SIMON BURN SOLICITORS

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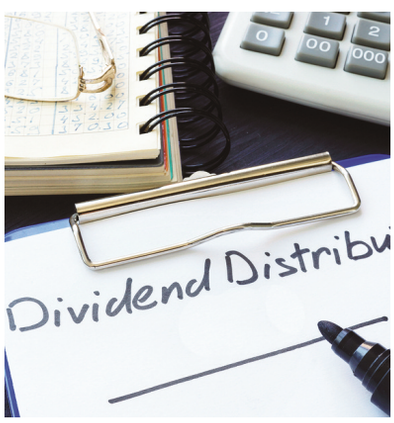
Commercial Law UPDATE

Standard Practice Gives Rise to Illegal Dividend

There are strict rules governing the payment of dividends by companies. As well as having to follow the correct company secretarial procedures to make such payments legitimate, dividends can only be paid when there are sufficient 'available profits' to pay them.

When a director of a company paid dividends of more than £20,000 between June 2014 and October 2015, these were challenged by the company, which went into liquidation in November 2016 with a deficiency of funds of more than £170,000. As the company did not at the time the payments were made have sufficient distributable reserves to make them lawfully, the liquidators demanded repayment of the distributions.

The company had followed the common but not always optimal advice to restrict the directors' salaries to a small sum and pay the bulk of their earnings through monthly dividends. The director



had continued to do this even though the company was in financial difficulties.

At the first court hearing on the matter, the judge accepted that there was no misfeasance by the director and that the payments were not repayable. They had been made as regular withdrawals, subject to confirmation as dividends when the annual accounts were prepared. On two previous occasions when the company had not had sufficient reserves to cover the withdrawals, the 'dividend' treatment had been reversed and they were treated in effect as salary. The judge reasoned that since the payments had not been confirmed as dividends when paid, the law that prohibits the payment of dividends by companies without the necessary reserves was not in point.

The liquidators appealed on the point of the strict legality of the payments, arguing that the intention of the director was not germane to the issue at hand – the payments were an unlawful distribution because they had not been made from available profits. The Court of Appeal accepted this argument – the intention of the director was not relevant. In the absence of a legal right to the payment (such as would arise under a contract of employment), the distributions were unlawful.

For advice on any issue relating to compliance with company law, contact us.

IPO Guidance on Brexit

The Intellectual Property Office (IPO) has published a guide on how intellectual property (IP) law is likely to be affected following Britain's withdrawal from the EU. The IPO's aim is to 'continue to protect all existing registered European Union Trade Marks, Registered Community Designs, and Unregistered Community Designs as we leave the EU'.

Essentially, what is proposed is a continuation of the status quo, with UK organisations having the same IP protections they do now in the EU, and EU organisations having their current IP rights in the UK recognised. Pronouncing itself confident that a 'no deal' exit is unlikely, the IPO says that 'it is in no one's interests for there to be a cliff edge, and so the laws and rules that we have now will, so far as possible, continue to apply'.

However, the IPO has also published a series of guides in the event of a 'hard Brexit'. These cover the following areas:

- Trade Marks and Designs;
- Patents;
- Copyright; and
- Exhaustion of IP rights.

All can be found on the IPO website at https://bit.ly/2NdsCCz.

Court of Appeal Guidance on Use of Pay Less Notices

When a construction dispute arises and a pay less notice is issued, the Housing Grants, Construction and Regeneration Act 1996 requires that the notice should specify the sum considered to be due and the basis on which that sum is calculated.

In a recent dispute involving a contractor (called the employer in these types of proceedings) and a subcontractor, the latter argued that the pay less notice was invalid (and so the required payment would be the whole of the amount invoiced) because the sum said to be due, which the contractor considered to be nil, was not properly calculated.

In this instance the contractor had sent a spreadsheet attached to the relevant pay less notice, but when the matter went to adjudication, the adjudicator held that the attachment of the spreadsheet was insufficient to meet the contractual requirement.

When the adjudicator's decision was challenged in court, Mr Justice Coulson concluded that a reasonable recipient of the notice would have understood it and it was therefore valid.

The case also dealt with what the position would be had the pay less notice been ruled invalid. Would the employer be entitled to bring a separate adjudication in order to determine the value of an interim application for payment? The Court of Appeal found that in some circumstances it would.

We can advise you on the conduct of any construction dispute.

Financial Ombudsman Service Remit to be Extended to Cover More Small Businesses

The Financial Ombudsman Service (FOS) exists to deal with complaints between financial services businesses (such as banks, insurance brokers, and loan and mortgage providers) and their customers – some of which are also businesses.

Access to the FOS is being extended to small businesses with a turnover below £6.5 million, and fewer than 50 staff or a balance sheet value (net assets) of under £5 million.

It has also been proposed that the maximum amount of compensation that can be awarded by the FOS should be increased from £150,000 to £160,000 where the complaint arises from an act or omission prior to 1 April 2019 and to £350,000 on or after that date.

Company Paralysed by Internal Dispute? The Deadlock Can Be Broken

Where companies are owned by shareholders equally but relations between them break down, the result can be complete paralysis. However, as a High Court case shows, such destructive deadlocks can be broken with expert legal help.

The case concerned a company that was owned in equal shares by two men, who were also directors. After they had a bitter falling out, one of them left and set up a new business in potential competition. The other launched proceedings under Section 994 of the Companies Act 2006, claiming that the actions of the director who had left had unfairly prejudiced his interests as a shareholder.

In upholding that claim, the Court found that the director's behaviour represented the clearest possible breach of his fiduciary and statutory duties as a director. Both before and after he left, he had exercised his powers not in the company's best interests but with a view to safeguarding his own.

He encouraged the company's employees to leave without giving proper notice and to begin work for his potentially rival business without honouring post-termination restrictions in their contracts. He took client files with him on his departure and, despite the company's precarious financial position, paid himself money from its account without justification.

In the circumstances, the Court ordered him to sell his shares in the company to his former colleague for £170,500. That sum represented the valuation of his half shareholding contained within a 'single joint expert' report.

50:50 shareholdings can present particular issues when relationships go bad and it is always worth giving thought at the beginning of a business relationship to building a procedure into the company's rules to provide an orderly exit should relations between the shareholders deteriorate. In this case, expert legal representation made an eventual resolution possible.

Outsourcing Web Marketing Proves Expensive When Trade Marks Infringed

When a firm set up two websites that had names close to those of a competitor's registered trade marks, it was making an expensive mistake, as a recent High Court decision shows.

The legal battle took place because a translation service, which owns UK and EU trade marks 'thebigword', found that a rival translation service had set up two websites which incorporated 'bigwordtranslation' in their web addresses. They also used the phrase 'the big word' in the text on their website.

The websites went live some time prior to 18 December 2014 and, after solicitors' letters had been sent in February 2017, were taken down. The claim that the sites infringed the trade marks of the other company was not contested. The infringing company claimed that the sites had been registered for it by a third party acting autonomously and had generated no income or enquiries. During the exchanges, two further domain names were discovered that also infringed the trade marks.

The defendant claimed in essence that the whole problem resulted from it having retained a web marketing consultant who had simply gone off and 'done his own thing'.

As well as arguing that it had made no income from the websites, the defendant company also argued that the trade mark owner had lost no sales as a result of its activities. Unfortunately for it, the judge found that its leading witness had produced 'a tangled mass of contradictions, inconsistencies, unlikelihoods, implausibilities and untruths

which obscured any truthful evidence he may have given such that I cannot identify it'.

The result was an award of damages of £142,044 to the firm whose trade marks had been infringed.

The case shows that if you outsource activities, it is important to ensure that you do so to reputable organisations with a proper understanding of the relevant legal considerations and have insurance that will cover you in case they cause a loss.

We can advise you regarding any trade mark or other intellectual property issue and how best to protect your business should you wish to outsource key activities.

Forfeiture for Rent Arrears – Commercial Landlords Take Note!

In a decision that will be essential reading for property professionals, the High Court has ruled that landlords who invoke the statutory commercial rent arrears recovery (CRAR) regime may thereby waive any right they have to forfeit leases.

Landlords who rented out commercial premises under a 20-year lease exercised the CRAR mechanism created by the Tribunals, Courts and Enforcement Act 2007 and instructed enforcement agents to recover rent arrears from the tenant. The agents exercised CRAR over the tenant's goods and the stated rent arrears, which came to over £8,000, were remitted to the landlords.

The landlords, however, argued that that sum did not in fact clear the arrears because a £3,000 cheque previously written by the tenant had been cancelled and dishonoured. In those circumstances, the landlords purported to exercise their right of forfeiture by peaceably re-entering the property.

After the tenant launched proceedings, a judge found that, where a right to forfeit a lease arises, a landlord must elect whether to enforce that right, thus treating the lease as being at an end, or not to enforce it, thereby treating the lease as continuing to exist. By engaging the CRAR procedure, the landlords had chosen to take the latter course and had thus irretrievably waived their right to forfeit the lease in respect of past rent arrears.

In dismissing the landlords' challenge to that ruling, the Court noted that the Act had abolished the ancient common law right to distrain a tenant's goods in order to recover rent arrears. That remedy had effectively been replaced by the CRAR regime and the landlords' exercise of the statutory procedure amounted to an unequivocal representation that the lease was continuing.

Other grounds of appeal put forward by the landlords were also rejected and the Court's decision opened the way for the tenant to claim damages from them in respect of trespass, breach of covenant and unlawful conversion of his goods.

Our property law experts can advise you on how best to deal with any landlord and tenant issue.

Does a Director Need to File a Tax Return?

There is a widespread belief that every UK company director has to file a tax return. Indeed, the Government's own website suggests that being a company director alone means you should register for self-assessment and file a tax return annually.

However, that is not what tax law says. Under the law, there is no automatic requirement for a company director to file a tax return.

A return must be filed in order to claim certain tax reliefs or if there are liabilities which must be reported to HM Revenue and Customs (HMRC), such as a Capital Gains Tax liability. A return must also be filed where HMRC issue one.

When in doubt, it is less risky to file a tax return, but it is established law that unless there is a tax liability which must be reported, a return does not normally have to be filed.

For advice on your responsibilities under the law, contact us.

NICs on Termination Payments Deferred

Because of delays in implementing the National Insurance Contributions Bill, the payment of employers' Class 1A National Insurance Contributions on termination payments above £30,000, which was due to commence in April 2019, has been deferred until April 2020.

For advice on dealing with redundancy or any employment matter, contact us.

Small Business Data Protection Law Compliance Checklist

The Information Commissioner's Office (ICO) publishes a great deal of useful information for all organisations on data protection and compliance with the General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA).

As well as the ICO's main guidance, there is also a 'What's new' information update that is published on a monthly basis. This can be found at https://bit.ly/2s7REL2.

For small businesses and sole traders, the ICO has also created a small business data protection checklist to allow them to assess how well they comply with data protection law. This can be found at https://bit.ly/2NAV15y and should only take a few minutes to complete.

If you are unsure about how the GDPR and DPA affect your organisation, we can advise you. In October alone the ICO announced that fines totalling £825,000 had been levied on three organisations for breaches of data protection law or nuisance calling. It is better to be safe than sorry.

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