SIMON BURN SOLICITORS

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Commercial Law UPDATE

Corporate Failure Costs Hotelier

The owner of a hotel who paid £110,000 for diesel powered generating equipment but received neither the goods nor a refund of his money has ended up with nothing but the sympathy of the court.

In a set of circumstances which the High Court described as 'on any view unfortunate', the supplier had gone into creditors' voluntary liquidation shortly after the purchase price for the equipment was paid. The hotelier put forward arguments in contract and under the Sale of Goods Act 1979 in a bid to recover his money or gain possession of the goods.

However, the Court found that the supplier had in fact never had good title to the equipment which it had purported to sell. Although it had agreed to purchase the equipment from a third party with a view to onward sale to the hotelier, that had been on the basis that ownership of the goods would not pass until the third party was paid in full. As the payment was never made, the Court found that the goods had remained the property of the third party and were never the supplier's to sell.

On the facts of the case, it was an inevitable consequence of the supplier's liquidation that either the hotelier or the third party would suffer substantial loss.

However, the Court noted that the solution lay in established principles of contract law, which provided a mechanism for resolving precisely such issues. The hotelier's broader arguments under the Sale of Goods Act were contrary to the 'plain construction' of the Act and that was fatal to his claim.

Insolvencies can be expected to rise for a period after the economy starts to grow again, as firms fail because they cannot finance their increased working capital requirements.

If you are contracting to buy a major piece of equipment, we can review the contract terms to make sure that you are protected in the event that the supplier becomes insolvent before title to the goods passes to you.

Judge Fines Company 'Every Penny It Has' After Speedboat Death

Following the death of an 11-year-old child who was hit by a speedboat whilst attending a friend's birthday party that took place at a lake, the company that operated the site pleaded guilty to charges brought under the Corporate Manslaughter and Corporate Homicide Act 2007.

Charges against one of the company's directors were dropped.

After hearing that the company had a 'lax attitude' to health and safety and that the speedboat driver had no recognised qualifications, the decision of the judge was to fine the company 'every penny it has' – £135,000 including costs.

This case is the fifth conviction under the Act and illustrates that the courts will take very seriously breaches of health and safety laws that lead to someone being killed.

Failure to comply with health and safety legislation can lead to criminal prosecution and the loss of one's business.

For advice on complying with your statutory responsibilities, contact us.

Net Value Means Current Value Not Book Value, Rules Court

When a family partnership broke up, the lack of precision in clauses of the partnership agreement led to an appearance in the Court of Appeal.

Two farmers took their 19-year-old son into partnership in 1997. In 2009, the son gave three months' notice to terminate the partnership. The deed gave the remaining partners the right to buy out the retiring partner.

A dispute arose between them as to the price to be paid for the retiring partner's share. Should it be based on the current market value of the assets, as the son claimed, or on the value of the assets shown in the partnership accounts, as his parents claimed?

The partnership deed stated that in the event of a termination of the partnership, the 'net value' to be attributed to the assets would be 'agreed between the Partners or their respective successors (as the case may be) or in default of such agreement shall be determined by the partnership accountants'. However, there was no definition of 'net value', which LJ Lewison described as a 'most regrettable' omission.

After an extensive discussion of the role of the accountants and their expertise, the Court of Appeal concluded that the partnership agreement required that on a termination, the actual values of the assets had to be taken into account rather than their 'book values' in the annual accounts.

It was persuasive that the alternative to the buy-out provision in the partnership deed was a winding up of the partnership, when the assets would have been disposed of at their open-market values.

The lesson for any partnership is that the partnership deed needs to be clear as to the definition of terms.

For advice on all partnership law, or to bring your partnership deed up to date, contact us.

Data Protection Policies and Personal Devices

A recent YouGov survey showed that 47 per cent of all UK employees now use their smartphone, tablet PC or other portable device for work purposes and the Information Commissioner's Office (ICO) has now issued a warning that organisations are failing to update their data protection policies to account for this growing trend.

The warning comes after the Royal Veterinary College was found to have breached the Data Protection Act 1998 when a member of staff lost a camera that held a memory card containing the passport images of six job applicants. It emerged that the College had no guidance in place explaining how to safeguard personal information stored on personal devices for work purposes.

ICO Head of Enforcement Stephen Eckersley said, "Organisations must be aware of how people are now storing and using personal information for work and the Royal Veterinary College failed to do this. It is clear that more and more people are now using a personal device, particularly their mobile phones and tablets, for work purposes so it is crucial employers are providing guidance and training to staff which covers this use."

The ICO has made available guidance on this subject, entitled 'Bring Your Own Device (BYOD)', on its website (www.ico.org.uk). This highlights some of the key issues organisations need to be aware of when allowing staff to use personal devices for work. Recommendations include the following:

- Be clear with staff about which types of personal data may be processed on personal devices and which may not;
- Use a strong password to secure all devices;
- Enable encryption to store data on the device securely;
- Ensure that access to the device is locked or data automatically deleted if an incorrect password is input too many times;
- Use public cloud-based sharing and public backup services, which you have not fully assessed, with extreme caution, if at all; and
- Register devices with a remote 'locate and wipe' facility to maintain confidentiality of the data in the event of a loss or theft.

Contact us for advice on any data protection matter.

Prediction of Success is Not a Public Need

The High Court recently had to deal with the question 'What constitutes a public need?' when it heard a planning appeal against an application for the creation of a very 'upscale' golf club and spa resort, which was to be built on Green Belt land.

Whilst the developer had made a good case that there was demand for the planned facilities and that the resort would be a commercial success, mere demand, ruled the Court, is not sufficient to equate to a public need.

In such circumstances, 'need', the Court decided, means a need that is in the interests of the public and the community as a whole.

Contact us for advice on planning law and practice.

Landlord Who Allowed Lease to Run On Loses Claim for Possession

When an assured shorthold tenancy (AST) reaches the end of its term and the tenant continues to occupy the premises, a new tenancy is created. This has implications for landlords who have ASTs expiring which were entered into before 6 April 2007, the date on which the Government introduced tenancy deposit protection. In this circumstance, the deposit paid by the tenant under the original lease may have to be dealt with under the rules that came into effect on that date, which require such deposits to be protected by a tenancy deposit scheme (TDS).

One of the downsides of not dealing correctly with a deposit to which the TDS rules apply is that it may not then be possible to serve a valid possession notice on the tenant.

The Court of Appeal recently heard a case in which a pre-2007 tenancy, under which a deposit had been paid by the tenant, was simply allowed to 'run on' by the landlord after it expired in 2008. The landlord did not transfer into a recognised TDS the deposit that had been paid by the tenant.

When the landlord sought possession of the property in 2011, the tenant resisted its attempts, arguing that its failure to protect the deposit on the expiry of the original tenancy invalidated its claim.

The Court agreed. A new tenancy had been created in 2008 and the landlord's possession notice was therefore invalid because of non-compliance with the TDS rules.

For advice on making sure you comply with the applicable landlord and tenant law, contact us.

Case Highlights Importance of Researching Property Use

When land has been used by someone who has no legal entitlement to use it for 20 years without interruption, an 'easement' can arise under the Prescription Act 1832. In principle, an easement gives the legal right to continue the use indefinitely. For an easement to arise, the use must be open (not secret), without force and without the permission of the owner of the land. A lease cannot therefore create an easement.

Legal rights of use of land can arise without any intent, as a recent case illustrates. It involved a local council which allowed, for a period of more than 20 years, the parking of cars on its land. Despite the fact that the title to the land had subsequently been passed to a new owner, and on his death to his wife, and that a subsequent lease had been agreed over the land in 2004, the earlier use for car parking for more than 20 years was sufficient to create an easement over the land and this passed with the title to it.

An argument by the council that the use of the land had effectively 'ousted' it from its own property was also rejected. The court ruled that the council could have used the land for other purposes, but it did not.

The message for landowners is clear – if you allow others to occupy your land on a casual basis for a long period, you may lose the right of exclusive use and occupation.

For buyers of land, researching the history of its use is important in order to make sure that rights over it have not arisen of which the vendor is unaware.

Contact us for advice on this topic.

Single Emailed Word Created Binding Contract

The Commercial Court has ruled that a single word in an email was enough to conclude a binding contract for a multi-million pound international oil trade. In response to the seller's 'firm offer', the buyer had emailed succinctly back with the word 'confirmed'.

The trade was for the sale of 25,000 metric tonnes of crude oil. The initial email string had been followed by more detailed negotiations which ultimately broke down and the buyer withdrew from the deal. In those circumstances, an issue arose as to whether a contract had been concluded.

It was submitted by the seller that its email was expressly stated to be a firm offer and that the language used had requested a definite acceptance or rejection. The time-sensitivity of the deal – a response was sought by the close of the same business day – 'did not admit of languid negotiation'.

The buyer pointed out that at least two essential matters had not been agreed on that day and that the seller's email had stated that 'contract negotiations' would follow. The buyer's contention was that the full terms of a contract had not been discussed or mutually agreed and the single word 'confirmed' was insufficient to create a binding commitment.

Ruling in favour of the seller, the Court found that it was a 'classic spot deal' where the speed at which trades are concluded in the oil market required the parties to agree the main commercial terms and 'leave the details' for subsequent negotiation. Although 'lay business people' from different jurisdictions did not always conduct their dealings in accordance with the conventions of English contract law, the language used in the emails was that of commitment and both sides had initially regarded themselves as bound by the deal.

The Court went on to dismiss various defences put forward by the buyer – including alleged misdescription of the goods and misrepresentation – and awarded the seller substantial damages. However, whilst the buyer would not have been entitled to reject the goods, it was given credit for a shortfall in the quality and quantity of the oil that would have been delivered had the deal gone ahead.

We can help you avoid unexpected pitfalls and safeguard your position when negotiating all contracts.

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