SIMON BURN
SOLICITORS

Autumn 2017

Commercial Law UPDATE

Even Small Data Protection Glitches Can Be Costly

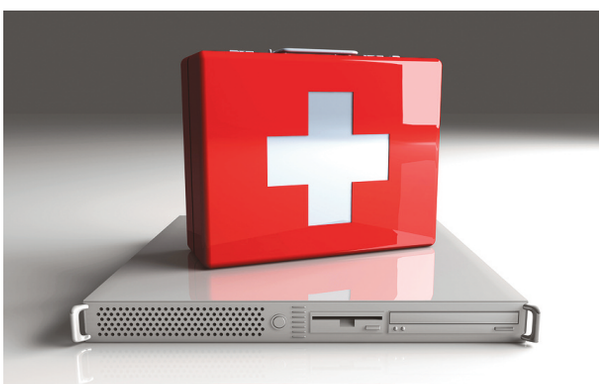
When a local council published information in connection with a family's planning application for building works, it failed to think through the consequences of its actions. The result was that it placed sensitive personal data in the public domain.

The data included information about health issues the family face and the names and ages of all the members of the family as well as their location.

Normally, such information would be redacted from the statement before it was made publicly available, but a procedural glitch meant that the council failed to do so, because the pre-publication check was entrusted to an inexperienced technician.

The reaction of the Information Commissioner's Office was to fine the council £150,000, with a £30,000 discount being available for prompt settlement if the council does not appeal.

From May 2018, the General Data Protection Regulation (GDPR) will replace the current EU Data Protection Directive, imposing stricter rules concerning the holding and management of



personal data and also its use for commercial purposes. Although it is European legislation, the Government intends that the GDPR will remain on the UK statute books after Brexit. To this end, the Data Protection Bill 2017 has been introduced into Parliament. This will transfer the GDPR into UK law, replacing the Data Protection Act 1998 and introducing new data protection rights that take into account developments in digital technology and the way organisations often collect a wide range of information about people.

We can advise you to ensure your organisation is fully compliant with the new data protection regime from day one.

Banter Doesn't Create a Contract

The trouble with light-hearted discussions of important business matters in a social context is that none of those present can really be sure whether any agreements apparently reached are serious or merely a joke. Exactly that happened in one case in which a £15 million deal was alleged to have been struck over drinks in a pub.

A financier who worked as a consultant for a publicly listed company claimed that the company's chief executive had agreed to pay him a £15 million bonus if its share price doubled within three years. That target was reached and the financier launched proceedings to hold the chief executive to what he claimed was a binding deal.

The High Court accepted that the bonus offer had been made and that the financier had expressed his agreement to the proposal. In dismissing the financier's claim, however, the Court found that the conversation had been a jocular one and that there had been no intention by either man to enter into legal relations.

The bonus offer had been greeted with laughter by those present and no reasonable person would have thought that it was serious and that there was an intention to create a contract. They all thought it was a joke and the fact that the financier had convinced himself that the offer was a serious one revealed only that the human capacity for wishful thinking knows few bounds.

It is always best for contracts to be clearly evidenced. Contact us for assistance in negotiating any business arrangement.

Student Bedsits Are Not 'Separate Dwellings'

In a decision of great importance to landlords of student accommodation, a tribunal has found that bedsits with communal facilities are not separate dwellings. The ruling meant that the tribunal had no power to consider an attempt by a group of students to have their service charges fixed by law.

The case concerned an old fire station that had been converted into student digs. It contained 96 bedsits, most of which had en suite shower rooms. In common with most student accommodation, tenants had access to communal living areas and kitchens, and only their bedrooms were fitted with locks.

A number of students who lived in the block applied to have their service charges fixed at a reasonable level under the Landlord and Tenant Act 1985. If the Act applied to them, service charges could only be levied in respect of sums reasonably incurred for works or services of a reasonable standard.

The landlord would also be required to provide information to tenants and consult with them before major works were carried out. There would be time limits set on the recovery of service charges and tenants would have access to the tribunal system for the determination of disputes. All those protections would, however, only be available if the bedsits were 'separate dwellings' within the meaning of the Act. The First-tier Tribunal (FTT) found that they were.

In ruling on the landlord's challenge to that decision, the Upper Tribunal found that in order to qualify as dwellings, the bedsits did not have to be someone's home. However, in upholding the appeal, it found that the extent of the communal facilities meant that the bedsits were not occupied as separate dwellings. The FTT thus had no jurisdiction to consider the tenants' application.

The decision in this case was made as a matter of fact, so is unlikely to be overturned. It has implications for anyone considering converting or building premises for multiple occupation. If you are in a similar situation, we can advise you on the applicable law.

Landlord Faces Six-Figure Bill for Notice to Quit Error

Correct service of legal documents may seem like a technicality to non-lawyers, but it is of crucial importance and should only be entrusted to professionals. In one case that resoundingly proves the point, a landlord who served a notice to quit on the wrong address was left facing a six-figure damages and legal costs bill.

The case concerned an agricultural tenancy of land. The lease provided that either party could serve any notice on the other at a particular address or such other address as had previously been notified in writing. The notice to quit was served on the tenant at the address specified in the lease, although he had given notice in writing that he had moved nearly six years previously to a new home.

The tenant was dispossessed of the land after the landlord let it to another tenant. Having not received the notice to quit, he was taken by surprise and

launched proceedings. His claim was initially dismissed, the judge finding that, on a literal reading of the lease, the notice had been validly served on him at the specified address and the lease had thus been validly terminated.

In upholding the tenant's challenge to that decision, the Court of Appeal found that the judge had erred in his interpretation of the lease. His reading of the document would lead to a surprising conclusion that would leave the door open to less than scrupulous landlords serving documents at tenants' original addresses in the knowledge that they had moved out.

As a matter of commercial common sense, the landlord and tenant must have intended that the new address, once duly notified in writing, would supersede the original address given in the lease. In the circumstances, the lease had not been validly terminated and the landlord was ordered to pay the tenant £31,500 in damages and meet the six-figure legal costs of the action.

In this case, the Court took a commercial view, as is commonplace with such decisions. If you feel that you have been unfairly dealt with or are facing a dispute that turns on a minor technicality, we can advise you.

Failing to Plan Ahead Creates Problems for Family Companies

Although people prefer not to think about their own death, failing to be prepared for all eventualities can cause chaos in family companies, which are often dependent for their success on the skills of a small number of people.

The point could hardly have been more powerfully made than by one High Court case concerning a company that was plunged into crisis following its founder's death.

A businessman owned all the shares in the company and was its sole director. His death had left the company entirely directionless, without directors or a company secretary to guide it. Its bank account had been frozen, leaving it unable to pay its staff or tax liabilities. In the circumstances, the executors of his estate launched emergency proceedings in order to save the business.

In upholding the executors' emergency application under Section 125 of the Companies Act 2006, the Court directed amendment of the register of companies to substitute them for the deceased as the holders of the latter's shares. That in turn would enable them to pass a written resolution appointing a director of the company who would be empowered to put it back on an even keel.

Such relief would normally be granted only after the businessman's will had been admitted to probate, but the Court recognised that the case was wholly exceptional. Given the company's pending liabilities in respect of staff wages and a VAT demand, any delay could irreparably damage the business.

A situation like this, in which the grieving family was also faced with the potential collapse of the family business, is avoidable with simple planning. We can help the owners of family businesses make sure that in the event of unforeseen circumstances, their family and employees are not faced with an immediate business crisis.

Insolvency Service Pursues Directors Who Transgress

The Government's Insolvency Service has been prosecuting and banning increasing numbers of directors. Such bans include persons acting as a director 'in fact', even if they are not listed as a director in a company's official records.

In the first week of July alone, the offences listed below all led to bans on acting as a director of any company in the UK:

- Failing to maintain, preserve and deliver records following liquidation of a company and failing to deal with tax affairs – nine-year ban;
- Failing to maintain adequate company books and records – eight- and seven-year bans;
- Trading in a manner that breached consumer protection law causing loss to customers – seven-year ban; and
- Continuing to trade while disqualified – ten-year ban.

It is accepted that companies can fail, and a director who takes prompt action to protect the interests of creditors and who makes sure the company complies with its legal requirements will not face retribution from the authorities. However, a company director who flouts the law and/or fails to take action when it is necessary can face a substantial ban and in some circumstances become personally liable for the debts of the company.

If your company is in financial difficulties, take advice immediately.

Gross Negligence Manslaughter – Longer Jail Terms for Negligent Employers

A consultation paper published in July by the Sentencing Council for England and Wales ('Manslaughter Guideline Consultation') has proposed that the current law on manslaughter committed by negligent employers should be beefed up, with longer potential terms of imprisonment in cases of 'gross negligence manslaughter'.

The paper recommends an increase in the maximum sentence from eight to 18 years where the duty of care to a person is breached to an extent which amounts to a criminal act or omission and the person dies as a result. The majority of those charged with the offence are likely to be employers, but grossly negligent medical practitioners can also be charged.

In practice, the definition will catch employers who display a complete disregard for the safety of others. To date, however, few cases have come to court. In the years 2014 to 2016 inclusive, only 11 charges of corporate manslaughter were brought.

Complying With Specifications Was Not Enough

If you have completed work in accordance with the design specifications laid out in your contract, can you be liable if what you have provided is not fit for purpose? Where the contract also contains a fitness for purpose clause, the view of the Supreme Court is that you can.

The facts of the case will make worrying reading for contractors. It involved energy giant E.ON and a contractor it employed to provide foundations for an offshore wind farm it was constructing.

The contract specified the particular industry design standard the work had to comply with and the work done was in accordance with that standard. However, the contract also stipulated that the foundations had to have a useful life of 20 years.

When it became clear that there were significant problems with the foundations, the question was which of the two companies should bear the cost of rectification. The cause – not known at the time the contract was made – was that the industry design standard was inadequate.

The contractor argued that it had been given specifications to use and had carried out its obligations under the contract to the letter. It was not negligent and therefore not liable.

E.ON argued that the requirement to provide foundations that were fit for purpose for 20 years overrode the clause specifying the design standard to be used. The foundations were not fit for purpose.

The Court preferred E.ON's argument. If the contractor was unable to give the warranty as regards fitness for purpose if it applied the appropriate standard, it should have refused the contract or ensured it was varied.

The clear implication is that if you are undertaking a contract to your customer's specification and complying with that specification means what you supply will be unfit for purpose, you could be heading for trouble. We can help you negotiate any contract in a way that limits the risk you take.

'Gig Economy' – Pimlico Plumbers Given Leave to Appeal

There have been a number of recent cases looking at the precise nature of the employment status of those working for employers who like their operatives to appear to clients as their representatives but who operate a model of self-employment.

In February this year, the Court of Appeal dismissed an appeal by Pimlico Plumbers Limited against a finding that the claimant's relationship with the company was that of a worker rather than that between an independent contractor and his client *(Pimlico Plumbers Limited and Another v Smith)*. It has now been reported that the Supreme Court has granted Pimlico Plumbers leave to appeal against that decision.

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