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NEWS BRIEF - legal news that affects you and your business

Battling to save a failing business can put directors at risk

As the recession deepens, more and more company directors could find themselves battling to keep their businesses afloat.

While they will naturally want to do everything possible to come through these current economic difficulties, they must guard against soldiering on for too long trying to rescue a business which has no chance of survival.

If they do they could be accused of wrongful trading and run the risk of financial ruin as they become liable for the debts of their business – even if it is a limited liability company. The danger is that some directors may fail to recognise or refuse to accept that their business has no chance of avoiding insolvency. Understandably, they may have an emotional attachment to a firm they have set up themselves and feel a tremendous loyalty to their staff. Or they may be trying to avoid having to pay back company loans which they have personally guaranteed.

This can make them carry on regardless, hoping against hope that things will improve even though that can sometimes makes things worse because the law is quite clear about what should happen in these circumstances. As soon as a company becomes insolvent, directors have a legal duty to protect the interests of creditors. When formal insolvency procedures get underway, the behaviour of directors over the previous few years could come under investigation.

They could become liable for wrongful trading if it's found that they continued entering into contracts or accepting credit after they knew or should have known there was no reasonable chance of avoiding insolvent liquidation.

The court could then order them to use their personal assets to help settle the company's debts. Directors of insolvent companies are also obliged to treat all creditors equally so they must not give preferential treatment to friends or a company that is threatening to sue them.

The problem for many directors is identifying the point at which they become insolvent so they should seek professional help as soon as problems start to emerge.

Persistence is a good quality in business but directors must also recognise when the cause may be lost and then make sure they meet their legal obligations.

Builders win dispute with contractor over payments

It is always advisable for businesses to draw up a contract before beginning work for a client, especially if it is a large project involving significant sums of money.

However, even if there is no written contract, it is still possible to take legal action to recover money due as was shown in a recent case involving a firm of builders.

The builders had agreed to refurbish a house and outbuildings for a contractor. There was no written contract but the builders issued statements of account for the work as it was carried out and the contractor made regular payments.

A dispute then arose about the amount being charged. The contractor refused to make further payments and the builders were ordered off the site. The builders contended that the contractor had agreed to pay the amounts shown in the statements of account and should honour that agreement. The contractor argued that the project was to be carried out on a cost plus basis. The amounts he had already paid were not in response to the individual invoices but on account for the final bill.

Expulsion from site 'unjustified'

The builders also argued that they had been wrongfully expelled from the site and were entitled to compensation for the loss of profit on the work they had been asked to do. The contractor counter claimed saying some of the work was defective and he was entitled to end the contract because of the builders' delay in completing the work.

In the absence of a written contract, the court had to decide whether the contractor had agreed to pay the prices as they were set out in the statements of account or whether he had merely agreed to pay a reasonable price on a cost plus basis.

The court held that the payment procedure had changed as the project

progressed. It began with the contractor paying individual invoices but then changed to a system by which he agreed to pay a reasonable price for the whole project. That, however, was overtaken by him ordering the builders off the site in the course of the dispute.

The court considered the expulsion to be unjustified because there had been no delay or other problem that entitled the contractor to terminate the contract.

The builders were therefore entitled to recover their losses for the uncompleted work.

It would have helped, of course, if the terms of payment and other issues had been written into an agreement before work began, but the case shows that the courts can still help when disputes arise.

Man successfully challenges his uncle's 'second will'

A man has successfully challenged the validity of a second will made by his uncle at a time when his health was failing and he was no longer able to read.

The court heard that the uncle had made his first will when he was in good health and there was no doubt that he knew what he was doing. This will left all his estate to his nephew who was also appointed as sole executor.

Later however, the uncle's health began to deteriorate and one of his friends began to act as his carer, managing his financial affairs including drawing his pension.

The uncle then made a second will dividing his estate into three parts. His nephew was to receive half the estate while the carer and another friend were each to receive a quarter.

At the time he made this will, the uncle had medical conditions that affected

both his hearing and his ability to read. However, the solicitor who drew up the will was satisfied that he had sufficient testamentary capacity and so knew what he was doing.

Later, the carer wrote to the solicitor saying that the uncle wanted to execute a codicil – that is to make an amendment – to change this second will. This change would give half the estate to the carer and reduce the nephew's share to 25%. The uncle was unable to read the wording of this change and so the solicitor had to read it to him.

When the uncle died, the nephew challenged this second will and the codicil on the basis that they had been brought about by the intervention of the carer. He submitted that his uncle had been too ill to approve them.

The court held that if a person, as in the case of the carer, had helped to draw up a will in which he was a beneficiary then there was an onus on him to demonstrate that the process was legitimate. The court had to be confident that the will represented the deceased person's true wishes and that he had not been unduly influenced by anybody else.

In this case, the second will and codicil had been influenced by the carer at a time when the uncle's health was failing. The carer had not given any reason for the nephew's share being reduced and had failed to establish that the second will truly represented the uncle's wishes.

Therefore, the court ruled that the second will was invalid and the first will, leaving everything to the nephew, should be re-instated.

Avoid all the legal pitfalls if you rent out your home

More and more homeowners who can't sell their properties in the current downturn are starting to rent them out to tenants instead, according to new research.

A survey by the LV insurance company showed there was a 56% increase in the number of properties available for rent in the final three months of last year. Nearly nine out of ten of those properties belonged to homeowners who had decided to let rather than sell in a depressed market.

Letting a property in this way will have some advantages but people new to the market should make sure they are meeting all the legal requirements that go with being a landlord. According to the LV research, many are not. For example, only 27% have signed up to a

Tenancy Deposit Scheme (TDS) even though they are obliged to do so by law and risk being fined if they fail to comply. The scheme is designed to protect a tenant's deposit in the event of a dispute.

If a landlord fails to sign up to a TDS then the tenant can apply for a county court order forcing him to do so. New landlords should select a suitable scheme as soon as possible. There are other legal requirements depending on the kind of property you own and an array of potential pitfalls.

For example, all landlords run the risk of sometimes having to deal with problem tenants. Some may fail to keep up with the rent or not treat your property as well as they should. In these circumstances you may need legal advice so you can take action to recover rent arrears or to recover your property from bad tenants when necessary.

Please contact us if you would like more information about tenancy deposit schemes or any aspect of property law.

Neighbours stop extension that would spoil scenic views

A group of neighbours on a housing development have successfully taken legal action to prevent the building of a three-storey extension which they feared would spoil the view from their homes.

The houses on the development had been sold subject to two restrictive covenants. The first was that homeowners could not erect buildings without the approval of the management company; the second prevented homeowners doing anything that would annoy or create a nuisance to other people on the estate.

One homeowner was then granted planning permission to build a three-storey extension. He also obtained approval from the management company on condition that the development would be in keeping with existing properties and the boundaries would not be altered.

However, the neighbours objected because they felt the extension would spoil their views over a nearby river and so breach the covenant by causing an annoyance. The homeowner argued that the permission granted by the management company should take priority over the nuisance and annoyance element of the covenant and so the development should be allowed to go ahead. The court, however, ruled in favour of the neighbours. The judge held that there was no reason why both elements of the covenant should not apply so that a development could only go ahead if it had the approval of the management company and did not cause a nuisance to others on the estate.

The next issue to resolve was whether or not the interference with the scenic views would cause annoyance. The judge held that most reasonable people would say that it would indeed cause annoyance within the meaning of the covenant and the development should therefore not be allowed to go ahead.

The danger for landlords in not pursuing overdue rent

The danger for landlords in not chasing up overdue rent and attending to legal detail has been illustrated in a recent case before the Court of Appeal.

It resulted in a landlord having to grant a 21-year-lease to a tenant he would have preferred to evict.

The case involved a landlord who had granted a tenant a 15-year-lease on some retail premises. The retailer later vacated the premises and a new tenant moved in and started trading without the landlord's knowledge.

The landlord did not object at first when he discovered the change and then in 1998 began negotiations to grant the new occupier a 21-year-lease. The tenant carried out repairs to the premises as part of the proposed lease.

However, the two parties then fell out over various matters including the fact that the tenant was persistently late in paying his rent. The landlord gave notice that he was terminating the tenancy.

The tenant claimed the landlord was prevented from denying his right to a

lease by the principle of proprietary estoppel. This is a principle that can be used to protect the interests of a person who has been given reasonable grounds to believe that he will acquire rights over a property and has taken action to his detriment on that basis, such as by carrying out expensive repairs.

The judge ruled that the tenant had in fact established an equitable tenancy and was entitled to be granted a 21-year-lease.

The judge also held that the tenant's claim could not be dismissed just because he had persistently delayed paying the rent.

The Court of Appeal has now upheld the judge's ruling. Commenting on the issue of late payment of rent, the judges said that the landlord's case had to be considered in the light of his actions. He could not have considered it a serious problem because he never did anything about it apart from write the occasional letter.

The tenor of the landlord's communication at the time had been that, in spite of the tenant's poor payment record, the lease could still go ahead.

The current credit crunch has no doubt encouraged most landlords to keep a tight rein on rent arrears but cases like this provide another incentive. They also highlight the need to pay close attention to legal detail when negotiating leases so that problems like these can be avoided.

Please contact us if you would like advice or information relating to landlord and tenant issues.

EU votes to end opt-out from 48-hour week

The European Parliament has voted to scrap the UK's right to opt out of the 48-hour maximum working week.

MEPs voted by a majority of 148 that the opt-out should end within three years of the new EU Working Time Directive being adopted.

The vote puts the parliament in conflict with the Council of Ministers which negotiated a deal with the UK government last summer allowing the opt-out to continue in return for Britain accepting improved rights for temporary workers. It means that the Council and the Parliament will now have to negotiate a compromise.

If they can't reach agreement then the directive will fail and the opt-out will remain in place. Those negotiations should be concluded by May.

If the directive is adopted then the opt-out clause will end three years later and UK workers will not be allowed to work more than an average of 48 hours a week, even if they want to do so.

We shall keep clients informed of developments.

Declaration of trust protects wife's house from husband's creditors

A court has ruled that a woman should be allowed to keep her family home even though her husband's creditors wanted it to be sold to help clear his debts. It is an unusual case and illustrates the benefits that can arise from making a declaration of trust.

The husband had bought the house several years before in his own name. However, he had an alcohol problem and also liked gambling. Eventually, his wife became concerned about the family's financial security.

To protect her future, she insisted that her husband made a declaration of trust in her favour which effectively handed the house over to her. At the time this was done the husband had no significant debts and was able to meet all his mortgage payments. That changed a few years later, however, when he fell into serious debt and was declared bankrupt.

The trustees in the bankruptcy applied for an order setting aside the declaration of trust the husband had made regarding the house and his wife. They argued that it had simply been a way of putting the property beyond the reach of his creditors. The husband denied this and said the declaration had been made at his wife's insistence. She had threatened to divorce him if he didn't sign

over his interest in the family home to her. The only reason she had in taking such assertive action was to maintain her family's financial security.

The court ruled in the family's favour. The judge said he was satisfied that the main reason for the husband's action was to maintain his marriage. The effect was to place the house beyond the reach of the creditors, but while that might now be a beneficial consequence of the declaration of trust, it was not the reason for making it in the first place.

The ruling does not mean, of course, that a person facing difficulties can avoid creditors by simply placing assets in someone else's name. However, it does show that a declaration of trust made in good faith can help to protect a family's financial security.

Please contact us if you would like more information.

HIPs to provide more information for home buyers

The Government has introduced new measures to provide more details in Home Information Packs (HIPs) and ensure that they are available as soon as a house is put on the market.

Sellers will have to include a Property Information Questionnaire (PIQ) covering areas such as the property's service charges, flood risk information, structural damage, gas and electricity safety and parking arrangements. The PIQ is in addition to the other required documents such as the Energy Performance Certificate rating the property's energy efficiency, evidence of title, the results of standard searches and the terms of sale.

HIPs will also have to be made available to buyers as soon as the property is put on the market. Sellers used to be able to request and pay for a HIP and then start marketing their property up to 28 days before the HIP was ready and available.

The new provisions, effective from 6th April this year, mean that HIPs and PIQs have to be available from the outset. The PIQ

will also be required for leasehold properties and will include a summary of the leasehold arrangements.

The temporary leasehold information provision was made permanent on 1st January. It means that a copy of the lease remains the only extra information needed for leasehold properties.

HIPs are required when selling homes of all sizes. Please contact us if you would like more information.

Family lawyers oppose 'draconian' measures against absent parents

The family lawyers' association, Resolution, is urging the Government to drop plans that would give civil servants increased powers to clamp down on parents who fall behind with child maintenance payments.

The proposal, which Resolution describes as draconian, is contained in the Welfare Reform Bill now making its way through parliament. It would allow the Child Maintenance and Enforcement Commission (CMEC) to confiscate the driving licence or passport of defaulting parents without the need to obtain a court order.

The Department for Work and Pensions says the measure would only be used as a last resort after all other sanctions to make parents pay had failed. It believes that allowing civil servants to take such direct action would be faster and easier and beneficial to the taxpayer. It will be tested in certain areas of the country before being adopted nationally.

The new powers are opposed by Resolution. A spokesman said: "We agree with the government's aim that all parents meet their pastoral and financial responsibilities toward their children.

"However it is well known that the administration of child support in this country is riddled with errors and bureaucratic failures. Until the system is fixed, running smoothly and has public confidence there can be no justification for not allowing a right to challenge such draconian measures in the courts."

The subject of child maintenance payments often evokes strong feelings on both sides of the argument. Many parents, usually but not always mothers, can suffer great hardship when their former partner fails to pay child maintenance.

On the other hand, many other parents, usually but not always fathers, often feel they are being hounded unfairly.

Whatever view one takes there is little doubt that there is a determination on behalf of the Government and CMEC to make sure more parents face up to their responsibilities.

Parents on both sides of the argument who are affected by these issues should seek legal advice to protect their interests.

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