

## Unfairly Denied a Public Contract? Legal Experts Can Help

If you feel that you have been unfairly denied a public contract, you should consult a solicitor straight away because any delay in launching proceedings can be fatal to your rights. In a High Court case, a trucking company which lost out in a multi-million-pound local authority contract race found that out to its cost.

The company tendered almost £7 million for a contract to supply cabs and trailers to serve waste re-processing facilities that the council operated through a corporate vehicle. The invitation to tender required that the interiors of cabs supplied must be of sufficient height to enable a person to stand up. The company was disqualified from the tendering process on the basis that that mandatory requirement had not been met. The contract was awarded to a trade rival notwithstanding that its bid was, at least in financial terms, substantially less favourable to the council.

The company responded by challenging the legality of the tendering process under the Public Contracts Regulations 2015. It was, amongst other things, argued that the standing height requirement was a mere technicality which was at best ambiguous and open to interpretation. In parallel proceedings, the company also sought judicial review of the disqualification decision on the basis that it was irrational and procedurally unfair.

In shutting the door on both claims, the Court noted that, under the Regulations, the company had 30



days in which to launch its challenge. That time limit – which began to run when the company first knew, or ought to have known, that it had grounds for complaint – had been substantially exceeded and it had put forward no good reason why it should be extended.

The company's judicial review application had also been brought too late and there was no compelling reason, of public policy or otherwise, why it should be permitted to proceed out of time. Waiving the time limit would create a real risk of prejudicing the position of the successful tenderer, which had already invested heavily in employing staff and upgrading its vehicle fleet with a view to meeting its obligations under the contract.

**For advice on any contractual matter, please contact us.**

## Manage Legionella Risks During COVID-19 Crisis, Urges HSE

The Health and Safety Executive (HSE) has issued updated guidance on the management of legionella risks during the coronavirus pandemic.

Employers, landlords and the self-employed have a duty to identify and control the risks associated with legionella.

The HSE warns that if your building has been closed or subject to reduced occupancy during the COVID-19 outbreak, water system stagnation may have occurred due to lack of use, increasing the risks of Legionnaires' disease.

Those with a duty to do so are advised to review their risk assessment and manage the legionella risks to protect people when the water system is reinstated or returned to use.

Where water systems are still used regularly, the appropriate measures should be maintained to prevent legionella growth.

Practical steps and guidance can be accessed at <https://www.hse.gov.uk/news/legionella-risks-during-coronavirus-outbreak.htm>

## Pet Food Company Triumphs in Trade Mark Infringement Claim

Trade marks that achieve widespread public recognition are the lifeblood of a great many businesses, forming the foundation of their brands. A High Court ruling in the context of the UK's £2.54-billion-a-year pet food market showed exactly why such valuable intellectual property assets are well worth developing.

In the 10 years since a pet food company began selling products under two two-word trade marks – which were identical save in terms of colour – it had sold 19 million units and achieved a turnover of nearly £10 million a year. It launched infringement proceedings against another pet food manufacturer that began marketing products under a similar name.

In upholding the company's claim, the Court found that it had become a brand leader in the raw pet food market and that its trade marks had attained both a high level of distinctiveness and a strong degree of consumer recognition. The name used by the rival to market its products was to a high degree conceptually similar to the trade marks. There were also, to lesser degrees, visual and aural similarities.

There was ample evidence that those similarities had led to both the likelihood of and actual consumer confusion between the company's products and those of its rival.

The Court had no hesitation in finding that the rival had been aware of the company's products when it adopted the similar name. The company had suffered detriment to its reputation as a result.

The rival was likely to have received a leg up in the marketplace due to its choice of a similar name and had to that extent taken unfair advantage of the trade marks. It was also guilty of passing off in that the similar name created a link in consumers' minds between its products and those of the company. The Court's ruling opened the way for the company to seek various forms of relief, including an injunction to restrain the future sale of infringing products and damages or an account of profits generated by the rival's wrongdoing.



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

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## Financier Dragged Over Coals for Breaching His Employment Contract



Those who play fast and loose with the contractual obligations they owe to their employers can expect severe consequences. That was certainly so in the case of a highly paid financier who resigned from his job, without notice, at a time when he had

for months been negotiating a move to a competitor.

The man's employment contract with a brokerage required him to give six months' notice. Unbeknown to his employer, he had for more than seven months prior to his summary resignation been in advanced discussions with the competitor. Following his departure, the brokerage swiftly launched High Court proceedings against him.

He responded with claims that the brokerage had, by its conduct over several years, destroyed their relationship of trust and confidence. He said, amongst other things, that he had uncovered various forms of wrongdoing on the brokerage's part and that its CEO had brushed off his attempt to raise a grievance in a belittling and insulting manner. On that basis, he claimed that he had been

constructively wrongfully dismissed and was thus entitled to resign without notice.

Ruling on the matter, the Court found no substance in the financier's claim that the CEO had treated him inappropriately or unfairly. The brokerage had done nothing that could be viewed as a repudiatory breach of his contract and, in summarily resigning, he had himself breached that contract. On the basis that he continued to be employed by the brokerage, and would remain so until the expiry of his notice period, the Court made an order prohibiting him from taking a job with any other business during that period.

The brokerage was also granted an order enforcing a non-compete clause in his contract, which would prevent him from obtaining employment with any competing business for a further six months after the end of his notice period. The Court was satisfied that the clause was reasonable and went no further than necessary in order to protect the brokerage's legitimate business interests.

The brokerage was also seeking almost £400,000 in damages against him in respect of his breach of his employment contract, together with an order requiring him to submit to forensic examination of his electronic devices and private emails. Those matters would be considered at a further hearing.

**We can advise you on any aspect of employment law.**

## High Court Acts to Rescue Company After Sole Shareholder's Death

If you are an entrepreneur and own your own company, that is all the more reason why you should take professional advice regarding the consequences that might arise on your death. In an unusual High Court case on point, a farm contracting business was left rudderless by the demise of its founder.

The founder was the company's sole director and shareholder. His shares passed automatically to the executors of his estate when he died. However, the company was left without a director and its bank stated that it would not be able to operate its account without the authority that only a director could provide.

As a result, the account was effectively frozen. The company was unable to pay creditors or to cover operating costs as its busiest time of the year approached. Although long-standing

members of its staff were able to run the business on a day-to-day basis, there was an imminent risk that the company would fail if it could not meet its contractual commitments and otherwise carry on its business.

Given the great urgency of the situation, the executors launched proceedings before applying for probate of the founder's will. Coming to their aid, the Court exercised its power under Section 125 of the Companies Act 2006 to rectify the register so as to record them as members of the company. In that capacity, they would be able to pass a written resolution appointing a new director, or directors, of the company.

**For advice on business continuity planning or any aspect of company law, contact us.**

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## Preserving Natural Beauty Matters – But So Does Boosting Jobs and Tourism

Preserving the natural beauty of scenic areas has always been a central objective of planning policy. However, as a Court of Appeal ruling showed, such considerations cannot always be decisive when the economic benefits of job creation and tourism are put into the balance.

The case concerned a proposal to expand an existing caravan park which was set in an Area of Great Landscape Value (AGLV). The local authority granted planning consent on the strength of a planning officer's advice that the development's slight or moderate impact on the AGLV would be outweighed by the provision of much-needed jobs and economic growth in the rural area.

A local objector subsequently mounted a successful judicial review challenge to the council's decision. In quashing the permission, a judge noted that the project was in direct conflict with a local planning policy which stated in

mandatory terms that developments harmful to AGLVs would not be permitted.

Upholding the local authority's appeal against that ruling, the Court acknowledged that there was some degree of conflict between the proposal and the policy, the wording of which was unqualified. There was, however, nothing to indicate that it was intended to have automatic primacy over other local policies, including one which positively supported the proposal in that it encouraged high-quality and sustainable developments which would create jobs and promote tourism.

The planning officer's reasons for recommending in favour of the development were adequate and intelligible and the balance that she struck between conflicting policy considerations could not be faulted. The planning permission was reinstated.

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## Providing Services Without a Formal Contract Can Be a Hiding to Nothing

Those who provide their services in the hope of some future benefit, but without a formal contract to secure their position, do so on a wing and a prayer. That was certainly so in the case of a company which provided design advice and other assistance in developing a successful line of soft toys.

Over a two-year period, the company provided its services to a toy designer in the expectation that a small Chinese factory in which the former had an interest would be engaged to manufacture the toys. In the event, however, the designer entered into a manufacturing and distribution agreement with another toy company which had since enjoyed considerable success in marketing the toys.

The company initially claimed in excess of \$4 million in damages from the designer on the basis that the latter had breached an oral agreement that it would use the Chinese

factory to produce the toys. In the absence of a formal contract, however, that claim was subsequently abandoned and the company instead pursued a much more modest restitution claim in respect of the value of the services it had provided.

In upholding that claim, the High Court found that the very significant contribution that the company had made to the products' success could not be overlooked and that it would be unconscionable for it to go entirely unrewarded for its efforts. Such an outcome would also result in the designer being unjustly enriched. The company was awarded £144,450, that sum representing the value of the services it had provided to the designer over a 20-month period.

**For advice on any contractual matter, please contact us.**

## Advance Contractual Payments and the Benefits of Bank Guarantees

Contracts often require payments for services to be made in advance in order to get the ball rolling and provide liquidity, but this gives rise to obvious risks. An instructive High Court ruling, however, showed how effective bank guarantees are in ensuring that such payments are recovered in the event of non-performance.

A Spanish company which was the main contractor on a major construction project in Saudi Arabia made an advance payment of about £8 million to a South Korean subcontractor. It was a condition of the subcontract that the subcontractor would secure the contractor's position by entering into a bank guarantee.

A bank guaranteed that, in the event of default by the subcontractor, it would repay such part of the sum advanced which had not been used in paying for work that had actually been done. On the basis that the subcontractor had defaulted on its obligations by effectively walking off the site, the contractor made demand upon the bank in respect of the whole of the sum guaranteed. The guarantee conferred on the courts in London jurisdiction to resolve any disputes arising and, when the bank declined to meet the demand, the contractor launched proceedings.

The guarantee required as a condition precedent that the advance payment be made into a numbered account held by the subcontractor with HSBC. There was nothing to suggest that the subcontractor had not received the money. However, whilst the payment had been made by the contractor into an account bearing the correct number, it was not held with HSBC. On that basis, the bank argued that the condition had not been met and the guarantee was unenforceable.

Ruling on the matter, the Court noted that, if the bank's restrictive interpretation of the guarantee were correct, it would

have had the result of rendering the guarantee entirely worthless at the moment the advance payment was made. In striving to avoid such an absurd result, it was permissible for the Court to take into account extraneous evidence as to the parties' intentions.

The bank into which the payment was made was 40 per cent owned by HSBC, which had no retail branches in Saudi Arabia. The bank's logo bore the distinctive HSBC symbol and there was no other qualifying bank account bearing the required number into which the money could have been paid. On that basis, the Court found that it was a classic case of misnomer. The bank had been misidentified in the guarantee and the money had been paid into the account intended.

The bank having no real prospect of defending the matter, and there being no other compelling reason for a trial of the action, the contractor was awarded summary judgment on its claim.



**Contact us for advice on any matter relating to commercial property law.**

**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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