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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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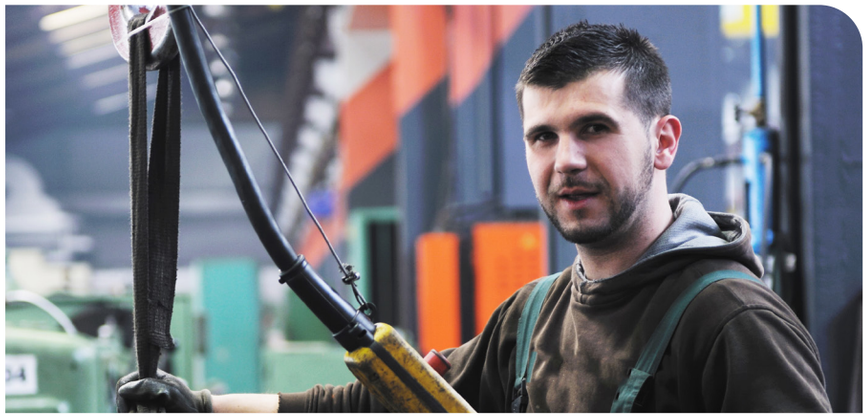
Payment holidays 'could sink some businesses'

Businesses that have offered payment holidays to customers may be damaging their own chances of survival, according to the Chartered Institute of Credit Management (CICM).



A survey by CICM of its members suggests that of the 83% of firms who had offered a payment holiday, two thirds (66%) said there would be a negative impact on revenues and profits over the coming six months.

Of those, a quarter (25%) said the losses could amount to 40% or more.

They feared this could seriously impact their own future performance and viability.

Sue Chapple, Chief Executive of the CICM, believes the figures confirm what many have feared, that some businesses may be sounding their own death knell.

She said: "Payment holidays benefit some to the financial detriment of others, and there has to be a day of reckoning.

"Holiday is a complete misnomer; there is no respite. It is simply delaying what still has to be paid."

The survey captured the thoughts of 1,000 CICM members across multiple sectors, from construction companies to recruitment consultants.

The insolvency restructuring company R3 also believes that current statistics do not reflect the true state of financial distress among businesses, due to government support programmes providing short-term relief.

R3 vice president Christina Fitzgerald said: "We are potentially in the calm before the storm, as indicated by the unprecedented 20.4 percent fall in GDP in April. For the first couple of months of lockdown, the insolvencies were mainly companies already in financial trouble.

It may not be long before this changes, however, and insolvencies of companies which would be viable under normal circumstances are initiated due to the lockdown and effects of the Covid-19 pandemic."

Please contact us if you would like advice about debt collection and credit management.

Sainsbury's to tighten procedures after harassment case

Sainsbury's has signed a legally binding document agreeing to tighten up its procedures after being found liable for sexual harassment against a member of staff.

The supermarket chain held talks with the Equality and Human Rights Commission (EHRC) and has voluntarily agreed to enter into a section 23 agreement under the Equality Act 2006.

This requires Sainsbury's to take all reasonable steps to prevent its employees from committing acts of harassment.

The measures include preparing a discrimination guide for line managers and employees, advising staff on how to deal with harassment through internal communications and establishing more effective training for its workforce.

EHRC started working with Sainsbury's in January 2019.

It wrote to the retailer stating it was considering using its enforcement powers after a member of the supermarket's staff won a sexual harassment claim in 2018.

EHRC asked Sainsbury's to provide information and documentation on its safeguarding procedures for employees.

A Sainsbury's spokesman said: "Safety is our highest priority and we do not tolerate harassment or abuse of any kind. We took immediate steps in 2016 to develop our training and processes."

The agreement is due to last for 18 months from this summer.

Please contact us for more information about the issues raised in this article or any aspect of employment law.

Furloughed workers retain full employment rights

The government has confirmed that employees who are laid off after being on the Coronavirus Job Retention Scheme (CJRS) are entitled to redundancy pay based on their normal wage.

The measure is contained in new legislation introduced to protect workers and ensure all furloughed employees retain their full employment rights. The legislation also covers other rights that rely on average weekly pay, including notice pay, unfair dismissal, and short time working.

Ministers say most businesses are doing right by their employees by paying those being made redundant their entitlement based on their normal wage, rather than their furlough pay, which is often less.

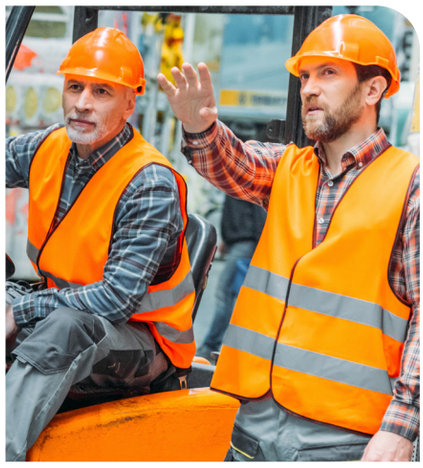
Unfortunately, however, there are a minority of firms who are not.

Employees with more than 2 years' continuous service who are made redundant are usually entitled to a statutory redundancy payment that is based on length of service, age and pay, up to a statutory maximum.

Business Secretary Alok Sharma said: "These changes will also apply to Statutory Notice Pay, which is where employees must be given a notice period before their employment ends, varying from at least one week's notice up to 12 weeks' notice, depending on how long they have worked for their employer. During this notice period, employees must be paid.

"This legislation will also ensure that notice pay is based on normal wages rather than their wages under the CJRS.

"Other changes coming into force will ensure basic awards for unfair dismissal



cases are based on full pay rather than wages under the CJRS."

Please contact us for more information about the issues raised in this article or any aspect of employment law.

GKN Aerospace wins appeal over break clause on flat

GKN Aerospace has won an appeal over a break clause for a flat it had leased.

The issue arose after GKN leased the flat from Duncan Investments Ltd in 2015.

The lease contained an option to renew, and a break option entitling GKN to terminate on giving at least two months' notice.

During the second year, the parties agreed to a further extension of the lease, until 23 October 2019, which was recorded in an addendum to the lease. Clause 2 of the addendum contained a break option, which provided that the "tenant may for this addendum only serve notice at one point, being three

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months prior to the anniversary of the first year".

The addendum was not drafted by lawyers.

On 1 June 2018, GKN gave notice to terminate the lease. Duncan rejected the notice on the basis that it was premature.

A county court judge agreed, holding that GKN had not validly exercised the break option. He interpreted cl.2 as meaning that the break notice had to be received on a specific date, namely 24 July 2018, in order to terminate the tenancy on 23 October 2018.

The High Court has overturned that decision. It held that a strict requirement for notice to be on a single day was exceptionally rare in practice and, if that had been the parties' intention, they would have used more specific language to explain that change.

The judge had been wrong to conclude that there were commercial reasons for requiring a 24-hour service window.

Please contact us for more information about the issues raised in this article or any aspect of commercial property law.

Protesters unable to stop development in beauty spot

A group of protesters have failed to stop a major development in a beauty spot despite mistakes in the way the local authority dealt with the planning application.

The proposal was for a mixed-use development comprising residential housing, a care home and a school. It fell within an area of outstanding natural beauty (AONB) and was also close to a conservation area of historic interest that contained a listed building.

The local authority had granted permission in 2019 based on the conclusions of its planning committee, which had adopted an officer's report. The report considered the impact of the development on the AONB and historic environment, the public interest in the development and the need for housing identified in the local plan.

The protesters called for a judicial review and submitted that the officer's report had failed to properly apply the National Planning Policy Framework (NPPF) policies on conserving and enhancing historic and natural environments.

The High Court found in favour of the local authority.

The court accepted that the officer's report had failed to address the requirements of the NPPF in a coherent way but held that even if it had done so, the authority would have reached the same conclusion on the application for planning permission.

The public benefits of the development were clearly apparent and outweighed the level of harm likely to occur either to the conservation area or the listed building.

Please contact us if you would like advice about the legal aspects of planning and development.

Insolvencies expected to surge by end of this year

Insolvency experts are expecting a large rise in the number of companies going out of business towards the end of the year.

The insolvency trade body R3 surveyed its members and found that an overwhelming majority (93.7%) of respondents expect corporate insolvency numbers to increase.

More than half (56.1%) of the respondents expected corporate insolvency numbers to be significantly higher than in 2019, while 37.6% think they will be somewhat higher.

And out of those who said they expect numbers to rise, nearly six out of ten (56%) think the increase will happen in October-December 2020, while more than a quarter (26.3%) expect it to occur in January-March next year.

A spokesman for R3, said: “Despite the lockdown, the economic turmoil and the fall in GDP of more than 20% in April, corporate insolvencies in April and May actually decreased in comparison to the previous months, according to the Government’s figures.

“This is in no small part due to the Government’s support measures, which have helped a number of businesses that would otherwise have struggled as a result of the pandemic.

“Our members also told us that during April and May, the enquiries they received were mainly around advice on companies’ eligibility for the state-provided relief packages, rather than formal insolvency support.

“However, it’s clear from the results of this survey that it’s a question of when, not if, corporate insolvency numbers increase, as the support available to businesses has deferred rather than deterred the rise in corporate insolvencies you would expect to see in an economic climate like this.

“We would urge anyone who is concerned about the future of their business to seek advice. Doing so will give them more options about their next step and allow them to make a more considered decision about how to move forward.”

Respondents felt the triggers for insolvency over the next 12 months would be rent payments or arrears (61.7%), trade debts (49.7%), and tax payments or arrears (48.1%).

Nearly four in five respondents (79.8%) said pubs/bars would be the worst hit by the Covid-19 pandemic.

A very similar proportion (78.7%) said restaurants and 63.9% said tourism operators.

Hotels (40.4%) and retailers (31.1%) were also identified as likely to be affected.

Please contact us if you would like help with debt collection and credit control management.

Cryptocurrency firm ordered to pay disputed invoices

A company providing cryptocurrency services has been ordered to pay a supplier more than £400,000 to cover two disputed invoices.

The case involved two businesses, Onfido and Blockchain (2020).

In 2018 Blockchain decided to expand and attract new customers. This required the ability to carry out online checks on the identity of proposed new customers, so it engaged Onfido to provide verification services.

The agreement included a charges provision that Blockchain would make a minimum monthly payment of £225,000 for the period November 2018-February 2019, and £125,000 per month thereafter.

Each verification was priced at 66 pence. If in any month the total verification fees exceeded the minimum monthly payment, Blockchain would pay the total per verification fees; if the verification fees were less than the monthly payment, Blockchain would receive a credit for the difference. All charges were paid monthly in arrears.

Blockchain disputed the quality of Onfido's services and refused to pay the invoices for November and December 2018, and January 2019.

Onfido suspended the agreement on 15 January 2019, terminating the agreement in February 2019. It took legal action for payment of the outstanding invoices.

The court found in favour of Onfido. It held that under the contract terms, the substantial provision of services was not a condition precedent to payment of the minimum monthly sum.

The charges provision was a payment stabilisation mechanism. That was apparent from the fact that if in any month the per verification fee was more than the minimum monthly payment, then the total verification fee was payable, but if the verification fee was less than the monthly fee, then Blockchain would receive credit.

That clearly demonstrated that the minimum payment was a form of partial prepayment on account in respect of the per verification fees.

Onfido was entitled to summary judgment on its claims for payment of the November and December invoices.

However, Blockchain could realistically argue that there was no entitlement to the minimum monthly payment for January because the contract had been suspended by Onfido part way through the month.

That issue would have to be decided at a full trial.

Please contact us for advice about debt collection and litigation or any aspect of credit control.

Covid ban on tenant evictions comes to an end

The ban on private tenant evictions introduced because of the coronavirus pandemic has been lifted.

From 24 August, landlords have again been able to take court action to repossess a rented home.

Lord Greenhalgh, the minister of state for housing, communities, and local government, announced the end of the ban in the House of Lords.

He said: “From 24 August 2020, the courts will begin to process possession cases again. This is an important step towards ending the lockdown and will protect landlords’ important rights to regain their property.

“Work is underway with the judiciary, legal representatives and the advice sector on arrangements, including new

rules, to ensure that judges have all the information necessary to make just decisions and that the most vulnerable tenants can get the help they need when possession cases resume.”

Letting agents say it could lead to a surge in the number of evictions, which could take up to a year to clear. The Association of Residential Letting Agents (ARLA) believes there could be a backlog of 60,000 cases.

David Cox, ARLA chief executive, welcomed the lifting of the ban, allowing courts to begin processing the backlog of possession cases.

He said: “We have previously expressed our concern to the government that there could be as many as 62,000 ‘business as usual’ landlord possession claims to be processed across England and Wales so having clarity on when these can be handled is extremely encouraging for landlords and the sector."

Please contact us if you would like advice about repossession cases or any aspect of commercial property law.

Businessman ordered to repay £5m to his former partner

A businessman who misappropriated large sums of money from his company has been ordered to refund more than £5 million to his former partner.

The case involved Ashank Patel and Mohammad Babar Iqbal, who had been partners in a property development business.

After some of the projects suffered delays due to cashflow problems, Patel discovered that Iqbal had been misappropriating funds from the business, resulting in losses of around £5 million.

The two men then entered into a deed containing clauses directing Iqbal on how to reimburse Patel.

Iqbal agreed to:

(1) pay the proceeds of the business, and any other funds he was able to raise, to Patel, another partner and himself under a defined schedule

(2) transfer a 25% shareholding in one of his companies to Patel

(3) procure another of his companies to pay £400,000 to Patel

(4) execute a declaration of trust in favour of Patel over his 66% beneficial interest in a second company.

Iqbal failed to comply with any of the clauses, so Patel applied for an order for damages.

The court found in his favour and made a declaration that Patel should receive £5 million to cover his losses. Iqbal was also ordered to pay a further £400,000 in damages and to transfer his 25% share in the first company and his 66% share in the second company to Patel.

Please contact us if you would like more information about the issues raised in this article or any aspect of company law.

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