

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

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2014

### Many small firms 'using pay day loans to survive'

One in six businesses are turning to pay day loans as an emergency measure to stay afloat.

One in four businesses need additional funding to grow yet say they are being starved of credit. Nearly 20% of business owners are turning to friends and family for financial support.

The alarming findings are from research carried out by One Poll on behalf of Amigo Loans. They surveyed decision makers at 200 small firms.

The research also showed that 21% of micro-businesses had no idea how they would grow in the future, and 15% felt growth was impossible for them in the current climate.

Meanwhile, a survey by the Federation of Small Businesses (FSB) found that late payment and cash flow are the biggest barriers to growth facing small to medium-sized enterprises.

The FSB is so concerned about the problem that it has started a



campaign to raise awareness of the impact of late payment and to bring about improvements. The campaign involves lobbying MPs so they're fully aware of the issues, and urging them to raise the matter in parliament.

The FSB is also highlighting examples of larger businesses that are extending their payment terms, and explaining the impact this is having on suppliers.

James Benamor, chief executive of Amigo Loans, said: "We talk a lot about start-ups and how we can help businesses get off the ground but growth of a business is what keeps it afloat, what brings about new prospects and helps owners feel secure about the

future. Growth can only happen when small businesses aren't crippled by the clutches of payday loans and their extortionate APRs. We want all small businesses to shop around before resorting to payday loans - there are better funding options available."

Many businesses get into such difficulties because of cash flow problems created when their customers fail to pay their invoices on time, or in extreme cases, simply refuse to pay.

Some of these problems can be reduced if businesses keep a tight rein on credit control and debt collection.

A letter from a solicitor is often enough to make debtors pay their invoices. If they still refuse to pay, there are several further legal steps that can be taken up to and including court action.

Businesses can even make a profit from pursuing debts because it is possible to impose a penalty charge and interest on the outstanding amount. This extra money is often more than enough to pay for the cost of pursuing the debt.

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### Businessman wins right to buy brother's half of company

A businessman has won the right to buy his brother's share of a jointly owned company after a breakdown in their relationship.

The case involved two brothers who had a holding company involving several businesses.

The most valuable asset was a hotel valued at £4.65m. The other assets were valued at a total of £1.4m

After 25 years in business together, their relationship began to deteriorate. The businessman claimed that his brother had been secretly milking the group of its cash and assets. The two men reached a point where they could no longer co-operate or agree on

anything. The businessman sought a court order allowing him to buy out his brother for a sum representing the net asset value of the group, minus what his brother owed.

The brother claimed that he had always acted in the group's best interests, and that he was owed a substantial sum for arrears of salary and expenses.

The court held that the terms on which the two brothers had agreed to do business was contained in their company's articles of association.

However, their personal relationship and the trust and confidence that had existed between them was also

a vital factor in their agreements and understandings. The court held that the brother's conduct had been unfair and prejudicial. He had used the company's assets for his own personal advantage. The business was not safe in his hands and he was not fit to be a director.

The businessman's petition was granted, allowing him to buy his brother's share of the company at a fair value, giving him complete control.

The brother would also have to step down as a director.

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## Firm stops ex-staff using its secret information

A publishing company has successfully taken legal action to prevent former employees using its confidential information including its customer databases.

The issue arose when three of the company's senior employees resigned to set up a rival business.

The company suspected that the employees had set up their new enterprise before resigning.

It then alleged that the employees had solicited its clients, used its LinkedIn accounts to further their own business and misused confidential information

including customer databases. They had also removed a large number of customer business cards. The company said the employees had acted in breach of their employment contracts and duty of good faith.

The court held that the employees owed the company duties of fidelity and good faith.

There was a strong case that the databases contained confidential information and that the employees had been working on their new business while they were still the company's employees. There was also a strong case that the business cards provided



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them with a competitive advantage. The company had a good chance of winning its case and should therefore be granted an interim injunction preventing the former employees using the company's confidential information.

The issues could then be considered again in more detail at a full trial hearing.

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## New landlord and tenant agreements to 'raise standards'

The government is introducing new measures to encourage longer term tenancies and improve standards in the private rented sector.

A model tenancy agreement, developed with the sector, will set out the rights and responsibilities of both landlords and tenants, and provide an industry benchmark for tenancy agreements.

Ministers say the agreement will ensure families can benefit from longer tenancies without changing the existing legal framework for the rental market. They also believe it will reduce costs



for both tenants and landlords who will not have to pay letting agents to arrange frequent contract renewals.

The government is also introducing a tenants' charter



which will give advice on what to do if something goes wrong with a tenancy. The charter will ensure greater transparency about letting agents' fees to prevent unreasonable practices and unfair charges.

The proposals are in addition to measures already announced. These include new legislation which will require all letting and managing agents to belong to an approved redress scheme. These schemes will enable both landlords and tenants to pursue

complaints. The aim is to drive up standards by weeding out rogue agents.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 will provide courts with the power to impose unlimited fines on landlords who fail to meet their statutory responsibilities.

Communities Secretary Eric Pickles, pictured left, said: "The government is determined to match support for home ownership with steps to improve the rental market, without strangling the sector with unnecessary rules.

"The proposals will raise the quality and choice of rental accommodation, root out the cowboys and rogue operators in the sector, and give tenants the confidence to request longer fixed-term, family-friendly tenancies that meet their needs."

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## Business wins case over £50,000 electricity payment

An electricity supplier which undercharged a company over several years has been told it cannot now recover the £50,000 outstanding on the account.

A court has also ordered that it must pay the company compensation for wrongfully disconnecting its power supply. The case involved EON energy and a company that operated an antiques market.

The company paid its bills in full over several years. It then emerged that the meter readings had been false and the company had been undercharged by at least £50,000.

The supplier presented a new bill based on more accurate meter readings but the company denied liability. Engineers from the supplier then entered the company's premises and disconnected the supply. The court held that the company

had acted in good faith at all times. It had accepted the bills presented to it and paid them. The sums paid were less than they should have been but that wasn't the company's fault.

The supplier could not now recover money owing because the company would not be able to pass the cost on to its stall holders in the antiques market in the way that it would have done if the original invoices had been accurate.

The court also held that the supplier had not been entitled to enter the company's premises and disconnect the electricity. It should therefore pay compensation for trespass, the hire of the generator and for management time spent dealing with the issue.

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# TUPE rules to be 'simpler and less confusing'

The government has announced changes to the TUPE regulations. It wants to cut red tape and make the process simpler and less confusing.

TUPE – the Transfer of Undertakings (Protection of Employment) Regulations – protects the rights of employees when a business is transferred from one owner to another.

The proposed changes mean that one year after the transfer, businesses will be able to renegotiate terms and conditions in collective agreements as long as the overall changes are no less favourable.

The new regulations will also make it clear that where employees have terms and conditions provided by collective agreements, only those terms and conditions existing at the time of the transfer will apply to the employment with the new company.

Later changes to a collective agreement won't be binding on the new employer if it is neither a party to that agreement, nor takes part in negotiations.

Employment Relations Minister Jo Swinson, pictured below, said: "TUPE rules are essential to making sure that when a business is transferred from one company to another, it happens in a fair and efficient way.

"There have been some areas of the law which created uncertainty and confusion for businesses trying to comply with the law.



"By making these changes we will clear out the cobwebs in some of the rules which will give businesses more clarity about conducting transfers. As part of the Red Tape Challenge we are reforming these rules, keeping in place the necessary protections for employees and helping support a stronger economy."



TUPE regulations will also be amended so that where the place of work changes after the transfer, any redundancies that are due to that change will not automatically be considered unfair.

This means that as a starting point, businesses will not face unfair dismissal claims simply because of a change in location of the workplace.

The changes will also enable micro businesses to inform and consult employees directly when there is no recognised trade union or other existing representatives.

At present when a transfer takes place, TUPE regulations require that businesses usually have to inform, and sometimes also consult, employee representatives.

The government says it won't repeal the rules relating to changes in service provision. These rules mean that TUPE will usually apply to the change in the provision of a service, such as security guarding services for a business, where there is a group dedicated to that service.

The government intends to put the new regulations before parliament within the next few months. We shall keep clients informed of developments.

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## Development in beauty area allowed to go ahead

An action group has failed in its legal bid to stop what it described as a "major development" of 14 houses in an area of outstanding natural beauty.

The case involved a reserve housing site. Before applying for planning permission, the developers asked the local authority to adopt a screening opinion as to whether the proposed houses constituted an environmental impact assessment development (EIA) within the Town and Country Planning Act.

The authority found that it was not an EIA development.

The subsequent planning application led to a public inquiry, after which the planning inspector granted permission for the development to go ahead.

A local action group sought judicial review of the decision on the grounds

that the authority's opinion that the development did not trigger EIA was unlawful.

The group also submitted that the inspector was wrong to find that the application before him was not a major development within the National Policy Framework.

The High Court, however, rejected the application for judicial review, pointing out that the threshold for quashing a decision that was dependent on planning judgment was very high.

It held that the local authority had not adopted an opinion that no reasonable planning authority could have adopted. Its reasoning was not flawed and it took account of the relevant guidance.

The action group had failed to demonstrate that the screening opinion was unlawful. The inspector was



entitled to conclude that the proposed development was in accordance with the relevant development plans.

He was also entitled to conclude that the phrase "major development" should not have a uniform meaning wherever it appeared in policy documents or government guidance. It was not unreasonable for him to conclude that the 14 houses did not constitute a major development.

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# Extra £69m available to help start-up businesses

The government is making an extra £69m available for loans to start-up businesses as a way of creating jobs and boosting the economy.

Ministers say more than 30,000 new businesses have been created over the last two years with support from government schemes including Start-Up Loans and the New Enterprise Allowance.

It's hoped the new funding will build on this momentum by providing help to unemployed people who want to set up a business.

The Start-Up Loan scheme helps people turn their business ideas into reality with mentoring support and an average loan of £4,500. The new funding will ensure there are more loans for those over 30 and specific support for ex-Service personnel.

The New Enterprise Allowance offers expert business mentoring and financial support to people living on benefits and has been behind a wide range of new ventures since it was introduced in 2011.



About 2,000 new businesses are being set up every month. Referrals to the scheme were due to end in September but will now continue until the end of December 2014.

The beneficiaries of the schemes come from all ages, with more than 6,000 businesses started by people aged 50 or over – challenging the idea that entrepreneurial zeal is solely a youthful attribute.

Almost 4,000 disabled people were also helped by the scheme to become their own boss.

Prime Minister David Cameron said: "I am determined to do all I can to support the British economy and that includes helping small businesses and budding entrepreneurs to get on."

"My message is simple: if you have drive, determination and are prepared to work hard, we will back you."

Setting up a new business can be exciting but there can be several pitfalls. Start-up businesses need to consider a variety of issues ranging from employment matters to business contracts and leasing agreements.

We have helped numerous new businesses get off the ground and are able to offer advice on such things as whether to set up as a sole trader, partnership or a new company. We also have valuable contacts including accountants, surveyors, valuers and financial advisers who can provide added value to the services we provide.

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## Landlord wins case over repairs to commercial premises

The economic downturn has made both landlords and tenants extra keen to minimise potential losses when leases come to an end.

A recent case in the High Court involved a dispute over the condition of a set of roof lights on a single-storey warehouse.

The lease had required that the tenant should "keep the whole of the premises... in good and substantial repair and condition".

When the lease ended, the landlord brought a dilapidations claim for the cost of repairing the roof lights which it claimed were so degraded they were opaque and needed to be treated with coating to restore their translucence. The tenant denied that substantial repair work was required.

The court found in favour of the landlord. It held that, in so far as it was possible through maintenance and repair, the lights had to be in the same condition at the end of the lease as

they were at the beginning. They had to be capable of letting in the same amount of light, and they had to be structurally sound and weatherproof.

Keeping the building in good and substantial condition involved taking whatever steps were necessary to achieve and maintain that standard.

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