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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.

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Corporate insolvencies rise as confidence falls

Corporate insolvencies continue to rise with companies struggling to cope with falling consumer confidence and Brexit uncertainty.

Underlying corporate insolvencies rose by 6.3% in Q1 2019 compared to Q4 2018, and rose by 5.1% compared to Q1 2018.

Stuart Frith, president of insolvency and restructuring trade body R3, said: "These underlying insolvency figures – the highest first quarter figures since 2014 – reflect the impact of stuttering consumer confidence and, to a degree, Brexit uncertainty on the business community.

"The first three months of each year are where we typically see the consequences of missed targets in the run-up to Christmas and the end of the year, particularly in the retail sector.

"The pre-Christmas period can be make or break, and Christmas 2018 was particularly tough."

Frith says the factors causing the rise in insolvencies have been around for some time and don't look like going away soon.

Consumer confidence and spending power is low, while the High Street is facing major structural challenges due to online competition.

Consumer facing businesses have tried techniques such as offering discounts to customers in a bid to increase demand. However, they are being pushed to the limit and struggling to remain viable.

This is also causing problems for other businesses.

The uncertainty surrounding Brexit has been another factor that has caused businesses to struggle as it is difficult to plan ahead when they don't know what problems a future trading relationship with the EU will bring.

Frith said: "This was particularly acute in the first quarter of this year as we approached the original 'Brexit Day' on 29 March. No Deal preparations put pressure on businesses to stockpile goods and materials, in turn putting pressure on their cashflow. Meanwhile, businesses reliant on EU trade saw orders and investment stall."

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New agency law protects landlords and tenants

Landlord & Tenant

All private rented property agents must now sign up to a scheme protecting renters' and landlords' money.

Under the new regulations that took effect on 1 April, all agents in the private rented sector are required to join a government-approved scheme to protect their clients' money while it is in their possession – with fines of up to £30,000 if they fail to do so.

In 2017, an estimated £2.7 billion in client funds – such as tenants' deposits and landlords' rental payments – was being held by letting agents.

Yet currently, people may not always be able to recover their money if their agent fails to repay it, for example, due to misuse by the agent or bankruptcy. The new requirement on agents to join an approved client money protection (CMP) scheme will stop tenants and landlords being left out of pocket when uninsured agents unexpectedly go bust or abscond with their money, giving people reassurance that their money is safe while it is with their agent.

A government spokesman said: "Whilst the vast majority of agents act responsibly, this new law will prevent people from losing their hard-earned cash through no fault of their own. This will give tenants and landlords confidence and peace of mind that their money is in safe hands whilst with their agent."

Before the new regulations came into force, membership of a client money protection scheme was voluntary with approximately 60% of agents signed up.

The government says that making membership mandatory will ensure every agent is offering the same level of security.

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Tenant Fees Act 2019: Implications for Landlords

This important new piece of legislation came into force on 1 June 2019 and is designed to prohibit certain payments between landlords or agents and tenants. All payments in connection with a tenancy are prohibited, unless they are specifically permitted by Schedule 1 of the Act.

Permitted payments are in relation to the following: Rent, Tenancy / Holding deposits, in the event of a default, on variation, assignment or novation of a tenancy, on termination of a tenancy and payments in respect of council tax, utilities, TV licences and communication services.

The Act applies to Assured Short Tenancies ("ASTs"), House in Multiple Occupation ("HMOs") and licences to occupy. After a one year transitional period, the Act will apply to all applicable tenancy agreements, regardless of when the tenancy was entered into.

How does the Act impact on the Tenancy Deposit?

Although the tenancy deposit is chargeable, the amount a landlord can request is limited by Schedule 2 of the Act. The deposit amount is determined by the amount of annual rent. If the annual rent is less than £50,000 per annum, the maximum tenancy deposit permitted is five weeks rent. If the annual rent is equal to or greater than £50,000, the maximum tenancy deposit permitted is six weeks rent.

How does the Act affect section 21 notices?

A landlord is prohibited from serving a section 21 notice if he requires a tenant to make a prohibited payment and / or breaches the conditions of Schedule 2 in relation to holding a deposit. Either or combination of both of the said prohibition will invalidate a section 21 notice and accordingly it is to be avoided given the cost implications this may have for landlords including the delay in obtaining vacant possession.

Schedule 3 – Financial Penalties

A first offence under the Act is treated as a civil offence and can lead to a fine of up to £5,000. If the offence is repeated within five years, it would be deemed a criminal offence with the possibility of a fine of up to £30,000.

The landlord can also be required to repay the tenant any outstanding prohibited payment or holding deposit, plus interest and pay compensation if a tenant was required to enter into a prohibited contract.

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Dental practice wins contract dispute with the NHS

A dental practice has won a long running contract dispute with the NHS that went all the way to the Court of Appeal.

The practice had a General Dental Services Contract with the NHS, which stated that no variation could take effect unless it was in writing and signed by or on behalf of the parties, or if the practice was in default.

The contract was later expanded to incorporate a fixed 12-month agreement to supply minor oral surgery services. The service continued after the 12-month period had ended and therefore the contract continued by conduct.

After several years, the NHS wrote to the practice to terminate the oral surgery part of the contract.

The practice argued that the NHS didn't have the right to terminate parts of the contract, only the contract as a whole - and only if the practice was in default. The NHS argued that since the oral surgery contract was still effective it was entitled to terminate it.

The Court of Appeal ruled in favour of the practice. It held that the oral surgery agreement had effectively been incorporated into the main contract, which could only be terminated as a whole and only if the practice was in default.

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Brokers fined £400,000 after breach of market abuse laws

A brokerage firm has lost its appeal against a penalty imposed on it for breaching market abuse laws.

Linear Investments Ltd had been fined £409,300 after it failed to act responsibly and effectively in detecting and reporting the abuses.

It had a responsibility to conduct its own post-trade surveillance, which it had failed to carry out, despite several reminders from the Financial Conduct Authority (FCA). Linear eventually began to take steps to remedy the breach, such as acquiring an automated monitoring system. However, due to unforeseen delays, it took a year for the new system to become effective.

The FCA calculated the penalty by applying a percentage of the firm's gross revenue. It allowed a 10% reduction as Linear had taken steps to remedy the issue and was not at fault for the delay.

While the firm accepted it was in breach of the law, it appealed the penalty. The Upper Tribunal ruled that the FCA had been correct to use gross revenue figures to calculate the penalty. To use something other than gross revenue could make the calculation so complicated that there would be little value in using revenue as a starting point.

It also ruled that the negligence of the firm had been so serious that the FCA had been correct in its assessment and that a 10% reduction in the final total was sufficient.

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New law to make sure all workers receive pay slips

New regulations requiring employers to provide payslips for all workers, including those on casual and zero-hours contracts, has now come into effect.

An estimated 300,000 people are expected to benefit.

These payslips must include the number of hours worked, making it easier for workers to check they are being paid in full at the correct amount.

There is also a new entitlement to a day one statement of rights setting out details of a new employee's leave allowance. Parliament has also approved the first package of Good Work Plan legislation, which means:

- around 1.5 million people are to receive a day one statement of rights setting out leave entitlements and pay
- all workers will be better protected from employers who have demonstrated malice, spite or gross oversight, with the maximum additional penalty that Employment Tribunals can use quadrupling from £5,000 to £20,000
- up to 120,000 agency workers will benefit from the scrapping of the Swedish Derogation – an end to the legal loophole that enables some firms to pay agency workers less than permanent staff
- new agency workers will also benefit from a key facts page before signing up with an agency, which will provide clarity, particularly around their pay
- employees will have a stronger voice in the workplace. Employees already have a legal right to make a request to be informed and consulted about issues at work and the threshold for them to request these arrangements will be reduced from 10% to 2%.

A government spokesman said: "This all forms part of the Good Work Plan, which is the cornerstone of our commitment to build a labour market which rewards people for hard work, celebrates good employers and boosts productivity and earning power of workers all across the UK.

In addition, the Government has launched a new £1 million advertising campaign to raise awareness of the National Living and Minimum Wage rates to workers and employers.

In a separate move, the government has said it's committed to maintaining workers' rights after the UK leaves the European Union.

It says it will not seek to reduce the standards of protection in EU laws retained in UK law and will ensure that all new legislation changing those laws will be assessed as to whether they uphold this commitment.

Parliament, trade unions and businesses will all be given an enhanced role in shaping employment law.

We shall keep clients informed of developments.

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The refusal of planning permission for housing project ruled unlawful

A planning inspector's refusal to grant permission for a housing development has been ruled unlawful by the High Court.

The case involved Green Lane Chertsey Developments and its proposal to build residential properties on three adjoining plots of land, some to the rear of existing houses.

Runnymede Borough Council refused permission even though its planning officer recommended approval for some of the development.

Its report addressed the National Planning Policy Framework (NPPF) and accepted that the local authority was unable to demonstrate a five-year housing land supply.

On appeal, the planning inspector found that the development would cause material harm to the character and appearance of the area and conflicted with the local plan.

Green Lane argued that the planning inspector had erred in law by failing to refer to the tilted balance in the NPPF in favour of approving developments. It said the inspector had also failed to

have regard to the significant need for housing in the area.

The court ruled in favour of Green Lane. It said it was surprising that the planning inspector had not mentioned the NPPF and the tilted balance.

It was for the planning inspector to exercise his judgment, but it was to be assumed that he was aware of the tilted balance and, if he was disapplying it, he should have declared that.

The inspector's decision had been unlawful and was quashed. The matter was remitted for reconsideration.

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Landlords call for a specialist housing court

Landlord groups have called on the government to establish a dedicated specialist housing court to speed up the process of legitimate evictions.

The move comes after the Ministry of Justice published figures showing that it is now taking longer for private landlords to evict problem tenants.

The average time between a landlord making a claim to the courts to repossess a property, and it actually happening, was 17.3 weeks for the first quarter of 2019, a week longer than the last quarter of 2018.

These figures are based on the government's preferred median measurement.

Landlords' concerns have been raised further in recent months after government ministers pledged to abolish Section 21 'no fault' repossessions.

The Residential Landlords' Association (RLA) says the court processes must first be fixed to ensure landlords are not unduly frustrated when wanting to reclaim their property from tenants who have failed to pay their rents or committed anti-social behaviour.

It is calling for the establishment of a properly funded, dedicated housing court to improve and speed up justice for landlords and tenants.

David Smith, policy director for the RLA said: "The courts are simply unable to cope when landlords seek to repossess property for legitimate reasons.

"Before seeking to scrap Section 21 repossessions …. the courts must first be substantially improved to speed up access to justice. That means establishing a full and proper housing court."

The RLA is currently consulting landlords for suggestions on how the process for repossessing properties can be improved, with record numbers of landlords already responding.

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Judge orders homeowner to pay builder in full for repair

The High Court has ordered a homeowner to pay the full cost of repair work carried out on his property by a building company.

The court heard that the homeowner, Sylvein Pinto, had asked ICCT Ltd to stop leaks in his basement.

The work was not paid for so ICCT took the matter to arbitration.

The adjudicator found that Mr Pinto had agreed to repairs at £400 a day plus the cost of materials, but that the basement had required a lot more work than he had realised, and he had terminated the contract early.

He convinced himself that he had been deceived but there was no evidence of that as a great deal of work had been required.

The adjudicator found in favour of ICCT and made an award of £6,456 including VAT.

Mr Pinto appealed saying there had been no jurisdiction to refer the matter to adjudication as the works had been on a residential dwelling, the adjudicator had been biased and his decision had been wrong on the merits of the case.

The court found in favour of ICCT, saying there was no evidence of bias. It held that it was not possible to resist enforcement simply because the losing party disagreed with the decision or believed that the adjudicator had got it wrong.

Mr Pinto had maintained that he didn't realise that adjudication applied mainly to commercial properties and that private homes were normally excluded, but ignorance of the law was no excuse and could not be used to ignore legally binding decisions.

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