SIMON BURN
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Commercial Law UPDATE

Environmental Offences – New Sentencing Guidelines

When a successful prosecution for an environmental offence occurs, the financial consequences for the business found to be in breach of the law can be severe.

On 1 July 2014, new sentencing guidelines were introduced for such cases, with the intention of making sure that a conviction for an environmental offence has a 'real impact' on the offending business and to persuade the managers and shareholders of the need to get their compliance with environmental regulations up to speed.

Fines are now to be geared to turnover and, whilst consideration is given to the profitability of the business, can be draconian.

Although the maximum fine is set at £3 million in normal circumstances, this may be increased for a large organisation.

The 'Environmental Offences – Definitive Guideline' also provides for compensation payments and confiscation of assets to be ordered where asked for by the Crown or where the court considers it appropriate.

If you are concerned about how environmental law may affect your business, contact us for advice.

Deductions for Defects Must Be Appropriate

When work done by a contractor is deficient, the standard JCT form of contract allows an 'appropriate deduction' to be made from payment where the work is not to be made good by the contractor.

Arguments over deductions made in these circumstances are common, especially where the contractor asserts that the defective work could have been rectified for less than the sum deducted.

In a recent case heard by the Technology and Construction Court (TCC), a contracting company took issue over the sum deducted from the retention over allegedly defective work when the property owner declined to let the contractor carry out the rectification work.

The contractor had been engaged to build an extension to a country house and carry out other building work. When the contract was completed, there was an extensive list of defects attached to the certificate of practical completion.

The homeowner arranged for the defects to be rectified by other contractors and also issued legal proceedings against the contracting company.

Although the facts were complex, the nub of the issue was that the contractor argued that the deduction that was calculated was excessive. It also argued that the cost of any remedial work should be calculated at the rates included in the original contract and that it could have arranged for some of the work to be carried out for nothing by the subcontractors it had used.

The TCC affirmed that the appropriate deduction depends on all the circumstances and that all factors have to be taken into account. In this case, the judgment gave weight to the argument that the contractor had not been allowed to arrange the rectification of the defective work, the TCC finding that it had established its right to have the deductions limited. The precise amount will be determined at a later hearing.

The TCC is not normally the best place to resolve issues such as this: sensible negotiation often leads to a better outcome. If you are in dispute over a building or construction contract, contact us for advice.

Agricultural Planning Rules Relaxed, But Care Still Needed

The relaxation of permitted development rights will mean that many holders of agricultural land will be able to develop buildings on their properties for residential purposes.

In many cases the gains on such developments will be exempt from Capital Gains Tax by the application of private residence relief (PRR). A key requirement here is that for PRR to be claimed, there must have been genuine permanent occupancy for a sufficient period to justify the claim.

However, as is often the case, the rules are complex and can limit the landowner's right to make future developments after a development is undertaken.

If your agricultural property has development potential, contact us for advice on the appropriate measures to take.

Who Pays the Rates?

When a company that is the tenant of a property goes into liquidation, it is normal for the liquidator to disclaim the lease on the premises.

Business rates must be paid by the 'person entitled to possession of the property' (Local Government Finance Act 1988). If the landlord reoccupies the property, then it is clear that the landlord will bear the liability for the rates. However, if the landlord leaves the property vacant, is it still liable?

In a recent case, the liquidator of the tenant disclaimed the lease. The lease was subject to a guarantee and the landlord left the premises unoccupied, making a claim against the guarantor of the lease for the rent shortfall. This gave the guarantor the right to occupy the premises if it so chose.

Once the lease had been disclaimed, the local authority demanded the rates from then on directly from the landlord.

The landlord refused to pay, claiming that since the guarantor had the right to call for a lease, the landlord was not the person entitled to possession of the property and had not, in fact, occupied it.

The High Court rejected the landlord's argument. The landlord had the right to immediate possession of the property once the lease had been disclaimed. The disclaimer of the lease meant that there was no longer any lease.

In addition, although the guarantor had the statutory right to demand a lease on the premises, it had not done so.

If you are a landlord, a carefully worded guarantee clause could avoid the problem by making the guarantor responsible for the rates as well as the rent in the event of the insolvency of the tenant. Contact us for advice.

Failure to Notice Flaw Does Not Defeat Indemnity

An argument over who was responsible for water leaks in an apartment block recently led to an appearance in the Court of Appeal for a contractor and subcontractor.

The contractor had won a contract to design and install the water system for a block of flats, using a 'boosted water' system to ensure the flow of water to the topmost flats was adequate.

This work was subcontracted to another firm. The contractor was warned about a possible danger to the system as a result of surges of pressure and arranged for the subcontractor to install two pressure arrestor valves to prevent surges from causing leaks.

The subcontractor's installation of the valves was defective, and this was not noticed by the contractor when its employees inspected the system.

The contract between the contractor and the subcontractor contained an indemnity clause in which the subcontractor indemnified the contractor for any loss resulting from the default or negligence of the subcontractor.

When a pressure surge subsequently caused a burst pipe, the question arose as to who was liable for the damage caused. At the first hearing, the court decided that the subcontractor was liable under its indemnity.

The subcontractor appealed, arguing that the contractor itself was at fault because it had been negligent when inspecting the system.

The Court of Appeal confirmed the original decision. The indemnity held good because the subcontractor had committed a negligent act which caused the damage. The indemnity clause could not be 'stretched' to mean that it included only defects that would not be visible on inspection by the contractor.

For advice on limiting your risk in any construction contract, contact us.

New Minimum Wage Rates – A Reminder

Employers are reminded that the following changes to the National Minimum Wage (NMW) rates came into effect on 1 October 2014:

- the adult NMW rate increased from £6.31 to £6.50 per hour;
- the NMW rate for workers aged 18 to 20 increased from £5.03 to £5.13 per hour;
- the NMW rate for 16- and 17-year-olds increased from £3.72 to £3.79 per hour; and
- the apprentice rate of the NMW, which applies to apprentices under 19 or over 19 and in the first year of their apprenticeship, increased from £2.68 to £2.73 per hour.

The accommodation offset increased from £4.91 to £5.08 per day.

In recommending the rates that will apply from 1 October 2015, the Low Pay Commission (LPC) has been asked to consider whether any changes can be made to the apprentice NMW rate – in particular, whether the structure and level should continue to be applied to all levels of apprenticeship, including higher levels. In addition, the LPC will review the conditions that need to be in place to allow the value of the NMW to increase in real terms and assess whether such increases can be afforded at the current time.

Guidance on Employing Disabled People

Nearly seven million people of working age in the UK are disabled or have a health condition and, historically, there has been a significant gap between the proportion of disabled people and non-disabled people in employment.

To tackle the issues preventing disabled people from fulfilling their potential in the workplace, the Government launched a Disability Confident campaign, aimed at working with employers to remove barriers and increase understanding of the needs of disabled people.

The Department for Work and Pensions has now updated its guidance for employers on employing disabled people and people with health conditions. This provides a summary of information to help employers recruit and support disabled people in work and provides links to other resources available

to enable employers to become more confident when attracting, recruiting and retaining disabled people. The guidance also contains advice on specific conditions and the type of adjustments that may be necessary to accommodate them.

The guidance can be found on the Government website www.gov.uk.

LLP Members and Pensions Auto-Enrolment

Following the decision of the Supreme Court that a member of a limited liability partnership (LLP) should be considered to be a 'worker' for employment law purposes, the Pensions Regulator has confirmed that LLP members can be eligible for pensions auto-enrolment.

If you require advice on the employment status of anyone working for you, contact us.

Deduction From Salary of Senior Employee Not a Penalty

It is commonly thought that when an employee resigns with immediate effect, an employer has no right to recompense from the employee.

However, where the employer has the contractual right to make a deduction from salary and this does not constitute a penalty, it is normally in order to do so. Where the deduction can be seen to be a 'penalty clause' rather than restitution for an anticipated loss based on a genuine pre-estimate of the loss, the court will not enforce it as UK law prohibits penalty clauses where the penalty is greater than the commercial loss suffered.

In a recent case, a company that specialises in support to offshore drilling activities for the oil and gas industry deducted some £5,000 from the final salary payment of a project engineer who left without working her notice period.

The employee's contract of employment provided that if she left without providing appropriate notice, 'the company will deduct a sum equal in value to the salary payable for the shortfall in the period of notice'.

The Employment Appeal Tribunal concluded that the clause was not a penalty clause as the replacement of a senior employee who leaves without notice represents a genuine commercial loss to the business.

Accordingly, the deduction was justified.

If a senior employee of yours leaves without giving sufficient notice, contact us for advice on the steps you can take.

Restriction on Goods Sold Breaches Competition Law

It is not uncommon for a landlord to want to preserve a 'balance' among the tenants trading in a commercial development and therefore to restrict the number of tenants in a particular trade.

A hidden danger inherent in this approach became evident recently when competition law was used to stop a landlord from enforcing such a policy.

The case arose when a tenant's lease came up for renewal. The landlord refused to renew it on the ground that the tenant would be selling alcohol and staple goods in the neighbourhood when there was a nearby shop selling the same sorts of products.

The landlord argued that the area needed a variety of shops selling different goods and the tenant argued that the landlord's policy had the effect of reducing competition.

The County Court agreed that the landlord's attempt to restrict the range of goods being sold was in breach of competition law.

For advice on ensuring that all your legal agreements comply with competition law, contact us.

Rugby Sponsorship Claim Fails

In an important decision for corporate sponsors and those who benefit from their financial help, a fishing company which stumped up £1.2 million in support of its cash-strapped local rugby club has suffered defeat in its legal campaign to deduct that sum from its profits assessable to Corporation Tax.

Over a three-year period, Interfish Limited had entered into a sponsorship deal which provided vital financial assistance to Plymouth Albion Rugby Football Club, which was in severe financial difficulties and badly needed funds for, amongst other things, improving its squad of players.

The main benefit to Interfish was greater public visibility for its business. It was also hoped that the exposure would make it easier for the company to obtain bank funding for expansion and that those involved with the club would 'look favourably upon the company in ways that would assist its trade'.

Interfish cited Section 74(1) of the Income and Corporation Taxes Act 1988 in its bid to write off the cost of sponsoring the club against its tax liabilities under the heading of 'advertising and marketing'. However, the deduction was refused by HM Revenue and Customs in a decision which was subsequently upheld by the First-tier and Upper Tribunals.

In dismissing the company's challenge to those decisions, the Court of Appeal noted that the payments had also been motivated by a desire to improve the financial position of the rugby club. As the money had not been paid out exclusively for the purposes of the company's own trade, it was not tax deductible.

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