory adoption pay and statutory shared parental pay are frozen at £139.58 per week. The statutory sick pay will also remain the same at £88.45.

### Increase in the Income Tax Threshold

There are changes to the income tax personal allowance which will increase to £11,000. The higher rate tax threshold increases to £43,000. These take effect on 6 April 2016.

### Employer NICs abolished for apprentices under the age of 25

From April 2016, employer national insurance contributions for young apprentices are abolished. Employers will not have to pay Class 1 national insurance contributions on earnings up to the upper earnings limit for apprentices aged under 25.

### Public Sector Exit Payments

Exit payments for public-sector employees are capped at £95,000, however, as yet there is no planned implementation date for this change. From 1 April 2016, public sector employees with annual earnings of £100,000 or more will be expected to repay exit payments if they return to work in the same sector with one year.

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## Architects win £150,000 dispute over hotel development

A firm of architects have won their claim that a developer should pay them £150,000 for work carried out on a new hotel.

The Court of Appeal heard that the architects were hired by the developers before a binding contract was drawn up. They carried out preliminary work while they were still negotiating payment terms.

The developers were unhappy with the work and decided to engage another firm instead. They agreed to pay the architects £150,000 for their efforts in relation to the preliminary planning.

The agreement stated that there was no need for the architects to do anything more, but then the developers refused to pay, arguing that further work was in fact required before payment was due.

The High Court ruled in favour of the architects, pointing out that the developers' interpretation made no sense in light of the statement that further work was not necessary.

The developers appealed saying the judge was wrong to conclude that the relationship between the two sides had broken down by the time of the

agreement and payment only related to work already done. At that time, the architects were still trying to remain on the project. The agreement could only refer to work that would be done in the future.

The Court of Appeal rejected their arguments. It said it was impossible to disagree with the judge that the agreement referred to work done in the past as it specifically said that nothing further was required of the architects.

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# Review to encourage more business start-ups

The government has commissioned an independent review to find ways to encourage more people to set up successful businesses.

It will be led by Michelle Mone, who founded the lingerie business Ultimo and turned it into a multi-million pound company.

Nearly 70,000 new businesses have already been created through the New Enterprise Allowance scheme, which started in 2010.

The review will look at ways to increase that figure by providing more help for aspiring entrepreneurs, particularly in areas of high unemployment.

Ms Mone said: "A truly modern and successful economy needs to be able to unleash the entrepreneurial energy and skills of everyone in society. It cannot tolerate a situation where people are



held back from achieving dreams of working for themselves and creating jobs for others, simply because of where they are from, because they have had a really tough time growing up, or because they are a lone parent."

Creating a new business can be an exciting but daunting task. It's vital to carry out extensive research to make

sure you start out in the right way. You need to know your potential market but you also need to consider the legal structure of your business.

For example should you set up as a sole trader, a limited company or perhaps enter into a partnership with a colleague?

There are advantages to all of these approaches depending on the type of business you want to create. You may also need to consider employment contracts if you want to take on staff, and leasing arrangements if you need premises.

Good legal advice at the outset can prevent mistakes that could prove costly in the future.

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## Changes allow more offices to be converted into homes

The government is introducing new measures to allow more offices and other commercial buildings to be converted into homes.

Temporary permitted development rights were introduced in 2013. They made it possible to convert offices into homes without having to apply for planning permission.

It led to 4,000 conversions being given the go-ahead between April 2014 and June this year.

The rights were due to expire on 30 May 2016 but the Housing and Planning Minister, Brandon Lewis, has announced that they are to be made permanent. Those who already have permission will have three years to complete the change of use – ending potential uncertainty

for developers and enabling the easier provision of homes converted from unwanted offices.

Mr Lewis said: "These measures will mean we can tap into the potential of underused buildings to offer new homes for first-time buyers and families long into the future, breathing new life into neighbourhoods and at the same time protecting our precious green belt."

The government says it also wants developers to be allowed to demolish offices to build new homes, and to convert light industrial buildings and launderettes into homes, subject to certain conditions.

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