SIMON BURN
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Commercial Law UPDATE

Rights to Light – Proposed Changes in the Law

The right to light has always been a complex and confusing area of law in the UK. In order to bring more certainty to the subject, the Law Commission undertook a consultation process in 2012/2013. As a result, the Commission has published a draft Right to Light (Injunctions) Bill, which aims to clarify and simplify this dispute-ridden area.

The principal proposed measures are:

- a statutory system for the payment of damages in appropriate circumstances instead of the compulsory demolition of a building or preventing a development;
- changes to the circumstances under which a 'prescriptive right' (right by use) of light can be prevented by landowners; and
- a new procedure under which the owners of land potentially affected by a development can be served with a notice requiring them to indicate their intention to apply for an injunction to protect their rights on the ground of deprivation of light.

The Lands Chamber is also to be given the right to modify or discharge obsolete rights to light.

Negligent Valuation Produced Instant Loss, Rules Court

When a firm of valuers placed a valuation of 135 million euros on a property in Germany in 2005, in connection with a complex refinancing package, and it subsequently turned out to be worth much less, a legal dispute was almost inevitable when the deal went wrong.

The refinancing package totalled nearly 1,000 million euros. When the transaction subsequently soured, the questions before the High Court were whether the valuation was negligent and, if so, what was the loss that had been suffered by the lender as a result. This was claimed to be more than 58 million euros.

The Court ruled that a variation of 15 per cent was a reasonable tolerance on the valuation. In its view, the correct valuation was 103 million euros, considerably below the tolerance limit, and the loan would not have been made had that valuation been placed on the property.

The judge concluded that the lender had suffered an instantaneous loss because it had acquired economic rights which were worth less then it had paid for them.

If you have suffered a loss because of a negligent property or other asset valuation, contact us for advice on the appropriate steps to take.

Employee Who Walked Out Held to Contract Terms

In a case which will be greeted with pleasure by employers whose employees are a likely target for competitors wishing to poach them, a high-flying financial broker paid a heavy price for walking out of his job without notice as the Court of Appeal condemned him to spend months twiddling his thumbs without pay.

The broker's departure to take up a post with a competitor in New York had come as a complete surprise to his employer. After he announced that 'he wanted to leave now', he marched out on the spot and never came back. His employer asked him to return to work, but he declined to do so and his salary and bonus were eventually stopped due to his continued absence from the office.

The employer took legal action against the broker and a judge found that he would remain an employee until the end of his notice period. His plea that his employment contract came to an end on the day he walked out was rejected and he was issued with an injunction forbidding him from taking up his new position, or any job with a competitor, until his notice period had expired.

The Court of Appeal dismissed his challenge to the decision, finding that the employer was entitled to stop paying him and that his ten-month inability to work was 'a situation of his own making'.

If you have been faced with a similar situation, contact us for advice.

Consultation Over Strategy Does Not Make Employee a Director

When one company sought damages from another for introducing to it clients that eventually created losses, a crucial question for the court was whether the employee who had made the introductions was a director of the defendant company.

Had the employee been found to be a director, the claimant company would have pursued him personally for the losses it suffered.

The man had not been duly appointed as a director, but it was argued that he was a 'de facto' or 'shadow' director who was part of the overall system of governance of the company.

Whether a person is deemed to be a shadow or de facto director will depend on the precise facts of the case.

In this instance, the Court of Appeal did not accept that the man was a director. The judgment included some interesting findings, one of which was that the mere fact that the man was consulted about 'directorial decisions' – i.e. on matters of great importance to the company – was not sufficient for him to be regarded as a de facto director of the company.

For advice on any issue relating to directors' rights and responsibilities, contact us.

Refusal to Mediate Justified, Rules Court

Normally, a refusal to mediate will incur the displeasure of the court and can be expensive if the court decides that the legal costs were higher than need be because of the refusal.

However, when a case is sound, mediation is not always the right answer, as a recent court decision illustrates.

It involved a substantial contract dispute over the termination of a licensing agreement. The claimant company repeatedly offered mediation but the defendant refused and made an offer to settle the dispute. When the matter reached the High Court, the amount awarded to the claimant by the Court did not exceed the sum previously offered by the defendant.

In such circumstances, the claimant will normally have to carry the defendant's legal costs from the time the offer was made by the defendant. The claimant argued that its bill for the defendant's costs should be reduced by 50 per cent because the defendant's unwillingness to mediate meant an appearance in court that was avoidable.

Although the judge concluded that the defendant's case was sufficiently strong to justify a refusal to mediate, its refusal had removed the potentially positive effect of keeping the negotiations going and also denied the claimant the opportunity to obtain an early settlement. However, the Court considered that this was not sufficient to justify the claimant's contention that the defendant should carry part of its own costs. The judge said, "A refusal to mediate means that the parties have lost the opportunity of resolving the case without there being a hearing. A failure to accept the offer has equally meant that the parties have lost the opportunity of resolving the case without a hearing."

Contact us for advice on the conduct of any legal dispute.

Commerciality Test Stymies Loss Claim

Accountants often speak glibly about setting off losses incurred by a business against other income, but losses can only usually be set off against income or profits made elsewhere if the entity that incurred the loss is being carried on 'with a reasonable expectation of profit'.

This is important, especially where it is difficult to show that a business is likely to make profits in the long term. Indeed, some new businesses can take a substantial number of years to turn a profit.

In a recent case, a football club which is a member of a trading group of companies made losses which it attempted to 'surrender' to the holding company of the group.

HM Revenue and Customs (HMRC) rejected the claim, arguing that the football club that wished to surrender its losses for tax purposes had not provided sufficient evidence to show that its trade was being carried on commercially with a reasonable expectation of profit.

The First-tier Tribunal heard evidence that overhead costs had for several years exceeded income for the football club and that the accountants' report indicated that it could continue to trade only with the continued support of the directors and shareholders.

The club's claim failed.

This follows an earlier case in which a businessman's sponsorship of a rugby club was held not to be a commercial transaction and tax relief on payments made to the club was denied.

HMRC are taking an increasingly tough stance on claims which they see as significant and lacking commercial purpose.

Holiday Pay & Overtime – Government Acts to Prevent Large Backdated Claims

Following the decision of the Employment Appeal Tribunal in *Bear Scotland Ltd. v Fulton* that holiday pay should reflect non-guaranteed overtime that is routinely worked, the Government has laid before Parliament the Deduction from Wages (Limitation) Regulations 2014. The Regulations amend the Employment Rights Act 1996 so as to limit most unlawful deduction from wages claims to the two-year period ending on the date on which the employee's Employment Tribunal (ET) claim is lodged. This provision will only apply to complaints presented to the ET on or after 1 July 2015.

In addition, the Regulations make clear that the right to payment in respect of annual leave under the Working Time Regulations 1998 is not intended to operate in such a way as to provide that right under a worker's contract. It is a separate statutory right.

Confidentiality Clause Means What it Says, Rules Court

When a company made an investment in a joint venture (JV) with other businesses, the shareholders' agreement required the participants to keep all information confidential (except when dealing with their professional advisers) unless its release to a third party was specifically agreed by the board of directors in writing.

Such clauses are normal. However, their implications can be important as the minority shareholder in the JV discovered when it decided to sell its shareholding and came up against the restriction over releasing information to prospective purchasers.

The investing company released information to its advisers to pass to prospective purchasers of its share of the JV once a non-disclosure agreement (NDA) had been entered into.

However, the other parties to the JV took exception to this and commenced legal action alleging breach of contract and claiming that the release of the confidential information had damaged the JV company.

The investor argued that the list of exceptions to the strict rule of confidentiality was not intended to be exhaustive and that, in practical terms, the inability to release information necessary for a prospective purchaser to conduct a due diligence exercise was impractical as it would render the minority interest unsaleable.

The court rejected the investor's arguments, ruling that the terms of the agreement did prevent the disclosure of the information unless permission to release it had been obtained in writing from the JV company.

The decision should serve as a warning to anyone who assumes that a confidentiality clause will not be breached if the confidential information is passed along under an NDA.

Contact us for advice on shareholders' agreements and company matters generally.

BYOD Guidance

Guidance from the Centre for the Protection of National Infrastructure and the UK's National Technical Authority for Information Assurance highlights some of the aspects organisations must consider when adopting a 'Bring Your Own Device' (BYOD) approach, whereby members of staff use their own laptops, phones and tablets in the course of their work.

Key issues that must be tackled are security – for example limiting the type of information that can be shared by such devices and having an effective BYOD policy so that staff understand their responsibilities when using their own devices for work purposes – and compliance with data protection legislation. Employers are reminded that the legal responsibility for protection of other people's personal information, in accordance with the Data Protection Act 1998 (DPA), rests with the Data Controller, not with the owner of the device. The Information Commissioner's Office can impose fines of up to £500,000 for serious breaches of the DPA.

In addition, it is important to make sure adopting a BYOD approach does not breach existing software user agreements.

The guidance can be found at: www.gov.uk/government/collections/bring-your-own-device-guidance.

Contact us for advice on any data protection matter.

Cash-Flow Problems Excused Late Tax Payments

In a decision which will give some comfort to many hard-pressed businesses, a tax tribunal has ruled that a small company's unexpected cash-flow problems provided a 'reasonable excuse' for its late payment of its PAYE liabilities.

The commercial photography business was already suffering in the recession when a client cancelled a major contract and its bank withdrew its £125,000 overdraft facility. The company managed to weather the financial storm but was late in paying its PAYE for a string of quarters and was hit with a substantial penalty as a result.

HM Revenue and Customs (HMRC) argued that general cash-flow problems could never be a reasonable excuse for failing to pay tax on time. However, in allowing the company's appeal and overturning the penalties, the First-tier Tribunal found that it had made the payments in full as soon as it was able to do so.

Although its business had already been weakened by the economic downturn, the immediate cause of the company's cash-flow problems was two 'wholly unexpected' events which caused it significant loss. The company had eventually brought itself back from the brink by selling its premises.

HMRC have for many years taken a very strong line against the argument that cash-flow difficulties are a reasonable excuse for the late payment of PAYE, VAT or other taxes. However, it is clear that the tax tribunal can take a more balanced view when the causes of the cash-flow issues are sudden and unpredictable.

If you are experiencing cash-flow difficulties, we can assist you in negotiations with creditors including HMRC.

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