SIMON BURN
SOLICITORS

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Commercial Law UPDATE

VAT – 'Pay Now, Appeal Later' Rule Receives Supreme Court Blessing

Unless they can show that they would suffer hardship as a result, traders who wish to challenge assessments to VAT are first required to pay, or at least deposit, the tax demanded before they can mount an appeal. That requirement has long been highly controversial, but its lawfulness has now been upheld by a Supreme Court ruling.

The case concerned a company that disputed a number of VAT assessments, but objected to the so-called 'pay now, appeal later' rule enshrined in Section 84 of the Value Added Tax Act 1994. It argued that the rule is contrary to the principle of equivalence, which forbids the law of individual member states from discriminating against claims based on EU law by affording them inferior procedural treatment to that given to comparable domestic claims.

The company pointed out that whilst the rule applies to VAT, which has its roots in EU law, no such rule applies to Income Tax, Capital Gains Tax, Corporation Tax and Stamp Duty Land Tax – all UK domestic taxes. The equivalence argument was first made before the Court of Appeal, but was rejected.

In dismissing the company's challenge to that decision, the Supreme Court found that none of the domestic taxes cited could be viewed as true comparators to VAT. The burden of VAT falls upon consumers, although it is collected by the trader and accounted for by the latter to HM Revenue and Customs. That arrangement could not stand comparison with taxes, for example Income Tax, that are directly levied. There was nothing inappropriate about traders who are assessed to VAT being required to pay or deposit tax in dispute, which they have or should have collected.

Debranded Goods Still Protected by Trade Mark Law

Products sell for widely differing prices in different national markets and that creates the opportunity for goods to be transferred from a lower-priced market to a higher-priced one – a practice known as 'grey importing'. This can undermine the profitability of the higher-priced market, especially where its marketing and distribution carry much higher costs.

Where the grey import uses the protected trade mark of the product, it is a relatively straightforward process to stop it. However, what is the situation when the goods are relabelled and have the original trade mark removed?

You might think that the general desire for free trade would mean that such situations are just bad luck for the brand owners, but a recent decision of the Court of Justice of the European Union (CJEU) shows that this is not the case. It involved a grey importer of Mitsubishi forklift trucks. The importer removed all traces of the origin of the products, including serial numbers etc. as well as badges.

Could Mitsubishi prevent the importation and resale of the rebranded forklifts? The CJEU said it could. In particular, the removal of Mitsubishi's trade mark adversely affected the functions of the mark. A trade mark requires investment and its use is part of a commercial strategy. Impeding the use of the mark by its removal can affect the owner's ability to make the most effective use of it.

Where the origin of the goods is clear even without branding, the harm to the trade mark will be even greater.

For advice on protecting your investment in brands and trade marks, contact us.

Private Rental Landlords Facing Double Whammy

Tax changes that affect residential landlords have sparked a massive sell-off, with 133,000 rental properties likely to be sold in the next year according to a survey by the Residential Landlords Association.

In the year ended 31 March 2017, 46,000 let properties were sold.

There are two principal reasons why landlords are increasingly wary of investing in let properties. The first is the restriction on the amount of mortgage interest which can be claimed against rental profits for tax purposes…a problem compounded by the threat of further interest rate increases in the future. The second is the additional rate of Stamp Duty Land Tax, which adds 3 per cent to the cost of most properties.

There is also an 'advance payment' regime for Capital Gains Tax that applies to gains made on the sale of most such properties.

If you are concerned about how the changes may affect your property holdings, get in touch.

Adjudication Proceedings in Liquidation? Court Says No

When a company enters liquidation, one of the principles that has to be observed is that creditors of the same class have to be treated the same way. There is, however, an exception to the rule under the Insolvency Rules 2016. If a company in liquidation owes money to a person or organisation and is also owed money by them, then an automatic 'set-off' applies and only the net balance is taken into account in the liquidation. This applies by rule of law and cannot be legally overridden.

When a contract between an electrical company and a subcontractor ended in dispute, with each side claiming that the other had wrongly terminated it, this was followed by the subcontractor going into liquidation. The subcontractor invoked the adjudication provisions in the contract with regard to allegations of breach of contract. It also claimed damages.

The electrical company argued that the adjudicator did not have jurisdiction because the relationship between the companies was now governed by the Insolvency Rules. The court agreed, deciding that once a company enters liquidation, there will only be a single claim for the net balance and no separate enforcement proceedings can be taken. The adjudicator did not have jurisdiction to determine the matter.

When construction contracts get contentious, taking legal advice is important, especially where the finances of either party to the dispute are difficult.

Registration of Property Owned by Foreign Entities

Under draft legislation now in Parliament (the Registration of Overseas Entities Bill), the Government is intending to establish a register of the beneficial ownership of properties in the UK where the property is owned by an overseas entity. The general intent is to clamp down on money laundering, as it is considered that many such investments are made with funds derived from criminal activity.

Where such disclosure is not made, the officers of the entity will be subject to criminal sanctions including fines and imprisonment and there will be restrictions on the ability of the property to be sold, let or used as security for a loan.

The register is expected to come into effect in 2020 and will be similar to that which already applies where properties are owned by UK residents.

Officers of the property-owning foreign entity will be required to confirm the details of the beneficial ownership annually.

The legislation will have significant implications for anyone who is buying or renting a property from or intending to sell or let to an overseas entity, or entering into a financial transaction which will result in a charge over such a property.

Certain aspects of the Bill are still the subject of an ongoing consultation process.

For advice on this, contact us.

Be Careful What You Sign

There is a common belief that in any contract, if the goods or services provided do not do what they are intended to do it will open the door to a claim in damages. That is not always so, as a recent case shows.

It involved a specialist fire protection company that provided a company that produced frozen foods with a fire suppression system in order to control the fire risk from a multi-purpose fryer in their building. When that caught fire 11 years after its installation, the fire suppression system failed to put the fire out, which caused extensive damage to the company's premises and its business and led to a claim for £6.6 million.

The fire protection company had a contract which incorporated as standard a term which clearly stated that it was excluded from all liability for loss, damage etc. resulting from the failure of the system or the negligence of the company that installed it. Cover for consequential loss was stated to be available at an extra cost.

The first paragraph of the agreement drew attention to this, clearly identifying that the contract provided for no damages to be due in any circumstances. The contract was ruled to be clear enough and not onerous, so the food producer's claim was dismissed.

Failing to Pay Fines Can Mean More Than Financial Penalties

Business owners and directors who fail to pay fines can lose in more ways than just financially. When a Derbyshire company fell foul of the Health and Safety Executive following a near-fatal accident to one of its employees, the fine that resulted after the investigation amounted to more than a quarter of a million pounds.

The company went into liquidation because it could not afford to pay the fine. However, the Insolvency Service then found that the director of the company had formed a new company which was undertaking similar work.

As a result, the director was disqualified from being directly or indirectly involved in the formation or management of a company for six years.

The Insolvency Service has teeth and is not afraid to use them. Merely creating a 'phoenix' company in similar circumstances is fraught with danger. Always seek advice.

Sleeping at Work and the National Minimum Wage

In an important decision for employers with 'on call' workers, the Court of Appeal has ruled that two care workers are not entitled to be paid the National Minimum Wage (NMW) for time when they are asleep during sleep-in shifts, commenting, "It would not be a natural use of language… to describe someone as 'working' when they are positively expected to be asleep throughout all or most of the relevant period."

Noting that conflicting authorities had given rise to a need for clarification of the law on the point, the Court found that, on a straightforward reading of the National Minimum Wage Regulations 1999, workers sleeping in under such arrangements will only be entitled to have their sleep-in hours counted for NMW purposes where they are, and are required to be, awake for the purpose of performing some particular task.

The decision has been hailed as a victory for common sense and one that provides a lifeline to an industry that hitherto faced higher wage bills and back-dated pay claims. However, the question is likely to be appealed to the Supreme Court and we will keep you appraised of developments.

The Government will issue revised guidance on calculating the NMW and the National Living Wage shortly.

Meanwhile, employers who have already committed to paying sleep-in workers the NMW for the entirety of their shifts are reminded that they cannot simply revert to paying them at a flat rate, as it is a breach of contract for an employer to change the terms of an employee's employment without their agreement. Most employers will probably choose to wait until the Supreme Court has had its say before taking any action.

Contact us for advice on your individual circumstances.

Unilateral Mistake – High Court Rectifies Terms of Commercial Lease

Signing leases is a serious business and both landlords and tenants are expected to live with their terms, however onerous they may be. However, as a High Court case illustrated, judges have the power to rectify terms if an obvious mistake has been made.

A retailer and a property company had conducted long and detailed negotiations in respect of a proposed lease of commercial premises. Various draft leases had passed between them and it had been agreed in principle that the retailer would pay 50 per cent of the rent for the first three years of a 20-year term and that there would be five-yearly rent reviews, fixed at 2.5 per cent (the initial rent and rent review clauses). However, in the lease that was eventually completed, the initial rent clause had been deleted and an entirely new rent review provision inserted.

After the retailer launched proceedings, the Court noted that its representative had been driving his car in France when he agreed completion terms on the phone. He had relied on the property company's representative, whom he trusted, to talk him through any significant changes to a previous draft of the lease. The Court, however, found that the representative had not drawn his attention to the amendments to the initial rent and rent review clauses.

In the context of a lease the small financial details of which had been closely negotiated, the only explanation for a lack of outcry on the retailer's part was that neither its senior management nor its representative had noticed the changes. The Court reached the unattractive, but inescapable, conclusion that the property company's representative knew, or at least suspected, that a unilateral mistake had been made but had decided to take advantage of the situation. In those circumstances, the Court ordered rectification of the lease so as to reflect the initial rent and rent review terms that had previously been agreed.

If you think you have been taken advantage of or had misrepresentations made to you in any property agreement, contact us for advice.

New Guidance on Transfers of Data Abroad

The Information Commissioner's Office (ICO) has issued new guidance on compliance with the General Data Protection Regulation (GDPR) for organisations that transfer personal data outside the European Economic Area (EEA).

Because the GDPR protects only data within the EEA, it restricts transfers of data outside the EEA unless there are sufficient protections.

Details can be found on the ICO website www.ico.org.uk.

If you are in any doubt about compliance with the GDPR, we can advise you regarding your responsibilities.

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