SIMON BURN
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Commercial Law UPDATE

Car Dealer Accused Over Ferrari Sale Overturns Dishonesty Finding

A judicial finding of dishonesty is bound to have serious reputational consequences, particularly in a business context. As a High Court case concerning the sale of a Ferrari sports car showed, such a finding should only be made on solid evidence presented in a rigorously fair trial.

A businessman bought the Ferrari 360 Spider from a motor dealership but, following its delivery to his home in Australia, he was deeply dissatisfied with his purchase. He launched a successful breach of contract claim against the dealership, but his hopes of obtaining relief from that source were stymied when it went into liquidation. Faced with that difficulty, he issued proceedings against the dealership's sole director, alleging fraudulent misrepresentation.

In upholding that claim, a judge found that the director had made a number of false representations concerning the condition of the car, its special features and the originality of some of its parts in an online advert and in a telephone conversation with the businessman. The director was found personally liable to compensate the businessman for any losses arising out of the misrepresentations on the basis that they had been made dishonestly.

In upholding the director's challenge to that outcome, the Court found that the trial of the action had been rendered unfair by a serious procedural irregularity. The judge had taken it upon himself to find that the director had acted dishonestly on a basis that had not been argued before him.

It was no part of the businessman's case that the director had dishonestly procured two important documents, yet that was what the judge had found. The director had also been given no opportunity to answer that allegation. The Court directed a retrial of the dishonesty issue before a different judge.

Dishonest Tax Evasion – Directors Cannot Hide Behind Corporate Veil

Directors who are complicit in dishonest tax evasion cannot use the corporate veil to escape the consequences of their wrongdoing. The point was powerfully made by a case in which the boss of an engineering company was ruled personally liable to pay a six-figure VAT evasion penalty.

The company's poor VAT compliance record began on the day it started trading. Following a lengthy investigation, HM Revenue and Customs (HMRC) concluded that it had failed to pay £316,354 in VAT over a period of about four years. An evasion penalty of 90 per cent of that sum – £284,718 – was raised against the company.

On the basis that the company's default was attributable, in whole or in part, to the dishonest conduct of its sole director and shareholder, HMRC exercised their powers under Section 61 of the Value Added Tax Act 1994 to issue him with a demand that he pay the whole of the penalty personally.

In dismissing his challenge to that decision, the First-tier Tribunal found that the director's conduct was beyond negligent and revealed a pattern of dishonesty. Although well aware that the company had been significantly under-assessed for VAT, he did nothing to alert HMRC to that fact. It was reasonable to hold him liable in person for 90 per cent of the company's default, the amount of which had not been overstated.

For advice on the conduct of any dispute with the authorities, contact us.

When Do Two Offices Become One for Rating Purposes?

Are adjacent commercial properties in common occupation, but divided by a service area, to be treated as one unit or two for business rates purposes? The Upper Tribunal (UT) has tackled that thorny issue in a case that clarified the law and will have significant financial consequences.

The case concerned two suites of offices in the same building. They were occupied by a single tenant but were separated by a 1.3-metre-wide fire escape corridor which was under the landlord's control. A local authority valuation officer (VO) took the view that the suites should be treated as separate units and entered them in the rating list accordingly.

The tenant's appeal against that decision was subsequently upheld by the Valuation Tribunal for England, which found that the two suites constituted a single unit for rating purposes. That ruling promised a

significant saving for the tenant in that the rateable value of the combined suites was substantially lower than would have been the case had they been listed separately.

In ruling on the VO's challenge to that outcome, the UT noted that the issue hinged on Section 64(3ZD) of the Local Government Finance Act 1988, which states that commercial premises in common occupation are to be treated as contiguous – and thus a single unit for rating purposes – even if there is a 'space' between them that the tenant does not own or occupy.

The UT found that, on a true reading of that provision, the word 'space' means a compartment or void within a wall, fence or other means of enclosure, or a space between storeys that is not itself a storey. The fire escape corridor did not fall into that category.

The UT ruled that two occupied units on the same floor can only be viewed as contiguous if some or all of a wall of one forms all or part of the wall of the other. As the two suites in question were not at any point on opposite sides of a common wall, the statutory criteria were clearly not satisfied. Even if service pipes above the corridor's ceiling linked the two suites, that did not change the position. The VO's appeal was allowed and the suites' separate listings restored.

Contact us for advice on any property law matter.

Traders Beware! Dashed-Off Emails Can Be Contractually Binding

Communicating by email may be quick and convenient, but it can also be extremely hazardous and, as a High Court case showed, employers should beware their staff entering into high-value contracts with just a few strokes of a keyboard.

The case concerned emails that passed between a saleswoman who worked for a cosmetics company and a buyer employed by a retail chain. The saleswoman requested confirmation of a commitment that the chain would purchase a minimum quantity of a particular range of products over a 12-month period. The buyer responded that he was 'happy' with that arrangement.

Sales of the range were disappointing, and the chain's orders dried up within about four months. The cosmetics company responded by launching a breach of contract claim, seeking about £980,000 in respect of losses arising from the shortfall in orders, plus storage charges for unsold stock and interest.

In its defence, the chain argued that the buyer had no authority to confirm orders of stock from any supplier, something which could only be done by the issue of a formal purchase order. It was asserted that, in common with other large retailers in its sector, the chain never made volume commitments.

In rejecting those arguments, however, the Court found that the buyer had, by his email, entered into a binding agreement that the chain would place orders sufficient to meet the minimum annual quantity sought by the saleswoman. Even if he did not have the chain's actual permission to make that commitment on its behalf, from the saleswoman's point of view he had apparent or ostensible authority to do so.

The Court was also unpersuaded by the chain's plea that there was an established industry practice never to commit to minimum purchases and that the saleswoman must have been aware that that was the case. Having found that none of the chain's lines of defence had any real prospect of success, the Court entered summary judgment in favour of the cosmetics company. If not agreed, the amount of damages payable by the chain will be assessed at a further hearing.

If you want to ensure an agreement is honoured and will withstand a legal challenge, make sure it is recorded in proper form. Our expert lawyers can advise.

Golf Clubs Maker Heavily Fined for Anti-Competitive Internet Sales Ban

The ever-increasing dominance of the internet as a sales medium was the focus of a landmark Court of Appeal case in which a bespoke golf club manufacturer that banned its authorised dealers from selling its products online was fined over £1 million for unlawfully restricting market competition.

The manufacturer had pioneered the importance of golf clubs being custom-fitted to their users and viewed non-bespoke internet sales of its products as anathema. It therefore introduced an internet sales policy which prohibited its authorised UK dealers from offering its products for sale on websites.

After the matter was investigated by the Competition and Markets Authority (CMA), a £1.45 million fine was imposed on the manufacturer on the basis that the policy amounted to a harmful restriction on competition, contrary to Article 101 of the Treaty on the Functioning of the European Union and the Competition Act 1998. That conclusion was subsequently confirmed by the Competition Appeal Tribunal,

although the financial penalty was reduced to £1.25 million.

In challenging that outcome, the manufacturer expressed indignation at being the subject of an infringement decision and pointed out that there was nothing covert about the policy. Insisting that it knew best how to market its own products, it submitted that custom fitting ensures that golfers get the most suitable club to optimise their game and that the policy actively promoted competition between club manufacturers based on quality.

In dismissing the appeal, however, the Court observed that the policy restricted authorised dealers from selling the manufacturer's clubs beyond the geographic locale of their premises. In the absence of internet sales, they did not have to worry about lower prices being charged by other authorised dealers elsewhere in the UK, or anywhere in the European Union, because the customer could not readily buy clubs from those dealers.

The Court noted that the law recognises the advantages of selective distribution networks for luxury or highly technical goods. However, the combination of such a network with an embargo on internet sales had resulted in a diminution of price competition which was sufficiently harmful to be unlawful. The desirable objective of custom-building clubs to golfers' particular specifications did not objectively justify a complete ban on internet sales. The manufacturer's challenge to the amount of the fine was also rejected.

If your business has been negatively impacted by restrictions on competition, contact us for advice.

Making Allowances for Mentally Ill Employees – Guideline EAT Ruling

Employers are, of course, entitled to dismiss staff for gross misconduct – but what if that conduct is caused or contributed to by mental illness? The Employment Appeal Tribunal (EAT) addressed that thorny issue in the case of a senior NHS manager who behaved out of character when suffering from bipolar disorder.

The woman reacted to what was described as minor restructuring of her department by sending a series of inappropriate emails to the medical director of the NHS trust for which she worked. After her suspension, she attended the medical director's home uninvited in an attempt to discuss her grievances. Following a disciplinary process, she was summarily dismissed for gross misconduct.

After she launched proceedings, an Employment Tribunal (ET) found that she had been guilty of gross insubordination on a grand scale. Despite her long service and clean disciplinary record, dismissal would, ordinarily, have been well within the band of reasonable responses open to a reasonable employer.

However, in ruling that her dismissal was unfair and amounted to an act of disability discrimination, the ET noted that it had emerged during the disciplinary investigation that she was suffering from bipolar disorder at the relevant time. The disciplinary panel had before it medical evidence that she was in the hypomanic phase of the condition when she sent the threatening and insubordinate emails.

The ET found that her condition had a significant impact on her actions, which thus arose because of something in consequence of her disability. However, it went on to rule that she was not blameless and that she bore 25 per cent of the responsibility for her dismissal on the basis that she would probably have responded inappropriately even had she not been suffering from bipolar disorder.

In upholding her appeal against that aspect of the ET's ruling, the EAT noted that she had plainly been suffering from a serious psychiatric illness. The ET had failed to objectively assess the extent of her blameworthiness and had given inadequate reasons for determining the level of her contributory fault at 25 per cent. That issue was sent back to the same ET for fresh consideration.

For advice on dismissal issues or any other aspect of employment law, contact us.

Government Pushes Ahead With Off-Payroll Rule Change Implementation

The government is to forge ahead with changes to the off-payroll working rules, after conducting a review into the contentious new measures.

Intended to address concerns from businesses about the changes, the review considered whether any additional steps could be taken to ensure the reforms are rolled out in a smooth and successful manner.

The reforms to the off-payroll working rules, known as IR35, come into force on 6 April 2020. Introduced in 2000, the rules require that individuals who work like employees for organisations, but through their own company, pay similar taxes to other employees.

Under the reforms, medium and large organisations across all sectors will be required to assess the employment status of individuals whom they contract in.

The government review into implementation of the changes gathered feedback from a range of businesses and affected individuals. A number of recommendations have been identified and will be actioned by HM Revenue and Customs, including 'taking a light touch approach to penalties', so that customers and private businesses will not have to pay penalties for inaccuracies relating to the off-payroll working rules in the first 12 months, unless there is evidence of deliberate non-compliance.

Further information can be found at https://www.gov.uk/government/publications/review-of-changes-to-the-off-payroll-working-rules-report-and-conclusions

High Court Apportions Seven-Figure Cost of Abortive Oil Prospecting Venture

Words are by their nature imprecise and even the most careful contract draftsman in the world can rarely achieve absolute certainty of meaning. As a case concerning an abortive oil prospecting venture showed, however, the courts are always there to resolve any differences of opinion that may arise.

An oil company sold an initial 17.5 per cent stake in an offshore drilling licence to an investor, the latter having agreed to contribute 26.25 per cent of the total costs of prospecting the relevant well. After the well turned out to be dry, the oil company sought almost £3.3 million from the investor in respect of those costs. The investor, however, argued that it only owed about a third of that sum.

It was accepted that the oil company had leased a drilling rig to prospect the well at a rate which substantially exceeded the market rate for an equivalent rig. However, it argued that the investor was contractually obliged to pay its agreed proportion of all costs in fact incurred in the ill-fated venture, without qualification.

In ruling on the matter, the High Court found that, on a true construction of relevant contractual provisions, the investor's contribution should be calculated on the basis of what it would have cost to hire a cheaper equivalent rig. Having paid £1,114,480 towards the cost of the project, it had discharged its contractual liability. The Court heard further argument as to whether interest should be added to that sum.

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