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

AUTUMN
2017

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.

For more than 125 years we have been providing clients with expert and professional legal advice. We understand the value of a personal and friendly service.

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More businesses at risk from interest rate rises

More than 79,000 businesses in the UK say they would not be able to repay their debts if interest rates were to rise by even a small amount.

That's an increase of nearly 60,000 since September last year.

The figures are based on a long running survey conducted by the insolvency and restructuring body, R3. Its researchers also found that 96,000 firms were only paying interest on their debts.

Andrew Tate, spokesperson for R3, said: "This is the first increase in the number of businesses worried they would be unable to cope with an interest rate rise since 2014, and it coincides with a period of slower than expected growth and a small rise in corporate insolvency numbers.

"UK firms have faced a challenging 2016 and early 2017: the sharp fall in the pound has made things difficult for importers, while a rising National Living Wage and the roll-out of pensions auto-enrolment have added to businesses' running costs.

"Only paying the interest on debts is not necessarily a sign that a business is in distress: it may be that a company is taking advantage of low rates to invest in its operations or assets. But only repaying the interest is also a common characteristic of a 'zombie business' – a business only able to keep going because of an ultra-low cost of borrowing and with little chance of survival.

"The research shows that there are tens of thousands of firms currently walking a very tight line. Rising inflation may also lead to a double-whammy for struggling businesses: it may increase the chance of the Bank of England raising interest rates, and it would undermine the consumer spending that has driven the economy over the last year."

The research highlights the need for firms to keep a tight rein on credit control and to take prompt action over late payment of invoices.

Firms in distress often only pay creditors who actively chase up debts and ignore those who take a relaxed approach.

If a creditor waits for too long, the distressed firm may go out of business making the debt very difficult if not impossible to recover.

A letter from a solicitor is often enough to secure payment. If not, there are several other measures that can be taken up to and including court action.

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Director caught out by having to repay loan 'on demand'

Company Law

Directors need to be clear about repayment terms when borrowing money from their company or using their loan account.

Failure to do so could result in being obliged to pay back large sums before they are ready to do so, as happened in a recent case before the High Court.

The issue arose due to a complex arrangement whereby the director borrowed £131,000 from his company so he could buy shares in the company. The agreement was further complicated by his being involved in a second related company.

Both companies were restructured two years later. At this point, the director defaulted on a repayment for the loan. The company then demanded repayment of all the money it had lent the director, and £14,000 debited to his loan account.

The director argued that an email sent to him by a company representative when discussing the arrangements said the loan was not repayable upon demand, but upon a trigger event such as a share sale, which had not occurred.

He argued that the loan account sums had been paid on terms that they would not be repayable except out of dividends subsequently declared.

The High Court ruled against him. It held that the email was merely a broad outline of terms which would be subject to discussion later. There had been no subsequent discussion of repayment terms.

It meant no agreement about repayment could be inferred beyond that which followed routinely, namely that repayment was due upon demand.

There was also no evidence of an agreement that debits to the account would not be repayable until a dividend was paid. In any case, such a term would have been unenforceable.

The sums on the loan account were therefore due for payment on demand.

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Judge & Priestley's Landlord & Tenant team

Judge & Priestley's Landlord & Tenant team specialise in all legal matters relating to managing tenancies. The team offers a complete legal service to include advice and assistance from commencement of the tenancy right through to eviction and enforcement proceedings. Our specialists can deal with drafting/reviewing tenancy agreements, possession claims, enforcement proceedings, unlawful eviction claims and all matters regarding landlord and tenant disputes. Answers to some of the more common questions our team gets asked are outlined below.

The team is headed by Nitika Singh, and if you need assistance or want to find out about our competitive fixed fee pricing, please call Nitika on 0208 290 7347 or email nsingh@judge–priestley.co.uk

Q: How can I gain access to my property for inspections/works if the tenant is refusing to allow me access?

If your tenant is persistently obstructive in allowing access for non-urgent inspections, you should maintain a written record of all of your requests for access. You should also advise your tenant in writing that you will not be liable for any outstanding repairs at the property for which you have not been given access and/or any resulting injury due to damage in the property which has arisen as a result of the tenant's failure to provide access.

You may also want to consider applying to Court for an injunction order if you deem it necessary to gain access without delay e.g. where annual gas safety inspection is due, and also consider serving a section 21 notice to gain possession of your property. In the event that you have incurred any wasted costs for a scheduled appointment agreed with your tenant you should refer to your tenancy agreement as there may be a term in your tenancy agreement that entitles you to recover such costs from your tenant.

Q: I have a 2 bedroom flat that I rent out and I am looking to rent out each room separately. Do I have to charge the same rent since one room has an ensuite and is a bigger bedroom?

The short answer is no you don't have to charge them the same rent. If you are planning to offer two separate tenancy agreements it is a matter for you as the landlord and the individual tenant to agree the amount of rent applicable for each room. Based on your description of the property and the room sizes you will be justified in charging a higher rent for the bigger bedroom.

Q: Can I evict a tenant without a Court Order?

No you cannot evict a tenant without a Court Order. You can terminate a tenancy by mutual consent between both the landlord and tenant but if your tenant is not willing to leave you will have to apply to Court for a possession order.

Q: Do I need to have a written tenancy agreement to allow somebody to stay in my house if I want to charge rent?

If you are proposing to remain in your property and let out a room you do not need to have a formal tenancy agreement but we would strongly advise that you do have some form of written agreement as it is often better for both parties to have clarity as to what is expected of the arrangement and this would help in the event of a dispute. If you propose to let out multiple rooms you may also want to investigate as to whether the rules relating to Houses in Multiple Occupation (HMO) would apply. These will vary from one local authority area to another.

Developer wins planning appeal in 'horseracing capital'

A developer has won a legal battle for planning permission to build 400 houses in Newmarket, described in court as the horseracing capital of the UK.

The importance of the racing industry was a major factor in the case. The High Court was told that large numbers of horses crossed the town every day on their way to and from training.

They interacted with the traffic, particularly at horse crossings. As thoroughbred racehorses, they were skittish and easily spooked.

The town's development plan included a policy which sought to avoid development that would have a material adverse impact on the horseracing industry unless the benefits of the development would significantly outweigh the harm caused.

The developers and the local planning authority agreed that the plan to build the 400 houses would add about 5% to the amount of traffic overall.

The inspector who considered the application recommended that planning permission should be granted.

Among other things, she concluded that the presumption in favour of sustainable development in the National Planning Policy Framework applied. She also determined that the development traffic would not make the congestion in Newmarket materially worse and there would be no unacceptable increase in congestion. She further concluded that the proposal would not result in an adverse effect on or

an undue risk to the existing economic importance, potential for future growth and continuing success of the horseracing industry.

The Secretary of State declined to accept the inspector's recommendation. The High Court has now ruled in favour of the developers. It held that the Secretary of State had failed to apply national policies correctly and failed to give any reasons for reaching his conclusion about the detriment to the horseracing industry.

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Unsuccessful tenderer can check confidential data

The High Court has allowed Bombardier Transportation to examine confidential documents after it alleged that it had been treated unfairly in a public procurement exercise.

The issue arose after the company failed to win a £460m contract to supply trains to Merseytravel.

The court heard that such contracts attracted the same group of tenderers, who regularly competed against each other across the world. A consent order had provided a confidentiality ring specifying individuals to whom confidential information and highly sensitive documentation, including the terms of the successful tender, could safely be disclosed.

Confidential information was to be supplied electronically, but only the lawyers could view it in that form; non-legal external consultants had to review it in hard copy. Highly sensitive documentation was to be disclosed only in hard-copy form, and non-legal external consultants were not entitled to review it at all.

Bombardier sought to vary which individuals within the confidentiality ring could see which types of information and documentation.

The court agreed to the request on the basis that there was nothing wrong with seeking to vary the terms of consent orders if practical difficulties in complying with them subsequently arose.

It ruled that the full group within the confidentiality ring be permitted to review both the confidential information and the highly sensitive documentation.

It said it was understandable that the defendant and successful tenderer in cases like this might be concerned

that such disclosure would enable the claimant to trawl through the successful tender for information justifying a separate complaint of unequal treatment.

However, such concerns about the potential for “fishing expeditions” should not be taken too far. Unsuccessful tenderers were entitled to fully investigate comparative treatment of the tenders.

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Enterprise fund helps 105,000 new businesses get started

More than 105,000 businesses have now been set up with the help of the New Enterprise Allowance (NEA), a fund for budding entrepreneurs with an idea for a new company.

Under the scheme, successful applicants get access to a business mentor, financial support for up to 6 months and may be able to apply for a loan of up to £25,000 to help with start-up costs.

The latest NEA figures show that the North West had the highest number of start-ups (16,090), followed by London (12,870) and Yorkshire and Humberside (11,590).

The NEA figures also show that of the total number of individuals launching a business:

- 24% were over the age of 50
- 7% were aged between 18 and 24
- 40% were women
- 22% have a self-declared disability
- 13% were from a black and minority ethnic background

Creating and developing a business can be an exciting but daunting task. It’s vital to carry out extensive research to make sure you progress in a sustainable way.

You need to know your potential market but you also need to consider the legal structure of your business.

For example, you may start out as a sole trader but later there might be advantages in creating a limited company or entering into a partnership.

The correct approach will depend on the type of business you operate. You may also need to consider employment contracts if you need to take on staff, and leasing arrangements for premises.

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

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Builder recovers £44,000 in dispute over defective work

A builder has recovered unpaid fees totalling £44,000 in a dispute with property owners over alleged defects in renovation work.

The owner had asked the builder to do certain works on their property. There was no written agreement.

The owners paid only part of the builder’s £57,000 fee and, when the builder brought proceedings, counterclaimed for defective work that had needed to be remedied.

The judge found that the evidence of a second builder, who had carried out the rectification works and gave evidence as to their cost, was unreliable. Instead, he accepted evidence as to cost from the single joint expert.

The judge disallowed the owners’ counterclaim in respect of rectifying work done to folding doors at the property, finding that the builder had not been responsible for their measurement and installation.

The total figure found to be due to the builder, after taking into account some work that was found to be defective, was £44,000 plus VAT.

The Court of Appeal has upheld that decision. It held that it was not possible to criticise the judge’s finding that the builder had not been responsible for measuring and fitting the doors.

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Employment tribunal fees judged to be unlawful

The Supreme Court has ruled that employment tribunal fees are unlawful.

The government responded immediately to say that it would scrap the fees and offer refunds to past claimants. The fees had proved controversial since they were introduced in 2013, with employees having to pay up to £1,200 to bring a claim.

A report by the House of Commons Justice Committee said the introduction of fees led to a drop of more than 70% in the number of cases brought.

The union Unison challenged the imposition of fees claiming they denied workers access to justice. They lost the case in the High Court and the Court of Appeal but the Supreme Court ruled in their favour. It held that the fees were discriminatory, unlawful and unconstitutional.

Following the judgment, justice minister Dominic Raab, said: "In setting employment tribunal fees, the government has to consider access to justice, the costs of litigation, and how we fund the tribunals.

"The Supreme Court recognised the important role fees can play, but ruled that we have not struck the right balance in this case.

"We will take immediate steps to stop charging fees in employment tribunals and put in place arrangements to refund those who have paid. We will also further consider the detail of the judgment."

It's thought the ruling could lead to a surge in employment claims over the coming months.

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Landlord's notice to quit sent to old address is invalid

Commercial Property

A notice to quit was declared invalid because the landlords sent it to the tenant's old address, even though they had been informed of the new one six years earlier.

The case involved the tenancy of an agricultural holding.

The original tenancy agreement stated: "Either party may serve any notice (including any notice in proceedings) on the other at the address given in the Particulars [at the beginning of the tenancy agreement] or such other address as has previously been notified in writing."

In July 2011, the landlords served notice to quit at the tenant's address as shown in the Particulars, even though he had moved from that address nearly six years before and had given notice of his change of address to the landlords by a written note dated December 2006.

The judge found that the old address was still valid as it was the one given in the Particulars, and it remained acceptable for service even after receipt by the landlords of the December 2006 notice of change of address.

The Court of Appeal has overturned that decision.

It held that as a matter of commercial common sense, the parties must have intended that the new address, once duly notified, should supersede the original one shown in the Particulars.

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