SIMON BURN
SOLICITORS

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Commercial Law UPDATE

Pre-Pack Owner Fails to Secure Lease

Insolvent tenants can be a major headache for landlords.

For example, when a corporate tenant goes into administration, the landlord needs to obtain the consent of the administrator, or of the court, to forfeit the lease. This is because administration is intended to provide a moratorium period during which action cannot be taken against the insolvent business while an attempt is made to make it viable or to sell it as a going concern.

Therefore, when a landlord goes to court to recover possession of the let property by forfeiting the lease, the court must balance the interests of the landlord with those of the creditors of the company in administration.

In a recent case, a landlord wished to recover a lease from a tenant company in administration. The tenant's business had been transferred to a newly formed company under a 'pre-pack' arrangement and the new company was occupying the premises.

The landlord had found what it considered to be a better tenant and refused to accept an application to assign the lease to the new company.

The landlord then applied to the court to forfeit the lease.

The new company opposed the application. However, the court ruled in favour of the landlord: once the company in administration had been sold to the new company, the purpose of the administration had been served and there was no longer a need to balance the interests of the landlord with those of the creditors of the insolvent company.

This ruling has implications for landlords fortunate enough to find a 'better' tenant when a tenant in administration is sold to a new owner and should also be borne in mind by tenants considering a pre-pack.

Contact us for advice on any aspect of dealing with an insolvent business.

Owner Not the Same as Member, Rules Court

Who can challenge a company's decision that has been improperly made? This question was the subject of a court hearing recently, when the owners of the 'ultimate economic interest' in shares in a company sought to overturn a decision the company had made.

A company is owned by its members. To be a member of a company, the shareholder has to have their membership registered in the register of members of the company – one of the statutory records that must be kept by all companies. No person is a shareholder in law until they are registered as such.

In the case in point, the challenge was brought by people that owned shares in a second company which was a shareholder in the company that had made the initial decision. Their argument was that their indirect shareholdings represented more than 5 per cent of the shares in the company, so a challenge was warranted.

The court rejected the challenge. A member is a person who is shown in the register of members, nothing more or less, and only a member can bring a challenge in such circumstances.

If you have concerns about how a company in which you own shares is being run, or wish to ensure that your corporate governance is up to the mark, contact us for advice.

Shop Worker Had Continuity of Employment

A shop worker whose employment was terminated due to the closure of the store in Sheffield where he worked, but who was redeployed shortly afterwards to another branch of the same chain, did have the requisite continuity of employment to institute an unfair constructive dismissal claim, the Employment Appeal Tribunal (EAT) has ruled *(Welton v Deluxe Retail Limited)*.

Mr Welton had been employed at the Sheffield store for over a year prior to its closure on 23 February 2010. The working week ran from Sunday to Saturday and so ended on Saturday 27 February 2010. On 1 March, during what would have been the next working week, he agreed to accept employment with the same employer in Blackpool, with the first working day falling in the following week. He resigned from his employment in December 2010 and brought an unfair dismissal claim.

The store owner argued that Mr Welton had insufficient continuity of employment, within the meaning of the Employment Rights Act 1996, to bring a claim because continuity of employment was broken when the Sheffield store closed. The Employment Tribunal agreed and declined jurisdiction to hear the case. However, that ruling was overturned by the EAT, which reinstated Mr Welton's claim.

The EAT ruled that, as the Sheffield store's closure occurred in the middle of a week and Mr Welton was re-engaged to work at the Blackpool store during the following week, there was no one working week during the whole of which his relations with his employer were not governed by a contract of employment. On the facts of the case, his cessation of work, after losing his first job at the Sheffield store and before taking up his new employment at the Blackpool store, could only be viewed as temporary.

If you are faced with the prospect of transferring staff as a result of branch closures, contact us for advice on the employment law implications.

Lawyers' Exclusive Right of Confidentiality Confirmed

A major principle on which the legal system in England and Wales relies is that the communication between a client and his or her lawyer is private. The courts cannot force the disclosure of the communications passing between client and lawyer, whether written or oral. This principle, known as legal professional privilege (LPP), recently came under the spotlight in the Supreme Court.

Insurance giant Prudential plc had sought to withhold from HM Revenue and Customs (HMRC) documents relating to advice the company had been given by an accounting firm, with regard to a marketed tax avoidance scheme, on the ground that the communications were subject to LPP.

In what is a significant victory for HMRC, the Supreme Court has now dismissed an appeal by Prudential plc and ruled that LPP applies only to communications with qualified lawyers, solicitors or barristers.

In other words, HMRC can force accountants to divulge advice given to their clients on tax law matters and the only privileged communications remain those between a client and their legal adviser.

For advice you can be sure remains confidential, contact us.

Cookies – Implied Consent OK

The Information Commissioner's Office (ICO) has issued a statement re-emphasising that awareness of Internet 'cookies' has increased to such an extent that it is now 'appropriate...to rely on a responsible implementation of implied consent' by users of websites to accept them. In other words, where clear and detailed information about cookies is given and an easy way to remove them is made available, then implied consent as opposed to specific consent to accept cookies is all that is necessary.

The ICO's own website has now adopted such a policy.

What is essential is that the website operator is satisfied that the users of its website understand that their actions will result in a cookie being set.

The ICO can fine website operators which fail to implement a cookie policy that is compliant with the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 up to £500,000.

Pre-emption Rights Not Perpetual, Rules Court

When two plots of land changed hands in 1989, the vendor would not have expected that more than 20 years later an argument would arise over its right to convey the land in question.

When the vendor, an Isle of Man company, had sold a parcel of land in 1984, it had also given the purchaser an option to buy two further plots of land in the event that the vendor had not obtained planning permission with regard to each of the plots within five years from the date of completion or if it offered the land for sale. The latter was in the form of a 'right of first refusal', rather than a formal option to buy.

The vendor disposed of the land in 1989, but the holder of the option did not become aware of this until 4 August 2009, when he sought to exercise it.

In general, the Perpetuities and Accumulations Act 1964 prohibited the granting of conditional obligations such as options for more than 21 years. The current owner of the land sought to defeat the claim on the basis that, as the option was more than 21 years old when the action was brought, the rights granted under it were void.

The person seeking to exercise the right to purchase the land argued that the Act only applied to options, not to rights of pre-emption, and in any event the 21-year limitation period under the Act would only start to run once the decision had been made by the original vendor to sell the property (1989), not before. The option was therefore exercised within the applicable perpetuity period.

The High Court rejected this interpretation, finding that the Act did apply to pre-emption rights, treating them as a 'species' of option. It contains a specific exemption to the 21-year rule for pre-emption that applies to local councils where the land concerned has been used for religious purposes but no longer is. In the Court's view, such an exemption makes no sense if the legislation does not apply to pre-emption rights generally.

The Court found that, in the present case, the perpetuity period began to run on the date of the agreement itself and had expired prior to the date of the letter purporting to exercise the option.

We can advise on any contract involving land or rights over land.

Copyright Law Changes in the Pipeline

Following the publication of the Hargreaves review of copyright law, the Government has published proposals to modernise copyright law in order to bring it up to date in the light of modern technology.

It is considered that changes need to be made for the benefit of creative industries, in which the UK has a significant global presence.

The changes are expected to include the allowance of private copying, copying for data analytics purposes for non-commercial research and simplified rules relating to educational use of copyright material.

The Intellectual Property Office will be involved through the introduction of a system of 'copyright notices' and a simplified procedure for bringing complaints relating to breaches of copyright.

Secondary legislation to introduce the changes is scheduled to be introduced later this year.

Data Processing Law to be Strengthened

Under proposals put to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, data protection law looks set to be reformed such that the use of 'pre-ticked' boxes will no longer be permitted as a way of showing consent in consumer agreements.

Many businesses use pre-ticked boxes, thus effectively requiring the consumer to untick a box if they wish to opt out of part of the agreement.

The proposal is that all consent will have to be positive, requiring the demonstration of 'clear affirmative action'.

A variety of other measures to toughen data privacy law have also been proposed. One of the most significant for many companies is the proposal to require that 'financial indemnification' be given to those who suffer a data breach as a result of the transfer of data to non-approved 'third world' countries.

Any changes in the law are not likely to take place before late 2013.

Contact us for advice on complying with data protection law.

Conditional Contract Produces Covenant Enforcement Impasse

If a person owns a property, either outright or by lease, which is bound by a positive obligation to observe a covenant and the property is then sold on, the obligation on the original owner will normally pass to the purchaser.

However, the High Court has ruled that where such obligations relate to a conditional contract (a contract based on the occurrence or non-occurrence of an event, the outcome of which is uncertain when the contract is entered into) or an option to buy, the obligations do not pass to the new owner. The reason advanced for this in the case in point was that the existing lease was not related to the grant of the option or the conditional contract.

Should I Take On a Franchise?

There are many potential benefits of buying a franchise, such as having access to well-established business and accounting systems, centralised marketing and a proven business model. Being part of a well-known national brand also has an appeal for many businesspeople.

In exchange for the franchise, the franchisee must pay agreed charges, normally including a royalty on sales.

The Intellectual Property Office has identified the principal advantages of being a franchisee as follows:

- Limiting risk – the business is not a new one but a tried and tested venture that has been successful elsewhere;
- Training – the franchisor usually provides extensive training and advice;
- Corporate image – the brand, trade marks, designs etc. have already been protected and established in the marketplace;
- Savings in time – the business model is already in place and the franchisee can focus on running a successful business;
- Economies of scale – it may be cheaper for franchisees to obtain the required supplies and services than for non-franchisees; and
- Customers – they may already be familiar with the brand and trust it more readily.

However, there are also potential disadvantages to being a franchisee. Often, the cost of running a successful franchise can be appreciably greater than the cost of going it alone, due to the impact of sales commissions and central charges.

It is also common for the franchise agreement to limit the range of activities that the franchisee can carry out, which may prevent a profitable opportunity from being exploited.

The agreements need to be read carefully and thought through, especially the 'get out' terms and the clauses which specify the degree of geographical or other exclusivity to which the franchisee is entitled.

If you are considering a franchise, it is critical to do your research diligently before committing yourself. Taking expert professional advice is crucial and the earlier you do so, the less likely you are to waste time and possibly make an expensive mistake.

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