SIMON BURN SOLICITORS

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Commercial Law UPDATE

New Cookie Law – A Reminder

The Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 require consent to be obtained for the use of cookies and similar technologies for storing information, and accessing information stored, on a user's equipment, such as their computer or mobile phone. The Regulations came into force on 25 May 2011. However, the Information Commissioner's Office (ICO) announced that organisations would be allowed a year-long period to work towards compliance with the changes.

That grace period has now expired.

Previously, privacy rules only required websites to tell users about cookies they used and provide information on how to 'opt out'. Most organisations did this by putting information in their privacy policy. The new rules require that in most cases websites wanting to use cookies must gain consent, which must involve some form of communication whereby the individual knowingly indicates their acceptance.

The ICO made last-minute changes to its guidance on how to comply with the new cookie law in order to clarify the following points with regard to implied consent:

- Implied consent is a valid form of consent and can be used in the context of compliance with the revised rules on cookies;
- If you are relying on implied consent you need to be satisfied that your users understand that their actions will result in cookies being set. Without this understanding you do not have their informed consent;
- You should not rely on the fact that users might have read a privacy policy that is perhaps hard to find or difficult to understand; and
- In some circumstances, for example where you are collecting sensitive personal data such as information about an identifiable individual's health, data protection law might require you to obtain explicit consent.

The updated guidance can be found at www.ico.gov.uk/. The ICO has also produced a short video answering FAQs.

Contact us for individual advice on this issue.

VAT Refunds Taxable, Tribunal Rules

If you discover that you have overpaid VAT, you may be entitled to a refund. However, this raises the question of the tax status of the additional profit generated by the refund. Is it taxable or not?

This point was contested at the First-tier Tribunal by several retailers that had received VAT refunds relating to overpayments of output tax totalling more than £600 million. HM Revenue and Customs (HMRC) reacted to the refunds by raising assessments for Corporation Tax on them.

The retailers claimed that the refunds were not trading income and should not therefore be taxed.

The Tribunal rejected the retailers' arguments, ruling that:

- the refunds were trading receipts;
- the amounts were chargeable to Corporation Tax; and
- the interest payments on the refunds made by HMRC were also taxable.

Given the sum at stake, an appeal is almost inevitable.

In the meantime, it would be wise to regard any VAT refunds received as being potentially taxable in the year of receipt.

Parent Company Carries Can for Subsidiary

When a man who was diagnosed with asbestosis sought compensation from his former employer, he discovered that the company was no longer in existence and its insurance policy had included an exception for asbestosis. However, its parent company was still trading.

He therefore brought a claim against the parent company and, in a ground-breaking decision, was successful in persuading the Court of Appeal that in the particular circumstances of the case the parent company had owed a direct duty of care to him, as an employee of its subsidiary, to provide him with a safe working environment.

The willingness of the Court to look behind the legal structure of a group and act in a way that makes one legal entity (in effect) responsible for the activities of another may cause concern for directors of some companies. However, the Court of Appeal stressed that there is no imposition or assumption of responsibility by reason only that a company is the parent of another company. Whether or not the parent company bears liability for providing a safe system of work to employees of its subsidiary companies will depend on the individual facts. The question that must be answered is whether or not what the parent company did amounted to taking on a direct duty to the subsidiary's employees. In this case, the parent company had superior knowledge regarding the nature and management of asbestos risks and was directly involved in health and safety matters at its subsidiary. In addition, some directors sat on the boards of both companies.

Whether this decision survives an appeal or its influence 'spreads' into other areas of law remains to be seen.

In the short run, directors of companies with subsidiaries that have ceased to trade but which may have potential liabilities should take advice on the implications of the decision.

Firms Urged to Pull the Plug on Unnecessary Electrical Safety Tests

The Health and Safety Executive has issued revised guidance on portable appliance testing in an attempt to dispel the myth that every portable electrical appliance in the workplace needs to be tested once a year.

Whilst regular checking of electrical appliances is part of an effective maintenance regime, the law simply requires employers to ensure that equipment is maintained in order to prevent danger. It does not demand that every item be tested or stipulate how often testing needs to be carried out.

Policy Term Adherence Important!

When a serious fire damaged an aggregate processing plant near London, the owner brought a claim against a company that had been carrying out 'hot works' just prior to the fire.

The company denied liability but, in the event that it was found liable, sought an indemnity from its insurers.

The insurers in turn denied that they were liable, arguing that the company had breached the terms of its insurance policy.

The first question to determine, therefore, was whether the company that carried out the hot works was liable for the fire. Because it had complied with its contractual obligation to take reasonable and necessary precautions to prevent fire, including maintaining a fire watch for $1^{1}/_{4}$ hours after the works were complete, it was found to be not liable. This turned out to be just as well for the company concerned because the court agreed that it had breached the terms of its insurance policy, which contained a different set of criteria that had to be observed, so the insurers would not have been liable under the policy. This would have left the company to carry the entire cost of the damage caused by the fire.

Accordingly, the cost of the loss will now fall to be met by the insurers of the aggregate processing plant.

The case does show how important it is to make sure not only that one's contractual obligations are met in circumstances such as this but also that insurance policy provisions are scrupulously observed.

Forfeited Leases – Practical Issues

When a landlord wishes to re-let a property that it has repossessed by 'forfeiture' because the tenant is in arrears with its rent payments, there is a potential problem in the form of the right a tenant has to apply for 'relief from forfeiture' for a period of six months after the landlord has caused the lease to be forfeited.

The court will grant relief from forfeiture where the tenant applies for it and it is reasonable to do so.

Where the tenant's application is granted, the landlord can incur significant costs. If the property has been re-let, the new tenant may be forced to move out if previously advised of the tenant's intention to apply for relief.

Clearly, a landlord will not want to leave a property empty for six months just to make sure 'the coast is clear'. The best course of action in such circumstances is usually to seek written assurances from the outgoing tenant that it will not seek relief from forfeiture and to keep the new tenant informed of the position.

Contact us for advice on dealing and negotiating with tenants in such circumstances.

Failure to Create Clear Terms Means Copyright Shared

How many times has the adage 'get it in writing' been ignored to the cost of one or more of the parties to a contract?

Recently, a failure to make clear contractual terms regarding who owned the copyright in a film, which featured a skydive over Mount Everest, led to the producer/financier and the cameraman falling out over their respective rights.

Although the court was satisfied that the producer had intended to have full ownership of the copyright, there was no express agreement to that effect and the court considered that, on the balance of probabilities, he had not made this clear to the cameraman.

As a result, the court ruled that they owned the copyright equally.

This is yet another case involving an argument that would not have arisen had the two parties put the terms of their agreement in writing: this is crucial when it comes to any form of profit sharing or ownership of intellectual property assets.

Contact us for advice on any aspect of contract law.

Decision Based on Evidence Means Planning Application Fails

When a local authority refused to approve a plan to build a 19-turbine wind farm on a peat bog near Swansea, the applicant – energy giant Npower – appealed.

The planning appeal was dealt with by way of an inquiry. There were objections related to the effect the wind farm would have on the peat in the area and the steps to be taken to mitigate this. Evidence was given by an expert instructed by the applicant that the impact would be minor. This evidence was not challenged.

The Inspector's report stated that the impact on the peat bog would be significant and the Welsh Ministers refused the planning application.

The refusal was overturned by the High Court on the ground that the Inspector's conclusion was not adequately supported by the evidence and did not follow coherently from it.

The Welsh Ministers appealed against this decision. The appeal was upheld by the Court of Appeal, which concluded that the Inspector had had enough information and had 'complied with the basic obligation to provide…adequate reasons'.

As a result, Npower is faced with submitting a new application with the wind turbines positioned in such a way as to minimise the impact on the peat.

Obtaining planning permission in a sensitive environment can be something of a lottery. We can help you put your case as strongly as possible.

Bank Cleared of Liability for Losses Due to Reasonable Suspicion

Money laundering legislation requires banks to freeze transactions pending clearance if there are reasonable grounds for suspecting that the funds concerned in the transaction may be the proceeds of crime or connected with criminal activity. The procedure involves the filing of a Suspicious Activity Report (SAR) with the Serious Organised Crime Agency (SOCA). If no ruling on the SAR is received from SOCA within a certain period of time, the transaction can proceed.

When banking giant HSBC delayed completion of three legitimate transfers – one by a fortnight and two by about a week – by a Zimbabwean businessman, pending clearances from SOCA, the result was a sequence of events which included his affairs coming under the scrutiny of the Metropolitan Police and the anti-money laundering authorities in Zimbabwe. This led to his being served with a search warrant by the Zimbabwean police, who conducted searches at his office and home. The businessman had also been reported to the Zimbabwean authorities by a former employee who alleged that he was engaged in money laundering.

As a result of the actions of the Zimbabwean authorities, the businessman brought a claim against HSBC for losses of more than $300 million.

Although the court rejected the claim on more than one ground, of most interest to businesspeople contemplating

large and perhaps unusual transactions was the ruling that the bank had acted properly in delaying the payment so that clearances could be obtained from SOCA.

If you are considering a transaction which might cause your bank enough concern to lead to a referral to SOCA, it is usually sensible to advise the bank in advance and to make sure that any enquiries or clearances are obtained in good time. This is especially true if a delay must be avoided.

Contact us if you would like advice on this topic.

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