SIMON BURN
SOLICITORS

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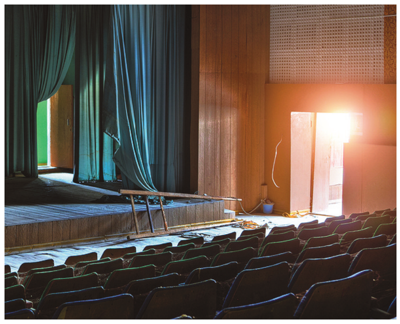
Commercial Law UPDATE

Architect Who Left Door Open Not Liable for Catastrophic Blaze

The first step in proving negligence is to establish the existence of a duty of care. A High Court case in which a firm of architects was cleared of liability in respect of a catastrophic fire provided a prime example of that principle in operation.

An architect employed by the firm performed an inspection of a disused cinema. He let himself into the premises using a key provided to him by the owner's managing agents and disengaged the alarm. He left the door unlocked whilst he was on the premises for about an hour and locked it again on leaving.

Following his departure, a fire engulfed the cinema. The owner, who suspected that one or more intruders had started the blaze after gaining access to the building via the unlocked door, launched proceedings against the firm, claiming over £6.5 million in damages. The firm



responded by applying to strike out the claim on the basis that it stood no real prospect of success.

Ruling on the matter, the Court noted that there had been no direct contact between the firm and the owner and that the damage was caused not by the architect but by an unconnected third party. Although locking the door would have prevented the fire, the architect neither created the source of the blaze nor provided the means by which it started. The allegation against him was therefore one of pure negligent omission, rather than any positive act.

The firm owed the owner no duty of care in that it had not assumed responsibility for protecting the premises from fire. In a commercial context, it was difficult to conceive of circumstances giving rise to an assumption of such responsibility where there had been no direct dealings between the firm and the owner.

The firm did not hold itself out as having any special expertise or skill in safeguarding property and it would not have been objectively reasonable for the owner to place reliance on it in that respect. The architect's possession of a key to the door did not confer on him a level of control over the premises that might render him subject to a duty of care. The owner's claim was struck out.

Contact us for expert advice on property law matters.

Worker Who Tripped Over No Entry Sign Awarded £35,000

Despite stringent health and safety rules, accidents at work remain a frequent occurrence and are a stark reminder of the need for risk assessments. In one case, a worker who tripped over a no entry sign, installed to deter employees from taking illicit smoking breaks, was awarded substantial damages.

In the early hours of the morning, before the sun came up, the man was making his way down a corridor in order to check a boiler. He forgot that the 'no unauthorised entry' sign had been slung on a chain across a flight of steps which lay in his path. He tripped over the chain and fell down the steps, suffering injuries.

Ruling on his compensation claim, the High Court found that the chain represented a tripping hazard but that there had been no risk assessment prior to its installation as a means of deterring smoking in undesignated areas. It was probable that all the lights in the area were not working, but he had not been provided with a torch.

The man's damages had been agreed at £35,000 and the Court ruled that the occupier of the industrial premises, where he had worked for 14 years, should pay 75 per cent of that sum. Having failed in its duty to ensure the safety of his workplace, his employer was ordered to pay the 25 per cent balance.

What Is the Difference Between a Car and a Van? Income Tax Test Case

What is the difference between a car and a van? The Court of Appeal's definitive answer to that question has very significant tax implications for employers who provide vehicles for their employees' combined business and private use.

The case concerned a company that provided modified Vauxhall Vivaro vehicles and modified first- and second-generation VW Transporter T5 Kombi vehicles to its staff for dual business and private use. The company argued that they were vans, which attract a lower rate of Income Tax and National Insurance Contributions than cars. HM Revenue and Customs (HMRC) took the opposite view.

In a ruling which was later upheld by the Upper Tribunal, the First-tier Tribunal found that the Vivaros were vans but the Kombis were not. In appealing against those parts of the decision that were negative to them, the company and HMRC both argued that all three types of vehicles should be classified either as vans or as cars.

Ruling on the matter, the Court noted that large numbers of employees are supplied by their employers with Kombis or Vivaros, or vehicles which share their attributes, and that the case was thus of considerable importance. The issue of the vehicles' correct classification hinged on Section 115(2) of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA), which defines a goods vehicle as a vehicle of a construction primarily suited for the conveyance of goods or burden of any description.

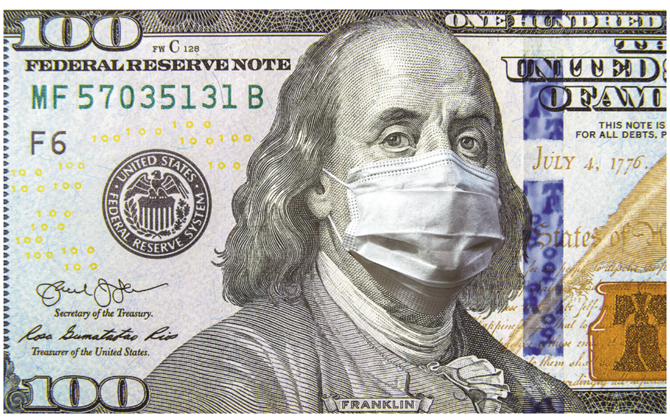
The Court noted that the fact that a vehicle may look like a van or have the apparent structure of a van is relevant to the statutory test but not conclusive. The fact that a vehicle is of a type not commonly used for private purposes is also not decisive and the presence of an employer's logo on the side of a vehicle is irrelevant to the issue in that it has nothing to do with the vehicle's construction.

Although the vehicles concerned were based on panel van designs, they had been modified in order to make them more suitable for dual business and personal use. The question of whether they were goods vehicles required the Court to look at their construction – in the sense of how they were put together, assembled or built – on the date they were subjected to the statutory test.

The question of whether the vehicles were primarily suitable for conveying goods had to be considered in the round and required one to discern the purpose for which they were first and foremost suited. After analysing the vehicles' characteristics, as modified, the Court found that all three of them were not vans. It was accepted that, if that were the case, they were properly classified as cars. The company's appeal was dismissed and HMRC's appeal allowed.

If you are faced with a dispute with HMRC, expert legal advice is a must. Contact us for assistance.

COVID-19 – Non-Delivery of Bank Notes Threatens Run on Overseas Bank



Many businesses which paid for goods prior to the onset of the COVID-19 pandemic have yet to receive either the goods or a refund. The High Court was confronted by exactly that situation in a case where the non-delivery of $60 million in bank notes created a real threat of a run on an overseas bank.

The bank, the largest such institution in one of the world's poorest countries, ordered the bank notes from an English wholesale supplier shortly before the virus triggered a worldwide lockdown. The value of the order represented roughly half of the bank's equity. Following airport closures, the notes had not been delivered and the supplier had thus far failed to refund the bank's money.

The supplier, which had in the interim used the notes purchased by the bank to fulfil another customer's order, explained that it was in serious financial difficulties and in need of restructuring. After the bank launched proceedings in England, however, the supplier put in no substantive defence to its claim and ultimately consented to summary judgment in the bank's favour.

Following a hearing, the Court rejected the bank's argument that the supplier should be required to refund its money immediately. There was no reason to believe other than that the supplier was making genuine efforts to restructure so that it could pay its creditors and ward off insolvency. The supplier was given the standard 14 days in which to satisfy the judgment sum and the bank's arguments that it should be ordered to pay interest and costs on a punitive basis fell on fallow ground.

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Prosecco Producers Successfully Oppose 'Nosecco' Trade Mark Registration

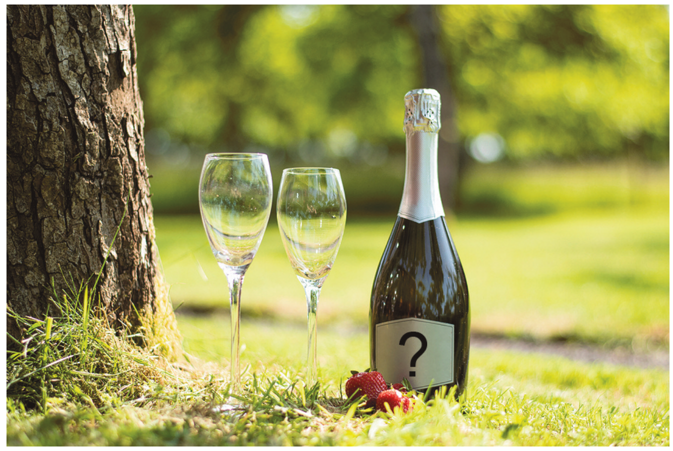
The names and trade marks of certain well-known regional food and drink products are tightly protected under European law. The extent of that protection was analysed in a High Court case concerning a non-alcoholic sparkling wine bearing the name 'Nosecco'.

The French producers of Nosecco applied for trade mark protection in respect of a bottle label bearing that name. The application was, however, successfully opposed by a trade association which guards the interests of Prosecco makers. The name of the enormously popular Italian wine is a protected designation of origin (PDO) under Regulation (EU) No 1308/2013.

A hearing officer acting on behalf of the Registrar of Trade Marks found that there was a serious risk of average consumers being deceived by use of the Nosecco name. She also ruled that the proposed trade mark evoked the PDO within the meaning of Article 103(2)(b) of the Regulation.

In challenging those conclusions, the producers of Nosecco pointed out that the name is prefixed by the ordinary English word 'no', and that the word 'secco' means 'dry' in Italian. It was, they argued, a witty and clever made-up name which conveyed to consumers that the drink is not alcoholic, not dry and not Prosecco.

Dismissing the appeal, the Court noted evidence in the form of social media posts and media articles indicating that consumers tended to describe Nosecco as 'non-alcoholic Prosecco'. The visual and aural similarity between the two words was such that the name Nosecco was likely to trigger an image of Prosecco in consumers' minds.



Although consumers would be aware that products labelled 'Nosecco' are not in fact Prosecco, the hearing officer was entitled to find that the former evoked the latter. In riding on the coat-tails of Prosecco, Nosecco took advantage of the Italian wine's vast reputation in the UK and it could not be suggested that that advantage was fair.

The Court also detected no error of law in the hearing officer's conclusion that use of the name Nosecco created a serious risk that consumers would be deceived, within the meaning of Section 3(3)(b) of the Trade Marks Act 1994. The risk was that purchasers of Nosecco would consider that it was de-alcoholised Prosecco which was in some way compliant with the requirements of the PDO.

For advice on any intellectual property matter or dispute, contact us.

When Does a Contract Dispute Crystallise? Guideline High Court Ruling

Contract adjudicators only have jurisdiction to resolve disputes after the points in issue have crystallised. The difficulty of discerning exactly when that point has been reached was underlined by a High Court case concerning a delayed laboratory construction project.

The main contractor engaged a subcontractor to perform mechanical and electrical services in connection with the project. The contract price for the works was over £23 million. The subcontractor sought an extension of time in which to complete the works. After the matter was referred to an adjudicator, he awarded the subcontractor the full 282-day extension sought.

The contractor subsequently launched proceedings, arguing that the adjudicator had no jurisdiction to consider the matter and that his award was of no legal effect. Eight days before commencing the adjudication, the subcontractor had submitted a new and substantial delay report. The contractor argued that the report was a fresh notification of delay and that it was contractually entitled to 16 weeks to assess it before the dispute could be said to have crystallised.

Rejecting the contractor's arguments, however, the Court noted that, over a period of almost a year, the subcontractor had served five notices of delay on the contractor. Each notice set out the cause or causes of the delay, the material circumstances relied on, the material relevant event and estimates of the expected delays. The notices indicated that the delays were cumulative.

In failing to respond to those notices within the 16-week deadline, the contractor had breached its contractual obligations. The delay report did not amount to a fresh notification and the dispute had therefore crystallised 16 weeks after the last of the five notices was served. The adjudicator thus had jurisdiction and his award was binding on the contractor. The contractor was also ordered to pay the adjudicator's fees of more than £37,000.

Expert legal advice is essential in all litigation. Preparing the best possible evidential support is vital, as is compliance with the rules of litigation practice.

Directors Who Invest in Other Businesses – Watch Out for Conflicts of Interest

Directors are generally required to devote their time and effort to the companies they serve and to avoid making investments which might conflict with their best interests. The High Court analysed the extent of those duties in resolving a dispute between shareholders in an indoor climbing centre.

A director and founder of the centre, who owned a 32 per cent stake in the company that ran it, was sacked after his fellow shareholders discovered that he had invested £100,000 to acquire 49 per cent of another business in the same sector. He was, amongst other things, accused of creating a conflict of interest and failing to promote the company's success.

Two of the fellow shareholders offered to purchase his shares in the company at a discounted price on the basis that he was a 'bad leaver' within the meaning of the shareholder agreement. He rejected that offer and launched proceedings under the Companies Act 2006, asserting that he had been wrongfully dismissed and subjected to unfair prejudice as a minority shareholder.

The director pointed out that the centre and the business in which he invested were not competitors and operated from premises 200 miles apart. In dismissing his claim, however, the Court found that he was heavily committed to the other business and worked for it at times when he could have been working for the company.

His direct or indirect interest in the other business conflicted, or possibly may have conflicted, with the interests of the company. That was a fundamental breach of the duty he owed to the company and the board was not wrong to exclude him from the company's management and to oust him as a director.

By signing a directors' services agreement (DSA), he undertook to devote his full time and attention to furthering the company's business during such hours as might be necessary for the performance of his duties. The Court noted that the board had been rightly concerned to understand how his commitment to the other business might affect his performance of that undertaking.

His decision to invest in the other business was unauthorised and unilateral and the investment opportunity which he pursued himself might also have been of interest to the company. His failure to make full disclosure of his involvement with the other business when asked was also a persistent breach of his obligations under the DSA. The Court concluded that he had suffered no unfair prejudice and that the company was entitled to terminate his employment contract.

For advice on any aspect of company law, contact us.

Get in touch with us if you would like advice on any of the issues raised in this bulletin or on any other commercial law matter.

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