SIMON BURN
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Winter 2021

Commercial Law UPDATE

Parliament Entitled to Close Perceived Tax Loophole Retrospectively

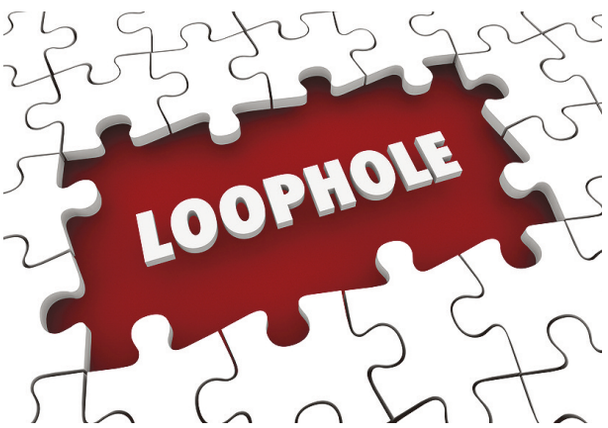
There is nothing inherently wrong with Parliament legislating retrospectively in order to plug perceived tax loopholes. The High Court resoundingly made that point in rejecting claims that a back-dated change in the law violated the human rights of thousands of taxpayers to whom it came as a financial bombshell.

The Finance (No 2) Act 2017 was passed in response to HM Revenue and Customs' (HMRC's) concerns about a multiplicity of so-called 'disguised remuneration' schemes. Such schemes came in various forms and with differing levels of complexity but, in simple terms, they commonly involved companies making loans to their employees on which no Income Tax or National Insurance Contributions were paid.

Sponsors of such schemes argued that the loans could not be viewed as taxable income. However, they were generally provided on highly preferential terms and employees were usually excused from repaying them indefinitely. HMRC took the view that, as a matter of economic reality, the loans were part of the reward given to employees in return for the work or services they provided.

The effect of the Act was to roll up relevant loans or quasi-loans that had been made since 6 April 1999 and to tax them as employment income received in the 2018/19 tax year. Similar provision was made in respect of self-employed contractors who had received loans in lieu of pay. About 50,000 workers were caught by the legislation and faced imminent receipt of substantial tax demands.

Two affected workers launched a judicial review challenge to the legislation, arguing that it breached their human right to peacefully enjoy their possessions, enshrined in Article 1 of the First Protocol to the European Convention on Human Rights. They asserted that the loans they received were genuine, that they were obliged to repay them and that they had engaged in tax mitigation, rather than avoidance.



Ruling on the case, the Court noted that HMRC had long disputed the effectiveness of disguised remuneration schemes. All that workers had been deprived of by the Act was an argument that they were not liable to pay tax on the loans. They had not been deprived of anything that could be described as a 'possession' and their rights under Article 1 were therefore not engaged.

In dismissing the claims, the Court noted that each of the workers was party to an arrangement to receive money as remuneration for their services by a means that they knew was designed and intended to prevent them having to pay tax that would normally be chargeable on the same sum if it had been paid as part of their salary.

The fact that the Act had retrospective effect did not, of itself, render it incompatible with Article 1. Parliament had struck a fair balance between public and private interests and the evidence fell far short of establishing that the Act was a disproportionate response. HMRC were alive to the impact of the change in the law on individuals and steps had been taken to support affected taxpayers and to reduce the risk of them becoming insolvent.

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

'All Risks' Business Interruption Policy Does Not Cover COVID-19 Losses

Many businesses are furious that their 'all risks' business interruption insurance may not cover them against losses arising from the COVID-19 lockdown. The High Court has, however, emphasised that sympathy for their plight cannot affect the settled legal principles by which policy wordings are interpreted.

The owner of a restaurant which was amongst thousands shut down by government edict in response to the pandemic launched proceedings after its insurer refused to provide an indemnity under the business interruption section of its policy. The insurer, however, argued that the claim was misconceived.

The relevant part of the policy was headed 'Business Interruption All Risks' and, in ruling on the matter, the Court accepted that, in the light of that wording, the policy should, where possible, be given a generous construction with regard to the extent of coverage. On that basis, the Court accepted that lockdown resulted in 'business interruption' as defined by the policy.

Coverage, however, only extended to losses arising from an 'event', a word defined in the policy as 'accidental loss or destruction of or damage to property'. On an ordinary reading of that phrase, the policy envisaged losses that had a physical aspect and were more than transient.

In striking out the owner's claim on the basis that it was bound to fail, the Court accepted the insurer's argument that the restaurant's temporary enforced closure was not an 'event' within the meaning of the policy. The owner had in any case failed to meet a proviso in the policy which required it to claim first on any building insurance or other policy by which it had insured its interest in the property against losses arising from such an 'event'.

The Court noted that it was impossible not to feel sympathy for the owner and the proprietors of numerous other businesses affected by the pandemic. Many would have an instinctive reaction that 'all risks' insurance policies should cover losses arising from COVID-19 restrictions and that some of the burden of the emergency should be shifted to insurance companies and other major financial institutions which may perhaps be in a better position to bear it.

The Court, however, observed that, in times of uncertainty, the law must provide a solid, practical and predictable foundation for the resolution of disputes and the confidence necessary to achieve an eventual recovery. The need for legal certainty remained paramount and offered the surest basis for resolution.

We can advise you on dealing with the impact of the COVID-19 pandemic on your business, or on the cover afforded to you under an insurance policy.

The Law Cracks Down on £35 Million 'Mafia-type' VAT/Duty Evasion Fraud

The immense profits that can be made from the fraudulent evasion of VAT and import duties make it an attractive proposition for organised criminals. However, as a case concerning wine imports showed, HM Revenue and Customs (HMRC) are wise to such operations and come down hard on perpetrators.

The case concerned what was described as a Mafia-type conspiracy which involved massively understating the volumes of wine that were imported by a company from Italy into the UK. The company was said to have evaded nearly £35 million in duty and VAT by providing false returns to HMRC. The conspiracy unravelled following a joint investigation by British and Italian police.

The company's sole shareholder, who was the alleged mastermind of the operation, absconded from his trial after the jury had retired to consider its verdict. He was convicted in his absence of fraudulent evasion of duty and VAT and received a 14-year prison sentence. The company's financial controller was found guilty of the same offences and was jailed for three and a half years.

It was the prosecution case that the company's financial records were a sham, with the only true record of its dealings being stored on a computer server in Italy. A large quantity of cash had been found at its premises. The financial controller's defence was that she was not knowingly involved in any fraud. She said that it was inherently unlikely that she would have been taken into the confidence of serious organised criminals engaged in a very substantial fraud.

In dismissing her challenge to her convictions, however, the Court of Appeal noted that the case against her was not entirely circumstantial. Criticism of the trial judge's summing up of the case was misplaced and the jury was entitled to infer her knowing involvement from all of the evidence.

Facing Forfeiture of Your Commercial Lease? Consult a Lawyer Without Delay

If you are a commercial tenant and your landlord is for any reason threatening to forfeit your lease, it is crucial that you take legal advice without delay. In a case on point, the High Court came to the aid of a tenant whose shop premises were repossessed due a mistaken delay in paying a few hundred pounds in rent.

The tenant was unaware that the rent paid in respect of the shop in one quarter was £500 short. As they were legally entitled to do, his landlords forfeited the lease and employed the services of bailiffs to re-enter the property. The tenant paid the missing £500 shortly afterwards but a delay of more than four months ensued before he launched proceedings, seeking relief from forfeiture.

Following a hearing, a judge described as very harsh and unyielding the landlords' albeit lawful decision to forfeit a lease that still had 10 years to run. The amount of arrears was relatively small and it had only been outstanding for a short period. In refusing the tenant's application, however, she noted his delay in seeking relief.

Upholding the tenant's appeal against that outcome and granting the relief sought, the Court noted that, although the landlords had acted strictly in accordance with their legal rights, human factors are relevant to the wide judicial discretion to grant relief from forfeiture. In cases where all rent and expenses due have ultimately been paid or tendered, relief should, save in exceptional circumstances, be granted. In seeking such relief within six months, the tenant had acted with reasonable promptitude.

Contact us for expert advice on any matters relating to landlord and tenant law.

What is an Employment Agency? High Court Provides an Authoritative Answer

What exactly is an employment agency? And does the statutory definition embrace businesses which merely introduce work-seekers to those who use their services? The High Court authoritatively answered both those important questions in a test case concerning the provision of private home tuition.

The case concerned nine companies which engaged similar business models. They introduced private tutors to hirers, usually parents, who directly engaged the tutors under contracts for services. The companies received an introduction fee and also provided various collateral services such as collecting payments from hirers and passing them on to tutors.

The Department for Business, Energy and Industrial Strategy took the view that the companies were employment agencies within the meaning of the Employment Agencies Act 1973 and were thus subject to extensive regulatory requirements designed to protect work-seekers, those who hire them and end users of their services. The companies were adamant that they were not employment agencies and sought a judicial declaration to that effect.

Ruling on the matter, the Court noted that the case hinged on whether tutors who are introduced to clients by an introducing company, but thereafter provide their services under contracts for services with their hirers, fall within the definition of 'employment' found in Section 13 of the Act.

On an obvious and literal reading of Section 13, the Court found that it was intended to apply to all arrangements through which a business supplies people personally to perform work for a third party – whether or not that is regarded as employment, in the non-statutory sense of the word, professional engagement or self-employment under a contract for services.

The word 'employee' in Section 13 had a specific and broad meaning and embraced a wide and inclusive range of ways in which people work. That interpretation accorded with the purpose of the Act to provide broad protections, not only to those seeking work via employment agencies, but also to those seeking to obtain the benefit of their work and vulnerable people who may be the subject of such work.

In rejecting the companies' application, the Court found that, where a business holds itself out as an intermediary between a person who needs services and a person offering to supply them, the protective terms of the Act and regulations made under it will usually apply.

The Court made a declaration that the definition of 'employment' in Section 13 includes in its application persons, including companies, who provide services on a self-employed basis as independent contractors. That definition encompassed private tutors introduced by the companies.

We can advise you on any aspect of employment law.

Hundreds of Jobs on the Line After Property Company Forced Into Administration

Corporate insolvency proceedings may appear dry as dust to the uninitiated but they can have major practical effects in the real world, with jobs and reputations frequently on the line. That was sadly so in the case of a property company which sank into administration after borrowing almost £27 million to fund its operations.

The company was part of a group principally engaged in commercial and residential property development. It borrowed the money from a Cayman Islands-based lender whose interests were secured by a debenture over the company's assets. The cash was received in two tranches, each of them repayable at the end of fixed 18-month terms together with 16 per cent interest.

When the company defaulted on those repayment deadlines, the debenture became immediately enforceable under the terms of the loan agreement. The lender agreed to waive enforcement on conditions which included adherence to specified payment schedules. Those conditions were not met, the waiver was revoked, and the lender launched proceedings, seeking an administration order.

Ruling on the matter, the High Court rejected the company's arguments that the loan agreement had been varied by consent or that the lender was not entitled to rely on its strict terms. The evidence indicated that the company was probably insolvent and that its debts were far from sufficiently secured by the debenture. The company was unable to demonstrate that it was in a position to pay interest due on the loans, let alone the capital sums.

The company argued that, once developments in the pipeline were completed and profits realised, it would be in a position to repay the loans and interest in full. It said that an administration order could have a devastating impact on the wider group, with some 300 full-time jobs and 1,000 subcontractors being affected. Building works on thousands of new homes, hotels and commercial properties might have to cease.

In granting the order sought, however, the Court noted that the administrators would be under a duty to consider whether it was reasonably practicable to rescue the company as a going concern. Given the company's defaults and its perilous financial position it would be wrong to deny the lender its right to enforce the debenture. A return to secured creditors was more likely to be achieved if licensed insolvency practitioners took control of the company.

The potential ripple-effects of insolvency are far reaching. For that reason, it is vital to seek expert legal advice as early as possible regarding insolvency matters. Contact us for advice.

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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