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

AUTUMN
2018

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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.

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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FSB urges top firms to ease late payments crisis

The Federation of Small Businesses (FSB) has called on the UK's top companies to address the issue of late payments.

FSB Chairman Mike Cherry sent a letter to the leaders of the FTSE 100 companies urging them to lead the way in eliminating late payments that can cause huge cash flow problems for smaller firms.

Mr Cherry said: "The poor payment practices that run rampant through UK supply chains is a national disgrace with the country falling behind almost all other industrialised nations in our ability to pay small businesses on time.

"Carillion's demise shone a light on the worst kind of payments practices but unfortunately it isn't a one-off. Some big businesses use inequality of power in business relationships to squeeze small suppliers and delay payments to improve their own cash flow. This is bullying, pure and simple.

"These practices are putting small businesses at risk forcing many to turn to personal credit cards or overdrafts just to survive. Sadly, we estimate late payments lead to 50,000 small businesses a year closing their doors, costing the economy £2.5 billion annually."

Research from the FSB found that 84% of small firms report being paid late, with a third saying at least one in four payments they're owed arrives later than agreed.

A similar proportion (37%) state that agreed payment terms have lengthened in the past two years, hampering cash flow. We specialise in recovering overdue invoices and can help

you avoid getting into financial difficulties as a result of late payments from customers.

We find that many late payers don't take your invoices or your requests for settlement seriously until they see that you are taking legal advice. That alone is often enough to secure prompt payment.

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Grant Thornton ordered to pay £315,345 over negligence

The accountancy firm Grant Thornton has been ordered to pay damages of £315,345 after providing negligent advice to Manchester Building Society.

However, it was not liable for the losses incurred following that advice.

The High Court heard that Grant Thornton audited the society's accounts from 1997 until 2012. In 2006, the society began a policy of hedging lifetime mortgages by entering into 50-year interest rate swaps. The 2008 financial crisis led to a sustained fall in interest rates.

In 2013 the society found that hedge accounting was not permitted under International Accounting Standard 39 (IAS39), and that its profits and losses were exposed to the full movement in the fair value of the swaps.

As a result, its profit for 2011 became a loss; its net assets were substantially reduced; and its regulatory capital position was affected so that it had a deficit of £17.9m. It was forced to close out the swaps, stop lending and sell its book of UK lifetime mortgages.

Grant Thornton admitted that, before signing an unqualified audit opinion for each of the years 2006-2011, it had negligently advised that the society's hedge accounting policy complied with IAS39 and had negligently conducted the audits of the accounts for the years ending 2006-2011. The society sought damages of £48.5m. The High Court held that although Grant Thornton had provided negligent auditing advice in relation to the availability of hedge accounting, it had not assumed responsibility for the losses incurred when the society was obliged to break long-term swaps.

Such losses flowed from market forces for which Grant Thornton did not assume responsibility and were not recoverable as damages.

However, the firm was liable for "termination" or "penalty" costs of breaking the swaps together with other factors which led to a total compensation figure of £315,345.

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New guidance aims to protect tenants in HMOs

The government has published new guidance for landlords to protect tenants from being exposed to poor living conditions.

From 1 October this year, landlords who let a property to five or more people – from two or more separate households – must be licensed by their local housing authority.

The move will affect around 160,000 houses in multiple occupation (HMOs) and will mean councils can take further action to crack down on the small minority of landlords renting out sub-standard and overcrowded homes.

Rules will also be introduced to set minimum size requirements for bedrooms in HMOs to prevent overcrowding. Landlords will also be required to adhere to council refuse schemes, to reduce problems with

rubbish. The guidance document includes further details on extending mandatory licensing to smaller HMOs as the government continues to rebalance the relationship between tenants and landlords.

The government will also review selective licensing to see how well it has been working. Selective licensing allows local housing authorities to make it compulsory for all private rented accommodation in a specified area to have a licence.

In areas where selective licensing applies, landlords must apply for a licence if they want to rent out a property.

This means the council can check whether they are a 'fit or proper person' to be a landlord, as well as making other stipulations concerning management of the property and safety measures.

Housing Minister Heather Wheeler said: ""This new guidance for landlords will further protect private renters against bad and overcrowded conditions and poor management practice."

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Developer can't dodge paying extra £750,000 for land

A developer has been ordered to pay an extra £750,000 for land that was sold subject to the condition that the price would increase if planning permission for houses was granted.

The issue arose after the developer purchased property from a landowner to redevelop for residential use.

The contract provided that the extra money would be payable if the local planning authority agreed to the development of 60 residential units.

Planning permission was granted but the developer denied liability to pay. It argued that the contract terms only applied if the 60 units could be lawfully built, whereas it had transpired that such a development would contravene the building regulations because of incompatibility with fire escape provisions.

The judge at the first hearing ruled in favour of the landowner. That decision has been upheld by the Court of Appeal.

It held that the regime for planning consent and the regime surrounding building regulations were entirely separate.

The trigger event for the extra payment was clearly concerned with planning permission; there was no mention in the agreement of compliance with building regulations or any other requirement that might need to be satisfied before the residential units could be built. If it had been intended that the trigger

event should require such compliance, the parties would have said so in the contract. Both were experienced developers and had been professionally advised.

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Director must repay value of assets taken from company

A director breached her legal duties by transferring company assets to herself during a period of financial difficulty.

Julie Anne Davey ran a company called Angel Group Ltd or AGL, which had three subsidiaries. The businesses specialised in lettings.

They had gone into administration in late 2012/early 2013 and into liquidation in 2015. Davey held all the shares in AGL. In 2010 or 2011, she transferred to herself the beneficial interest in properties which she had previously held on trust for

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the company and its subsidiaries. Following the transfer, she sold some of the properties.

The company liquidators sought to recover the assets she had appropriated.

Davey claimed that she only held the properties on trust to the extent that the companies had contributed to their original purchase prices. The High Court ruled in favour of the liquidators.

It held that the trusts made it clear that Davey should have dealt with the properties in a way that benefited AGL and its subsidiaries, not herself.

Davey had breached her duties as a director and was ordered to pay compensation equal to the full market value of all the properties taken.

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New powers to ban and fine reckless directors

Directors could soon be banned from running a business and face large fines if they dissolve their companies to avoid paying employees or making required pension contributions.

The crackdown is part of government plans to safeguard workers, pensions and small suppliers when a company goes bust.

Under the shake-up, bosses will face investigation if they try to escape paying a dissolved company's debts to their own staff and creditors.

Ministers say most UK companies are run responsibly but there are a minority of directors who deliberately dodge debts by dissolving companies then start up a near identical business, with a new name. The practice is known as 'phoenixing' or 'bumping companies'.

Under the new powers, the Insolvency Service will be able to fine directors or even have them disqualified.

Business Minister Kelly Tolhurst said: "Some recent large-scale business failures have shown that a minority of directors are recklessly profiting from dissolved companies. This can't continue.

"That is why we are upgrading our corporate governance to give new powers to authorities to investigate and hold responsible directors who attempt to shy away from their responsibilities, help protect workers and small suppliers and ensure the UK remains a great place to work, invest and do business."

In a further development, the Investment Association will be asked to investigate to see if action is needed to ensure that companies are giving their shareholders an annual vote on dividends.

Directors will also have to explain to shareholders how the company can afford to pay dividends alongside financial commitments such as capital investments, workers' rewards and pension schemes.

The government is also introducing new measures in response to its corporate insolvency consultation that will give financially-viable companies more time to rescue their business. These include:

- giving viable companies more time to restructure or seek new investment to rescue their business, helping to safeguard jobs
- enabling companies in financial distress to continue trading through the restructuring process, ensuring that small suppliers and workers still get paid
- a new restructuring plan to help rescue viable businesses and preserve jobs.

These measures are being put forward as part of the government's response to the corporate governance and insolvency consultation, launched in March this year.

We shall keep clients informed of developments.

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39% rise in tribunal claims since fees ruled unlawful

There has been a 39% rise in claims before the Employment Tribunal since the Supreme Court ruled last year that the fees charged to bring claims were unlawful.

Figures released by the Advisory, Conciliation and Arbitration Service's (ACAS) show that notifications to bring a claim increased in the year to July 2018 by 17,000 (19%). The number of cases that went on to appear before a tribunal rose by 7,000 (39%).

The ACAS helpline received 783,000 calls in the year to July. The top three topic categories were discipline, dismissal and grievances; contracts; wages and the national minimum wage.

Businesses may wish to check that their employment policies are up to date to reduce the risk of costly and time-consuming claims from employees.

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Trader in cash flow crisis overturns bankruptcy order

A sole trader has won a long running battle against a bankruptcy order after his business got into difficulties due to a cash flow crisis.

The trader, Mr Rafferty, bought and sold packaging machinery. Some of his customers were late settling invoices, so he was unable to pay £14,000 to a company called Sealants International Ltd.

Sealants served a statutory demand on him and obtained a bankruptcy petition. Mr Rafferty submitted invoices of £200,000 to one of his customers. He said that once he received that money, he would be able to pay his debts. However, the judge refused to adjourn the case and made the bankruptcy order. Mr Rafferty then applied to annul the order.

There then followed a series of adjournments due to Mr Rafferty's ill health.

Following more health-related delays, the judge refused a further adjournment and dismissed the application to annul the bankruptcy order.

The High Court reversed that decision. It held that something had clearly gone wrong in the case. The question of Mr Rafferty's health had not been contested and the question of the further adjournment being refused was open to appeal.

An annulment was justified on condition that the debt and Sealants' costs be paid.

The case illustrates the need to stay on top of debt control and cash flow to ensure that situations like this do not arise to threaten the viability of your business.

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Guidance on dress code and sex discrimination

The Government Equalities Office has published new guidance for employers on how to avoid sex discrimination when implementing workplace dress codes.

The document, entitled Dress codes and sex discrimination – what you need to know, stresses that while policies on clothes can be a legitimate part of an employer's terms and conditions of employment, the requirements for men and women must maintain similar standards.

It states: "Dress policies for men and women do not have to be identical, but standards imposed should be equivalent.

"Dress codes must not be a source of harassment by colleagues or customers, for example, women being expected to dress in a provocative manner.

"It is best to avoid gender specific prescriptive requirements, for example, the requirement to wear high heels. Any requirement to wear make-up, skirts, have manicured nails, certain hairstyles or specific types of hosiery is likely to be unlawful."

The guidance sets out to explain the law on dress codes in workplaces such as offices, hotels, airlines, temporary work agencies, corporate services, the retail sector, the hospitality sector, especially in bars, restaurants and clubs. It is, however, also relevant throughout industry.

It adds that a dress code that requires all employees to "dress smartly" would be lawful, provided the definition of smart is reasonable. It then gives the following examples of what would be reasonable advice:

"A two-piece suit in a similar colour for both men and women, with low-heeled shoes for both sexes.

"A requirement for men to wear a shirt and tie is not unlawful if women are also expected to wear smart attire."

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Sub-contractor wins dispute over payment of £388k

A sub-contractor has won its battle to force a developer to pay more than £388,000 for work carried out on a major project.

The case involved E7 Building Services and R G Carter Cambridge Ltd.

E7 had been contracted to carry out mechanical and electrical works on one of Carter's projects.

The two sides later disputed the levels of payment due, so the matter went before an adjudicator.

The adjudicator found the value of the works to be £2,338,653, which was £388,888 more than Carter had paid. However, the adjudicator did not have jurisdiction to order payment to be made.

E7 demanded payment of the outstanding balance, which the Carter countered by alleging delay damages and contra-charges of £769,201.

The case went before the High Court, which ruled in favour E7. It held that the issues had been fairly assessed by the adjudicator. The parties had been aware of all the relevant material. No breach of natural justice had arisen.

The application to enforce payment of the outstanding £388,888 was therefore granted.

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