SIMON BURN SOLICITORS

Winter 2018

Commercial Law UPDATE

GDPR – Time is Running Out

The clock is ticking fast regarding compliance with the General Data Protection Regulation (GDPR), which will be fully enforced from 25 May 2018 and will impose significant compliance issues for all organisations which handle 'protected data' – i.e. personal data, the definition of which is more detailed and broader than that used previously. One significant addition is the 'accountability principle', whereby data controllers must keep records to demonstrate how they comply with the data protection principles – for example by documenting the decisions taken about a processing activity.

The penalties for non-compliance with the GDPR are severe and the Information Commissioner's Office (ICO) has been told that enforcing it must be self-funding, so little mercy is likely to be shown to those who fall foul of it.

The Data Protection Bill 2017-2019, which implements the GDPR into UK law, will impose additional compliance requirements over and above those contained in European legislation. Information on these together with useful guidance on implementing the GDPR can be found on the ICO's website (www.ico.org.uk).

The ICO has also established a dedicated telephone service aimed at helping small businesses prepare for the forthcoming changes in the law. Small organisations seeking information on the GDPR should ring the ICO helpline on 0303 123 1113 and select option 4 to be transferred to staff who can offer support.

If you have not already started your review of the impact of the GDPR on your business and begun to adapt, time is fast running out. It will, almost certainly, necessitate revising written policies and procedures – for example regarding information that must be included in privacy notices – and some redrafting of business and employment contractual terms and conditions.

For individual advice on the steps your business needs to take, please contact us.

Dealing With the Public? Are Your Charges Transparent Enough?

Companies that deal with the public are required by law to be transparent about their charges and those who do not comply can be hit hard in the pocket. In one case, an estate agency chain received an £18,000 financial penalty for failing to be specific about its administration charge.

A local authority took action under the Consumer Rights Act 2015 on the basis that the agency had failed to display notices in three of its branches, and on its website, that gave sufficient information to enable would-be residential tenants to understand the services and costs that were covered by the £420 administration charge.

The council, which took the view that the agency's breaches were too serious to be downplayed or ignored, imposed four £5,000 penalties, one for each of the breaches. The total of £20,000 was later reduced to £12,000 by the First-tier Tribunal on the basis that the agency had, when pressed, clarified the wording of its notices.

In upholding the council's challenge to that ruling, the Upper Tribunal (UT) noted that even the modified wording had not achieved compliance with the Act. However, in fixing the overall penalty at £18,000 – £4,500 for each breach – the UT found that the agency deserved some credit for at least attempting to design notices that met the requirements of the legislation.

Informal Oral Contract Costs Construction Company Almost £7 Million

Informal oral contracts remain sadly commonplace despite any number of examples of them leading to costly disputes. In one case, a construction company that allowed another to use its name in tendering for jobs ended up losing almost £7 million.

One of the company's senior employees was an acquaintance of the founder of a start-up business. On the company's behalf, he orally agreed that it would take a 30 per cent stake in the business for £3,000 and would provide a 10-year, interest-free loan of £147,000. It was also agreed that, at least initially, the fledgling business would be permitted to enter into contracts in the company's name.

One such project involved the business constructing industrial/warehouse units, some of which later suffered from subsidence. The company, in whose name the design and build contract had been entered into, eventually had to settle claims brought by owners of the affected units for £6,975,000.

With a view to recovering its loss, the company launched proceedings against the business, which had since prospered mightily, employing 620 staff and having a turnover of £480 million. The company argued that, as part of the oral agreement, the business had agreed to indemnify it against any losses that might arise from construction projects that were carried out in its name.

The absence of a written contract meant that the High Court was constrained to rely on other documentary and oral evidence as to what had been in the parties' minds when the agreement was reached in 2001. In dismissing the company's claim, the Court ruled that it had not been established on the balance of probabilities that the business had agreed to provide an indemnity.

Getting legal agreements properly formulated from the outset is always sound advice. Failing to do so has proved to be expensive on countless occasions.

Corporate Governance – Informality Not Enough

When you need to take decisions in your company, it is essential to make sure they are taken properly and the correct procedures are followed.

In a recent case, it took the intervention of the Court of Appeal to determine whether administrators could be validly appointed by a single director of a company if its articles of association required that two directors be present for a board meeting to be quorate.

The facts of the case were complex, but the judge in the lower court concluded that the articles of association had been 'informally varied' by the consent of the only existing shareholder, who owned 75 per cent of the shares. The other 25 per cent were owned by a company that had been dissolved many years ago.

The decision was appealed by two of the company's creditors who opposed the appointment of the administrators. They argued that the appointment was invalid because the articles of association were clear that a board meeting required two directors to be quorate and the decision was taken by a sole director.

The Court agreed that the company could not do informally what it must do formally. It could not pass a board decision when the board was inquorate and the administrators' appointment was therefore invalid.

For advice on any aspect of company law, contact us.

Inadequate Glue Leaves Kitchen Components Maker in Sticky Situation

Manufacturing supply chains can be lengthy and a flaw in a single link can lead to problems for more than one of those involved. In one case, an adhesives company was left facing a substantial damages bill after supplying a glue that was not reliably up to the job of holding together thousands of kitchen unit doors.

The manufacturer of the doors had installed a new, robot-assisted production line and began to use one of the company's products to glue together their MDF and PVC layers. In due course, this led to a stream of complaints from customers that the PVC layers were peeling away.

The manufacturer launched proceedings against the adhesives company alleging, amongst other things, breach of contract. The company argued that the manufacturer had failed to use the glue properly and that it would have performed its task if applied correctly and in sufficient quantities.

In upholding the manufacturer's claim, the High Court found that the probable cause of the problem was that, over time, water and wax had migrated from the MDF layer, resulting in failure of the laminate. That had happened to about 6 per cent of the manufacturer's doors, a rate which was inordinate and unacceptable.

The adhesives company had not taken adequate account of the presence of wax in the MDF layer and was thus in breach of an implied term of the contract that the glue would be suitable for the purpose for which it was intended.

For advice on the negotiation of contracts which protect your commercial interests to the full, contact us.

Government Consultations on Construction Contract Problems

The Government is undertaking two consultations of importance to those in the construction industry. The first is on the Housing Grants, Construction and Regeneration Act 1996, which was only fully implemented in 2011, and the second relates to the controversial subject of retentions in building contracts.

The general thrust of the former is to find ways of reducing the frequency of disputes and to make adjudication proceedings more effective and less likely to be challenged. In particular, it concerns the problems created by oral contracts, which are common in variations of work orders. An amendment to the Act meant that oral contracts can now be subject to adjudication, as one judge put it 'with all the uncertainty and contention that such a situation can engender' *(RCS Contractors v Conway (2017) EWHC 715 TCC)*.

The second consultation, on retentions, deals with a number of practical issues arising, such as non-payment or late payment of retentions and problems with recovery of retentions when a contractor becomes insolvent.

It is likely that a 'retention deposit scheme' will be recommended, which will provide that the retention is safeguarded in a separate account that is protected.

The consultations can be found at http://bit.ly/2iuLKlI and http://bit.ly/2gAWWcz.

'Understanding' With Bank Worthless

When borrowing from any lender, it is crucial that any terms on which you wish to rely are incorporated in the formal documentation.

When a borrower relied on an 'understanding' with his bank that was not met, he was left to count the cost after a failed court action. The bank had made loans against two properties and took legal charges over them. The borrower claimed that there was an understanding between them that in the event that the required loan repayments were not made, he would be given time to sell other assets to reduce his indebtedness to a level acceptable to the bank.

When the borrower failed to make the repayments, the bank called in the loans and then sought to appoint receivers over the properties to obtain possession of them so that they could be sold.

The borrower fought the action in court, arguing that he had relied on the bank's undertaking to give him time to realise assets, so the bank was 'estopped' from enforcing its charges over the properties until a reasonable time had passed.

However, the documentation showed no such undertaking and there was no evidence of a clear and unequivocal promise by the bank…a mere understanding was not enough for the High Court to refuse the bank's application to appoint receivers.

It is important to take legal advice when negotiating any contract, especially one for significant finance: failing to build necessary protections into the documentation can lead to disaster.

Get it Right First Time or Pay the Consequences

The importance of following the right procedures in the management of payments under building contracts has again been underlined by a recent court decision.

It involved a contractor who applied for payment from an employer under a contract. The employer disputed the value of the work for which payment was sought and issued a 'pay less' notice.

The payment application in point was issued in August 2016 and was for more than £1 million. The deadline for serving a pay less notice was 14 August 2016. The notice was issued on the evening of 12 August, which was a Friday. However, the terms of the contract were that any notices regarding payment that were delivered by hand or sent by email after 4:00pm on a business day were deemed to be delivered on the next business day. In this case, that was Monday 15 August, which was after the deadline for serving a valid pay less notice under the contract.

When the matter went to adjudication, the adjudicator ruled that the payment must be made. The employer appealed to the High Court.

In upholding the adjudicator's decision, the Court held that the notice was served late and was therefore invalid.

It is essential to read and understand the terms of your contracts and, when there are time limits involved, to make sure that they are adhered to: leaving things until the last minute is often unwise.

Getting into business is relatively easy – it is getting out of business where it starts to get really tricky. Despite that, many people establish companies without thinking through the mechanics and consequences of leaving the company. This is especially true when people go into business with friends or family, and the closeness of the relationship can be especially problematic if differences of opinion ensue.

The sorts of issues that can arise are many and varied.

For example, personality clashes are relatively common, especially when there is a difference in strategic thinking or the business is under financial pressure. These can often make small gaps into unbridgeable fissures.

Another source of board-level friction can be if one director feels others are no longer pulling their weight or are taking out more from the business than they should.

Even a pre-planned and agreed retirement can prove problematic as the question of what the retiree should extract from the company rears its head. Share valuations and whether the remaining stakeholders wish to acquire the shares of the departing director can be particular issues.

Prevention is better than cure. Putting the right documentation in place at the beginning of the process can help you minimise the chances of a dispute later on.

Here are some of the main safeguards you should consider creating:

Shareholders' Agreement

A shareholders' agreement is a crucial document in small companies. It should specify the terms under which shares can (or must) be transferred and normally a pricing mechanism. The key aspect is to remove the areas for potential dispute. This (and a Director's Service Agreement – see below) may contain differing clauses for use depending on whether the director is a 'good leaver' or a 'bad leaver';

Contracts of Employment

A director's contract of employment should include all of the principal terms applying to their employment as an employee of the company;

Director's Service Agreement

A director's service agreement can be used to spell out the details not included in the standard contract of employment – for example, entitlements to performance-related incentives after retirement, termination payments into pensions and so on; and

Non-Competition Agreement

If needed, this may be combined with one of the agreements above. Its terms must be narrow enough to be enforceable but wide enough to protect the company's interests.

What is most important is to get these agreements in place early, while relations are convivial and before there is a divergence of interests.

Contact us for advice on setting up the necessary agreements and contracts.

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